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14 UNITED STATES DISTRICT COURT  
15 NORTHERN DISTRICT OF CALIFORNIA

16 CENTRO LEGAL DE LA RAZA;  
17 IMMIGRANT LEGAL RESOURCE  
CENTER; TAHIRIH JUSTICE CENTER;  
18 REFUGEE AND IMMIGRANT CENTER  
FOR EDUCATION AND LEGAL  
19 SERVICES,

20 Plaintiffs,

21 v.

22 EXECUTIVE OFFICE FOR  
23 IMMIGRATION REVIEW; JAMES  
MCHENRY, Director, Executive Office  
24 for Immigration Review; UNITED  
STATES DEPARTMENT OF JUSTICE;  
25 JEFFREY A. ROSEN, Acting United  
26 States Attorney General,

27 Defendants.  
28

Case No.

**COMPLAINT FOR DECLARATORY AND  
INJUNCTIVE RELIEF**

**ADMINISTRATIVE PROCEDURE ACT  
CASE**

**DEMAND FOR JURY TRIAL**

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**INTRODUCTION**

1  
2 1. This action challenges a rushed, unlawful, and arbitrary final rule that strips away  
3 procedural protections for immigrants, restricts the authority of immigration judges, and obstructs  
4 critical forms of relief for people at risk of deportation. *Appellate Procedure and Decisional*  
5 *Finality in Immigration Proceedings; Administrative Closure*, 85 Fed. Reg. 81,588 (Dec. 16,  
6 2020) (“the Rule”). The Rule’s overhaul of procedures in the Board of Immigration Appeals  
7 (“BIA”) and limitations on the authority of judges dramatically disadvantage immigrants seeking  
8 to establish their claims. The Rule is part of a barrage of new regulations the Trump  
9 Administration promulgated in a single week in December as part of its final assault on  
10 immigrants and organizations like Plaintiffs that defend their rights. Like so many other rules the  
11 Trump Administration promulgated in its final year, the Rule is unlawful and must be stayed,  
12 enjoined, or set aside.

13 2. The Rule imposes procedural changes that block critical avenues for relief in  
14 immigration courts and the BIA. For example, the Rule eliminates administrative closure, which is  
15 a vital case management tool that allows immigration judges to hold cases in abeyance pending  
16 action by a party over which they have no control, including the United States Citizenship and  
17 Immigration Services (“USCIS”). This tool is particularly important in the cases of immigrants  
18 with statutory claims for humanitarian relief that immigration courts cannot provide, such as  
19 Special Immigrant Juvenile Status (“SIJS”), and U visas for victims of crimes who have suffered  
20 substantial mental or physical abuse. The Rule also limits the authority of immigration judges to  
21 grant *sua sponte* motions to reopen or reconsider cases where warranted to prevent manifest  
22 injustice. It also imposes a new simultaneous briefing regime and dramatically shortens the time  
23 for briefing on appeal. The result is a sudden overburdening of legal service providers and pro  
24 bono counsel who will not be able to continue to provide high quality representation to as many  
25 noncitizens.

26 3. As with other anti-immigrant rules the Trump Administration promulgated, the Rule  
27 violates the procedural and substantive requirements of the Administrative Procedure Act  
28 (“APA”).

1           4.     *First*, the Rule was proposed as part of a series of hurried and interrelated new rules  
2 fraught with problems. The public was denied a meaningful opportunity to comment on the Rule  
3 because of a staggered rulemaking process. This problem was exacerbated by Defendants’  
4 decision to permit only 30 days for comment in the midst of a global pandemic, as well as the  
5 crush of multiple proposed rules hitting the same community around the same time. The result is a  
6 Rule that is arbitrary and capricious for failing to consider the interplay and cumulative effect of  
7 all the various rules on Plaintiffs and the populations they serve.

8           5.     *Second*, the Rule was impermissibly signed by the Director of the Executive Office  
9 for Immigration Review (“EOIR”), Director James McHenry. 85 Fed. Reg. at 81,656. Director  
10 McHenry does not have authority to issue the Rule under 8 U.S.C. § 1103(g)(2). The Rule asserts  
11 generally that the Attorney General delegated authority to Director McHenry, but where a statute  
12 requires a specific delegation of authority, a more general delegation of authority does not suffice.  
13 In this case, it is easy to see why. In the Rule, EOIR Director McHenry purported to use generally  
14 delegated authority to delegate additional specific adjudicatory authority from the Attorney  
15 General to himself. The public could not have anticipated this dangerous result; the language of  
16 the proposed rule, and even the language of the final rule, indicated that the Attorney General  
17 would sign the rule. The rush to finalize the Rule without the Attorney General’s authorization  
18 denied the public an opportunity to comment on the EOIR Director’s misuse of delegated  
19 authority.

20           6.     *Third*, the Rule is contrary to law because the cumulative effect of its provisions is  
21 incompatible with the overall statutory scheme governing the immigration courts and the BIA.  
22 The Rule alters procedures in immigration court and the BIA in ways that undermine statutory  
23 protections codified in the Immigration and Nationality Act (“INA”), including the statutory rights  
24 to counsel and a full and fair hearing, which are necessary to protect against persecution and  
25 torture.

26           7.     *Fourth*, the Rule is arbitrary and capricious. Defendants promulgated the Rule  
27 without giving adequate consideration to the serious harm it will inflict on immigrants and their  
28 advocates. They also failed to provide a rational explanation for abandoning longstanding

1 practices that protect the rights of those in removal proceedings and disregarded the significant  
2 reliance interests at stake. The Rule’s radical alteration of EOIR procedures is not rationally  
3 connected to Defendants’ stated goal of achieving efficiency, and Defendants ignored comments  
4 offering alternative strategies and pointing out the reasons why the Rule’s changes would only  
5 cause chaos, waste resources, and increase the backlog of cases pending in the immigration courts  
6 and the BIA.

7 8. *Fifth*, in their rush to promulgate the Rule, Defendants failed to conduct the analysis  
8 required under the Regulatory Flexibility Act (“RFA”). Had they conducted that analysis, they  
9 would have been required to acknowledge and address the significant impact of the Rule on small  
10 entities, including some of the Plaintiffs in this case.

11 9. *Sixth*, the Rule is contrary to law because it violates the Due Process Clause of the  
12 United States Constitution by obstructing the statutory pathway through immigration courts and  
13 the BIA for people in removal proceedings and their pro bono legal service providers.

14 10. The Rule is already causing irreparable harm to Plaintiffs. The Rule hit a community  
15 already reeling from an onslaught of anti-immigrant policy changes in the Trump Administrations’  
16 final year, including six new anti-immigrant rules issued in a single week in December, right  
17 before the holidays and in the midst of a COVID-19 surge. All of the rules were issued with a 30-  
18 day effective date and timed to take effect within days of each other. Under the pressure of  
19 COVID and holiday business closures, Plaintiffs have consumed precious resources in a push to  
20 complete as much work as possible for those subject to the Rule before imposition of the new  
21 regime. But there is nothing more Plaintiffs can do on their own to mitigate the harm from this  
22 Rule. The Court’s intervention is necessary to prevent further harm to Plaintiffs, the populations  
23 they serve, and the public.

#### 24 **JURISDICTION AND VENUE**

25 11. This case arises under the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.*, and  
26 this Court has subject matter jurisdiction under 28 U.S.C. § 1331.

27 12. Venue is proper in this district under 28 U.S.C. § 1391(e) because Defendants are  
28 agencies of the United States and federal officers acting in their official capacity and Plaintiffs

1 Centro Legal de la Raza (“Centro Legal”) and Immigration Legal Resource Center (“ILRC”) have  
2 their principal places of business and reside in this district.

3 13. Defendants’ publication of the final Rule in the Federal Register on December 16,  
4 2020 constitutes final agency action subject to judicial review. 5 U.S.C. §§ 704, 706.

5 14. Plaintiffs have standing to challenge the Rule under 5 U.S.C. § 702 because they  
6 have been and will continue to be injured by the Rule’s operation. Plaintiffs are also within the  
7 zone of interest of the INA. *See, e.g., E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1270  
8 (9th Cir. 2020) (“*EBSC II*”); *La Clinica de La Raza v. Trump*, No. 19-cv-04980-PJH, 2020 WL  
9 4569462, at \*9–11 (N.D. Cal. Aug. 7, 2020), *amended and superseded by* 2020 WL 6940934  
10 (N.D. Cal. Nov. 25, 2020), *reconsideration granted by* 2020 WL 7053313 (N.D. Cal. Nov. 25,  
11 2020).

12 **INTRADISTRICT ASSIGNMENT**

13 15. Assignment to the San Francisco or Oakland Division of this Court is proper under  
14 Local Rule 3-2(d) because this action arises in San Francisco County.

15 **PARTIES**

16 16. Plaintiff Centro Legal is a nonprofit legal services agency in Oakland, California.  
17 Founded in 1969, Centro Legal protects and advances the rights of low-income, immigrant, Black,  
18 and Latinx communities through bilingual legal representation, education, and advocacy. Centro  
19 Legal’s immigration practice includes comprehensive, full-service direct representation; legal  
20 rights education; and local and national advocacy. Centro Legal is on the list of Pro Bono Legal  
21 Service Providers that EOIR provides to noncitizens in removal proceedings. Centro Legal  
22 provides legal representation to individuals in removal proceedings before the immigration courts,  
23 BIA and the Ninth Circuit Court of Appeals. Centro Legal specializes in detained and non-  
24 detained removal defense, with a particular focus on asylum seekers and the intersection of  
25 immigration and criminal law. Centro Legal also runs a robust pro bono immigration program. It  
26 trains and provides technical and substantive assistance for pro bono attorneys representing clients  
27 seeking asylum, U visa relief, and SIJS before the immigration courts, BIA, state court, and  
28 USCIS. In addition, Centro Legal engages in policy advocacy to seek systemic change to the

1 immigration system and to promote the rights of individuals on a local, regional, and national  
2 scale. In 2019, Centro Legal’s annual revenue was less than \$10 million, and it qualifies as a small  
3 entity under the RFA. If the Rule remains in effect, it will require Centro Legal to divert resources  
4 away from critical operations and impede Centro Legal’s ability to carry out its mission.

5 17. Plaintiff ILRC is a national nonprofit organization headquartered in San Francisco,  
6 California. ILRC’s mission is to collaborate with and educate immigrants, community  
7 organizations, and the legal sector to build a democratic society that values diversity and the rights  
8 of all people. ILRC provides training to attorneys, paralegals, and community-based advocates  
9 who work with immigrants around the country. To assist practitioners, ILRC produces  
10 immigration law practice manuals on a variety of topics, including removal defense, asylum, U-  
11 visas, T-visas, SIJS, and naturalization. ILRC also publishes practice advisories, conducts  
12 trainings, and provides technical assistance to advocates on a variety of immigration topics. As a  
13 key part of its mission, ILRC’s Immigrant Post-Conviction Relief Project engages in federal, state,  
14 and local advocacy to advance the rights of immigrants with criminal convictions, and assists  
15 advocates in understanding how to better serve this population. ILRC is in the process of  
16 coordinating implementation and training for the California Immigrant Justice Fellowship, the first  
17 California-sponsored legal fellowship program to expand access to counsel in the most  
18 underserved rural regions of the state. The publication of the Rule has required ILRC to divert  
19 resources from its core activities to address the Rule’s impact on the communities it serves. If the  
20 Rule remains in effect, it will require further diversion of resources and impede ILRC’s ability to  
21 carry out its mission.

22 18. Plaintiff Tahirih Justice Center (“Tahirih”) is a national nonprofit organization that  
23 was founded in 1997 and is headquartered in Falls Church, Virginia, with offices in Atlanta,  
24 Georgia, Baltimore, Maryland, Houston, Texas, and San Bruno, California. Tahirih’s annual  
25 revenue for 2019 was just over \$10 million. Tahirih offers legal representation and social services  
26 for individuals who seek protection, including asylum, T and U nonimmigrant status, and  
27 protection under the Violence Against Women Act (“VAWA”). In addition, Tahirih devotes  
28 significant resources to providing limited advice and information services to individuals for whom



1 it cannot provide full scope representation, and information to immigrants through Know-Your-  
2 Rights presentations. Through administrative advocacy, legislative campaigns, and outreach,  
3 Tahirih aims to increase the efficiency and fairness of the asylum system. Tahirih leverages its  
4 expertise by working directly in a co-counsel relationship with pro bono attorneys on many of its  
5 cases. Tahirih's current pro bono network includes 2,770 attorneys from nearly 490 law firms  
6 across the country. For these pro bono partners, Tahirih creates and provides extensive training  
7 and education, as well as sample pleadings, templates, articles, expert reports, and other written  
8 materials to assist them. Tahirih also conducts regular updates, webinars, and additional education  
9 as necessary to update its pro bono partners on new developments in the law. If the Rule remains  
10 in effect, Tahirih will not be able to effectively engage pro bono partners to represent its clients. It  
11 will also require a continued diversion of resources away from critical operations and impede  
12 Tahirih's ability to carry out its mission.

13         19. Plaintiff Refugee and Immigrant Center for Education and Legal Services  
14 ("RAICES") is a national nonprofit organization founded in 1986 by community activists as the  
15 Refugee Aid Project. RAICES is headquartered in San Antonio, with offices in Austin, Corpus  
16 Christi, Dallas, Fort Worth, Houston, and San Antonio. RAICES's mission is to defend the rights  
17 of immigrants and refugees; empower individuals, families, and communities; and advocate for  
18 liberty and justice. A diverse staff of approximately 283 attorneys, legal assistants, social workers,  
19 advocates, and support staff provide 'know your rights' trainings, consultations, direct legal  
20 services representation, social services assistance, and advocacy work on behalf of immigrants  
21 throughout Texas. In 2019, RAICES managed 28,257 legal cases. RAICES represents  
22 unaccompanied children, family units, and individuals, including detained immigrants and  
23 children in ORR custody, in matters before USCIS, the immigration courts, the BIA, Juvenile  
24 Texas State Courts, and U.S. Federal Courts. RAICES is on the list of Pro Bono Legal Service  
25 Providers that EOIR provides to noncitizens in removal proceedings.

26         20. Defendant EOIR is a sub-agency within the U.S. Department of Justice ("DOJ") to  
27 which the Attorney General has delegated authority to interpret the immigration laws and  
28 adjudicate removal cases. EOIR administers the immigration courts and the BIA.

1           21. Defendant James McHenry is the Director of EOIR and is sued in his official  
2 capacity.

3           22. Defendant DOJ is a cabinet-level department of the federal government.

4           23. Defendant Jeffrey A. Rosen is the Acting Attorney General of the United States and  
5 the most senior official in the DOJ. Under 8 U.S.C. § 1103(g), the Attorney General is responsible  
6 for the administration of immigration law. Defendant Rosen is sued in his official capacity.

7   **FACTUAL ALLEGATIONS**

8 **I. Background to the Rule**

9           **A. Constitutional and Statutory Protection for Those in Removal Proceedings**

10           24. Individuals in removal proceedings are protected by the Due Process Clause of the  
11 United States Constitution. In particular, “due process requires that [removal] hearings be  
12 fundamentally fair.” *Rosales v. ICE*, 426 F.3d 733, 736 (5th Cir. 2005); *see also Oshodi v. Holder*,  
13 729 F.3d 883, 889 (9th Cir. 2013) (en banc); *Biwot v. Gonzales*, 403 F.3d 1094, 1098–99 (9th Cir.  
14 2005); *Borges v. Gonzales*, 402 F.3d 398, 408 (3d Cir. 2005).

15           25. The INA is a comprehensive statutory scheme that creates a pathway through the  
16 immigration courts and the BIA for people to present defenses to removal and claims for relief.  
17 The INA requires an immigration judge to “administer oaths, receive evidence, and interrogate,  
18 examine, and cross-examine the [applicant] and any witnesses.” 8 U.S.C. § 1229a(b)(1). It also  
19 provides that applicants “shall have a reasonable opportunity to examine the evidence against  
20 [her], to present evidence on [her] own behalf, and to cross-examine witnesses presented by the  
21 Government.” *Id.* § 1129a(b)(4)(B).

22           26. The INA specifies that noncitizens are entitled to be “represented, at no expense to  
23 the Government, by counsel of the [applicant’s] choosing.” *Id.* §§ 1229a(b)(4)(A), 1362. For that  
24 reason, EOIR maintains a List of Pro Bono Legal Service Providers (the “List”) that “shall be  
25 provided to individuals in removal and other proceedings before an immigration court.” *Id.* §  
26 1229(b)(2); 8 C.F.R. § 1003.61(b).

27           27. The INA also addresses the right to apply for and be granted certain forms of relief  
28 from removal. For example, the INA incorporates the United States’ treaty obligations to refugees

1 by providing that “[a]ny [noncitizen] who is physically present in the United States . . .  
2 irrespective of such [noncitizen’s] status, may apply for asylum.” 8 U.S.C. § 1158(a)(1). The INA  
3 also provides that “the Attorney General may not remove [a noncitizen] to a country if the  
4 Attorney General decides that the [noncitizen’s] life or freedom would be threatened in that  
5 country” based on a protected ground. 8 U.S.C. § 1231(b)(3)(A); *see INS v. Stevic*, 467 U.S. 407,  
6 422 (1984).

7 28. Noncitizens in removal proceedings can assert eligibility for asylum as a defense to  
8 removal. Under the INA, immigration judges have authority to adjudicate asylum claims.

9 29. The INA also offers other forms of humanitarian relief that are not adjudicated by  
10 immigration judges. For example, the INA provides for T visa petitions for survivors of human  
11 trafficking, U visa petitions for victims of certain crimes, and protection under VAWA. These  
12 forms of relief are adjudicated by USCIS.

13 30. Under the INA, an order of removal issued by an immigration judge is not final until  
14 either the BIA has affirmed the order or the time to appeal to the BIA has expired. 8 U.S.C. §  
15 1101(a)(47)(B).

16 31. The INA protects the right to a meaningful appeal by requiring that “[t]he  
17 determination of the immigration judge shall be based only on the evidence produced at the  
18 hearing,” 8 U.S.C. § 1229a(c)(1)(A), and that “a complete record shall be kept of all testimony  
19 and evidence produced” in immigration court. *Id.* § 1229a(b)(4)(C).

20 32. In addition to appeal to the BIA, the INA provides other mechanisms to ensure  
21 opportunities for those in removal proceedings to present a full range of defenses. For example,  
22 the INA provides for one motion to reconsider within 30 days of a removal order. 8 U.S.C. §  
23 1229a(c)(6)(B). A motion to reconsider is based on legal grounds and seeks a new determination  
24 based on alleged errors of fact or law. *Ayala v. Sessions*, 855 F.3d 1012, 1020 (9th Cir. 2017).

25 33. The INA also guarantees noncitizens the opportunity to file a motion to reopen their  
26 removal proceedings. “A motion to reopen is a traditional procedural mechanism in immigration  
27 law with a basic purpose that has remained constant—to give [noncitizens] a means to provide  
28 new information relevant to their cases to the immigration authorities.” *Meza-Vallejos v. Holder*,

1 669 F.3d 920, 924 (9th Cir. 2012). It is “a form of procedural relief that asks the Board to change  
2 its decision in light of newly discovered evidence or a change in circumstances.” *Guerrero-*  
3 *Lasprilla v. Barr*, 140 S. Ct. 1062, 1067 (2020) (citation omitted) (quoting *Dada v. Mukasey*, 554  
4 U.S. 1, 14, 13 (2008)).

5 34. The INA generally allows for one motion to reopen within 90 days of a final  
6 administrative order of removal. 8 U.S.C. § 1229a(c)(7)(C)(i).

7 35. Both motions to reconsider and motions to reopen must be filed with the  
8 adjudicatory body that last had jurisdiction over the case—either the immigration court that  
9 ordered the noncitizen removed if there was no appeal, or the BIA if there was an appeal. 8 C.F.R.  
10 § 1003.2(b)(2) (motions to reconsider before the BIA); 8 C.F.R. § 1003.23(b)(1) (motions to  
11 reconsider before the immigration court); 8 C.F.R. § 1003.2(c)(2) (motions to reopen before the  
12 BIA); 8 C.F.R. § 1003.23(b)(1) (motions to reopen before the immigration court).

13 36. The INA also provides for an opportunity for voluntary departure for some  
14 individuals in removal proceedings. Voluntary departure is a substantive grant of relief that allows  
15 noncitizens to depart the United States without receiving a removal order. 8 U.S.C. § 1229c.

## 16 **B. Procedures in Immigration Court and the BIA before the Rule**

### 17 **1. Administrative Closure in Immigration Court**

18 37. Immigration judges use a variety of procedural tools to efficiently manage their  
19 heavy dockets. In particular, prior to the Rule, immigration judges were able to administratively  
20 close removal proceedings for a variety of reasons, including to allow for the processing of relief  
21 that can only be adjudicated by USCIS.

22 38. Administrative closure “temporarily takes a removal case off of an immigration  
23 judge’s calendar, preventing it from moving forward,” which enables a “noncitizen to pursue  
24 alternative relief—such as a U visa—from USCIS.” *Meza Morales v. Barr*, 973 F.3d 656, 664  
25 (7th Cir. 2020) (internal citations omitted); *see also Gonzalez-Caraveo v. Sessions*, 882 F.3d 885,  
26 889–91 (9th Cir. 2018).

27 39. At least since the 1980s, immigration judges and the BIA have managed their  
28 dockets with administrative closure. *See Matter of Avetisyan*, 25 I. & N. Dec. 688 (BIA 2012);

1 *Matter of Amico*, 19 I. & N. Dec. 652 (BIA 1988).

2 40. Administrative closure is an important case management tool for several reasons.  
3 First, it conserves resources by sparing immigration courts and the parties from having to  
4 adjudicate potentially complex and difficult claims for people with easier avenues to relief. Those  
5 granted relief from USCIS can move to have their removal proceedings terminated or ask to have  
6 the case calendared to efficiently adjudicate a claim based on the USCIS grant. If USCIS denies  
7 relief, the case is “recalendared” before the immigration judge.

8 41. Second, if an immigration judge issues a removal order to someone who is  
9 simultaneously pursuing a claim before USCIS, an applicant who is entitled to statutory protection  
10 can be removed from the United States and may face significant challenges returning to the United  
11 States even if USCIS ultimately grants relief. A removal order may have the practical effect of  
12 denying a person relief to which they are entitled under the INA. The alternative is for an  
13 immigration judge to continue the applicant’s removal proceedings, but serial continuances are  
14 burdensome for the court and the parties who must prepare and adjudicate continuance motions  
15 and might have to travel long distances to appear only to have their hearings continued.<sup>1</sup>

16 42. Despite nearly 40 years of the practice, the Attorney General issued a decision in  
17 2018 that purported to unilaterally eliminate administrative closure except in very limited  
18 circumstances. *See Matter of Castro-Tum*, 27 I. & N. Dec. 271 (A.G. 2018). The Attorney General  
19 read regulations in place at that time as barring administrative closure. *Id.* But the Fourth and  
20 Seventh circuits rejected that reading. *See Meza Morales*, 973 F.3d at 667; *Romero v. Barr*, 937

21  
22 <sup>1</sup> Public Comment of National Association of Immigration Judges at 2-3 (Sept. 25, 2020),  
23 <https://tinyurl.com/y4lr48f> (“The use of administrative closure, to put a short term hold on cases  
24 not ready for completion, permits the Immigration Judge to attend to and resolve cases that are  
25 ready for resolution and allows immigration judges to complete more cases. . . [G]ranting a  
26 continuance in these situations is often not efficient. When a case is continued, it still occupies a  
27 position on our overcrowded dockets, and generates workload for judges and staff, and  
28 unnecessary time and expenditures for the parties before the Court.”); Public Comment of Former  
Round Table of Immigration Judges at 2 (Sept. 24, 2020), <http://bit.ly/3oFfRE8> (“In our decades  
of experience, the Court’s ability to sensibly manage its docket through administrative closure  
allowed for disposition of cases with fairness and due process as a guiding objective. Objective  
evidence supports our considerable experience. A September 2020 analysis by TRAC of EOIR’s  
own data determined that administrative closure helped reduce the backlog of cases at the Court,  
rather than contributing to the backlog.”).

1 F.3d 282, 287, 297 (4th Cir. 2019).<sup>2</sup> Those courts recognized that the prior regulations gave  
2 immigration judges general authority to administratively close cases and that administrative  
3 closure is an effective case management tool.

## 4 **2. Briefing an Appeal at the BIA**

5 43. Parties have 30 days to file a notice of appeal with the BIA from an adverse decision  
6 by an immigration judge. The 30-day clock runs from the time the court issues an oral opinion or  
7 mails a written decision. 8 C.F.R. § 1003.38(b).

8 44. At some point after a party files a notice of appeal, the BIA sends to the parties a  
9 transcript of the proceedings before the immigration judge, the immigration judge's order, and a  
10 briefing schedule. 8 C.F.R. § 1003.3(c)(1).

11 45. There is no set timeline for the BIA to issue these materials. Those in removal  
12 proceedings and their counsel might wait weeks, months, or years before the BIA issues the  
13 transcript, order, and briefing schedule. 67 Fed. Reg. 54,877, 54,895 (Aug. 26, 2002).

14 46. The appealing party's opening brief is due to the BIA within 21 days from the date  
15 the BIA issues the transcript, order, and briefing schedule. Before the Rule took effect, in the cases  
16 of non-detained noncitizens, the opposing party was ordered to file a responsive brief 21 days after  
17 the appealing party's opening brief.

18 47. The parties cannot predict when the BIA will issue these materials. Appellate  
19 counsel must rearrange their workflow as soon as the transcript and briefing schedule arrive in the  
20 mail, and then review the record to prepare an opening brief.

21 48. As a practical matter, the parties may not actually receive the BIA materials until  
22 much of the 21-day period to submit the opening brief has passed.

23 49. The BIA does not follow the "mailbox rule" so the opening brief must be sent in  
24 advance of the 21-day deadline. The BIA does not allow for electronic filing of briefs.

25 50. Accounting for the time it takes after issuance for appellants to receive the materials  
26 for appeal and the time it takes for BIA to receive the opening brief, individuals challenging

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27 <sup>2</sup> The Sixth Circuit agreed with the Attorney General's narrow reading of the prior regulations.  
28 *See Hernandez-Serrano v. Barr*, 981 F.3d 459 (6th Cir. 2020).

1 immigration court orders typically have fewer than 14 days to prepare their appellate briefs.

2 51. For those in detention, the time frame can be even more abbreviated due to delays in  
3 mail processing and other complications in immigration detention centers.

4 52. The timeline presents serious challenges for all those in removal proceedings but has  
5 the harshest consequences for those who proceed *pro se* in immigration court and for those who  
6 are detained. Everyone in removal proceedings has a statutory right to counsel but not at the  
7 government's expense.

8 53. Approximately 70% of those who appear in immigration court proceed *pro se*.  
9 Finding appellate counsel for BIA representation is challenging on the tight timeline following the  
10 BIA's issuance of materials for appeal.<sup>3</sup> Those who wish to obtain counsel will often have to copy  
11 and mail the paper transcripts, determine whether counsel has the resources at whatever arbitrary  
12 moment in time the materials arrive, and allow time for potential counsel to evaluate the merits of  
13 the case before taking it on. These steps can consume much of the appellate briefing timeline. If a  
14 person is lucky enough to secure counsel, the attorney is left with very little time to prepare and  
15 submit the opening brief.

16 54. BIA procedures made allowances for these practicalities through an extension  
17 request procedure that is undone by the Rule. Prior to the Rule, the BIA would grant "an  
18 additional 21 days to file a brief regardless of the amount of time requested." BIA Practice Manual  
19 §§ 4.7(c)(i)(A), (B) (June 10, 2020).<sup>4</sup> And the parties could ask for extensions of up to 90 days.  
20 The prior regulations also permitted multiple extensions, which the BIA Practice Manual provided  
21 should be granted "only in rare circumstances." *Id.*

### 22 3. Motions to Remand

23 55. Under regulations and precedent in place before the Rule took effect, either party  
24

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25 <sup>3</sup> Noncitizens were *pro se* in 136,592 out of 191,633 (69.2%) cases initiated in FY 2020.  
26 Transactional Records Access Clearinghouse at Syracuse University ("TRAC"), State and County  
27 Details on Deportation Proceedings in Immigration Court, (last updated Nov. 2020),  
<https://bit.ly/3s8wZnV> (hereinafter "TRAC Representation Rates"). The percentage is even higher  
28 for detained noncitizens.

<sup>4</sup> Available at <https://www.justice.gov/eoir/page/file/1284741/download>.

1 was permitted to file a motion to remand if new and material evidence became available while an  
2 appeal was pending before the BIA. *See Matter of Coelho*, 20 I. & N. Dec. 464 (BIA 1992). For  
3 example, someone in removal proceedings might obtain evidence of eligibility for an alternative  
4 form of relief from USCIS or evidence of a significant change in country conditions or personal  
5 facts relevant to an asylum claim. In addition, a due process violation in the underlying  
6 proceedings, such as ineffective assistance of counsel, may come to light while an appeal is  
7 pending and necessitate a motion to remand. A motion to remand could also be based on a change  
8 in law.

9 56. BIA procedures before the Rule permitted motions to remand during the pendency  
10 of an appeal. By filing a motion to remand, those in removal proceedings could present material,  
11 previously unavailable evidence before their order of removal became final and before the BIA  
12 was required to expend resources on the underlying appeal. *See id.* at 471. These procedures  
13 “guard against piecemeal appeals” and ensure that any reviewing Article III court “is presented  
14 with a full and complete record.” *Narayan v. Ashcroft*, 384 F.3d 1065, 1068 (9th Cir. 2004).

15 57. Motions to remand are a critical tool for those in removal proceedings to present  
16 evidence that could materially change the outcome of their cases.

#### 17 4. Motions to Reopen

18 58. Motions to reopen are another longstanding procedure for protecting those subject to  
19 removal proceedings. *Dada v. Mukasey*, 554 U.S. 1, 12 (2008) (citing decisions on motions to  
20 reopen dating back to 1916-17). When the BIA was established in 1958, the Attorney General  
21 promulgated regulations allowing the BIA to reopen or reconsider a case “on its own motion” or  
22 “upon written motion” by either party, with no time or number limitations. *Dada*, 554 U.S. at 13  
23 (citing 23 Fed. Reg. 9,115, 9,118-19 (Nov. 26, 1958), final rule codified at 8 C.F.R. § 3.2 (1959)).

24 59. The Immigration Act of 1990 directed the Attorney General to issue regulations  
25 placing time and number limitations on motions to reopen and reconsider. *Dada*, 554 U.S. at 13  
26 (citing Immigration Act of 1990, § 545(d)(1), 104 Stat. 5066). DOJ issued a rule in 1996 that  
27 imposed time and number limitations on motions to reopen and reconsider for both parties.  
28 61 Fed. Reg. 18,900, 18,901 (Apr. 29, 1996).



1           60. The 1996 rule retained immigration judges’ and the BIA’s authority to reopen cases  
2 *sua sponte*, without any time and number limitations. 8 C.F.R. §§ 3.2(a), 3.23(b)(1) (1996). That  
3 was an important feature of the rule; when the 1996 rule was proposed, a number of commenters  
4 advocated for a “good cause” exception to the time and number limitations on the parties, 61 Fed.  
5 Reg. at 18,901, and DOJ responded by emphasizing that *sua sponte* motions to reconsider  
6 effectively allow an exception for good cause. Specifically, DOJ stated: “section 3.2(a) of the rule  
7 provides a mechanism that allows the Board to reopen or reconsider *sua sponte* and provides a  
8 procedural vehicle for the consideration of cases with exceptional circumstances.” *Id.* at 18,902.

9           61. Congress then enacted the Illegal Immigration Reform and Immigrant  
10 Responsibility Act of 1996 (“IIRIRA”), which affords noncitizens the right to file one motion to  
11 reconsider within 30 days of a removal order, 8 U.S.C. § 1229a(c)(6), and one motion to reopen  
12 within 90 days of a removal order, 8 U.S.C. § 1229a(c)(7), with certain exceptions.<sup>5</sup>

13           62. IIRIRA thus adopted the time and number limitations in the 1996 rule but  
14 “transform[ed] the motion to reopen from a regulatory procedure to a statutory form of relief”  
15 *Dada*, 554 U.S. at 14; *see also id.* at 18 (calling the motion to reopen an “important safeguard” to  
16 “ensure a proper and lawful disposition”).

17           63. The time and number limitations on motions to reopen can be equitably tolled. *See*,  
18 *e.g.*, *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1187-88 (9th Cir. 2001) (en banc). Equitable tolling  
19 is available when fraud or other extraordinary circumstances prevent a noncitizen from filing and  
20 the noncitizen acts with due diligence. *Iturribarria v. INS*, 321 F.3d 889, 897–98 (9th Cir. 2003);  
21 *see also Mejia-Hernandez v. Holder*, 633 F.3d 818, 824 (9th Cir. 2011).

22           64. In 1997, DOJ published regulations that exempted the government from the time  
23 and number limitations on motions to reopen and reconsider filed with the immigration courts but  
24 not the time and number limits in the BIA. 62 Fed. Reg. 10,312 (Mar. 6, 1997).

25           65. Prior to the Rule, no other substantive changes to the statutory and regulatory  
26

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27           <sup>5</sup> There are exceptions or different deadlines for motions to reopen *in absentia* removal orders,  
28 motions to reopen to apply for asylum based on changed country conditions, and motions to  
reopen filed by certain battered spouses and children. 8 U.S.C. § 1229a(c)(7)(C).

1 scheme for motions to reopen and reconsider had been made since 1997.<sup>6</sup>

2 66. At all times prior to the Rule, the BIA and the immigration courts have been free to  
3 reopen or reconsider a case *sua sponte* irrespective of time and number limitations on the parties.

4 67. *Sua sponte* motions to reopen are essential to prevent injustice because they may be  
5 the sole mechanism for many to obtain relief from removal orders. In particular, lawful permanent  
6 residents with removal orders based on criminal convictions may have grounds to reopen their  
7 cases based on a change in law, post-conviction relief, or a pardon, which either eliminates the  
8 legal basis of removability or makes them eligible for discretionary relief from removal.

9 68. Motions to reopen are also important for those who become eligible to adjust to  
10 lawful permanent resident status after receiving their removal orders. For example, a noncitizen  
11 who marries a U.S. citizen or whose U.S. citizen child reaches the age of 21 after a removal order  
12 is entered can be the beneficiary of an I-130 relative petition and may be eligible to adjust status  
13 on that basis, but only if proceedings are reopened. *See* 8 U.S.C. § 1255(a). A noncitizen survivor  
14 of battery or extreme cruelty by a U.S. citizen or lawful permanent resident spouse or relative can  
15 file an I-360 “self-petition” and become eligible to adjust status on that basis. 8 U.S.C. § 1154.

16 69. In a variety of circumstances, a person who seeks reopening beyond the statutory  
17 deadline may not be able to make the showing of due diligence required for equitable tolling  
18 despite having acted reasonably—which leaves *sua sponte* reopening as the only way to rescind a  
19 removal order. *See, e.g., Devitri v. Cronen*, 289 F. Supp. 3d 289, 291 (D. Mass. 2018) (finding  
20 that Indonesians had “reasonably relied on their [orders of supervision] in not filing motions to  
21 reopen earlier and had no reason to suspect that the Government would abruptly change its mind”)  
22 *appeal docketed*, No. 18-1281 (1st Cir. Apr. 6, 2018); *Chhoeun v. Marin*, 306 F. Supp. 3d 1147,  
23 1161 (C.D. Cal. 2018) (finding that Cambodians who “had been living undisturbed under  
24 supervised release for decades” had “reasonably concluded that removal, particularly imminent  
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26 <sup>6</sup> In 2003, the DOJ reorganized Title 8 of the Code of Federal Regulations after the functions  
27 of the former Immigration and Naturalization Service were transferred to the Department of  
28 Homeland Security pursuant to the Homeland Security Act of 2002. Accordingly, the regulations  
previously at 8 C.F.R. §§ 3.2 and 3.23 were moved to 8 C.F.R. §§ 1003.2 and 1003.23. 68 Fed.  
Reg. 10349 (Mar. 5, 2003).

1 removal, was unlikely”). A lack of access to affordable legal counsel prevents many individuals  
 2 from obtaining legal advice and thereby establishing due diligence. For these and other reasons,  
 3 many people with valid grounds for reopening their removal proceedings are often unable to meet  
 4 statutory deadlines for their motions to reopen and rely on immigration judges or the BIA to grant  
 5 a *sua sponte* motion to reopen in order to prevent manifest injustice.

### 6 **C. Backlogs and a Barrage of New Rulemaking**

#### 7 **1. Backlogs in Immigration Court and the BIA**

8 70. Fiscal Year 2021 started with the largest immigration court backlog on record.<sup>7</sup> The  
 9 median time from a notice of appeal to a BIA decision is approximately 323 days and, as a result  
 10 of COVID-19-related delays, it has become increasingly common for appeals to remain pending  
 11 for 335 days or longer. *See* 85 Fed. Reg. at 81,619 (acknowledging the “323-day median case  
 12 appeal time period.”).

13 71. The backlog has grown under the Trump Administration, which has not  
 14 implemented recommendations from the independent consulting firm EOIR hired to help it  
 15 improve efficiency.

16 72. One of the most important changes the consultants recommended was that BIA  
 17 implement an electronic case management system.<sup>8</sup> The BIA has not done so.

18 73. The BIA also has not implemented other recommendations to improve efficiency.<sup>9</sup>  
 19 For example, the consultants recommended that the BIA work with DHS “to administratively  
 20 close cases awaiting adjudication in other agencies or courts” as a way to improve EOIR’s  
 21

22 <sup>7</sup> TRAC, *FY 2021 Begins with Largest Immigration Court Backlog on Record*, (Nov. 24,  
 23 2020), <https://bit.ly/35c4MTD>.

24 <sup>8</sup> Public Comment of Catholic Legal Immigration Network, Inc. at 5–6 (Sept. 25, 2020),  
<https://bit.ly/3pIWhXP> (“CLINIC Comment”); EOIR, Legal Case Study Summary Report, Booz  
 25 Allen Hamilton at 26 (Apr. 6, 2017), <https://bit.ly/35td6yo> (“Booz Allen Hamilton Report”).

26 <sup>9</sup> U.S. Gov’t Accountability Off., GAO-18-469T, Testimony Before the Subcommittee on  
 27 Border Security and Immigration, Committee on the Judiciary, *Immigration Courts: Observations  
 28 on Restructuring Options and Actions Needed to Address Long-Standing Management Challenges*  
 at 9 (Apr. 18, 2018), <https://bit.ly/3rQDJqm> (“EOIR could take several actions to address long-  
 standing management and operational challenges and reduce the case backlog. . . . Overall, EOIR  
 has fully implemented 1 recommendation” out of eleven total).

1 processes.<sup>10</sup> Instead, EOIR has tried to stop the practice of administrative closure.

2 74. Former immigration judges have commented that these and other changes at EOIR  
3 have only exacerbated the backlog. They have reported that “the number of appeals received by,  
4 and pending before, the BIA” has increased as a “result of prior actions by the Department.” The  
5 agency’s policy changes have caused much of the “crushing backlogs” the regulations purport to  
6 alleviate.<sup>11</sup>

## 7 2. A Barrage of Rulemaking

8 75. The Administration launched a barrage of rules in the second half of 2020, all of  
9 which were aimed at making it more difficult for noncitizens to obtain immigration relief. Many  
10 of these rules have been partially or completely enjoined by the federal courts because they violate  
11 the APA.

12 76. In June 2020, DHS issued two final rules—*Removal of 30-Day Processing*  
13 *Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applicants*, 85  
14 Fed. Reg. 37,502 (June 22, 2020) (“EAD Rule I”) and *Asylum Application, Interview, and*  
15 *Employment Authorization for Applicants*, 85 Fed. Reg. 38,532 (June 26, 2020) (“EAD Rule II”) (collectively, “EAD Rules”)—that significantly increase the amount of time that asylum  
16 applicants must wait to obtain employment authorization and in some cases make it impossible to  
17 obtain or maintain such authorization. The rules took effect for a brief period of time in August  
18 2020 before being partially enjoined. *Casa de Md., Inc. v. Wolf*, --- F. Supp. 3d ---, 2020 WL  
19 5500165 (D. Md. Sept. 11, 2020).

20 77. On August 3, 2020, DHS issued a final rule dramatically increasing fees for  
21 applicants for essential immigration benefits, including naturalization and asylum. *U.S.*  
22 *Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration*  
23 *Benefit Request Requirements*, 85 Fed. Reg. 46,788 (Aug. 3, 2020) (“Fee Increase Rule”). In  
24 September 2020, Judge White in the Northern District of California enjoined the fee increases on  
25

26 \_\_\_\_\_  
27 <sup>10</sup> Booz Allen Hamilton Report at 26.

28 <sup>11</sup> Public Comment of Former Round Table of Immigration Judges at 2-3 (Sept. 24, 2020), <http://bit.ly/3oFfRE8>.

1 grounds that plaintiffs were likely to prevail on their claims that Chad Wolf lacked authority to  
2 serve as Acting Secretary of DHS, and that the fee increase was arbitrary and capricious.  
3 *Immigrant Legal Res. Ctr. v. Wolf*, --- F. Supp. 3d ---, 2020 WL 5798269, at \*1 (N.D. Cal. Sept.  
4 29, 2020). About a week later, the United States District Court for the District of Columbia  
5 reached a similar conclusion. *N.W. Immigr. Rights Project v. U.S. Citizenship & Immigr. Servs.*, --  
6 - F. Supp. 3d ---, 2020 WL 5995206, at \*24 (D.D.C. Oct. 8, 2020).

7 78. On October 21, 2020, DHS and DOJ issued a final rule imposing a slew of new  
8 categorical bars on asylum applicants. *Procedures for Asylum and Bars to Asylum Eligibility*, 85  
9 Fed. Reg. 67,202 (Oct. 21, 2020) (“Asylum Eligibility Rule”). On November 19, 2020, the day  
10 before the rule was scheduled to take effect, a court in this district issued a temporary restraining  
11 order enjoining implementation of the rule nationwide on grounds that it was contrary to law,  
12 arbitrary and capricious, and passed in violation of the APA. *Pangea Legal Servs. v. U.S. Dept. of*  
13 *Homeland Sec.*, No. 20-cv-07721-SI, 2020 WL 6802474, at \*2 (N.D. Cal. Nov. 19, 2020)  
14 (“*Pangea I*”), *appeal docketed*, No. 20-17490 (9th Cir. Dec. 28, 2020). On November 24, 2020,  
15 the Court converted the temporary restraining order to a preliminary injunction. *Id.*, 20-CV-07721-  
16 SI, (N.D. Cal. Nov. 24, 2020), ECF No. 74.

17 79. On December 11, 2020, DHS and DOJ issued a final rule that transforms the asylum  
18 process and effectively prevents most applicants from establishing claims for asylum, withholding  
19 of removal, and protection under the Convention Against Torture (“CAT”), *Procedure for Asylum*  
20 *and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 80,274  
21 (Dec. 11, 2020) (“Omnibus Asylum Rule”). The rule was scheduled to take effect on January 11,  
22 2021 but was enjoined by a court in this district. *Pangea Legal Servs. v. U.S. Dep’t of Homeland*  
23 *Sec.*, No. 20-CV-09253-JD, 2021 WL 75756, at \*1 (N.D. Cal. Jan. 8, 2021) (“*Pangea II*”).

24 80. On December 16, 2020, DOJ issued a final rule to amend the regulations for  
25 adjudication of applications for asylum, withholding of removal, and protection under CAT,  
26 *Procedures for Asylum and Withholding of Removal*, 85 Fed. Reg. 59,692 (Sept. 23, 2020)  
27 (“Asylum Procedures Rule”). Among other things, the Asylum Procedures Rule establishes a 15-  
28 day filing deadline for asylum applicants in asylum-and-withholding-only proceedings. 85 Fed.

1 Reg. 81,698 (Dec. 16, 2020). The rule requires immigration judges to reject an asylum application  
2 as incomplete if it does not include a response to each of the required questions contained in the  
3 asylum application form or is unaccompanied by the required materials. 85 Fed. Reg. at 81,699.  
4 The rule was scheduled to take effect on January 15, 2021 but was enjoined by a court in the  
5 District of Columbia.<sup>12</sup>

6 81. On December 17, 2020, DOJ and DHS finalized a prior interim rule that barred  
7 access to asylum for those who do not first seek asylum and receive a final adjudication in another  
8 country while en route to the United States. *See Asylum Eligibility and Procedural Modifications*,  
9 85 Fed. Reg. 82,260 (Dec. 17, 2020) (“Transit Ban Rule”). Iterations of this rule have been struck  
10 down by the federal courts. *See Capital Area Immigrants’ Rights Coal. v. Trump*, 471 F. Supp. 3d  
11 25, 57 (D.D.C. 2020); *E. Bay Sanctuary Covenant v. Barr*, 964 F. 3d 832 (9th Cir. 2020); *Al Otro*  
12 *Lado v. Wolf*, 952 F.3d 999, 1003 (9th Cir. 2020); *see also Al Otro Lado v. Gaynor*, No. 17-cv-  
13 02366-BAS-KSC, 2021 WL 150987, at \*1 (S.D. Cal. Jan. 18, 2021) (temporarily restraining  
14 government from applying the Transit Ban Rule to provisional class members).

15 82. On December 18, 2020, EOIR issued a final rule, *Fee Review*. 85 Fed. Reg. 82,750  
16 (Dec. 18, 2020) (“EOIR Fee Rule”). The rule would drastically increase EOIR fees. For example,  
17 the cost for Form EOIR-26, Notice of Appeal from a Decision of an Immigration Judge, would  
18 increase from \$110 to \$975. Although the rule was scheduled to take effect on January 19, 2021, it  
19 too was enjoined by a federal court. *See Catholic Legal Immigr. Network v. Exec. Office for*  
20 *Immigr. Review*, Case No. 1:20-cv-03812-APM (D.D.C. Jan. 18, 2021), ECF No. 34.

21 83. On December 23, 2020, DHS and DOJ finalized a rule than amends regulations to  
22 allow adjudicators to deny asylum and applications for withholding of removal on “security”  
23 grounds if the applicant exhibits a symptom of a contagious disease or is coming from a region  
24 where the disease is prevalent. *Security Bars and Processing*, 85 Fed. Reg. 84,160 (Dec. 23,  
25 2020). (“Security Bar Rule”). The rule would amend regulations to allow adjudicators to deny  
26

27 <sup>12</sup> *Nat’l Immigrant Justice Ctr. v. Exec. Office for Immigr. Review*, Case No. 1:21-cv-00056-  
28 RBW, Order Granting Mot. for Temporary Restraining Order, Prelim. Inj. & Stay (D.D.C. Jan. 14,  
2021), ECF No. 11.

1 asylum and withholding applications on “security” grounds if the applicant exhibits a symptom of  
2 a contagious disease (such as COVID) or coming from a region where the disease is prevalent.  
3 Thirty days were allowed for public comment. *Id.* That rule is scheduled to take effect on January  
4 22, 2021. 85 Fed. Reg. 84,160 (Dec. 23, 2020).

5 84. In addition to the many rules finalized in late 2020, DOJ proposed two new rules  
6 that directly intersect with the one at issue in this case.

7 85. On November 27, 2020, DOJ issued a notice of proposed rulemaking to restrict the  
8 availability of continuances in immigration court. *Good Cause for a Continuance in Immigration*  
9 *Proceedings*, 85 Fed. Reg. 75,925 (Nov. 27, 2020) (“Continuance NPRM”).

10 86. Also on November 27, 2020, DOJ issued a notice of proposed rulemaking to  
11 significantly heighten the standards and burdens of proof for adjudicating statutory motions to  
12 reopen, including claims regarding ineffective assistance of counsel. *Motion to Reopen and*  
13 *Reconsider; Effect of Departure; Stay of Removal*, 85 Fed. Reg. 75,942 (Nov. 27, 2020) (“Motion  
14 to Reopen NPRM”).

15 87. DOJ issued these NPRMs after the comment period for the Rule at issue in this case  
16 had already closed.

## 17 **II. The Rule**

### 18 **A. Notice of Proposed Rulemaking**

19 88. Defendants issued the Notice of Proposed Rulemaking titled “*Appellate Procedures*  
20 *and Decisional Finality in Immigration Proceedings; Administrative Closure*” (the “Proposed  
21 Rule”) on August 26, 2020, as part of the barrage of rulemaking that took place in 2020. 85 Fed.  
22 Reg. 52,491 (Aug. 26, 2020).

23 89. The Proposed Rule was signed by then-Attorney General William Barr. It proposed  
24 numerous changes to immigration court and BIA procedures, each of which operates against those  
25 seeking to defend against removal.

26 90. These changes included many that are contrary to the way most courts function. For  
27 example, the rule proposed requiring simultaneous briefing on appeal, limiting briefing extensions  
28 on appeal, authorizing the BIA to issue dispositive decisions, assigning authority to the EOIR

1 Director to adjudicate cases, limiting the BIA’s authority to grant motions to remand for  
2 consideration of new evidence, allowing the BIA to limit the scope of remand, and limiting  
3 immigration judges’ and the BIA’s ability to administratively close cases. 85 Fed. Reg. at 52,491.

4 91. The Proposed Rule also made significant changes to motions to reopen and  
5 reconsider, most notably eliminating the immigration courts’ and BIA’s longstanding authority to  
6 reopen or reconsider cases *sua sponte*, except to correct typographical errors or defective service.  
7 85 Fed. Reg. at 52,505. The Proposed Rule allowed the filing of one motion to reopen or  
8 reconsider outside the time and number limitations where a change in law or fact renders the  
9 noncitizen no longer removable and the noncitizen has exercised diligence in pursuing the motion.  
10 *Id.* at 52,506. Such a motion could be granted only by a three-member panel of the BIA. *Id.*  
11 Finally, the Proposed Rule exempted DHS from time and number limitations on motions to reopen  
12 and reconsider filed with the BIA. *Id.*

13 92. Although the Rule was issued around the same time as numerous other rules that  
14 effect the same population, and in the midst of the COVID-19 pandemic, the Proposed Rule  
15 allowed only a 30-day public comment period. 85 Fed. Reg. at 52,491.<sup>13</sup>

16 93. Defendants acknowledged that the Proposed Rule was a “significant regulatory  
17 action” under Executive Order 12866, *see* 85 Fed. Reg. at 52,509, but did not explain why only 30  
18 days were provided instead of the default 60-day comment period. *See* Exec. Order No. 12866,  
19 §6(a), 58 Fed. Reg. 51,735, 51,740 (Oct. 4, 1993) (“[E]ach agency should afford the public a  
20 meaningful opportunity to comment on any proposed regulation, which in most cases should

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21 <sup>13</sup> This stands in stark contrast with the typical practice of allowing 60 days for comment on  
22 significant regulatory actions, *see* Exec. Order 12866, 58 Fed. Reg. at 51,740 (“[I]n most cases  
23 [rulemaking] should include a comment period of not less than 60 days.”), and also with the  
24 decisions of other agencies to extend the period for public participation during the COVID-19  
25 pandemic. *See, e.g.*, Bureau of Consumer Financial Protection, *Debt Collection Practices*  
26 *(Regulation F); Extension of Comment Period*, 85 Fed. Reg. 30,890 (May 21, 2020) (agreeing that  
27 “the pandemic makes it difficult to respond to the SNPRM thoroughly” and providing an  
28 additional 90 days to comment on a proposal “in light of the challenges posed by the COVID-19  
pandemic”). Meanwhile, numerous rules seeking merely an extension of forms without change  
have been allowed a 60-day comment period. *See Agency Information Collection Activities; Extension*  
*Without Change, of a Currently Approved Collection: Petition for U Nonimmigrant*  
*Status*, 85 Fed. Reg. 58,381 (Sept. 18, 2020); *Agency Information Collection Activities; Extension,*  
*Without Change, of a Currently Approved Collection: Request for the Return of Original*  
*Documents*, 85 Fed. Reg. 58,380 (Sept. 18, 2020) (same).



1 include a comment period of not less than 60 days.”); *also* Exec. Order No. 13563, 76 Fed. Reg.  
2 3,821, 3,822 (Jan. 21, 2011) (reiterating that comment periods should “generally be at least 60  
3 days.”).

4 94. 1,284 individuals and organizations including Plaintiffs ILRC, Tahirih, and  
5 RAICES, submitted comments on the Proposed Rule, mostly expressing opposition to the rule.  
6 Many of these comments emphasized that the short comment period prevented them from  
7 submitting a complete response to the Proposed Rule.

8 95. In particular, the staggered rulemaking process made it difficult for commenters to  
9 address the interplay between and impact of rules. And the sheer number of rules promulgated in a  
10 relatively short time period made it impossible for interested parties, including nonprofit  
11 organizations like Plaintiffs, to dedicate sufficient resources to comment comprehensively on the  
12 rules. Some small entities, like Plaintiff Centro Legal, were unable to comment on the Rule during  
13 the 30-day comment period.

#### 14 **B. The Final Rule**

15 96. The Final Rule was published in the Federal Register on December 16, 2020. 85  
16 Fed. Reg. 81,588 (Dec. 16, 2020). The Rule was one of six anti-immigrant rules finalized between  
17 December 11 and December 23, 2020.<sup>14</sup> All six were given 30-day effective dates, leaving  
18 immigrants and those who represent them struggling to respond to sweeping changes over the  
19 holiday business closures and in the midst of the surging COVID-19 pandemic.

20 97. The Rule purported to explain why Defendants rejected commenters’ requests to  
21 extend the comment period, stating that “the COVID-19 pandemic has no effect on the sufficiency  
22 of the 30-day comment period” because employers have adopted telework policies and childcare  
23 would remain an issue “regardless of the length of the comment period.” *Id.* at 81,643. That  
24 response ignored comments that office closures had created challenges for legal service providers  
25 who must meet with clients and handle physical documents; that community organizations were  
26 unexpectedly assisting clients experiencing food and housing insecurity due to the pandemic; and

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27 <sup>14</sup> Omnibus Asylum Rule, Asylum Procedures Rule, Transit Ban Rule, EOIR Fee Rule,  
28 Security Bar Rule. *See supra*, ¶¶ 79-83.

1 that staff had caregiving responsibilities for family members who had contracted COVID-19 and  
2 for children whose schools were closed.<sup>15</sup>

3 98. The Rule summarily rejected many other comments from the public and included  
4 virtually no changes from the Proposed Rule.

5 99. In addition to failing to meaningfully respond to comments, the Rule did not analyze  
6 how the Rule would affect small entities that provide legal services to immigrants, and whose  
7 missions and operations will be upended by the Rule’s radical changes to EOIR procedures.  
8 Without wrestling with issues commenters identified, Defendants concluded that the Rule “would  
9 not have a significant economic impact on a substantial number of small entities” and “does not  
10 limit the fees [representatives] may charge or the number of cases a representative may ethically  
11 accept under the rules of professional responsibility.” *Id.* at 81,646.

12 100. The Rule also did not provide a rational response to comments explaining that the  
13 Rule will exacerbate existing problems in the immigration courts and the BIA, cause the backlog  
14 to increase, and impose practically insurmountable barriers to those seeking to defend against  
15 removal. The Rule also did not articulate a rational connection between the changes it imposes and  
16 its purported justifications. For example, it ignored data back to 1986 showing that administrative  
17 closure has helped reduce the backlog in immigration court, and that EOIR had misrepresented  
18 data it relied on in the Rule.<sup>16</sup>

19 101. The Rule took effect on January 15, 2021.  
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23 <sup>15</sup> Public Comment of Brooklyn Defender Services at 2 (Sept. 25, 2020),  
24 <https://tinyurl.com/y2nxssh2>; Immigrant Law Center of Minnesota at 2 (Sept. 25, 2020),  
<https://tinyurl.com/y3akqtxc>; Public Comment of Community Legal Services in East Palo Alto at  
25 2 (Sept. 24, 2020), <https://tinyurl.com/yyzsrmem>.

26 <sup>16</sup> See TRAC, Report: The Life and Death of Administrative Closure (Sept. 10, 2020),  
27 <https://tinyurl.com/y2u2kn8f>; cited in Public Comment of DePaul Asylum and Immigration Law  
28 Clinic (Sept. 24, 2020), <https://tinyurl.com/yyg3lc4b>; Round Table of Immigration Judges  
(Sept. 24, 2020), <http://bit.ly/3oFfRE8>; Public Comment of The Legal Aid Society (Sept. 24,  
2020), <https://tinyurl.com/y6cnkh2k>; Public Comment of Tahirih Justice Center (“Tahirih  
Comment”) (Sept. 25, 2020), <https://tinyurl.com/y6qy229m>.

1 **III. The Rule Violates the Procedural and Substantive Requirements of the APA.**

2 **A. Defendants' Rulemaking Process Was Fatally Flawed**

3 **1. The 30-Day Comment Period Was Unreasonably Short**

4 102. Without explanation, Defendants issued the Proposed Rule with just 30 days for  
5 comments. Such a short comment period would have been inadequate in any circumstances given  
6 the complexity of the scheme the Rule alters. But it was particularly inadequate at the time the  
7 Rule was proposed in light of the many other intersecting rules proposed around the same time  
8 and the unique challenges that affected parties faced during the COVID-19 pandemic.

9 103. Although numerous commenters raised concerns about the short comment period,  
10 Defendants ignored requests for more time. Defendants offered no meaningful explanation for  
11 imposing such a short comment period, even though many other agencies extended deadlines in  
12 light of the pandemic.

13 104. Courts have observed that 60 or “90 days is the ‘usual’ amount of time allotted for a  
14 comment period.” *Becerra v. U.S. Dep’t of the Interior*, 381 F. Supp. 3d 1153, 1176-77 (N.D. Cal.  
15 2019) (quoting *Prometheus Radio Project v. FCC*, 652 F.3d 431, 453 (3d Cir. 2011)); accord  
16 *Petry v. Block*, 737 F.2d 1193, 1201 (D.C. Cir. 1984) (“[A] thirty-day period is, in the  
17 Administrative Conference’s view, ‘an inadequate time to allow people to respond to proposals  
18 that are complex or based on scientific or technical data.’ The Administrative Conference itself  
19 thus suggests a sixty-day period as ‘a more reasonable *minimum* time for comment.’” (footnotes  
20 omitted)); *Pangea I*, 2020 WL 6802474, at \*19-20 (enjoining immigration rule due to, *inter alia*,  
21 providing a 30-day comment period).

22 105. Executive Order 13563 makes clear that “[t]o the extent feasible and permitted by  
23 law, each agency *shall* afford the public a meaningful opportunity to comment through the  
24 Internet on any proposed regulation, with a comment period that should generally be at least  
25 60 days.” Exec. Order 13563, 76 Fed. Reg. at 3,821-22 (emphasis added); *see also* Exec. Order  
26 12866, 58 Fed. Reg. at 51,740 (“[I]n most cases [rulemaking] should include a comment period of  
27 not less than 60 days.”).

28 106. Defendants acknowledged that the Rule is a “significant regulatory action” that must

1 be “consistent with the principles of Executive Orders 12866 and 13563.” 85 Fed. Reg. at 81,643.  
2 In light of that fact, a 60- or even 90-day comment period would have been the minimum  
3 appropriate here. Instead, Defendants allowed just 30 days for comments on the proposed Rule.

4 107. The comment period was wholly inadequate under the circumstances. The Rule is a  
5 complex rule that makes major changes to a critical part of the immigration system. It was also  
6 part of a “staggered” rulemaking process “in which [DOJ and DHS] published this NPRM and  
7 several other related proposed rules.” *Pangea I*, 2020 WL 6802474, at \*22.

8 108. Defendants also issued the Rule in the midst of a global pandemic sweeping the  
9 country, endangering lives, and disrupting life and work schedules. Other agencies have  
10 acknowledged the unique challenges of operating during the pandemic and extended comment  
11 periods under the circumstances.<sup>17</sup>

12 109. Defendants did not articulate a reasoned explanation for providing such a brief  
13 comment period. Defendants did not suggest that a 60-day comment period was infeasible for any  
14 reason. They did not even explain why a 30-day comment period was preferable.

15 110. Instead, Defendants offered only weak rebuttals of commenters arguments.

16 111. For example, Defendants asserted that “commenters did not suggest or indicate what  
17 additional issues the comment period precluded them from addressing.” 85 Fed. Reg. at 81,642.  
18 This is patently false. Commenters identified issues they would have addressed given more time,  
19 including the interaction between this Rule and the Asylum Procedures Rules, which was issued  
20 just two days before the close of this Rule’s comment period.<sup>18</sup>

21 112. Defendants also pointed to 2002 rulemaking that allowed a 30-day period was a rule  
22 that amended certain BIA procedures. *See* 85 Fed. Reg. at 81,642 & n.72 (citing 67 Fed. Reg. at  
23

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24 <sup>17</sup> *See, e.g.*, Bureau of Consumer Financial Protection, *Debt Collection Practices (Regulation*  
25 *F); Extension of Comment Period*, 85 Fed. Reg. 30,890 (May 21, 2020) (agreeing that “the  
26 pandemic makes it difficult to respond to the SNPRM thoroughly” and providing an additional 90  
days to comment on a proposal “in light of the challenges posed by the COVID-19 pandemic”).

27 <sup>18</sup> *See, e.g.*, Public Comment of AILA at 2-3 (Sept. 25, 2020), <http://bit.ly/3pNe14r> (“AILA  
28 Comment”); Reichlin-Melnick Comment n.5, at 2-4 (Sept. 25, 2020),  
<https://tinyurl.com/yxzpzkxj>; Public Comment of Center for Gender & Refugee Studies at 4 (Sept.  
25, 2020), <http://bit.ly/3s6c2tW>.

1 54,878). That single example from nearly twenty years ago is irrelevant and an outlier set against  
 2 more recent examples in which commenters were given substantially more time. And in all events,  
 3 Defendants failed to defend their decision making with respect to this Rule, taking into  
 4 consideration their staggered rulemaking and a global pandemic.

5 113. Commenters explain that the COVID-19 pandemic made commenting more difficult  
 6 by, for example disrupting workplaces, increasing childcare duties, and making it harder to  
 7 communicate with clients who might have relevant information. Defendants' response was wholly  
 8 inadequate. They asserted that allowing a 60-day comment period in light of COVID-19, "would  
 9 effectively preclude rulemaking by the Department for the duration of the COVID-19 outbreak"  
 10 because "individual personal circumstances" that make commenting a challenge are present for  
 11 "every rulemaking." 85 Fed. Reg. at 81,643. But allowing more time for comments is not the same  
 12 thing as saying that rulemaking must cease. Defendants' failure to seriously consider the  
 13 challenges commenters faced during the pandemic denied the public a meaningful opportunity to  
 14 respond to the proposal.

15 **2. Defendants' Staggered Rulemaking Denied the Public A Meaningful**  
 16 **Opportunity to Comment and Renders the Rule Arbitrary and**  
 17 **Capricious**

18 114. The Rule was issued as part of an improper staggered rulemaking process in which  
 19 various rules affecting people subject to immigration court and BIA proceedings were proposed  
 20 separately at different times, preventing the public from understanding and commenting on the full  
 21 implications of changes to the regulatory landscape.

22 115. In particular Defendants proposed the Asylum Procedures Rule just two days before  
 23 the comment period for this Rule ended, leaving commenters without time to address issue.

24 116. Defendants also proposed two closely-related rules—the Motion to Reopen NPRM  
 25 and the Continuance NPRM—after the comment period for this Rule closed.<sup>19</sup> These two NPRMs

26 \_\_\_\_\_  
 27 <sup>19</sup> DHS also issued a proposed rule affecting individuals impacted by the instant Rule during  
 28 this period. *See Employment Authorization for Certain Classes of Aliens With Final Orders of Removal*, 85 Fed. Reg. 74,196 (Nov. 19, 2020) (eliminating work authorization for individuals with final orders).

1 exacerbate the detrimental impact of this Rule on noncitizens' ability to present defenses to  
2 removal. Because these NPRMs were published in November 2020, commenters were deprived of  
3 the ability to discuss the interplay of the rules and the full effect of *this* Rule. And Defendants did  
4 not consider this interplay when they finalized the Rule at issue in this case.

5 117. In particular, Defendants' Motion to Reopen NPRM significantly heightens the  
6 standards and burdens of proof for adjudicating statutory motions to reopen, including claims  
7 regarding ineffective assistance of counsel. *See* 85 Fed. Reg. 75,942 (Nov. 27, 2020). Among  
8 other things, it prohibits immigration judges from receiving evidence outside the scope of relief  
9 for which reopening was granted, *see id.* at 75,953, which compounds the harms caused by the  
10 instant Rule because it eviscerates an immigration judge's ability to consider new evidence. The  
11 Motion to Reopen NPRM also proposes significant hurdles to obtaining a stay of removal, as well  
12 as consequences for departing the United States, which will exacerbate the harm caused by many  
13 of the changes in this Rule.

14 118. Defendants' other proposed rule, the Continuance NPRM, further restricts  
15 continuances before the immigration court. *See* 85 Fed. Reg. 75,925 (Nov. 27, 2020). It therefore  
16 makes seeking parallel relief before EOIR and USCIS or state courts even more difficult, adding  
17 to the erosion of procedural protections at issue in this Rule. The Continuance NPRM is also  
18 inconsistent with Defendants' attempt to justify the Rule at issue in this case. Defendants  
19 specifically relied on the existence of continuances to justify the elimination of remedies like  
20 administrative closure and *sua sponte* reopening. *See, e.g.*, 85 Fed. Reg. at 81,647.

21 119. Defendants' rulemaking process not only denied the public an opportunity to  
22 comment on the interplay of these rules, Defendants failed to consider the cumulative effect of all  
23 the rules at the same time.

24 120. For example, Defendants failed to consider the interplay of this Rule and the  
25 Omnibus Asylum Rule, which would alter the substance and procedure of asylum adjudications.  
26 *See* 85 Fed. Reg. 80,274. Among other things, the Omnibus Asylum Rule curtails the discretion of  
27 an immigration judge or the BIA to consider motions to reopen even based on changed country  
28 conditions, yet the Rule at issue in this case repeatedly rests on the availability of such motions to

1 justify limiting other procedural remedies like *sua sponte* reopening and motions to remand. *See*,  
2 *e.g.*, 85 Fed. Reg. at 81,629, 81,632, 81,634. Defendants did not consider the interactions between  
3 these rules.

4 121. Defendants also failed to consider the interplay of this Rule and the Asylum  
5 Procedures Rule, which imposes a strict 15-day timeline for filing an asylum application for those  
6 in asylum-only and withholding-only proceedings. *See* 85 Fed. Reg. at 81,698. Under the Asylum  
7 Procedures Rule, immigration judges will deem individuals who fail to file asylum applications  
8 within 15 days to have waived the opportunity to submit an application. *Id.* Because such  
9 individuals are to have their cases “returned to DHS,” it is unclear what appellate rights they will  
10 have. For some, the availability of *sua sponte* reopening by an immigration judge will become all  
11 the more critical to prevent miscarriages of justice. The Asylum Procedures Rule also allows  
12 immigration judges to submit evidence in proceedings, which has profound implications for  
13 “undisputed” facts the BIA may now “administratively notice” under the instant Rule.  
14 Nevertheless, Defendants did not consider the interactions between these rules.

15 122. The EOIR Fee Rule increases the fee from \$110 to \$975 for BIA appeals, and from  
16 \$110 to \$895 for BIA motions to reopen or reconsider. *See* 85 Fed. Reg. at 82,750. Defendants  
17 acknowledge the EOIR Fee Rule but refused to consider its implications because it could be  
18 enjoined. *See* 85 Fed. Reg. at 81,594. In other words, Defendants did not meaningfully consider  
19 the deterrent effect of increased fees before overhauling the EOIR system, nor the burden of  
20 seeking fee waivers or other sources of funding for appeals while also meeting an expedited  
21 timeframe for briefing. Nor did Defendants consider the harm in eliminating the BIA’s self-  
22 certification and *sua sponte* reopening authority, which are often used to accept appeals and  
23 motions that are rejected after denial of a fee waiver.

24 123. Two other final rules issued in December 2020 also intersect with the Rule at issue  
25 in this case. The Transit Ban Rule, 85 Fed. Reg. at 82,260, bars individuals from seeking asylum if  
26 they transited through another country and did not seek and receive a denial of protection in that  
27  
28

1 country.<sup>20</sup> The Security Bars Rule, 85 Fed. Reg. 84,160, bars access to the United States, the  
 2 asylum process, and the immigration courts in the name of national security and public health, but  
 3 is so sweeping that nearly anyone who traveled through a country where COVID-19 is prevalent  
 4 or manifests minor symptoms could be barred from immigration relief, *id.* at 84,196. Even if those  
 5 rules are enjoined, people subject to them will not be able to seek remand of a pending appeal at  
 6 the BIA to address the change in law, due to changes made by the Rule at issue here.

7 124. Defendants’ failure to consider the implications of these rules constitutes arbitrary  
 8 and capricious rulemaking, and it also denied the public a meaningful opportunity to comment on  
 9 the Rule. *Immigrant Legal Res. Ctr.*, 2020 WL 5798269, at \*14 (preliminarily enjoining DHS-  
 10 issued rule under APA in part because DHS “fail[ed] to consider the combined impact” of another  
 11 DHS-issued rule); *see also Casa de Md., Inc.*, 2020 WL 5500165, at \*26 (preliminarily enjoining  
 12 DHS-issued rule under APA in part because DHS staggered rulemaking, precluding the public  
 13 from considering the cumulative impact of the rules).

14 **B. Director McHenry Issued the Rule Without Valid Authority**

15 125. The INA provides that “[t]he Attorney General shall establish such regulations, . . .  
 16 delegate such authority, and perform such other acts as the Attorney General determines to be  
 17 necessary for carrying out” his authority under the INA. 8 U.S.C. § 1103(g)(2). The EOIR “shall  
 18 be subject to the direction and regulation of the Attorney General” as prescribed by § 1103(g). 6  
 19 U.S.C. § 521(a).

20 126. By way of federal regulation, the Attorney General has delegated limited authority  
 21 to EOIR. *See* 8 C.F.R. § 1003.1. These regulations also delineate the authority of the Director of  
 22 EOIR. *See id.* § 1003.1(b). The Director has the authority to “[i]ssue operational instructions and

23  
 24 <sup>20</sup> A court in the District of Columbia vacated the interim final rule that preceded that rule  
 25 because it violates the APA, *Cap. Area Immigrants’ Rights Coal. v. Trump*, 471 F. Supp. 3d 25,  
 26 57 (D.D.C. 2020), *appeals docketed*, Nos. 20-5271 & 20-5273 (D.C.Cir. Aug. 31, 2020), and the  
 27 Ninth Circuit has also signaled its view that the same interim final rule violates the INA and the  
 28 APA, *see East Bay Sanctuary Covenant*, 964 F. 3d 832. As to the Security Bar Rule, a D.C.  
 District Court has recently concluded that COVID-19 cannot be the basis for expedient  
 deportation of children. *See P.J.E.S. v. Wolf*, -- F. Supp. 3d --, 2020 WL 6770508 (D.D.C. Nov.  
 18, 2020), *appeal docketed*, No. 20-5357 (D.C. Cir. Nov. 30, 2020). Though *P.J.E.S.* does not  
 directly involve the Security Bar Rule, the decision signals a judicial rejection of its underlying  
 approach and reasoning.



1 policy, including procedural instructions regarding the implementation of new statutory or  
2 regulatory authorities[.]” *Id.* § 1003.1(b)(i). But the regulation’s text distinguishes “operational  
3 instructions,” “policy,” and “procedural instructions” from “new statutory or regulatory  
4 authorities,” and nowhere does the regulation authorize the Director to ratify “new regulatory  
5 authorities.” *Id.* Instead, that authority remains with the Attorney General. *See* 6 U.S.C. § 521(a).

6 127. The Final Rule asserts that the Director of EOIR had authority to issue the Rule  
7 under Attorney General Order Number 4910-2020. *See* 85 Fed. Reg. at 81,650–51. At the time of  
8 the Proposed Rule, the public could not have commented on the propriety of Order 4910-2020  
9 because the Proposed Rule indicated the Attorney General would issue the Rule, and the Order  
10 was not signed until November 17, 2020.

11 128. The Order purportedly delegates “the authority to issue regulations related to  
12 immigration matters within the jurisdiction of the [EOIR]” to the Director of EOIR “[p]ursuant to  
13 the authority vested in the Attorney General by law, including 28 U.S.C. §§ 509 and 510.”<sup>21</sup> But  
14 28 U.S.C. §§ 509 and 510 are general delegation provisions and do not provide the specific  
15 statutory authority for the Attorney General to delegate rulemaking authority under the INA to the  
16 EOIR Director. *See N.S. v. Hughes*, No. 1:20-cv-101-RCL, 2020 WL 4260739, at \*5 (D.D.C. July  
17 24, 2020).

18 129. The Attorney General may only delegate the specific authority necessary to  
19 promulgate the Rule under 8 U.S.C. § 1103(g)(2). *See id.* This is because the INA is a  
20 “comprehensive federal statutory scheme for regulation of immigration and naturalization,”  
21 *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 587 (2011), and the Attorney General’s  
22 power to delegate rulemaking authority within the Department pursuant to §§ 509 and 510 “does  
23 not apply where Congress has specifically and separately allocated enforcement authority over a  
24 certain action or set of actions.” *N.S.*, 2020 WL 4260739, at \*5 (citing *United States v. Giordano*,  
25 416 U.S. 505, 513 (1974)).

26  
27 <sup>21</sup> *See* Attorney General Order No. 4910-2020, *Nat’l Immigrant Justice Ctr., et al. v. The*  
28 *Executive Office for Immigration Review, et al.*, No. 1:21-cv-00056-RBW (D.D.C. Jan. 13, 2021),  
ECF No. 10-1.

1           130. The Attorney General may therefore *only* delegate authority to the Director of EOIR  
2 under 8 U.S.C. § 1103(g). Order Number 4910-2020 does not refer to that provision, and the more  
3 general delegation in the Order does not suffice under fundamental principles of administrative  
4 law. *See SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943); *see also N.S.*, 2020 WL 4260739, at \*6.

5           131. Because Director McHenry was without statutory or regulatory authority to issue the  
6 Rule, and because the Rule fails to provide a valid reason why Director McHenry had the  
7 authority to issue the Rule, the issuance of the Rule was *ultra vires* “in excess of statutory  
8 jurisdiction, authority, or limitations,” 5 U.S.C. § 706(2)(C), and not in accordance with law, *id.*  
9 § 706(2)(A). As such, the Rule in its entirety should be set aside.

10           132. The Rule also suffers from the additional problem that the Proposed Rule did not  
11 disclose that the EOIR Director would sign the Rule, so the public was denied a meaningful  
12 opportunity to comment on the propriety of his actions. In particular, they were denied an  
13 opportunity to comment on the anomalous and dangerous circumstances of the Rule, through  
14 which Director McHenry purported to use power delegated to him generally to further delegate  
15 specific adjudicatory authority from the Attorney General to himself. The Rule also violates the  
16 APA for this reason. *See* 5 U.S.C. § 553(c); 5 U.S.C. § 706(2)(D).

17           **C. The Rule Effects Numerous Procedural Changes That Are Contrary to Law**  
18           **and Arbitrary and Capricious**

19           **1. Elimination of Administrative Closure**

20           133. For decades, immigration judges and the BIA have used administrative closure to  
21 defer cases while respondents await USCIS decisions on applications that are likely to provide  
22 relief from removal. Because the statutory scheme established by Congress requires USCIS to  
23 adjudicate certain petitions, immigration judges and the BIA have used administrative closure to  
24 allow noncitizens to pursue relief made available to them by statute. The Rule amends the  
25 regulations at 8 C.F.R. §§ 1003.1(d)(1)(ii) and 1003.10(b) to generally prohibit immigration  
26 judges or the BIA from exercising this authority.

27           134. By eliminating administrative closure as a procedural tool, Defendants failed to  
28 consider an “important aspect of the problem.” *Motor Veh. Mfrs. Ass’n v. State Farm Ins.*, 463

1 U.S. 29, 43 (1983). Specifically, Defendants failed to reckon with the fact—highlighted in  
2 numerous comments—that eliminating administrative closure will lead to the deportation of  
3 noncitizens who have meritorious claims for relief. *Meza Morales*, 973 F.3d at 665 (“[C]ases must  
4 be disposed of fairly, and granting a noncitizen the opportunity to pursue relief to which she is  
5 entitled may be appropriate and necessary for a fair disposition.”)<sup>22</sup>

6 135. Particularly when combined with the elimination of motions to remand for new  
7 evidence and *sua sponte* motions to reopen, elimination of administrative closure will make it  
8 impossible for many noncitizens to pursue various forms of relief that Congress made available by  
9 statute, depriving them of an opportunity to be heard on such remedies. Defendants failed to even  
10 acknowledge that a major purpose of administrative closure is to enable noncitizens to pursue  
11 relief to which they are entitled (e.g., U visas, VAWA self-petitions, and provisional unlawful  
12 presence waivers). Likewise, the Rule failed to consider the combined effect of the elimination of  
13 administrative closure and the other changes in the Rule. Restricting motions to reopen, motions to  
14 remand, and the BIA’s authority to act *sua sponte* makes it more difficult and often impossible to  
15 alter an order of removal or other immigration judge decision when a noncitizen subsequently  
16 obtains relief from USCIS or another agency.

17 136. The Rule will thus lead to removal orders and actual removal of noncitizens who are  
18 entitled to immigration benefits, subjecting them to violence or other hardship before they are  
19 granted relief, or in some cases preventing them from obtaining the relief altogether.

20 137. Because prohibiting administrative closure is likely to result in some noncitizens  
21 being removed, even though they would have been able to obtain relief, the risk of unfairness and  
22 injustice is high, yet Defendants discounted this important consideration altogether. In fact, in  
23 response to comments concerning data showing that noncitizens who obtain administrative closure  
24 have obtained lawful status, the Rule concluded that such data was “ultimately of little relevance

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25 <sup>22</sup> See Tahirih Comment at 8-9 (describing devastating effects of the change on survivors of  
26 violence, including renewed threats to their lives upon deportation). See also Public Comment of  
27 the Mayor of Minneapolis at 1-2 (Sept. 25, 2020) (noting that deportation can be a death sentence)  
28 <https://bit.ly/38Y6Ssx>; Public Comment of the National Network to End Domestic Violence at 3-4  
(Sept. 25, 2020) <https://bit.ly/3bSsUP7> (describing the horrific and life-threatening situations  
survivors of domestic violence face upon deportation).

1 to the rule.” 85 Fed. Reg. at 81,648.

2 138. Although the Rule notes that commenters raised concerns about how the elimination  
3 of administrative closure would result in “unfairly harsh consequences” for noncitizens pursuing  
4 relief through USCIS, 85 Fed. Reg. at 81,597, Defendants did not adequately respond to those  
5 comments. Defendants merely concluded that “[w]ith EOIR’s pending caseload reaching record  
6 highs, EOIR simply cannot allow indefinite delays that prolong adjudication any longer than  
7 necessary for immigration judges to decide the issues squarely before them. . . . [T]he Department  
8 does not believe that administrative closure is a proper tool for efficiently adjudicating  
9 proceedings . . . .” *Id.* at 81,598 (footnote omitted).

10 139. Defendants’ justification for prohibiting administrative closure is arbitrary and  
11 capricious. Defendants purportedly base the elimination of administrative closure on a belief that  
12 administrative closure decreases the efficiency of the immigration courts, conflicts with the  
13 immigration courts’ duty to resolve cases in a timely fashion, and is not authorized by, or even  
14 conflicts with, existing regulations. 85 Fed. Reg. at 81,598–99. None of these rationales justifies  
15 Defendants’ action.

16 140. First, immigration courts have used administrative closure as a procedural tool for  
17 decades. Accordingly, elimination of administrative closure marks a departure from past practice.  
18 As the Rule notes, the Attorney General’s 2018 decision in *Matter of Castro-Tum*, 27 I. & N.  
19 Dec. 271, concluded that neither immigration judges nor the BIA have authority to  
20 administratively close cases. 85 Fed. Reg. at 81,598. But that decision, which was contrary to  
21 longstanding EOIR practice, has now been rejected twice by courts of appeals. *See Meza Morales*,  
22 973 F.3d at 664–67; *Romero*, 937 F.3d at 287–97.<sup>23</sup>

23 141. A numerous commenters, the BIA, EOIR consultants, and federal courts have  
24 explained, administrative closure *improves* efficiency and facilitates timely resolution of cases.  
25 For example, the BIA has observed that administrative closure facilitates “efficient management  
26

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27 <sup>23</sup> The Sixth Circuit disagreed with these decision. *See Hernandez-Serrano v. Barr*, 981 F.3d at  
28 464; *see also id.* at 467, 471 (Clay, J., dissenting) (noting that the Sixth Circuit now comes into  
conflict with the two other circuits that found such authority to exist under federal regulation).

1 of the resources” of the immigration courts by allowing immigration judges and the BIA to  
2 manage their dockets. *Matter of Avetisyan*, 25 I. & N. Dec. at 695.

3 142. Administrative closure is typically employed in cases where the respondent is  
4 seeking relief in another forum that would moot or otherwise have a dispositive effect on the  
5 proceedings before EOIR. In such cases, “in which two coordinate offices in the executive branch  
6 are simultaneously adjudicating collateral applications, closing one proceeding might help  
7 advance a case toward resolution.” *Meza Morales*, 973 F.3d at 665.

8 143. Far from advancing the “efficient and timely administration of immigration  
9 proceedings,” eliminating administrative closure “would in fact serve to lengthen and delay many  
10 of these proceedings by: (1) depriving [immigration judges] and the BIA of flexible docketing  
11 measures sometimes required for adjudication of an immigration proceeding, as illustrated by  
12 *Avetisyan*, and (2) leading to the reopening of over 330,000 cases upon the motion of either party,  
13 straining the burden on immigration courts.” *Romero*, 937 F.3d at 297.

14 144. The Rule’s elimination of administrative closure forces the parties and immigration  
15 judges to expend resources on litigation when a grant of relief from USCIS would moot the  
16 proceedings.

17 145. Immigration judges have emphasized that administrative closure promotes  
18 “[e]fficient and fair management of a docket” because it “allows for cases to be held in abeyance,  
19 without unnecessary use of court time and resources, when preliminary matters need to be  
20 completed for the case to become ripe for further adjudication.”<sup>24</sup> It thereby “permits the  
21 immigration judge to attend to and resolve cases that are ready for resolution and allows  
22 immigration judges to complete more cases.”<sup>25</sup> As a result, immigration judges are typically able  
23 to render a decision within four months of recalendaring an administratively closed case.<sup>26</sup>

24 146. Even the EOIR-commissioned Booz Allen Hamilton study recommended working  
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26 <sup>24</sup> NAIJ, Letter to Attorney General Sessions, Re: Administrative Closure of Removal Cases at  
1 (Jan. 30, 2018), <https://bit.ly/398PYX6>.

27 <sup>25</sup> *Id.* at 2.

28 <sup>26</sup> Booz Allen Hamilton Report at 26.

1 with DHS “to administratively close cases awaiting adjudication in other agencies or courts” as a  
2 way to improve EOIR’s processes.<sup>27</sup>

3 147. In the face of this evidence, Defendants cite an increase in cases pending before the  
4 immigration courts after *Matter of Avetisyan* in 2012 to imply that administrative closure was the  
5 cause. 85 Fed. Reg. at 81,599. As multiple commenters, including Plaintiffs RAICES and Tahirih,  
6 pointed out, correlation is not causation.<sup>28</sup> Defendants’ assertion is fatally flawed; it does not take  
7 into account the numerous other factors increasing the immigration court backlog—including the  
8 historic rise in asylum seekers arriving at the border, a years-long EOIR hiring freeze that reduced  
9 the number of immigration judges, and changes in DHS’s enforcement practices.<sup>29</sup>

10 148. Defendants also assert that administrative closure is inconsistent with existing  
11 regulations, 85 Fed. Reg. at 81,599. That is incorrect, as both the Fourth Circuit and Seventh  
12 Circuit concluded. *See Romero*, 937 F.3d at 292 (“[T]he authority of [immigration judges] and the  
13 BIA to administratively close cases is conferred by the plain language of 8 C.F.R. §§ 1003.10(b)  
14 and 1003.1(d)(1)(ii).”); *accord Meza Morales*, 973 F.3d at 665.<sup>30</sup> As then-Judge Barrett explained,  
15 “some cases are more complex and simply take longer to resolve,” *Meza Morales*, 973 F.3d at  
16 665. Defendants did not adequately consider comments explaining that administratively closing  
17 unripe cases is an efficient use of resources because it facilitates resolution of other cases.

18 149. The Rule contends that the general authorization of administrative closure would  
19 render superfluous other regulatory provisions that specify situations in which administrative  
20 closure is appropriate. 85 Fed. Reg. at 81,599. Here again, Defendants did not adequately address  
21 the Seventh Circuit’s rejection of this argument, explaining that the referenced provisions  
22 “*mandate* administrative closure in specific circumstances with ‘shall’ language,” as distinct from  
23 the discretionary availability of administrative closure in other circumstances. *Meza Morales*, 973  
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25 <sup>27</sup> *Id.*

26 <sup>28</sup> Public Comment of RAICES at 2 (September 25, 2020) (noting that “correlation is not  
causation”), <https://bit.ly/3nY2ldY>.

27 <sup>29</sup> *See, e.g.*, Public Comment of Reichlin-Melnick at 7–8.

28 <sup>30</sup> The Sixth Circuit has created a circuit split on the issue. *See supra* notes 3, 34.

1 F.3d at 666 (emphasis added).

2 150. Nor was EOIR correct that immigration judges' and the BIA's authority to manage  
3 their own docket conflicts with the EOIR leadership's authority to "[d]irect that the adjudication  
4 of certain cases be deferred." 8 C.F.R. §§ 1003.0(b)(1)(ii), 1003.1(a)(2)(i)(C), 1003.9(b)(3); 85  
5 Fed. Reg. at 81,599. The fact that EOIR supervising officials have the authority to order deferrals  
6 in cases whose result they cannot otherwise direct, *see* 8 C.F.R. §§ 1003.0(c), 1003.1(a)(2)(ii),  
7 1003.9(c), says nothing about the authority of immigration judges handling those cases, who are  
8 tasked with "exercis[ing] their independent judgment and discretion and ... tak[ing] any action ...  
9 that is appropriate and necessary for the disposition of such cases." 8 C.F.R. § 1003.10(b); *accord*  
10 8 C.F.R. § 1003.1(d)(1)(ii).

11 151. Defendants also did not adequately address the reliance interests at issue. Countless  
12 individuals currently in proceedings before EOIR are pursuing relief before USCIS or state courts  
13 while their proceedings are administratively closed. Although the Rule suggests that reliance  
14 interests are not a concern because the Rule applies only prospectively, 85 Fed. Reg. at 81,601,  
15 either EOIR or DHS could re-calendar all cases that are currently administratively closed. As a  
16 result, people in the Fourth and Seventh Circuit could no longer pursue administrative closure  
17 despite recent judicial decisions sanctioning this longstanding procedural tool. Defendants dismiss  
18 or ignore these interests with little explanation. *See, e.g.*, 85 Fed. Reg. at 81,645 (finding concerns  
19 about reliance interests with respect to administrative closure "misplaced"); *see also id.* at 81,601  
20 (same). Indeed, Defendants absurdly suggest that "nothing in the rule prohibits a practitioner from  
21 seeking administrative closure," *id.*, even though such requests would be frivolous in many cases.

22 152. EOIR seeks to minimize the unfairness of the Rule by suggesting that people can  
23 request continuances instead of administrative closure. 85 Fed. Reg. at 81,598 n.24. That  
24 suggestion ignores the burden and inefficiency of continuances. Plaintiffs, individuals in removal  
25 proceedings, DHS, and immigration judges will be required to substantiate or evaluate the  
26 showing required for every continuance and waste resources with unnecessary court appearances.

27 153. As the BIA noted in *Avetisyan*, this dual-track process can even delay ultimate  
28 relief, forcing many to live with uncertainty and causing an unnecessary drain on the courts' and

1 DHS's resources. *See Avetisyan*, 25 I. & N. Dec. at 689–90 (explaining that the continuances  
2 required DHS to transfer the file back and forth between DHS's visa petition unit and litigating  
3 counsel, leading to six continuances while the visa petition was pending).

4 154. The Rule's reliance on continuances is also disingenuous because in January 8,  
5 2021, Defendant McHenry issued a memo restricting access to continuances and Defendants have  
6 proposed a rule that would restrict continuances. As restrictions on continuances become  
7 increasingly severe, the parties must be prepared to address all issues when a continuance is  
8 denied. This places a severe burden on Plaintiffs, other pro bono legal providers, and people in  
9 removal proceedings.

10 155. As a result, it will be difficult for organizations like Plaintiffs to place cases with *pro*  
11 *bono* or affiliate partners, who tend to limit their representation to one form of relief.  
12 Organizations like Plaintiffs will also have to divert resources and hire more staff for direct  
13 representation or *pro se* support. Even for cases Plaintiffs can place with *pro bono* attorneys or  
14 affiliates, Plaintiffs will need to spend much more time on mentoring those attorneys and  
15 affiliates. Defendants failed to give adequate consideration to this problem.

16 156. Elimination of administrative closure will also prevent organizations like Plaintiffs  
17 from seeking hardship waivers of unlawful presence. 8 U.S.C. § 1182(a)(9)(B)(v). Although  
18 commenters noted the effect this change would have on families, 85 Fed. Reg. at 81,643, the Rule  
19 gave that effect virtually no consideration because EOIR considered the link between waivers and  
20 administrative closure "too attenuated to outweigh the significant legal and policy concerns raised  
21 by the Department concerning administrative closure." *Id.* at 81,644. But as even EOIR  
22 acknowledged, 85 Fed. Reg. at 81,601, *id.* at 81,644, people in removal proceedings can obtain the  
23 waiver of unlawful presence only if their removal proceedings are administratively closed. *See* 8  
24 C.F.R. § 212.7(e)(4)(iii). Therefore, eliminating administrative closure makes it impossible for  
25 many noncitizens to apply for the waiver.

26 157. Defendants justify their approach by contending that individuals could take  
27 voluntary departure and then seek a provisional waiver before DHS. 85 Fed. Reg. at 81,644. But  
28 that contention conflicts with DHS regulations, *see Expansion of Provisional Unlawful Presence*



1 *Waivers of Inadmissibility*, 81 Fed. Reg. 50,243, 50,256 (July 29, 2016) (“[I]ndividuals granted  
2 voluntary departure will not be eligible for provisional waivers.”). Rather than addressing the  
3 effect of the Rule on provisional waivers, the Rule concludes, “DHS may choose to update their  
4 regulations as a result of the Department’s amendments regarding administrative closure authority,  
5 but any concerns with DHS’s policy decisions are outside the scope of this rule.” 85 Fed. Reg. at  
6 81,599. That does not suffice. Defendants cannot just declare serious problems identified by  
7 comments as “outside the scope of the rule,” *id.*, because they regulate against the background of  
8 existing law. Because Defendants did not adequately consider the interplay of the Rule with other  
9 regulations, they failed to assess the Rule’s full impact and weigh its advantages against the  
10 disadvantages commenters noted. This too is arbitrary and capricious, in violation of the APA.

## 11 **2. Limits on BIA’s Remand Authority**

12 158. The Rule severely limits the BIA’s authority to remand for factfinding, for  
13 consideration of changes in law, and for consideration of new evidence. These restrictions are  
14 inconsistent with the ordinary operation of appellate courts and needlessly accelerate the removal  
15 of people with meritorious claims for relief.

16 159. Under the Rule, the BIA may not remand to the immigration judge for further  
17 factfinding unless the party seeking a remand—almost always the noncitizen—meets new criteria.  
18 *See* 85 Fed. Reg. at 81,651 (new 8 C.F.R. § 1003.1(d)(3)(iv)(D)). Specifically, the Rule permits a  
19 remand for factfinding only if (1) the noncitizen “preserved the issue” before the immigration  
20 judge and “attempted to adduce the additional facts”; (2) the factfinding would “alter the  
21 outcome” of the case; *and* (3) either the immigration judge’s factual findings were “clearly  
22 erroneous,” or the immigration judge committed an error of law that requires additional  
23 factfinding. *Id.* These provisions are arbitrary and capricious because they illogically require the  
24 noncitizen or their advocate to predict the immigration judge’s legal or factual errors before a  
25 decision is rendered.

26 160. The restrictions on remand for factfinding also conflict with *Franco-Gonzalez v.*  
27 *Holder*, which involves safeguards for mentally ill or incompetent noncitizens under the INA, the  
28 Rehabilitation Act, and the Due Process Clause. No. 10-cv-02211-DMG, 2013 WL 3674492 (C.D.

1 Cal. Apr. 23, 2013). The permanent injunction in that case, which applies to noncitizens detained  
2 in Arizona, California, and Washington, provides that when competency concerns arise, “the  
3 [BIA] *shall* order a remand to the immigration judge with instructions to apply the procedures” for  
4 safeguards that are afforded to class members. *Franco-Gonzalez v. Holder*, No. 10-cv-02211-  
5 DMG, (C.D. Cal. Oct. 29, 2014), ECF No. 786, Order at 23 (emphasis added). The Rule prohibits  
6 this court-ordered process.

7 161. The Rule also restricts remands for changes in law. The Rule permits the BIA to  
8 remand a case based on a change in law only if “that change has vitiated all grounds of  
9 removability.” 85 Fed. Reg. 81,652 (new 8 C.F.R. § 1003.1(d)(7)(ii)(C)). Remand is not permitted  
10 if the change in law merely adds a new type of relief from removal. The result is profoundly  
11 unfair. For example, a lawful permanent resident is foreclosed from seeking cancellation of  
12 removal before the immigration judge if their conviction is an aggravated felony under binding  
13 precedent. *See* 8 U.S.C. § 1229b(a)(3). In 2018, the Supreme Court struck down part of the  
14 definition of a common aggravated felony ground as unconstitutionally vague. *Sessions v.*  
15 *Dimaya*, 138 S. Ct. 1204 (2018). An appellant who remained removable but became eligible for  
16 cancellation of removal under *Dimaya* would have no avenue to obtain a remand and would be  
17 ordered removed based in part on an unconstitutional deportation ground.

18 162. The Rule’s bar on remands for the introduction of new evidence are particularly  
19 arbitrary and unfair because they force people who are eligible for relief to be ordered removed,  
20 and in some cases actually removed, before they can fully present their claims. Under the Rule,  
21 “the [BIA] shall not receive or review new evidence submitted on appeal, shall not remand a case  
22 for consideration of new evidence received on appeal, and shall not consider a motion to remand  
23 based on new evidence.” 85 Fed. Reg. at 81,652 (new 8 C.F.R. § 1003.1(d)(7)(v)(A)). An  
24 individual may secure a remand only if the new evidence relates to EOIR’s jurisdiction or the  
25 individual’s removability—not if the evidence relates to relief from removal. *Id.* (new 8 C.F.R.  
26 § 1003.1(d)(7)(v)(B)).

27 163. The Rule requires individuals to wait until their removal orders become final and  
28 then file motions to reopen, instead of filing motions to remand while their cases are pending. *See*

1 85 Fed. Reg. at 81,611 & n.37. Because ICE may execute a removal order as soon as it is finalized  
2 by the BIA, the Rule will force individuals to litigate motions to reopen from abroad, at substantial  
3 disadvantage, unless they can secure a stay of removal. This approach is arbitrary and capricious  
4 because it ignores the significant consequences that can flow from an order of removal, including  
5 prolonged family separation, and persecution or torture. It also ignores the challenges of litigation  
6 following an order of removal, which may entail not only a motion to reopen before the BIA, but  
7 also a motion to stay removal before the BIA, petition for review before the Court of Appeals, and  
8 motion to stay removal before the Court of Appeals.

9 164. Many people in removal proceedings, especially those who are *pro se* and/or  
10 detained, will be unable to secure stays of removal even if they have meritorious claims and face  
11 irreparable harm if deported. As a result, the Rule’s limits on remands will lead to needless  
12 deportation of individuals who are entitled to relief—in some cases to countries where they face  
13 persecution or torture, in violation of *non-refoulement* obligations. *See* 8 U.S.C. § 1231(b)(3)(A)  
14 (prohibiting removal to country where noncitizen’s “life or freedom would be threatened” because  
15 of “race, religion, nationality, membership in a particular social group, or political opinion”).  
16 Removal from the United States may effectively extinguish a person’s ability to seek review of  
17 their removal order and return to the United States if successful. A person who experiences  
18 persecution, poverty, or other hardship in their home country may face nearly insurmountable  
19 obstacles to finding counsel, filing legal challenges, or communicate with already-retained  
20 counsel.

21 165. Defendants contend that a motion to reopen is an adequate substitute for a motion to  
22 remand. That contention is arbitrary and capricious. And the Rule’s justifications for largely  
23 eliminating remands based on new evidence fall far short of the reasoned explanation necessary in  
24 light of Defendants’ departure from longstanding agency precedent endorsing remand motions.  
25 *See Matter of Coelho*, 20 I. & N. Dec. 464, 470-71.

26 166. Defendants assert that the elimination of remands would reduce “gamesmanship” by  
27 noncitizens. *See, e.g.*, 85 Fed. Reg. at 81,611-12. But they offer no evidence of alleged  
28 gamesmanship. They also ignore that existing standards already allow the BIA to deny motions

1 that are not based on material or previously unavailable evidence. And they fail to contend with  
2 the many legitimate reasons asylum seekers may not initially have access to evidence, as  
3 explained by Plaintiff Tahirih and other commenters. Tahirih Comment at 13-16.

4 167. Defendants' justification also exposes the Rule's arbitrariness. The Rule creates an  
5 exception for DHS to present new evidence at any time based on identity, law enforcement, or  
6 security investigations, without any requirement that the evidence be material or previously  
7 unavailable. EOIR offers no explanation as to why preserving that right for DHS alone does not  
8 promote gamesmanship on the part of DHS.

9 168. Defendants claim that channeling motions to remand into motions to reopen is  
10 "more efficient" and reduces the "burden" on the agency. 85 Fed. Reg. 81,611-12. This is false.  
11 The same evidence and arguments that would have been offered in support of a motion to remand  
12 will be offered in support of a motion to reopen—only after the BIA has adjudicated the appeal  
13 based on a stale record. And, as explained above, what would have been one motion to remand  
14 will become a motion to reopen at the BIA, a stay motion at the BIA, a petition for review at the  
15 circuit, and a stay motion at the circuit. The Rule promotes "efficiency" only in the sense that  
16 those who are removed may be unable to pursue these motions.

17 169. Defendants also offer no evidence to support their assertion that the BIA has failed  
18 to adjudicate motions to remand in a consistent manner. *See* 85 Fed. Reg. at 52,500-01. In any  
19 case, the Rule does not solve the problem they claim they are trying to fix. *Matter of Coelho*, 20 I.  
20 & N. Dec. at 471; *see also* 85 Fed. Reg. at 81,611 (acknowledging that "motions to remand are  
21 generally considered analogous to motions to reopen or reconsider").

22 170. All of the harms described above are exacerbated by Defendants' parallel efforts to  
23 limit motions to reopen and stays of removal in this Rule and in the Motion to Reopen NPRM.  
24 This Rule's elimination of *sua sponte* motions to reopen means that people who could have filed a  
25 motion to remand will instead be forced to exhaust their one and only motion to reopen,  
26 potentially foregoing any claims to reopening that arise later.

27 171. The Motion to Reopen NPRM creates additional hurdles to accessing the BIA's  
28 already-inadequate process for adjudicating stays of removal, increasing the risk that people will

1 be removed before they can pursue a motion to reopen. For example, people in removal  
2 proceedings would be required to first seek a stay with ICE and wait until it is denied or five  
3 business days have passed before even moving for a stay with the BIA. ICE's process for  
4 adjudicating stays has its own complications, including a separate fee, a requirement that the  
5 application be submitted in person, and a requirement that the applicant produce identity  
6 documents that many refugees, for instance, do not have. Defendants' failure to even acknowledge  
7 the interaction of these changes renders the Rule arbitrary and capricious.

### 8 **3. Limits on Scope of Remand**

9 172. The Rule prohibits an immigration judge from "consider[ing] any issues outside the  
10 scope or purpose" of a limited or qualified BIA remand, except issues pertaining to jurisdiction.  
11 85 Fed. Reg. at 81,652 (new 8 C.F.R. § 1003.1(d)(7)(iii)).

12 173. The Rule thus prevents supplementing the record upon remand if there is a change in  
13 law or circumstances while a person is waiting for a new hearing. That wait could range anywhere  
14 from months to several years.

15 174. Defendants contend that current practices cause inefficiency by "encourag[ing] the  
16 re-litigation of issues." 85 Fed. Reg. at 81,615. That contention ignores the reality that new facts  
17 or intervening law are issues that would *not* have been litigated before. Moreover, because the  
18 Rule prohibits an immigration judge from hearing new facts or legal arguments when a case is  
19 remanded, it produces the absurd result of requiring immigration judges to ignore controlling law  
20 or relevant facts at the time of the hearing. This will also result in orders of removal that are based  
21 on outdated law and facts and force Plaintiffs to engage in additional court of appeals litigation to  
22 overturn such orders. The Rule will therefore cause the inefficiency it purportedly seeks to  
23 eliminate.

24 175. The Rule also eliminates the BIA's practice of remanding a case based on the  
25 "totality of the circumstances," 85 Fed. Reg. at 81,652 (new 8 C.F.R. § 1003.1(7)(ii)(B)). The BIA  
26 often uses that standard for remands if it is clear that a person did not understand the proceedings,  
27 or that the immigration judge relied on a mistaken belief or engaged in blatant misconduct.

28 176. A blanket prohibition on such remands will tie the hands of the BIA and force the

1 issuance of denials and removal orders based on undeveloped records or other errors. Especially  
2 with the strict limitations imposed by this Rule on other forms of remand and reopening, there are  
3 virtually no remaining procedures available to address such miscarriages of justice. This too is  
4 arbitrary and capricious.

#### 5 **4. Elimination of *Sua Sponte* Authority to Reopen**

6 177. For as long as the BIA has existed, *sua sponte* reopening or reconsideration has been  
7 a vital mechanism for curing later-discovered injustices or accounting for new facts or law that  
8 make a noncitizen eligible for relief, or not removable at all. The Rule prohibits both immigration  
9 judges and the BIA from reopening or reconsidering a case *sua sponte*. The only exception to the  
10 Rule's withdrawal of *sua sponte* authority is to correct minor mistakes such as typographical  
11 errors. *See* 85 Fed. Reg. at 81,654–55 (new 8 C.F.R. §§ 1003.2(a), 1003.23(b)(1)); *cf.* 8 C.F.R.  
12 §§ 1003.2(a), 1003.23(b)(1).

13 178. *Sua sponte* authority allows immigration judges and the BIA to reopen a case in  
14 “exceptional situations,” such as where a “fundamental change” in law materially impacts a  
15 noncitizen's case. *Matter of J-J-*, 21 I. & N. Dec. 976, 984 (BIA 1997); *Matter of X-G-W-*, 22 I. &  
16 N. Dec. 71, 74 (BIA 1998). Immigration judges and the BIA often exercise this authority after  
17 noncitizens alert them to relevant facts or law via motion.

18 179. In place of this traditional authority, the Rule permits reopening outside the time and  
19 number limits in just two circumstances: (a) where the individual claims U.S. citizenship, or, (b)  
20 subject to a three-member BIA decision only, where the individual's “removability is vitiated *in*  
21 *toto* prior to the execution of the removal order” *and* they exercised diligence in pursuing the  
22 motion. 85 Fed. Reg. at 81,591 (new 8 C.F.R. §§ 1003.2(c)(3)(v)-(vi), 1003.23(b)(4)(v)).

23 180. Defendants' elimination of *sua sponte* authority is arbitrary and capricious because,  
24 among other things, they failed to consider that some noncitizens will be forever barred from  
25 reopening their removal orders, resulting in wrongful deportations.

26 181. First, individuals who are newly eligible for relief based on a change of law or facts  
27 will be left with no recourse. For example, an individual who is eligible for discretionary relief  
28 following the vacatur of a criminal conviction, a spouse of a U.S. citizen with an approved family-

1 based petition, or an individual whose changed personal circumstances entitle them to fear-based  
2 protection from removal would not fall within the two exceptions to the time and number limits  
3 created by the Rule. Defendants assert repeatedly that a statutory motion to reopen with equitable  
4 tolling remains available in such situations. *See, e.g.*, 85 Fed. Reg. at 81,633. But even in cases  
5 where a person can demonstrate the due diligence required for tolling, it is far from settled that  
6 new eligibility for relief would constitute circumstances beyond the individual’s control that  
7 trigger tolling. *Socop-Gonzalez*, 272 F.3d at 1193.

8 182. Second, individuals who discover that a miscarriage of justice occurred in their  
9 removal proceedings will be stripped of an important remedy. For example, a person who suffered  
10 ineffective assistance of counsel, who never received a competency assessment despite indicia of  
11 mental illness, or who was wrongly denied an opportunity to apply for relief would not fall within  
12 the Rule’s exceptions to time and number limits. These individuals will be denied reopening  
13 unless they can make a successful equitable tolling argument. Defendants rejected commenters’  
14 concerns that the standard for equitable tolling is difficult to meet, citing the “frequency with  
15 which [tolling] has been argued” (making no mention of how often it is *successful*) and ignoring  
16 the BIA’s exacting interpretation of the diligence requirement. 85 Fed. Reg. at 81,633; *see, e.g.*,  
17 *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1067 (2020) (describing procedural history of case  
18 where BIA found noncitizen who filed motion to reopen one month after relevant change in law  
19 was not diligent).

20 183. Third, even individuals who are no longer removable at all—and thus do fall within  
21 the Rule’s limited exceptions—will be subject to a newly-imposed diligence requirement to  
22 reopen their removal proceedings. The BIA and the Ninth Circuit have recognized that deporting a  
23 person who is not removable under immigration law is a “gross miscarriage of justice”—  
24 regardless of whether the person exercises diligence in pursuing legal remedies. *See Vega-*  
25 *Anguiano v. Barr*, 982 F.3d 542, 547, 549 (9th Cir. 2019) (citing BIA precedent that a “gross  
26 miscarriage of justice occurs when a deportation or removal order had no valid legal basis at the  
27 time of its issuance *or* at the time of its execution” and finding no diligence requirement to bring  
28 collateral attack); *cf. Estrada-Rosales v. INS*, 645 F.2d 819, 821 (9th Cir. 1981) (holding that

1 deportation based on a subsequently vacated conviction is not “legally executed”). The Rule will,  
2 contrary to this precedent, cause the deportation of individuals who are not removable but cannot  
3 show “diligence” as the BIA will define it in to-be-decided cases.

4 184. Defendants’ claim that a joint motion to reopen remains available for the situations  
5 described above falls flat. As commenters explained, this “alternative” to *sua sponte* authority  
6 “places ultimate authority to reopen or reconsider a case on DHS,” an adverse party that rarely  
7 agrees to join such motions. 85 Fed. Reg. at 81,632. Defendants’ only response to this point was  
8 to repeat that noncitizens “may seek a joint motion with DHS.” *Id.* at 81,633.

9 185. Every justification provided by Defendants for the withdrawal of *sua sponte*  
10 reopening authority is arbitrary and capricious. First, Defendants claim that the lack of meaningful  
11 standards for when *sua sponte* reopening should be granted has resulted in “potential for  
12 inconsistent application or even abuse.” 85 Fed. Reg. at 81,628. But as commenters pointed out,  
13 Defendants cite no examples. *Id.* at 81,630. The alleged harms are purely speculative, as the  
14 agency recognized in calling them “potential” harms.

15 186. The “exceptional circumstances” standard for granting *sua sponte* reopening is  
16 guided by the precedent cited by Defendants. *See, e.g., Matter of G-D-*, 22 I. & N. Dec. 1132,  
17 1134-35 (BIA 1999) (defining one type of “exceptional” situation warranting *sua sponte*  
18 reopening: a “fundamental change in the law” upon which the noncitizen’s case “manifestly  
19 turn[s]”). Indeed, immigration law is “replete” with similar standards that immigration judges and  
20 the BIA routinely apply. Public Comment of National Association of Immigration Judges at 6  
21 (Sept. 25, 2020), <https://tinyurl.com/y4lrl48f>; *see, e.g.,* 8 U.S.C. § 1229b(b)(1)(D) (“exceptional  
22 and extremely unusual hardship” standard for cancellation of removal). And if the lack of a  
23 standard were the true problem, Defendants could have created one, as commenters suggested. *See*  
24 85 Fed. Reg. at 81,632. Defendants rejected that suggestion with only the conclusory assertion that  
25 “further elaboration” of the standard would not address the concern. *Id.* at 81,633.

26 187. As for the alleged “abuse” or “improper” use of *sua sponte* authority, Defendants  
27 apparently refer to the BIA’s longstanding practice of exercising that authority in response to a  
28 party’s motion. *See, e.g.,* 85 Fed. Reg. at 81,631 (calling reopening in response to a motion



1 “improper”); 85 Fed. Reg. at 52,505 (referring to BIA’s “misapplication of the *sua sponte* label”).  
2 Nowhere do Defendants explain why this practice is improper or abusive. At least one  
3 precedential BIA decision *expressly invited* noncitizens to file motions seeking *sua sponte*  
4 reopening or reconsideration. *Matter of X-G-W-*, 22 I. & N. Dec. 71, 74 (BIA 1998). Defendants  
5 also do not explain how an immigration judge or the BIA would learn of developments in a  
6 noncitizen’s case that may constitute an exceptional situation other than through a motion. *See*  
7 *Matter of G-D-*, 22 I. & N. Dec. 1132, 1134 (BIA 1999) (stating that the BIA “must *be persuaded*  
8 that the respondent’s situation is truly exceptional before we will intervene”) (emphasis added).  
9 Defendants’ semantic problem with the *sua sponte* term does not justify withdrawing the authority  
10 long exercised by immigration judges and the BIA.

11 188. Second, Defendants’ claim that *sua sponte* authority “undermines efficiency” lacks  
12 factual support. *See, e.g.*, 85 Fed. Reg. at 81,633. Defendants offer no evidence, for example, of  
13 the volume of *sua sponte* motions, the time required to adjudicate them, or their relative  
14 contribution to the workload of the immigration courts and BIA. One report Defendants cited in  
15 the Rule actually shows that aggregate number of motions to reopen and reconsider filed with the  
16 immigration courts and the BIA declined slightly from 2008 to 2020. *Id.* at 81,612 (citing EOIR,  
17 *Adjudication Statistics: Motions*, Oct. 13, 2020, <https://tinyurl.com/y457sxrt>).<sup>31</sup>

18 189. If anything, the elimination of *sua sponte* authority will impede efficiency. What  
19 would have been *sua sponte* motions will be channeled into statutory motions to reopen which  
20 often require equitable tolling, entail more complex factual and legal determinations, and are  
21 subject to federal court review. *Guerrero-Lasprilla*, 140 S. Ct. at 1068 (holding that whether  
22 noncitizen exercised due diligence for purposes of equitable tolling is a reviewable mixed question  
23 of law and fact). Given that the BIA often acts through a single judge, the requirement that certain  
24 motions to reopen can be granted only by a three-member panel of the BIA further undermines the  
25 efficiency rationale.

26  
27 <sup>31</sup> *See* Public Comment of the Immigrant Justice Network, Immigrant Legal Resource Center,  
28 Immigrant Defense Project, Just Futures Law, and the National Immigration Project of the  
National Lawyers Guild at 12 (September 24, 2020), <https://bit.ly/39LGrp5>.

1           190. Third, Defendants claim that the elimination of *sua sponte* authority promotes  
2 finality in immigration proceedings. *See, e.g.*, 85 Fed. Reg. at 81,628. This justification is belied  
3 by Defendants’ decision to exempt DHS from time and number limits on motions filed with the  
4 BIA. *Id.* at 81,591. Moreover, the agency has long recognized that finality should be tempered by  
5 “the interest of justice.” *Matter of X-G-W-*, 22 I. & N. Dec. 71, 73 (BIA 1998); *Matter of G-C-L-*,  
6 23 I. & N. Dec. 359, 362 (BIA 2002) (recognizing that policy of granting *sua sponte* motions  
7 provided critical relief to individuals adversely impacted by “regulations designed to bring finality  
8 to immigration proceedings”). Invoking a generic goal such as finality, with no effort to weigh it  
9 against competing goals that the agency itself has acknowledged as legitimate, is arbitrary and  
10 capricious.

11           191. The Rule is also arbitrary and capricious because Defendants wholly failed to assess  
12 the reliance interests engendered by the agency’s decades-long practice of entertaining *sua sponte*  
13 motions to reopen and reconsider. *See Dep’t of Homeland Sec. v. Regents of the Univ. of*  
14 *California*, 140 S.Ct. 1891, 1915 (2020) (“*Regents*”). A mechanism for reopening a removal order  
15 outside of time and number limits in the interest of justice has *always* existed. In establishing time  
16 and number limits for the first time, the Attorney General declined to include a “good cause”  
17 exception because “*sua sponte* authority to reopen removal proceedings accomplished the same  
18 goal.” *Avila-Santoyo v. U.S. Atty. Gen.*, 713 F.3d 1357, 1363 (11th Cir. 2013). This is precisely  
19 the type of “longstanding polic[y]” that creates reliance interests. *Regents*, 140 S. Ct. at 1913  
20 (citation omitted).

21           192. Yet the Rule ignores the reliance interests of individuals directly affected by the  
22 elimination of *sua sponte* authority. Many noncitizens with removal orders have expended  
23 considerable time and resources pursuing post-conviction relief or pardons that would eliminate  
24 grounds of removal, or petitions that would enable them to adjust to lawful permanent resident  
25 status. These individuals have relied on the availability of *sua sponte* reopening or  
26 reconsideration, and their efforts are rendered futile by Defendants’ abrupt change of policy.

27           193. For example, Nak Kim Chhoeun was ordered removed in 2003 based on  
28 Pennsylvania convictions for simple assault and carrying a firearm, but was released on an order

1 of supervision because Cambodia would not repatriate him. After ICE again threatened to remove  
2 him in 2017, Mr. Chhoeun hired two attorneys for post-conviction relief, submitted hundreds of  
3 pages of documentation in support of a pardon application, testified before the Pennsylvania  
4 Board of Pardons, and finally secured a full and unconditional gubernatorial pardon on January  
5 15, 2021. While the pardon waives the aggravated felony ground of removal and makes Mr.  
6 Chhoeun eligible for cancellation of removal for lawful permanent residents, he remains  
7 removable on the firearms ground and thus does not qualify for reopening under the Rule. *See* 8  
8 U.S.C. §§ 1227(a)(2)(A)(vi) (listing deportation grounds waived by pardon), 1229b(a) (setting out  
9 requirements for cancellation of removal). For Mr. Chhoeun and others in his situation, the Rule  
10 negates years-long efforts to secure clemency or post-conviction relief.

11 194. The Rule makes no mention of any reliance interests of the type described above.  
12 Defendants failed to even “assess whether there *were* reliance interests,” much less determine their  
13 significance and weigh them against policy concerns, as required by the APA. *Regents*, 140 S. Ct.  
14 at 1915 (emphasis added).

15 195. Finally, Defendants compound the unfairness of the Rule by applying the  
16 withdrawal of *sua sponte* reopening authority to “all cases, regardless of posture, on the effective  
17 date.” 85 Fed. Reg. at 81,588. Individuals whose motions to reopen are pending before the BIA on  
18 the effective date—who sought *sua sponte* reopening or reconsideration based on established BIA  
19 precedent—will have their motions summarily denied. And they will be unable to file new  
20 motions advancing alternative arguments because those motions will be both time and number-  
21 barred. The application of the Rule to pending motions is manifestly unfair and impermissibly  
22 retroactive, disrupting noncitizens’ reasonable expectations that their requests for *sua sponte*  
23 reopening would be considered. *Cf. INS v. St. Cyr*, 533 U.S. 289, 321 (2001) (explaining that a  
24 statute is impermissibly retroactive if it “impairs vested rights” or “attaches a new disability,”  
25 among other things).

## 26 5. Changes to the Appellate Briefing Schedule

27 196. The Rule introduces four significant changes to the appellate briefing schedule: (1) it  
28 reduces the maximum allowable time for an extension of the opening brief from 90 to 14 days,

1 regardless of circumstances, and regardless of whether the opposing party would consent, 85 Fed.  
2 Reg. at 81,654 (new 8 C.F.R. § 1003.3(c)(1)); (2) it limits the parties to one extension, again  
3 regardless of circumstances and again regardless of whether the opposing party would consent,  
4 *id.*; (3) it eliminates consecutive briefing for non-detained BIA appeals, *id.*; it shortens the time  
5 for submitting reply briefs from 21 to 14 days. *Id.*

6 197. The Rule purports to impose these changes to expedite appeals. But reducing the  
7 time available to draft BIA briefs will not have any effect on the duration that an appeal will be  
8 pending before the BIA, particularly in light of the existing backlogs. Instead, the Rule's changes  
9 will make it more difficult for noncitizens to mount appeals and obtain legal representation.

10 198. The INA encourages legal representation by requiring the Attorney General to  
11 advise noncitizens seeking asylum of the privilege of being represented by counsel and provide  
12 them with the List of Pro Bono Legal Services Providers. 8 U.S.C. § 1158(d)(4). Likewise, the  
13 INA requires that individuals in removal proceedings be provided a list of organizations that offer  
14 pro bono representation. *Id.* § 1229(b)(2); 8 C.F.R. § 1003.61(b).

15 199. The Rule undermines these provisions by making it almost impossible to obtain  
16 effective representation in BIA appeals. The BIA's mail-based system, unpredictable briefing  
17 schedules, and the short timeline to file a brief *already* limit the ability of noncitizens to obtain  
18 counsel. Unrepresented noncitizens expend the majority of their appeal timeline waiting to receive  
19 materials including the transcript in the mail and seeking out appellate counsel. By the time  
20 prospective counsel receives these materials, counsel often has less than two weeks to review the  
21 record, ascertain the merits of a claim, finalize representation agreements, and prepare an appellate  
22 brief. The abbreviated timeline makes an already-difficult task effectively impossible.

23 200. Shortened briefing schedules also make it nearly impossible for litigants to represent  
24 themselves, as *pro se* litigants already struggle to make their cases before the BIA given language  
25 barriers and limited access to resources that would aid in appellate brief writing. These challenges  
26 are especially profound for detained *pro se* noncitizens. For these individuals, their mail is further  
27 delayed and they have limited access to law libraries and phones.

28 201. This problem is compounded by the Attorney General's recent decision requiring

1 the BIA to examine substantive issues on all statutory elements *de novo* without deference to the  
2 parties' stipulations below. *See Matter of A-C-A-A-*, 28 I. & N. Dec. 84. This makes the process of  
3 writing a BIA brief more substantively complex and cumbersome.

4 202. These changes will effectively deprive noncitizens of the right to appeal to the BIA,  
5 the right to counsel of their choosing (at no expense to the Government), and a reasonable  
6 opportunity to present arguments and evidence. *See* 8 U.S.C. §§ 1229a(b)(4), 1362. Defendants  
7 failed to consider this in effectuating the Rule.

8 203. The Rule's new concurrent briefing requirement also impedes effective  
9 representation. It forces the noncitizen to anticipate what the Government will argue and also  
10 disprove any possible ground upon which the BIA could affirm the immigration judge's decision.  
11 This guts the right to counsel and the right to a meaningful opportunity be heard.

12 204. Defendants' justifications for these changes are irrational. First, Defendants claim  
13 that these changes would curb "gamesmanship" and end "last-minute delay tactics." *See* 85 Fed.  
14 Reg. at 81,637. Again, Defendants offer no evidence of alleged gamesmanship. Modest briefing  
15 extensions, reply briefs, and consecutive briefing are all ordinary features of appellate process.  
16 Tellingly, Defendants did not identify any other court in which judges are forbidden from giving  
17 extensions for briefing in their cases regardless of circumstances, and even where the opposing  
18 party consents to the extension.

19 205. Second, Defendants contend that these provisions will make the BIA's adjudication  
20 process more efficient. *See* 85 Fed. Reg. at 81,637. That contention ignores the major causes of  
21 delay in the current system, including EOIR's paper-based system and backlog of unadjudicated  
22 cases. The Rule does nothing to address protracted delays before the briefing schedule is issued  
23 and after briefs are filed. In other words, the Rule increases the noncitizen's need to "hurry up"  
24 but does nothing to address "wait" that inevitably follows. Indeed, BIA decisions are often issued  
25 more than a year after briefing is complete.

26 206. Indeed, the Rule's mandate that the BIA conduct an individualized good cause  
27 analysis for every extension request undermines any possible efficiency benefit.

28 207. Defendants' responses on this issue confirm that Defendants did not consider these

1 aspects of the problem or alternative solutions. For instance, Defendants’ response that noncitizens  
2 may overcome any timing restrictions by beginning to prepare their appeal while they await a  
3 briefing schedule ignores comments explaining the practical problem with that approach. The BIA  
4 provides the immigration judge’s decision and the transcripts at the same time as the briefing  
5 schedule. Without access to the decision and transcript, noncitizens and/or their counsel, like  
6 Plaintiffs, have no reasonable way to meaningfully prepare an appeal in advance.

7 208. EOIR is well aware of these problems. The BIA Pro Bono Project provided counsel  
8 with a full copy of the record of proceedings and automatically reset the briefing schedule to allow  
9 newly-engaged pro bono counsel time to adequately prepare an appellate brief. It did so with the  
10 understanding that such accommodations actually “enable[ ] the BIA to provide a more effective  
11 and timely case review.”<sup>32</sup> Despite previously acknowledging the utility of such procedures,  
12 Defendants restricted those same procedures in the Rule without a reasoned explanation.

13 209. Defendants’ reasons for concurrent briefing are also arbitrary. Defendants claim that  
14 there is not a “legal or operational reason to adjudicate non-detained cases in a less efficient  
15 manner than detained cases.” 85 Fed. Reg. at 52,499 (NPRM); *see also* 85 Fed. Reg. at 81,636.  
16 But in the detained context, a person’s liberty interests and the Government’s expense related to  
17 detention at least weigh in favor of speedier adjudications (though, speedier adjudication does not  
18 require concurrent briefing). EOIR instituted concurrent briefing for detained cases nearly  
19 20 years ago; at that time, it considered but then reversed its proposal to implement a concurrent  
20 briefing schedule in non-detained appeals, too. *See* 67 Fed Reg. at 54895. Defendants do not  
21 adequately explain the reasons for rejecting their earlier conclusions.

22 210. Defendants’ justification for concurrent appeals and limits on reply briefs is even  
23 more irrational when DHS appeals. DHS suggests that noncitizens’ interests are protected if they  
24 brief all issues on the notice of appeal. 85 Fed. Reg. at 81,636. But DHS routinely reserves the  
25 right to raise additional arguments and often adjusts its arguments based on a review of the  
26 transcript.

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27 <sup>32</sup> EOIR DOJ, *BIA Pro Bono Project* (last updated Oct. 20, 2020),  
28 <https://tinyurl.com/y5bqq65l>.

1           211. Defendants suggest that EOIR’s plan to institute an electronic filing system at the  
2 BIA mitigates commenters’ concerns. *See* 85 Fed. Reg. at 81,638. But there is no indication that  
3 the electronic filing system will actually be implemented in the near future, and Defendants do not  
4 explain why changes to briefing extensions are warranted before that system comes online.  
5 Defendants did not seriously consider the obvious alternative of deferring the changes until an  
6 electronic filing system is in place. Nor did Defendants confront the fact that e-filing will not  
7 improve matters for many of those in removal proceedings. People in immigration detention  
8 centers rarely have access to the internet, which means an e-filing system will not mitigate the  
9 harms to *pro se*, detained noncitizens.

10           212. Finally, Defendants did not consider how the Rule’s new briefing procedures  
11 interact with other changes in the Rule and with BIA practice generally. For example, the Rule  
12 grants the BIA new authority to affirm on any basis in the record, and an Attorney General  
13 decision disallows the BIA’s reliance on immigration court level stipulations. As a result of these  
14 changes, appellate briefs will have to not only challenge the immigration judge’s errors, but also  
15 anticipate the Government’s response and disprove any other reasoning the BIA could offer.  
16 Similarly, Defendants fail to consider the compound effect of numerous other sub-regulatory  
17 changes, including limiting BIA briefs and motions to 25 pages, and adopting a policy that  
18 disfavors granting extensions.<sup>33</sup> These changes make the Rule’s restrictions even more oppressive  
19 for noncitizens and legal service providers.

## 20           **6. License to Engage in Impermissible Factfinding**

21           213. The Rule delegates to the BIA the new, and exceedingly broad authority to make  
22 findings of fact, contrary to the ordinary practice of appellate bodies. It also creates additional  
23 burdens for Plaintiffs and their clients, who must relitigate noncitizens’ removal proceedings  
24 before an appellate body with a limited ability to review adverse evidence or to present counter  
25 evidence. These provisions violate the INA, deprive noncitizens of due process, and will force  
26 Plaintiffs to undertake more complicated and resource-intensive approaches to appellate

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28 <sup>33</sup> AILA, *Practice Alert: Updates to the BIA Practice Manual, Briefing Extensions Now Disfavored* (Dec. 11, 2019), <https://bit.ly/3pOEXkd>.

1 representation on behalf of those they serve.

2 214. The Rule allows the BIA to take “administrative notice” of any purported facts “not  
3 reasonably subject to dispute,” including “[t]he contents of official documents outside the record,”  
4 “[f]acts that can be accurately and readily determined from official government sources and whose  
5 accuracy is not disputed,” and “[u]ndisputed facts contained in the record.” 85 Fed. Reg. at 81,651  
6 (new 8 C.F.R. § 1003.1(d)(3)(iv)(A)). The BIA must only give notice to the parties or an  
7 opportunity to respond if the noticed facts are the explicit basis for *overturning* a grant of relief.  
8 *Id.* (new 8 C.F.R. § 1003.1(d)(3)(iv)(B)). It need not provide any notice or opportunity to respond  
9 if the noticed facts are the basis for affirming a removal order, or if those facts merely inform the  
10 BIA’s decision to reverse an immigration judge’s decision without forming the explicit basis. *See*  
11 *id.*

12 215. These provisions are inconsistent with the requirement that factfinding take place in  
13 the trial court. *See* 8 U.S.C. § 1229a(a)(3), (b)(1); 8 C.F.R. § 1003.1(d)(3). The provisions are also  
14 contrary to the way normal appellate courts function, and deprive noncitizens of the opportunity to  
15 be heard and present evidence on facts that they reasonably dispute.

16 216. Official documents or facts from government sources may contain incorrect or  
17 disputable material. For example, the Rule explicitly contemplates that the BIA will deem State  
18 Department Reports an “official government source[,],” *see* 85 Fed. Reg. at 81,602, even though  
19 they go to the central issues in a fear-based case, are subject to interpretation and rebuttal, and are  
20 *not* accepted as fact. *Cf. Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000) (stating that it would be  
21 inappropriate for the BIA to “give conclusive weight to statements in [State Department] reports  
22 that not only are not incontestable, but also are not even facts”). Moreover, Department of State  
23 reports are increasingly politicized,<sup>34</sup> yet the Rule does not ensure that noncitizens will have an  
24 opportunity to show that they are reasonably disputed.

25 217. This is a serious problem the agency failed to adequately consider. In vacating

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27 <sup>34</sup> *See, e.g.,* Asylum Research Center, *Comparative Analysis of US Department of State*  
28 *Country Reports on Human Rights Practices (2016-2019)* (Oct. 21, 2020), <https://bit.ly/35n135K>;  
Catholic Legal Immigration Network, Inc., *Department of State Country Report on Human Rights*  
*Practices: Honduras: Comparison Chart: 2016 and 2019* (Oct. 20, 2020), <http://bit.ly/3bmcb6L>.



1 denials of both asylum and relief under the Convention Against Torture, the Ninth Circuit has  
2 repeatedly made clear that the Mexican government’s supposed efforts “to combat drug cartels  
3 and the corruption of public officials” obscure the reality of ongoing, systemic violence, torture,  
4 and corruption in that country. *Xochihua-Jaimes v. Barr*, 962 F.3d 1175, 1184-85 (9th Cir. 2020)  
5 (citing earlier cases to the same effect). Current events relevant to removal proceedings, and the  
6 meaning of those events, are therefore very frequently subject to reasonable dispute.

7 218. The Rule also permits the BIA to consider other unreliable DHS-issued  
8 documents—such as border interviews contained in Form I-213s—as “official documents.” Such  
9 materials invariably present adverse facts that the noncitizen has a right to examine and refute.<sup>35</sup>

10 219. The Rule offers no administrable definition of “official documents,” or explain what  
11 constitutes an “undisputed” fact.

12 220. Even in the limited circumstances in which the Rule provides for notice and an  
13 opportunity to respond to the BIA’s judicially noticed facts, the BIA would not remand to the  
14 immigration judge. Instead, the noncitizen may only respond in writing to the BIA months or  
15 years after the immigration judge issued a decision. The BIA itself will determine the matter in the  
16 first instance, which is entirely inconsistent with the function of an appellate court. *See* 85 Fed.  
17 Reg. at 81,651 (new 8 C.F.R. § 1003.1(d)(3)(iv)(B)).

18 221. Commenters explained that the proposal failed to articulate critical aspects of  
19 procedures that would apply to the new appellate factfinding process but Defendants largely  
20 ignored the serious problems they identified.

21 222. For example, Defendants “recogniz[ed] that parties may disagree over whether a fact  
22 is truly undisputed,” but responded that “factual disputes are already a common feature of  
23 immigration proceedings and can be resolved under existing law.” *Id.* at 81,603. But resolving  
24 factual disputes is not ordinarily the role of an appellate court. Under existing law, the BIA is not  
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26 <sup>35</sup> *See* Human Rights Watch, *You Don’t Have Rights Here* (Oct. 16, 2014),  
27 <https://bit.ly/39a3cmo> (reporting CBP officers’ failure to screen protection claims and recording  
28 wrong information); *see also, e.g., Singh v. INS*, 292 F.3d 1017, 1021–24 (9th Cir. 2002)  
(discrediting the reliability of CBP airport interviews as “not sufficient standing alone” to be a  
reliable impeachment source).

1 empowered to address these factual disputes and lacks a process to resolve them.

2 223. Given the significant departure from prior practice, Defendants were required to  
3 have articulated a more detailed justification for their approach. They did not.

4 224. Defendants also failed to consider the serious harm the Rule would inflict on people  
5 in removal proceedings and legal service providers placed in the position of defending against the  
6 BIA's new factfinding and prosecutorial role. Defendants assert that parties will have an  
7 opportunity to respond but that opportunity is limited to when the BIA reverses on the basis of  
8 new facts. 85 Fed. Reg. at 81,604.

9 225. Defendants also disregarded the fact that the noncitizen's only recourse is to appeal  
10 the BIA's factfinding to the courts of appeals or pursue otherwise unnecessary motions practice.  
11 These options will only prolong proceedings and negate any purported gains.

#### 12 **7. Authority for BIA to Affirm on Any Basis in the Record**

13 226. The Rule permits the BIA to affirm the underlying decision of the immigration  
14 judge on "any basis" supported by the record, including on the basis of "undisputed" facts or  
15 "facts that are not reasonably subject to dispute, such as undisputed facts in the record," 85 Fed.  
16 Reg. at 81,651 (new 8 C.F.R. § 1003.1(d)(3)(v)). This allows impermissible factfinding by the  
17 BIA and deprives noncitizens of the opportunity to challenge those determinations in the first  
18 instance.

19 227. The Rule effectively permits a second adjudication of cases on issues the parties did  
20 not address in the appeal because it does not limit to the "bases" upon which the BIA may affirm.  
21 The Rule even allows the BIA to affirm denials on the basis of facts unrelated to the immigration  
22 judge's decision. Such facts may not have been developed or even considered by the immigration  
23 judge, much less rebutted in prior proceedings.

24 228. The Attorney General's recent decision in *Matter of A-C-A-A-*, makes matters  
25 worse. It bars reliance on immigration judge level stipulations or concessions by DHS. In  
26 combination with this Rule, the BIA could find that an element that was uncontested below was  
27 nonetheless insufficiently proven, and then affirm the immigration judge's denial on that basis,  
28 without ever giving the noncitizen an opportunity to address the issue. Defendants completely

1 ignored comments that the Rule would invite improper factfinding on issues reasonably subject to  
2 dispute or create absurd results when applied with *Matter of A-C-A-A*.

3 229. The Rule does not adequately explain Defendants' departure from prior practice.  
4 Defendants note that federal appellate courts may affirm the lower court on any basis in the  
5 record. 85 Fed. Reg. at 81,607. But even assuming the systems are comparable, federal appellate  
6 courts do not affirm where one party never had notice or the opportunity to respond to a disputed  
7 fact.

8 230. Defendants also disregarded legal service providers' comments that the Rule's  
9 changes would require them to brief every issue that could potentially be considered, expanding  
10 briefing and requiring more time, more resources, and more requests for extensions, replies, or  
11 enlarged briefs. These consequences of the Rule negate any purported efficiency justifications.  
12 Defendants responded that an *appealing* party must address all relevant issues, 85 Fed. Reg. at  
13 81,608; this not only misses the point but also reveals the extent to which Defendants ignored that  
14 noncitizens will, at least sometimes, be the appellee.

### 15 **8. Changes to the Availability of Remand for Voluntary Departure**

16 231. The Rule eliminates the BIA's ability to remand a case to an immigration judge  
17 "solely to consider a request for voluntary departure" or to provide instructions (i.e., "advisals")  
18 for complying with a grant of voluntary departure. 85 Fed. Reg. at 81,589 (new 8 C.F.R.  
19 § 1003.1(d)(7)(ii)(E)). Instead, the Rule authorizes the BIA to decide a request for voluntary  
20 departure as long as it was preserved below, regardless of which party appealed. *Id.* (new 8 C.F.R.  
21 §§ 1003.1(d)(7)(iv), 1240.26(k)(1)). When the BIA grants voluntary departure, the Rule requires  
22 that bond be posted within ten days of the order if served by mail or five days if served  
23 electronically. *Id.* (new 8 C.F.R. § 1240.26(k)(4)). The BIA is also responsible for advising the  
24 recipient of the terms of the voluntary departure order. *Id.*

25 232. Voluntary departure is a discretionary benefit for which the noncitizen must show,  
26 among other things, five years of "good moral character," a standard that involves intensive fact  
27 finding and balancing of numerous favorable and unfavorable factors. 8 U.S.C. § 1229c(b)(1)(B);  
28 *Campos-Granillo v. INS*, 12 F.3d 849, 852 (9th Cir. 1994). The Rule allows the BIA to consider

1 these factual questions in the first instance and to do so based on an incomplete record.

2 233. Some forms of immigration relief, such as withholding of removal and protection  
3 under CAT, do not require a showing of “good moral character,” or any discretionary assessment.  
4 These forms of relief may be based on records before the immigration judge that might not include  
5 any evidence relevant to a determination on voluntary departure. If an immigration judge grants  
6 other relief and does not reach the alternative request for voluntary departure, the noncitizen will  
7 not have developed any facts in support of the request. Immigration judges ordinarily would not  
8 entertain testimony on an issue that they do not intend to reach, especially if they intend to grant a  
9 primary application.

10 234. But under the Rule, immigration judges must develop the record on voluntary  
11 departure for all applicants who are apparently eligible so that the BIA can make decisions with  
12 respect to voluntary departure in the first instance. This is terribly inefficient because it forces all  
13 immigration judges to develop a voluntary departure record in case DHS appeals the grant of  
14 some other relief, and the BIA sustains.

15 235. The Rule also creates the risk of inadvertent non-compliance. The Rule requires the  
16 BIA to give advisals about the consequences of failing to comply with voluntary departure but  
17 does not explain how the BIA will do this in the context of a paper-based appellate process in  
18 which the noncitizen never appears in person. By contrast, in-person advisals by an immigration  
19 judge are conducted in the noncitizen’s native language and permit the noncitizen to ask  
20 questions.

21 236. “Voluntary departure is an agreed-upon exchange of benefits, much like a settlement  
22 agreement.” *Dada v. Mukasey*, 554 U.S. 1, 19 (2008). For that reason, immigration judges “shall  
23 advise the [noncitizen]” of all the boilerplate conditions, including the conversion of the voluntary  
24 departure order into a removal order for failure to comply, as well as any additional terms “beyond  
25 those specifically enumerated” before granting voluntary departure. 8 C.F.R. § 1240.26(c)(3).  
26 Only after the conditions are “set forth” can the noncitizen accept or refuse the grant of voluntary  
27 departure. *Id.* The Rule abandons these safeguards that exist only in in-person hearings.

28 237. The Rule’s five- or ten-day bond requirement is woefully insufficient when such

1 substantial rights are at stake. It is very unlikely that applicants would even receive the BIA order  
2 within sufficient time to post the bond, especially factoring in mail delays. Even if the BIA  
3 institutes e-filing, these problems will persist because many indigent noncitizens do not have  
4 regular access to the internet. The situation will be even more challenging for detained noncitizens  
5 who routinely encounter problems with detention centers' mail systems and rarely have internet  
6 access.

7 238. The Rule is also arbitrary because it gives noncitizens just days to pay a substantial  
8 sum of money even though noncitizens may wait months or years for a BIA decision, often  
9 without work authorization. And under the Rule, a one-week delay in collecting the funds is likely  
10 to result in the conversion of voluntary departure into a removal order. For someone who sought  
11 voluntary departure in order to pursue family reunification through consular processing from  
12 abroad, the consequence of this one-week delay will be ten years of family separation because of a  
13 statutory bar to reentry following a removal order. *See* 8 U.S.C. § 1182(a)(9)(A)(ii). Defendants  
14 failed to consider this serious problem.

15 239. The Rule also does not afford the opportunity to challenge lack of notice, seek  
16 additional time, or request an appropriate amendment to the terms of a voluntary departure order.  
17 With just a written advisal, BIA members will not even be able to ensure that the noncitizen can  
18 read and understand the order.

19 240. As a result of the Rule, countless voluntary departure applications will be denied on  
20 an insufficient record or converted to removal orders for non-compliance. Those who suffer these  
21 harsh consequences have no recourse: The INA bars further appeal to a circuit court. *See* 8 U.S.C.  
22 §§ 1229c(f); 1252(a)(2)(B)(i). Requests for amendments are also impossible because filing a  
23 motion to reopen or reconsider at the BIA will result in termination of voluntary departure. 85  
24 Fed. Reg. at 81,656 (new 8 C.F.R. § 1240.26(k)(4)). Defendants did not give adequate weight to  
25 these serious consequences.

26 241. Defendants did not offer a reasoned response to comments raising these concerns.  
27 Instead, Defendants relied on the incorrect assumption that the noncitizen would have necessarily  
28 developed the record for voluntary departure before the immigration judge, and that the “[t]he

1 requirements for [voluntary departure] . . . involve determinations that the [BIA] already makes.”  
2 85 Fed. Reg. at 81,640. But while the BIA may *review* questions relating to good moral character,  
3 it does not make such determinations in the first instance.

4 242. Defendants made only a slight revision to the proposed Rule in response to the  
5 problems commenters identified. The final Rule allows the BIA to grant voluntary departure even  
6 where the request was not developed before the immigration judge because alternate relief was  
7 granted, *see id.* at 81,641. That does not solve the problems with the Rule; the BIA will *still* be  
8 unable to determine a noncitizen’s eligibility for relief if the issue of good moral character was not  
9 before the immigration judge.

10 243. Defendants entirely disregard concerns that issuing a notice written in English, and  
11 delivered by mail—which requires possibly indigent individuals to post a bond within days— will  
12 lead to unjust conversions of voluntary departure grants to orders of removal. *See id.* Defendants  
13 refuse to acknowledge the significant difference between an oral advisal, with an interpreter and  
14 the ability to ask questions, and a letter received in the mail months or years after the individual  
15 last appeared before the immigration judge.

## 16 9. Changes to Remand for Background Checks

17 244. Background checks (also called “biometrics”) are required for most forms of  
18 immigration relief. 8 C.F.R. § 1003.47(b). Under the Rule, the BIA must now “hold” a  
19 noncitizen’s case for up to 180 days until DHS reports the results of the background checks  
20 instead of remanding to the immigration judge. 85 Fed. Reg. at 81,651–52 (new 8 C.F.R.  
21 § 1003.1(d)(6)(ii)). Respondents must await instruction from DHS to complete background  
22 checks. *Id.* If the respondent fails to respond to DHS’s instructions within 90 days (or 120 days,  
23 with one 30-day extension), the application will be deemed abandoned. 85 Fed. Reg. at 81,651–52  
24 (new 8 C.F.R. § 1003.1(d)(6)(ii)).

25 245. This new process only harms noncitizens. It provides no recourse to the noncitizen if  
26 the application is wrongfully deemed abandoned. *See id.* But if DHS fails to timely complete  
27 background checks, the case will be remanded to the immigration judge. *Id.*

28 246. These changes abandoned safeguards which previously required DHS to notify the

1 respondent *in person at an immigration court hearing* of the background check requirements and  
2 provide instructions for compliance, and for the immigration judge to “specify for the record when  
3 the respondent receives” this information, along with a warning about the consequences of failing  
4 to do so. 8 C.F.R. § 1003.47(d). Under the Rule, if background checks are outstanding months or  
5 even years after relief was first sought before the immigration judge, DHS will mail out  
6 instructions.

7 247. Completing background checks requires travel to a particular law enforcement  
8 agency or DHS office. Many people face obstacles during the process and require additional time.  
9 Notices sent by mail may be delivered to the wrong address, or may be mailed with insufficient  
10 time for completion.

11 248. Under the Rule, the BIA is authorized to order removal based on noncompliance  
12 with a technical requirement that may be exceedingly difficult to satisfy. Deeming a fully-  
13 adjudicated and granted application, such as asylum, abandoned in these circumstances is  
14 unnecessarily harsh and will prevent many noncitizens from receiving the relief they have already  
15 been granted. Defendants failed to give adequate weight to this serious problem.

#### 16 **10. Elimination of the BIA’s Self-Certification Authority**

17 249. The Rule eliminates the BIA’s self-certification authority that BIA historically used  
18 to cure untimely appeals or other filing defects based on extraordinary circumstances, and to  
19 review decisions that were not appealed despite clear errors or misconduct committed by the  
20 immigration judge. *See* 8 C.F.R. § 1003.1(c). This change will make it practically impossible to  
21 access the appellate process in some circumstances. Many noncitizens—especially those who are  
22 detained or *pro se*— will be denied the opportunity to appeal adverse decisions, or will need to use  
23 their single motion to reopen to challenge technical defects and delays beyond their control.

24 250. Defendants do not have a reasoned basis for eliminating the BIA’s ability to cure  
25 minor defects. Defendants claim that such authority lacks clear standards and assert without  
26 evidence that self-certification authority has been applied inconsistently or abusively. 85 Fed. Reg.  
27 at 81,596. As commenters showed, Defendants’ premise is wrong. The BIA’s self-certification  
28 authority is “uncommonly used” and “allows the BIA to correct injustices” like mail delays

1 outside the parties' control.<sup>36</sup>

2 251. Defendants do not adequately explain their refusal to consider obvious alternatives  
3 like issuing a clearer standard. Defendants contend that BIA members have “disregard[ed]”  
4 existing standards, and there is “no effective check on its usage.” 85 Fed. Reg. at 81,596. They  
5 offer no evidence to support these contentions. Nor do they explain why it is reasonable to burden  
6 noncitizens and their counsel to solve a purported problem of the BIA's own making.

7 252. Moreover, commenters explained that the Rule would disproportionately impact *pro*  
8 *se* individuals. In response, Defendants merely repeated the assertions that most noncitizens are  
9 represented on appeal and that the BIA Pro Bono Project is an effective backstop. *See* 85 Fed.  
10 Reg. at 81,596–97. These excuses do not suffice.

11 253. Defendants failed to consider Rule's impact on detained noncitizens. Many factors  
12 beyond the control of noncitizens in detention might prevent them from timely filing a notice of  
13 appeal. For example, detained noncitizens face challenges such as mail processing delays,  
14 lockdowns due to illness, and lack of access the commissary to purchase stamps. The Rule  
15 eliminates an important remedy for these situations.

#### 16 **11. Immigration Judge Certification of BIA Decisions**

17 254. The Rule establishes a so-called “quality assurance certification process” that  
18 permits “an immigration judge to certify BIA decisions” that reverse the immigration judge's prior  
19 decision “for further review by the Director in situations in which the immigration judge alleges  
20 that the BIA made an error.” 85 Fed. Reg. at 81,590. The Rule permits the Director, an  
21 administrator charged with the day-to-day management of EOIR,<sup>37</sup> to then decide the legal dispute  
22 between the immigration judge and the BIA, including by issuing “a precedent decision.” 85 Fed.  
23 Reg. at 81,653.

24 255. This procedure allows an immigration judge to attempt to overturn a ruling in favor  
25 of one the parties before it, placing the immigration judge in the position of advocating against  
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27 <sup>36</sup> *See, e.g.*, AILA Comment at 13.

28 <sup>37</sup> *See* 8 C.F.R. § 1003.0(b); *see also supra* Part IV.



1 one of the litigants. As former immigration judges explained in their comment, “[i]t is wholly  
2 inappropriate for a trial judge to have the authority to appeal from an appellate tribunal’s decision  
3 which reverses her/him . . . . Immigration judges are neutral arbitrators, not parties in the cases  
4 they hear.”<sup>38</sup>

5 256. Absent specific delegation of authority from the Attorney General, the EOIR  
6 Director is prohibited from adjudicating cases. 8 C.F.R. § 1003.0(c). The Rule’s new “quality  
7 assurance certification process” establishes a substantive process of reviewing and reversing BIA  
8 decisions, *see* 85 Fed. Reg. at 81,590, and thus falls squarely within section 1003.0(c)’s  
9 prohibition on Directorial adjudication without delegation by the Attorney General.

10 257. The Rule does not cite any authority that confers on the Director the authority to  
11 adjudicate cases. It asserts that “[r]eviewing certified cases falls within the ‘such other authorities’  
12 provided to the Director by the Attorney General,” contained in 8 C.F.R. § 1003.0(b)(1)(ix), and  
13 also points to 8 C.F.R. § 1003.1(e)(8)(ii). 85 Fed. Reg. at 81,626. But neither provision delegates  
14 to the Director the authority to review BIA decisions in the way the Rule permits.

15 258. In particular, 8 C.F.R. § 1003.0(b)(1)(ix) provides that the Director may “[e]xercise  
16 such other authorities as the Attorney General may provide.” This general statement only leaves  
17 open the possibility that the Attorney General will delegate additional powers to the Director. It  
18 does not itself delegate any authority, let alone the authority that the Rule attempts to grant to the  
19 Director. *See* 85 Fed. Reg. at 81,590. In all events, the recognition that the Attorney General *could*  
20 delegate other authorities does not override section 1003.0(c)’s explicit prohibition on the Director  
21 adjudicating immigration cases.

22 259. Nor does the Rule itself constitute a delegation, because it was signed by the  
23 Director of EOIR rather than the Attorney General. 85 Fed. Reg. at 81,656; *see* 8 C.F.R.  
24 § 1003.0(c) (limiting the authority of the Director to adjudicate cases “[e]xcept as provided by  
25 statute, regulation, or delegation of authority from the Attorney General,”).

26 260. Defendants also cite 8 C.F.R. § 1003.1(e)(8)(ii) but that provision does not authorize

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27 <sup>38</sup> Public Comment of Round Table of Immigration Judges at 10–11 (Sept. 24, 2020),  
28 <http://bit.ly/3oFfRE8>.

1 the Director to adjudicate cases, as the Rule contemplates. That delegation merely allows the  
2 Chairman of the BIA to refer cases to the Director if a decision has not issued “within the  
3 established time limits,” *id.*, in order to “ensure that adjudications are conducted in a timely  
4 manner.” 84 Fed. Reg. 44,537, 44,539 (Aug. 26, 2019). This is a narrow exception to the general  
5 prohibition on the Director’s ability to adjudicate cases. *Id.*

6 261. No existing delegation authorizes the Director to review of BIA decisionmaking as  
7 the “quality assurance certification process” requires. The Rule therefore conflicts with 8 C.F.R.  
8 § 1003.0(c)’s prohibition on the Director engaging in such adjudication and is in excess of the  
9 Director’s authority.

10 262. The “quality assurance certification process” is also arbitrary and capricious.  
11 Defendants claim that the Rule “do[es] not create a higher secondary appellate review body.” 85  
12 Fed. Reg. at 81,625, but that is exactly what it does. The Rule creates a new form of appellate  
13 review because it grants the Director power to reverse BIA decisions and “issue a precedent  
14 decision” or “remand the case back to the BIA for further proceedings.” *Id.*

15 263. The certification process is also inconsistent with finality and timely adjudication.  
16 There is no timetable for the Director’s decision. There is a high risk of significant delay when a  
17 case is certified because the Rule simultaneously assigns to the Director (with few exceptions)  
18 every case that has been pending for more than 335 days from the notice of appeal. Those cases  
19 would include most if not the vast majority of non-detained case in the past four years. 85 Fed.  
20 Reg. at 81,653. Defendants did not seriously consider this problem.<sup>39</sup>

21 264. Defendants assert that immigration judges cannot “simply certify cases with which  
22 they disagree” and that “merely disagreeing . . . is not a basis for certification.” *Id.* at 81,626. But  
23 the Rule allows immigration judges to certify based on their belief that “the BIA decision is  
24 clearly contrary to a provision of the INA, any other immigration law or statute, any applicable  
25 regulation, or a published, binding decision,” that “the BIA decision is vague, ambiguous,  
26 internally inconsistent, or otherwise did not resolve the basis for the appeal,” or that “a material  
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28 <sup>39</sup> See CLINIC Comment at 23.

1 factor pertinent to the issue(s) before the immigration judge was clearly not considered.” *Id.* at  
2 81,625.

3 265. The Rule asserts that these are “narrow situations ... tailored to quality control.” *Id.*  
4 That ignores most of the grounds on which the Rule authorizes certification, and mischaracterizes  
5 others. For example, in response to the concern that “an immigration judge could solely object to a  
6 particular legal interpretation and still certify the case,” the Rule states only that this would not  
7 justify certification under the “vagueness” criteria. That response ignores that the Rule permits  
8 allowing certification where an immigration judge believes the BIA decision is contrary to law,  
9 regulation, or published decision. *Id.* at 81,626.

10 266. Defendants have not established a mechanism to ensure that immigration judges will  
11 not abuse this process. They assert “that these procedures will be employed infrequently” because  
12 of immigration judges’ busy dockets, *see id.*, but that assertion ignores that having cases remanded  
13 negatively reflects on the immigration judge’s job performance, which creates an incentive to  
14 certify remanded cases.

15 267. Defendants also arbitrarily refuse to allow the parties to file objections or responses  
16 to immigration certifications. Defendants contend that such an opportunity is not required because  
17 “the case was likely already briefed to the [BIA] prior to the certification to the Director.” *Id.* at  
18 81,627. But new issues or arguments might be presented in the certification, and the certification  
19 may omit an important procedural or substantive fact. Defendant do not identify any examples of  
20 courts in which a ruling can routinely be referred for review by a higher adjudicator without an  
21 opportunity for the parties to provide a response or context.

22 268. Defendants also claimed that providing an opportunity for the parties to submit  
23 briefs opposing the certification would “plac[e] an additional burden on the parties.” *Id.* at 81,627.  
24 This response does not consider the reasonable alternative of allowing optional response briefs,  
25 rather than mandatory ones.

26 269. Defendants offer a false comparison between the new certification process and the  
27 existing authority of immigration judges to certify their decisions to the BIA. *Id.*; *see* 8 C.F.R.  
28 § 1003.7. This existing process is simply a means for immigration judges to refer a decision to the

1 ordinary appellate body for review, akin to the process whereby district judges can certify a case  
2 for interlocutory appeal. *See* 28 U.S.C. § 1292(b). In contrast, the Rule creates a novel situation in  
3 which a judge whose decision has been reversed can ask a non-judicial arbiter to intervene. 85  
4 Fed. Reg. at 81,590.

5 270. Defendants did not grapple with the ethical implications of converting immigration  
6 judges into advocates seeking to overturn BIA decisions in the cases they are adjudicating.  
7 Defendants attempt to minimize the immigration judge’s role in the certification process as merely  
8 “flagging an issue and relaying it to the Director for examination,” but do not square that  
9 characterization with the requirement that the immigration judge “specify the regulatory basis for  
10 the certification and summarize the underlying procedural, factual, or legal basis . . . necessary to  
11 relay the immigration judge’s determination of error by the BIA.” *Id.* at 81,627 (quotation marks  
12 omitted).

13 271. The Rule also disregarded the performance metrics established for immigration  
14 judges in October 2018, under which they must maintain a low remand rate or risk discipline,  
15 reassignment, or termination.<sup>40</sup> These metrics create a significant incentive for immigration  
16 judges to certify cases.

17 272. Defendants rejected commenters’ concerns even though they insisted elsewhere in  
18 the Rule that the BIA should be prohibited from remanding for factfinding because it would  
19 interfere with the BIA’s “role as an impartial or neutral arbiter.” 85 Fed. Reg. at 81,605. If  
20 requiring further factfinding is improperly partial, an immigration judge petitioning the Director to  
21 overrule an opinion in a case before her—a case that could affect her continued employment—  
22 cannot possibly be defended as “impartial or neutral.” This internal inconsistency exposes the  
23 Rule as arbitrary and capricious.

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28 <sup>40</sup> EOIR Performance Plan Adjudicative Employees (March 30, 2018),  
<https://tinyurl.com/y58xfms>.

## 12. Referral of Pending BIA Appeals to the EOIR Director

273. With limited exceptions, the Rule “instructs the [BIA] Chairman to refer appeals pending beyond 335 days to the Director for adjudication,” even if that appeal is days away from a determination or is particularly complex. 85 Fed. Reg. at 81,591.

274. This provision conflicts with the INA. By statute, removal orders shall be final *only* upon the expiration of a noncitizen’s right to appeal the order or “a determination *by the Board of Immigration Appeals* affirming such order.” 8 U.S.C. § 1101(a)(47)(B) (emphasis added).

275. The referral provision also conflicts with the prohibition on the Director adjudicating immigration cases, absent a specific delegation of authority from the Attorney General. *See* 8 C.F.R. § 1003.0(c).

276. The Rule purports to find this delegated authority in 8 C.F.R. § 1003.1(e)(8). According to Defendants, 8 C.F.R. § 1003.1(e)(8), which grants the Director “authority . . . to adjudicate BIA cases that have otherwise not been timely adjudicated,” constitutes “such other authorit[y]” within the meaning of Section 1003.0(b)(1)(ix). *See* 85 Fed. Reg. at 81,621. But §1003.1(e)(8) which provides authority for the Director to adjudicate cases on far narrower grounds than the Rule permits. Under that section, the Director is permitted to adjudicate cases only when an appeal has been pending before the BIA for more than 90 or 180 days (depending on whether the case is before a single BIA judge or a three-judge panel) from the “completion of the record on appeal.” 8 C.F.R. § 1003.1(e)(8)(i). Even then, the Director may only adjudicate the case if the Chair of the BIA elects to refer the case to the Director. *See id.* § 1003.1(e)(8)(ii).

277. The Rule purports to authorize the Director to adjudicate cases that exceed the Attorney General’s delegation in section 1003.1(e)(8). Section 1003.1(e)(8) authorizes the Director only to adjudicate cases that have been pending 90 or 180 days *from the time the record is completed*—*i.e.*, after the transcript and record are submitted to the BIA and “any briefs, motions, or other submissions” have been filed. 8 C.F.R. § 1003.1(e)(8)(i). This authority was “limited to only a narrow subset of EOIR cases.” 85 Fed. Reg. at 69,475. The Rule exceeds the explicit limits of that delegation, granting the Director authority to adjudicate any case more than 335 days *from the filing of the notice of appeal*. *See* 85 Fed. Reg. at 81,622 (335-day period

1 includes “time for transcription, briefing, and adherence to the exiting [sic] 90- or 180-day time  
2 frames for decision”). The Rule effectively allows EOIR to grant itself authority that violates the  
3 delegation from the Attorney General.

4 278. In so doing, EOIR has assigned itself authority in a large number of cases.  
5 Defendants often do not produce the briefing schedule in non-detained cases for months or even  
6 years after a notice of appeal is filed. In such cases, the Rule shifts adjudication from the BIA to  
7 the Director, even in situations where the BIA never issued a briefing schedule, or where the BIA  
8 had fewer than 90 or 180 days to consider briefs.

9 279. The median time from a notice of appeal to a BIA decision is approximately 323  
10 days and, as a result of COVID-19-related delays, it has become increasingly common for appeals  
11 to remain pending for 335 days or longer. *See* 85 Fed. Reg. at 81,619 (acknowledging the “323-  
12 day median case appeal time period”). In fact, a 2015 report shows that appeals of removal  
13 decisions averaged around 500 days.<sup>41</sup> The Director has thus not only given himself impermissible  
14 adjudicatory authority, he has also taken authority away from the BIA in the vast majority of non-  
15 detained cases.

16 280. Referral to the EOIR Director will likely lengthen the time to decision. When the  
17 EOIR Director receives a case, he or his support staff will need to begin review of the case from  
18 scratch—even if the BIA has been working on the case for weeks or months. The Rule does not  
19 explain why this is an efficient use of resources. Nor does it offer any reason to believe that the  
20 EOIR Director and his staff will be able to adjudicate cases more quickly than BIA members,  
21 whose sole responsibility is to adjudicate cases. Tellingly, the Rule does not impose any time  
22 limits on the EOIR Director’s consideration of a case. There is no reason to assume that  
23 adjudication by the EOIR Director will be any faster than BIA adjudication.

24 281. Defendants asserted that the Director will decide “few, if any” appeals under the  
25 new Rule. 85 Fed. Reg. at 81,619. But Defendants acknowledge that the median case appeal takes  
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27 <sup>41</sup> Government Accountability Office (GAO), *Immigration Courts, Actions Needed to Reduce*  
28 *Case Backlog and Address Long-Standing Management and Operational Challenges* at 33, Fig. 7,  
(June 2017), <https://bit.ly/2Xsp7Qi>.

1 323 days, 85 Fed. Reg. at 52,508 n.39, meaning the Director could potentially decide thousands of  
2 appeals each year. And if the Director does not actually handle many appeals under his new  
3 referral authority, the change will also do little, if anything, to address backlogs.

4 282. Commenters expressed concern that too many appeals, especially complex ones,  
5 will take longer than 335 days and so will be referred to the Director. Defendants responded by  
6 suggesting that, “for such cases that are atypical” or where “it would be appropriate for the BIA to  
7 devote additional time to completing adjudication,” the BIA can take extra time without triggering  
8 the referral obligation. *Id.* at 81,622 (citing 8 C.F.R. § 1003.1(e)(8)(ii)). But  
9 Section 1003.1(e)(8)(ii) permits the BIA to extend the amount of time it has to render a decision  
10 only once the record has been completed, only for exigent circumstances as determined by the  
11 BIA Chairman, and only for 60 days. In any case, the 335-day clock runs from the time the appeal  
12 is *filed*, not from the time the record has been completed. *See* 85 Fed. Reg. at 81,653. The Rule  
13 does not identify any authority that would permit the BIA to stop the 335-day clock where delays  
14 occur during the completion of the record.

15 283. The Rule does identify certain reasons for delay that are exempt from the 335-day  
16 referral requirement, *see id.* at 81,622, but does not explain why the Rule allows for some  
17 exceptions and not others. It also does not address whether these exceptions will reach a  
18 significant number of cases or explain the implications for the BIA’s caseload.

19 284. Defendants also did not adequately consider the costs of adjudication by a non-BIA  
20 member. The Director has no formal training or expertise in adjudicating appeals, and need not  
21 even be an attorney (as BIA members must, *see* 8 C.F.R. § 1003.1(a)(1)). This creates a  
22 substantial risk that the Director may issue erroneous decisions on some of the most complicated  
23 issues pending before the BIA.

24 285. The Rule does not explain how the Director will deal with the volume of cases that  
25 will be mandatorily referred under the Rule, except to say that the Director will rely on qualified  
26 staff. *See* 85 Fed. Reg. at 81,621. That is no answer. The Director is also responsible for “ensuring  
27 the [BIA] itself has sufficient staff,” *id.*, so there is no reason the caseload concerns that  
28 purportedly animate the Rule would not be better addressed by the addition of staff at the BIA.

1           286. Finally, Defendants did not grapple with commenters’ concerns that referral to the  
2 Director will deepen the politicization of the various immigration agencies and cast doubt on the  
3 BIA’s impartiality. Defendants dismissed these concerns out of hand as nothing more than “ad  
4 hominem dislike, crude suppositions, and unfounded, tendentious accusations of bias.” 85 Fed.  
5 Reg. at 81,621. But it is hardly an ad hominem attack to observe that placing adjudications in the  
6 hands of a policymaker is inconsistent with neutral judicial process.

### 7                           **13. Mandatory Timelines and Other Changes for Adjudication of BIA** 8   **Appeals**

9           287. The Rule arbitrarily imposes mandatory internal deadlines for adjudicating BIA  
10 appeals. Among other things, it requires initial screening for summary dismissals to be completed  
11 within 14 days of filing and a decision to be issued within 30 days. It also requires a single BIA  
12 member to determine within 14 days whether to adjudicate the case in a single-member decision  
13 or assign it to a three-member panel, reserved for more complex review. *See* 85 Fed. Reg. at  
14 81,652–53 (new 8 C.F.R. § 1003.1(e)(8)(i)). A single BIA member can affirm the immigration  
15 judge in a two-sentence boilerplate opinion (known as an “affirmance without opinion” or  
16 “AWO”), which is ordinarily not issued in a three-member decision.<sup>42</sup> The Rule eliminates the  
17 requirement for immigration judges to review the transcript of an oral decision to correct mis-  
18 transcribed language or other errors before it is sent to the parties, which is currently required to  
19 be completed with 14 days of receipt. *Id.* at 81,638 (new 8 C.F.R. § 1003.5).

20           288. Imposing these arbitrary adjudication timelines pressures screeners to review cases  
21 quickly rather than thoroughly. The result will be erroneous summary dismissals and AWOs. This  
22 is especially true because the BIA is already incentivized to adjudicate cases quickly in light of the  
23 90- and 180-day adjudication requirements. The Rule will ultimately lead to more federal court  
24 appeals and remands back to the BIA.

25           289. Defendants deflected commenters’ concerns about these issues by mischaracterizing  
26 the commenters’ concerns as attacks on the BIA members’ competency and integrity. 85 Fed.

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27           <sup>42</sup> *See* 8 C.F.R. §§ 1003.1(e)(4) (6); *Affirmance Without Opinion, Referral for Panel Review,*  
28 *and Publication of Decisions as Precedents*, 84 Fed. Reg. 31,463 (July 2, 2019).



1 Reg. at 81,617. Defendants also claimed that there was no meaningful difference between  
2 requiring screeners to adjudicate cases “promptly,” which the previous regulations required, and a  
3 fixed, 14- or 30-day deadline. *Id.* Finally, Defendants dismissed comments that the recently issued  
4 case management procedures, which already established the Rule’s timelines, failed to result in  
5 improved efficiency. *Id.* None of these justifications meaningfully respond to commenters’  
6 concerns.

7 290. The elimination of the immigration transcript review is particularly  
8 counterproductive. EOIR contractor Booz Allen Hamilton reported that the issuance of oral  
9 decisions actually *contributes* to inefficiencies in adjudicating cases because it prevents both the  
10 parties and the BIA from deliberating on the issues of the case.<sup>43</sup> The Rule does not mention this  
11 countervailing data. In fact, Defendants stated that removing the transcript review process “will  
12 not affect the quality of transcriptions” at all. 85 Fed. Reg. at 81,639. Defendants did not explain  
13 why limiting the 14-day review process would reduce inefficiencies as compared to alternatives  
14 such as hiring more transcribers to produce transcripts in a timely manner after the immigration  
15 judge’s review.

16 291. Defendants also dismissed concerns that litigation at the courts of appeals would  
17 increase due to inaccurate or defective transcripts, thereby harming both noncitizens and their  
18 advocates, such as Plaintiffs.

19 **D. Defendants Failed to Comply with Federalism Certification Requirements**

20 292. Before issuing a rule that will have “substantial direct effects on the States, on the  
21 relationship between the national government and the States, or on the distribution of power and  
22 responsibilities among the various levels of government,” a federal agency must assess the rule’s  
23 federalism impacts, consult with state and local officials, and certify that it has done so. Exec.  
24 Order No. 13132, § 1(a), 64 Fed. Reg. 43,255 (Aug. 4, 1999).

25 293. Defendants failed to examine the federalism implications of withdrawing *sua sponte*  
26 reopening authority. Crime-based grounds of removal sit at the intersection of state and federal  
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28 <sup>43</sup> See Booz Allen Hamilton Report at 18, 25.

1 interests. While state convictions trigger federal deportation grounds, it is well-settled that  
2 vacatur based on “procedural or substantive defect[s] in the underlying proceedings” eliminate  
3 those deportation grounds. *Matter of Pickering*, 23 I. & N. Dec. 621, 624 (BIA 2003). The Rule  
4 upsets this balance by making removal orders based on state convictions permanent in many  
5 cases—even where the state has deemed the conviction legally invalid.

6 294. Relatedly, the Rule undermines the efficacy of state-level efforts to undo  
7 unconstitutional convictions, and grant clemency where appropriate, for noncitizens facing  
8 deportation as a result of the state’s own criminal systems. For example, California enacted  
9 legislation creating a means by which to challenge legal defects in old criminal proceedings,  
10 expressly contemplating its use by noncitizens with removal orders. *See* Cal. Penal Code §§  
11 1473.7(a)(1) (allowing motion to vacate “due to prejudicial error” affecting noncitizen’s ability to  
12 understand immigration consequences), (b)(2) (allowing filing of motion after notice of a final  
13 removal order). Defendants gave no consideration to states’ legitimate investments in such  
14 measures.

15 295. Indeed, despite such clear effects on the states, Defendants claim without further  
16 explanation that the Rule “would not have sufficient federalism implications to warrant the  
17 preparation of a federalism summary impact statement.” 85 Fed. Reg. at 81,650.

18 **E. Defendants Failed to Comply With the Regulatory Flexibility Act.**

19 296. The Regulatory Flexibility Act (“RFA”), 5 U.S.C. § 601 et seq., requires federal  
20 agencies to conduct a “regulatory flexibility analysis” analyzing how rules they promulgate will  
21 affect “small entities,” and to publish final versions of that analysis. 5 U.S.C. § 604.

22 297. Plaintiff Centro Legal is an example of a “small entity” under the RFA because it is  
23 a “not-for-profit enterprise which is independently owned and operated and is not dominant in its  
24 field.” 5 U.S.C. § 601(4).

25 298. An agency can forgo a regulatory flexibility analysis “if the head of the agency  
26 certifies that the rule will not . . . have a significant economic impact on a substantial number of  
27 small entities” *and* publishes that certification, “along with a statement providing the factual basis  
28 for such certification,” in the Federal Register when it publishes the final Rule. 5 U.S.C. § 605(b).

1           299. Defendants did not conduct a regulatory flexibility analysis of the Rule. Rather, “the  
2 Department”—not the head of the agency—issued an uncertified statement that the Rule “will not  
3 have a significant economic impact on a substantial number of small entities.” 85 Fed. Reg. at  
4 81,650. Defendants likewise did not publish “a statement providing the factual basis” for the  
5 Department’s claim that the Rule does not significantly impact small entities. *See id.*

6           300. Defendants asserted that the Rule has no adverse impact on small entities because  
7 the Rule “does not limit the fees [practitioners] may charge, or the number of cases a  
8 representative may ethically accept under the rules of professional responsibility.” 85 Fed. Reg. at  
9 81,645. They also contended that “[t]he rule will not economically impact representatives of  
10 [individuals] in immigration proceedings.” *Id.* at 81,646. These responses do not meaningfully  
11 address the significant, adverse impacts the Rule will have on the number of cases that small  
12 entities are able to handle, their ability to secure ongoing funding, and other consequences—all  
13 points that commenters raised.<sup>44</sup>

14           301. Defendants also contend that portions of the Rule apply only to individuals and not  
15 entities. *See* 85 Fed. Reg. at 81,646. This contention disregards the direct harm to Plaintiffs and  
16 the indirect harm as a result of the Rule’s impact on the populations they serve. “Congress took  
17 steps to ensure that pro bono legal services of the type that the Organizations provide are available  
18 to asylum seekers.” *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 768 (9th Cir. 2018)  
19 (citing 8 U.S.C. § 1158(d)(4)(A)-(B)); *see also* 8 U.S.C. § 1229(a)(1)(E), (b)(1)-(2). The Rule  
20 impedes Plaintiffs’ and similar organizations’ efforts to provide this congressionally contemplated  
21 *pro bono* service. And in all events, “small entities” can be affected by or otherwise regulated by a  
22 Rule simply by virtue of their contractual relationships with their clients. *See Aeronautical Repair*  
23 *Station Ass’n, Inc. v. F.A.A.*, 494 F.3d 161, 176-77 (D.C. Cir. 2007) (distinguishing the two

24 \_\_\_\_\_  
25 <sup>44</sup> *See* Public Comment of ILRC at 12 (September 25, 2020) (stating that the Rule “will create a  
26 staggering cost to legal advocates offering representation to protect procedural due process rights  
27 to immigrants in removal proceedings.”), <https://bit.ly/38YdUxr>; Public Comment of Safe  
28 Horizons at 9 (September 25, 2020) (explaining that the changes imposed by this Rule “will in  
turn place an even greater burden on nonprofit organizations such as ours” and will ultimately  
result in the organizations being forced to turn away potential clients as a result of the  
organization’s limited resources), <https://bit.ly/3nUeUa9>.

1 Circuit decisions cited by Defendants in the Rule).

2 302. Defendants' failure to comply with the certification requirements under § 605(b) of  
3 the RFA was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law  
4 under the APA. *See Northwest Min. Ass'n v. Babbitt*, 5 F. Supp. 2d 9, 16 (D.D.C. 1998)  
5 (remanding Rule to the agency due to violation of § 605(b)).

#### 6 **IV. The Rule Harms Plaintiffs**

7 303. Plaintiffs Centro Legal, ILRC, Tahirih, and RAICES are non-profit organizations  
8 that provide legal services to noncitizens, advocate on behalf of immigrant communities, and  
9 provide training and educational programming to immigration practitioners and/or immigrant  
10 communities. They each have significant reliance interests at stake because they have structured  
11 their missions, operations, budgets, and plans based on the law as it existed before the recent  
12 barrage of rulemaking, and with the expectation that Agencies will not arbitrarily and capriciously  
13 change regulations governing EOIR proceedings. The changes imposed by the Rule will cause  
14 Plaintiffs substantial harm.

##### 15 **A. The Rule Frustrates Plaintiffs' Missions**

16 304. Each of the Plaintiffs shares a mission to support and provide legal services to as  
17 many low income and vulnerable noncitizens as possible, including to asylum seekers. The Rule  
18 frustrates Plaintiffs' missions by making changes that increase the likelihood that noncitizens will  
19 be unable to vindicate their legal rights and pursue relief for which they are eligible. The Rule  
20 eliminates critical procedural devices that are currently used to correct fundamental miscarriages  
21 of justice, to allow individuals to receive relief from deportation for which they qualify, and to  
22 avoid dramatic consequences like deportation to death or torture. Many of the Rule's changes  
23 deny noncitizens a fair opportunity to present evidence. By eviscerating adjudicators' ability to  
24 manage their own proceedings, the Rule will lead to an increase in the backlog of cases in the  
25 immigration courts and the BIA, which will delay relief for noncitizens and could result in  
26 removal of people who are entitled to relief.

27 305. The Rule also frustrates Plaintiffs' missions by reducing the number of clients that  
28 Plaintiffs can serve. For example, BIA appeals will be significantly more resource intensive.

1 Before the Rule, the record before the BIA was closed, and the briefing in nondetained cases was  
2 sequential. Because the Rule allows the BIA to engage in factfinding and to affirm an immigration  
3 judge's decision on any basis, puts new limits on extensions of time for BIA briefing, and requires  
4 simultaneous briefing, Plaintiffs' ability to present the strongest case in a 25-page brief will be  
5 severely compromised. Although the Rule affects all Plaintiffs who provide representation in BIA  
6 appeals, this will be particularly devastating to Tahirih's Atlanta office, which was opened in  
7 January of 2018 with the intent of focusing on BIA appeals. The combined effect of the changes in  
8 the Rule will make it essentially impossible for Tahirih to take on BIA appeals for noncitizens  
9 who appeared *pro se* or with other counsel in immigration court.

10 306. The Rule also hinders Plaintiffs' ability to leverage pro bono attorneys to serve more  
11 clients. For example, before the Rule, Tahirih routinely referred BIA appeals to pro bono  
12 attorneys. The changes to the briefing schedule and the increased complexity of BIA appeals will  
13 make it virtually impossible to recruit pro bono attorneys for those matters. Asking a pro bono  
14 attorney to take an appeal on a closed record with the possibility of a 90-day extension of time is  
15 much different than an appeal that must cover *all* issues raised in the immigration court and is  
16 subject to additional factfinding, simultaneous briefing, and for which only a one-time extension  
17 of 14 days is possible.

18 307. Similarly, the lack of availability of administrative closure will reduce the number of  
19 cases that Plaintiffs can accept. Before the Rule, Plaintiffs representing noncitizens in removal  
20 proceedings and before USCIS were able to focus on the USCIS proceedings and administratively  
21 close the removal proceedings. Now, Plaintiffs will have to pursue both tracks at the same time,  
22 which is particularly wasteful of Plaintiffs' resources because USCIS proceedings may moot the  
23 removal proceedings. Two-track cases are also more difficult to place with pro bono attorneys.  
24 This is particular true for U visa cases due to prolonged delays at USCIS. Because removal  
25 defense is much more resource intensive than USCIS proceedings, Plaintiffs will have to reduce  
26 the number of clients they serve.

27 308. In short, the Rule makes immigration representation more uncertain, costly, resource  
28 intensive, and complex. It will hinder Plaintiffs' ability to manage their caseloads, which will

1 necessarily result in a reduced capacity to provide direct representation to clients. The Rule itself  
2 will make it much more difficult for noncitizens to obtain relief for which they are eligible. These  
3 results of the Rule all frustrate Plaintiffs' missions.

4 **B. The Rule Diverts Resources from Plaintiffs' Core Programs**

5 309. The Rule is causing and will continue to cause Plaintiffs to divert resources from  
6 their core programs. Before the effective date of the Rule, each Plaintiff had to expend significant  
7 resources—including by diverting resources from its core programs—to analyze and interpret the  
8 Rule, screen existing cases to determine whether immediate action needed to be taken before the  
9 Rule took effect, create new informational materials and resources to address the Rule, and  
10 provide training to its attorneys and staff.

11 310. Additionally, several of the Plaintiffs provide training and support to other legal  
12 services providers, practitioners, and/or directly to immigrant communities, which will require  
13 them to expend substantial resources in the near term on tasks such as drafting client alerts,  
14 designing and hosting webinars, and updating any website content concerning removal  
15 proceedings and BIA appeals.

16 311. Likewise, all Plaintiffs anticipate needing to rework their existing training materials  
17 to ensure their staff understand the entire gamut of the Rule's new substantive and procedural  
18 requirements, which will take a tremendous amount of time and workforce effort that the Plaintiffs  
19 cannot afford to spare. This will be especially burdensome for Plaintiff ILRC, which maintains a  
20 substantial series of immigration law publications that will all need to be reviewed and updated in  
21 addition to revamping its curriculum for removal defense roundtables, trainings, and webinars.

22 312. The Rule will also impose increased costs on Plaintiffs that will not be able to refer  
23 as many cases to pro bono attorneys. Plaintiffs will expend more resources to provide direct  
24 representation to the noncitizens who would have otherwise been referred. Decimating pro bono  
25 programs will also result in an increase in expenses for Plaintiffs because pro bono attorneys often  
26 pay the filing fees for noncitizens. Plaintiffs will now have to find a way to cover those fees for  
27 noncitizens, who are indigent and unlikely to be able to afford them. The burden will be  
28 particularly high for motions to reopen, which will increase in cost as a result of the EOIR Fee

1 Rule.

2 313. The Rule will also complicate, prolong, and require more resources for Plaintiffs'  
3 representation of existing and future clients. For example, in place of motions to remand for new  
4 evidence, the Rule directs noncitizens to file motions to reopen, which may only be filed *after*  
5 removal proceedings have concluded before the BIA, *i.e.*, when an order of removal becomes  
6 final. *See* 85 Fed. Reg. at 81,611 & n.27. The purported goal of this Rule is efficiency, but this  
7 change will delay proceedings by months or even years, and it will force Plaintiffs to litigate and  
8 the BIA to adjudicate appeals on possibly outdated facts that would not have previously been  
9 necessary with a remand. In addition, this approach ignores the significant consequences that flow  
10 from an order of removal, including a substantial risk of removal from the United States,  
11 prolonged family separation, and other attendant consequences.

12 314. As a result of changes in the Rule, Plaintiffs will be required to file more motions to  
13 reopen, which are subject to time and number bars and, under the EOIR Fee Rule, exorbitant fees.  
14 While motions to remand are free of cost, motions to reopen will cost \$895 under the EOIR Fee  
15 Rule. The new fees will also force Plaintiffs to consider assisting noncitizens with finding  
16 resources to pay the fees or filing time-consuming waivers. Because filing a motion to reopen uses  
17 an applicant's one chance to do so, this change will significantly increase the amount of time and  
18 resources Plaintiffs will require to prepare each motion and advise clients.

19 315. The change is also likely to prolong Plaintiffs' representation, likely by years, by  
20 forcing additional circuit court appeals. It would also require Plaintiffs to seek a stay of removal,  
21 likely within days of the BIA's decision, in order to avoid the client's deportation, which likely  
22 would require concurrent requests to the BIA and to the circuit court. Because each of these  
23 additional steps takes considerable time and resources, the Rule will hinder Plaintiffs' ability to  
24 represent additional clients.

25 316. Moreover, if noncitizens are removed while seeking a motion to reopen—a risk that  
26 is not present in seeking a motion to remand, since the appeal is still pending—Plaintiffs will also  
27 have to divert resources to cover the additional costs associated with representing clients from  
28 abroad and possibly even assisting the client's return to the United States.

1           317. Plaintiffs will also be forced to divert resources if their cases that are currently  
2 administratively closed are re-calendared. Plaintiffs’ workload will expand dramatically in a short  
3 amount of time. Plaintiffs will need to repeatedly move for continuances before EOIR. Because  
4 motions for continuances are not always ruled on before hearings, Plaintiffs may need to appear  
5 personally in immigration court to report that USCIS proceedings remain ongoing. For attorneys  
6 in RAICES’s Austin office, this means traveling to immigration court in San Antonio and  
7 sometimes waiting an hour or more as the immigration judge hears other matters. If further  
8 continuances are denied, Plaintiffs will then also need to prepare for merits hearings on complex  
9 applications for relief.

10           318. Each of the tasks and expenses necessary to respond to the new Rule—including  
11 those described above—requires Plaintiffs to divert their finite resources from other aspects of the  
12 programs they provide. As a result of the Rule, Plaintiffs anticipate the need to make changes  
13 including reallocating staffing, devoting less time to advocacy projects and community initiatives,  
14 and taking on fewer cases.

15           **C. The Rule Jeopardizes Plaintiffs’ Funding**

16           319. Some Plaintiffs rely in part on grants from sources such as states, counties, and  
17 foundations. Such grants are often conditioned on Plaintiffs’ ability to achieve certain “deliverable  
18 requirements,” such as a total number of clients served or asylum applications filed each year.  
19 Because the Rule will reduce the number of clients that Plaintiffs can serve, Plaintiffs are unlikely  
20 to be able to comply with existing funding requirements—and thus expect to lose a substantial  
21 amount of their funding once this Rule goes into effect.

22           320. Even under the best of circumstances, the loss of a significant source of funding  
23 could have cascading and devastating impacts for the Plaintiffs. With less funding, Plaintiffs will  
24 be forced to reduce staff and thus further reduce the number of clients served. With respect to the  
25 new Rule, the harm caused by the loss of funding will be further exacerbated by the concomitant  
26 increase in demands on Plaintiffs’ resources.



**CLAIMS FOR RELIEF**

**FIRST CLAIM FOR RELIEF**

**Violation of the APA (Arbitrary and Capricious)**

321. Plaintiff realleges and incorporates the paragraphs above.

322. Defendants’ publication of the Rule in the Federal Register is “final agency action for which there is no other adequate remedy in a court” and is therefore subject to APA review.

323. The APA provides that a court “shall . . . hold unlawful and set aside agency action” that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

324. In promulgating the Rule, Defendants “failed to consider an important aspect of the problem, offered an explanation for [their] decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n.*, 463 U.S. at 43.

325. In particular, although Defendants assert that the Rule will ensure the consistency, efficiency, and quality of adjudications, Defendants failed to articulate a satisfactory explanation for their actions, including a rational connection between the facts found and the choice made. The justifications offered by Defendants are unsupported by evidence.

326. Contrary to the stated goal of efficiency, elimination of administrative closure will increase inefficiencies. Immigration judges will be forced to hold hearings and rule on repeated motions for continuances while USCIS processes pending applications for relief.

327. As another example, the Rule’s elimination of motions to remand will require the BIA to adjudicate pending appeals even when evidence presented in a motion to remand could eliminate the need to do so.

328. Likewise, shortening the briefing extension period for BIA appeals will not improve operational efficiency because delays in adjudication at the BIA are not attributable to the time the parties are briefing. *Cf.* 85 Fed. Reg. at 81,638.

329. The Rule is arbitrary and capricious and should be set aside under the APA because Defendants departed from longstanding policies without assessing reliance interests or giving a

1 reasoned explanation for the changes.

2 330. When an agency substantially alters its position, it must “supply a reasoned analysis  
3 for the change.” *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 42. Likewise, it may not “depart from a  
4 prior policy sub silentio or simply disregard rules that are still on the books.” *F.C.C. v. Fox*  
5 *Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

6 331. Defendants departed from longstanding policies that permitted administrative  
7 closure, motions to reopen or reconsider cases *sua sponte*, and motions to remand without  
8 assessing reliance interests associated with the existing policies or alternatives within the ambit of  
9 the existing policy. Defendants similarly failed to justify their conversion to universal concurrent  
10 briefing schedules, a policy they had previously considered and explicitly rejected.

11 332. Defendants failed to consider the reliance interests of Plaintiffs and other pro bono  
12 legal service providers that have designed programs and accepted cases with the reasonable  
13 expectation that Defendants would not arbitrarily and capriciously change EOIR procedures.  
14 Because the Rule will make many cases more time and resource intensive, the Rule affects  
15 Plaintiffs’ capacity to serve the same number of clients and their ability to manage their pending  
16 cases.

17 333. The Rule is arbitrary and capricious because it implements changes to administrative  
18 closure without addressing the benefits of this procedural tool or the harm that eliminating it will  
19 cause.

20 334. The Rule is arbitrary and capricious because it does not adequately weigh the  
21 serious risk of refolement, despite that concern being raised by comments on the proposed rule.

22 335. The Rule is arbitrary and capricious and should be set aside under the APA because  
23 Defendants failed to consider important aspects of the problem, including how the shortened  
24 briefing extension time period would reduce legal representation at the BIA, the impact on  
25 noncitizens who are effectively barred from reopening or reconsideration under the Rule, and the  
26 Rule’s interaction with other rules impacting noncitizens, including those issued through staggered  
27 rulemaking.

28 336. As explained throughout this Complaint, Defendants arbitrarily and capriciously

1 failed to analyze many other substantial issues and reasonable alternatives raised in comments.

2 337. For these and other reasons stated above, the Rule is arbitrary and capricious and  
3 thus unlawful under the APA.

4 338. Defendants' violation is causing ongoing harm to Plaintiffs.

## 5 **SECOND CLAIM FOR RELIEF**

### 6 **Violation of the APA (Without Observance of Procedure Required by Law)**

7 339. Plaintiffs repeat and incorporate by reference each of the foregoing paragraphs as if  
8 fully set forth herein.

9 340. Defendants' publication of the Rule in the Federal Register is "final agency action  
10 for which there is no other adequate remedy in a court" and is therefore subject to APA review.

11 341. The APA requires an agency proposing a rule to provide notice and to "give  
12 interested persons an opportunity to participate in the rule making through submission of written  
13 data, views, or arguments." 5 U.S.C. § 553(c).

14 342. The APA provides that a court "shall . . . hold unlawful and set aside agency action"  
15 that is "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

16 343. Defendants violated the APA by providing the public with just 30 days to comment  
17 on the proposed rule.

18 344. The Rule's 30-day comment period was inadequate to give interested persons a  
19 meaningful opportunity to participate in light of the number of changes to immigration court and  
20 BIA procedure effected by the Rule and the unique challenges affecting interested persons during  
21 the COVID-19 pandemic.

22 345. The Rule was also part of an improperly staggered rulemaking process in which  
23 various rules affecting noncitizens with orders of removal were proposed at different times,  
24 preventing the public from understanding and commenting on the final regulatory regime.

25 346. Defendants also failed to analyze the Rule's federalism implications as required by  
26 Executive Order No. 13132, 64 Fed. Reg. 43,255 (Aug. 4, 1999).

27 347. The agency failed to comply with the requirements of the Regulatory Flexibility Act  
28 ("RFA").

1 348. The Rule is a “rule” within the meaning of the RFA. *Id.* § 601(2).

2 349. The RFA requires federal administrative agencies to analyze the effects on “small  
3 entities” of rules they promulgate, and to publish initial and final versions of those analyses. *See* 5  
4 U.S.C. §§ 603–604.

5 350. The RFA defines “small entities” to include small businesses, small nonprofit  
6 organizations, and small governmental jurisdictions. *Id.* § 601(6). Plaintiffs are “small entities”  
7 within the meaning of the RFA and are directly affected by the Rule, which, among other things,  
8 will require them to expend substantial resources, including to update training materials and  
9 evaluate the Rule’s impact on pending cases.

10 351. The Rule’s regulatory flexibility analysis does not comply with the RFA because  
11 Defendants concluded that the Rule will not have a significant impact on small entities. In lieu of  
12 an adequate explanation, the Rule simply asserts that the Rule “applies to [noncitizens] in removal  
13 proceedings, who are individuals, not entities,” a statement that wholly ignores the impact of the  
14 Rule on Plaintiffs and other organizations that serve noncitizens in removal proceedings. 85 Fed.  
15 Reg. at 81,646.

16 352. The RFA requires Defendants to describe and estimate the number of small entities  
17 that would be affected by the Rule. 5 U.S.C. § 604(a)(4). Defendants did not do so and refused to  
18 include small nonprofit organizations affected by the Rule. 85 Fed. Reg. at 81,650.

19 353. As a result of the foregoing, the Rule’s regulatory flexibility analysis does not  
20 comply with the RFA.

21 354. Moreover, the Rule failed to give notice to interested parties that Director McHenry,  
22 rather than the Attorney General, would be issuing the Rule, in contravention of the APA and in  
23 excess of Director McHenry’s statutory, regulatory, and constitutional authority.

24 355. The Rule is therefore procedurally invalid and should be set aside under the APA.

25 356. Defendants’ violation is causing ongoing harm to Plaintiffs.  
26  
27  
28

**THIRD CLAIM FOR RELIEF**

**Violation of the APA, 5 U.S.C. § 706(2)**

**Agency Action in Excess of Statutory Jurisdiction or Authority**

357. Plaintiffs repeat and incorporate by reference each of the foregoing paragraphs as if fully set forth herein.

358. The APA provides that a “reviewing court shall . . . hold unlawful and set aside agency action, findings and conclusions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right[.]” 5 U.S.C. § 706(2)(C).

359. In the INA and Homeland Security Act, Congress vested all of EOIR’s rulemaking authority in the Attorney General alone. 8 U.S.C. § 1103(g); 6 U.S.C. § 521.

360. The Rule cites 8 U.S.C. § 1103(g) as the statutory authority for its issuance. 85 Fed. Reg. at 81,588.

361. Although the Attorney General signed the proposed rulemaking, he did not sign the Final Rule, which was instead signed only by Director McHenry in his role as Director of EOIR.

362. The Attorney General’s purported delegation of rulemaking authority to the Director of EOIR pursuant to Attorney General Order Number 4910-2020 violated longstanding principles of administrative law and improperly delegated authority to Director McHenry. *See Chenery*, 318 U.S. at 95; *see also N.S.*, 2020 WL 4260739, at \*5–6. Director McHenry also has no statutory or regulatory authority to issue final rules independent of this unlawful delegation. *See* 8 U.S.C. § 1103(g)(2); *see also* 8 C.F.R. § 1003.0(b).

363. Moreover, the Director of EOIR cannot use any purported delegated authority to delegate additional authority to himself.

364. The Rule purports to grant new authority to the EOIR Director to adjudicate BIA appeals that have been pending for more than 335 days.

365. In responding to comments about this provision, the Rule provides that, “[i]n issuing the rule, the Attorney General properly delegates adjudicatory authority to the Director to review certain administrative decisions that are otherwise untimely. 8 CFR 1003.1(e)(8).” 85 Fed. Reg. at 81,621. But the Rule was not, in fact, issued by the Attorney General.



1           375. The Rule’s effect on the operation of the immigration courts and the BIA is not in  
2 accordance with the INA and in excess of statutory authority because it obstructs the statutory  
3 path Congress created through the immigration courts and the BIA.

4           376. The Rule is contrary to law and in excess of statutory authority because it drastically  
5 disadvantages individuals in immigration courts and the BIA contrary to the statutory scheme  
6 designed to provide fair access to relief consistent with principles of due process.

7           377. The legislative purpose of providing fair access to immigration courts and the BIA is  
8 evidenced in the many provisions of the INA that the Rule contravenes, including but not limited  
9 to:

- 10           • 8 U.S.C. § 1229a(b)(4)(B), which provides that noncitizens have a right to a  
11 “reasonable opportunity to examine evidence” against them and to present evidence  
12 of their own.
- 13           • 8 U.S.C. § 1101(a)(47)(B), which provides that an order of removal becomes final  
14 upon “a determination by the [BIA]” or the expiration of a noncitizen’s time to  
15 appeal to the BIA.
- 16           • 8 U.S.C. §§ 1229a(1), (a)(3), and (c)(1)(A). Under these provisions, an immigration  
17 judge, not the BIA, shall conduct removal hearings and order removal.
- 18           • 8 U.S.C. § 1182(a)(9)(B)(v), which allows noncitizens to seek a provisional  
19 hardship waiver of unlawful presence in the United States.
- 20           • 8 U.S.C. §§ 1158(a)(1) and 1231(b)(3). The first provision allows any noncitizen  
21 who is present in the United States to apply for asylum. The second provides  
22 mandatory relief from removal in cases where there is a clear probability that the  
23 individual will be persecuted abroad.

24           378. The Rule as a whole, including the cumulative effect of all its provisions, is contrary  
25 to law and in excess of statutory authority because the Rule is incompatible with the overall  
26 statutory scheme governing proceedings in the immigration courts and the BIA.

27           379. The Rule is contrary to law and in excess of statutory authority because it cuts off  
28 access to statutory rights of asylum and withholding of removal under 8 U.S.C. §§ 1158(a)(1) and

1 1231(b)(3), and creates a significant danger of refoulement, which “occurs when a government  
2 returns [noncitizens] to a country where their lives or liberty will be threatened on account of race,  
3 religion, nationality, membership of a particular social group, or political opinion.” *Innovation*  
4 *Law Lab v. Wolf*, 951 F.3d 1073, 1087–88 (9th Cir. 2020).

5 380. Refoulement is prohibited under international law norms and treaty obligations that  
6 are binding on the United States. *Id.* at 1088 (“The United States is obliged by treaty and  
7 implementing statute . . . to protect against refoulement of [applicants for protection.]”); *INS v.*  
8 *Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987) (explaining that Congress enacted the Refugee  
9 Act of 1980 “to bring United States refugee law into conformance with the 1967 United Nations  
10 Protocols Relating to the Status of Refugees”).

11 381. The Rule also violates the Due Process Clause of the Constitution, which provides  
12 that no person shall “be deprived of life, liberty, of property, without due process of law.”  
13 U.S. Const. Amend. V, cl.4.

14 382. The Rule also constitutes arbitrary government action that is pretext for the  
15 indiscriminate removal of immigrants from the United States in a manner incompatible with the  
16 carefully crafted scheme for proceedings in the immigration courts and the BIA.

17 383. Defendants’ violation is causing ongoing harm to Plaintiffs.

## 18 **FIFTH CLAIM FOR RELIEF**

### 19 **Violation of the Due Process Clause**

20 384. Plaintiffs repeat and incorporate by reference each of the foregoing paragraphs as if  
21 fully set forth herein.

22 385. The Due Process Clause of the Fifth Amendment of the Constitution guarantees that  
23 people cannot be deprived of life, liberty, or property without due process of law.

24 386. The fundamental requirement of due process is the opportunity to be heard at a  
25 meaningful time and in a meaningful manner.” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)  
26 (internal quotations and citations omitted). Procedural due process also “protect[s] a substantive  
27 interest to which the individual has a legitimate claim of entitlement.” *Olim v. Wakinekona*, 461  
28 U.S. 238, 250 (1983).





1 alternative, issue an order under 5 U.S.C. § 705 postponing the effective date of the Rule pending  
2 judicial review;

3 c. Declare the Rule arbitrary and capricious under 5 U.S.C. § 706(2)(A) and without  
4 observance of procedure required by law under 5 U.S.C. § 706(2)(D);

5 d. Hold unlawful and set aside the Rule under 5 U.S.C. § 706(2);

6 e. Permanently enjoin Defendants and all those acting on their behalf from  
7 implementing or enforcing the Rule;

8 f. Award Plaintiffs costs and reasonable attorneys' fees under the Equal Access to  
9 Justice Act, 28 U.S.C. § 2412, and any other applicable basis; and

10 g. Grant such further relief as the Court deems just and proper.

11 Respectfully submitted,

12  
13 Dated: January 19, 2021

/s/ Naomi A. Igra

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