

December 28, 2020

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

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**Re: Comments in Response to Department of Justice Executive Office for Immigration Review Notice of Proposed Rulemaking (NPRM): *Motions to Reopen and Reconsider; Effect of Departure; Stay of Removal*; EOIR Docket No. 18-0503; RIN 1125-AB01; Dir. Order No. 01-2021**

The Tahirih Justice Center<sup>1</sup> (Tahirih) submits the following comments to the Executive Office of Immigration Review (EOIR) in response to the above-referenced NPRM published on November 27, 2020.<sup>2</sup> See EOIR, *Motions to Reopen and Reconsider; Effect of Departure; Stay of Removal*, 85 Fed. Reg. 75942 (Nov. 27, 2020). Tahirih opposes the rule as a matter of public policy, and because it violates due process and numerous laws, including the Immigration & Nationality Act (INA), the Administrative Procedure Act (APA), and the international obligations of the United States as a State party to the United Nations (UN) Convention Relating to the Status of Refugees and 1967 Protocol (collectively, the Convention). See generally UNHCR, *The 1951 Refugee Convention*.<sup>3</sup>

## I. Introduction

Tahirih is a national, nonpartisan policy and direct services organization that has answered calls for help from nearly 29,000 survivors of gender-based violence and their families since its inception twenty-three years ago. Our clients are primarily women and girls who endure horrific human rights abuses such as domestic violence, rape and sexual torture, forced marriage, human trafficking, widow rituals, female genital mutilation/cutting (FGM/C), and “honor” crimes.<sup>4</sup>

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

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

<sup>3</sup> <https://www.unhcr.org/1951-refugee-convention.html>.

<sup>4</sup> For background information on these types of gender-based violence, see, e.g., UNHCR, *Guidelines on the Protection of Refugee Women* 17, <https://www.unhcr.org/3d4f915e4.html>; UN Women, *Defining “honour” crimes and “honour” killings*, <https://endvawnow.org/en/articles/731-defining-honourcrimes-and-honour-killings.html>;

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Tahirih provides free legal and social services to help our clients find safety and justice as they engage in the daunting, courageous, and rewarding work of rebuilding their lives and contributing to their communities as illustrated by our clients' stories. Since its founding, Tahirih has also served as an expert resource for the media, Congress, policymakers, and others on immigration remedies for survivors fleeing gender-based violence (GBV). *See, e.g.,* Tahirih Justice Center, *Tahirih in the News*;<sup>5</sup> Tahirih Justice Center, *Congressional Testimony*;<sup>6</sup> Tahirih Justice Center, *Comments*.<sup>7</sup> In light of our relevant experience and expertise, these comments focus on the harm the rule will inflict on survivors of gender-based violence including asylum seekers, petitioners for U and T visas, and Self-Petitioners under the Violence Against Women Act.

Among the clients we have served are Mariam\*<sup>8</sup> from Mali, who recounts:

“The day after my 16th birthday, my father circled a date on the calendar: August 28. He told me this was the day that I would be married. My soon-to-be-husband was a wealthy man from Mali. He was older than my father! I begged my father to stop the marriage, but he insisted it was final. In that moment, I felt like my life was over. My mom learned that my fiancé had AIDS. Villagers said his first wife died of the disease.

“Desperate for a way out, I told my uncles I was no longer a virgin. They beat me so badly that I thought I would die. Then, they locked me in a room used to store crops. There was no bathroom or windows, just a hole in the wall for food. I couldn't tell if it was night or day, and I knew that if my life ended, they would not care.

“Eight months passed before my mom rescued me. My uncles went away on a business trip, and she broke through the bolt on the door. With the help of my sister I escaped to the United States and applied for asylum. I'll never forget the day I received my asylum approval. I am free! I can live my life without fear of being forced back to Mali, where my uncles would kill me.

“Very soon, I will graduate from college with a degree in agribusiness. I hope to get a job in banking or at a government agency and then pursue an MBA. And I want to get married and start a family, at my own pace.”

Another client, Koumba\* from Benin, began her fight for justice when she was raped at the age of 11 by a man from her father's village. Four years later, she was raped a second time by a different man. She then learned that she had been promised to this man in marriage. Koumba\* suffered for a long time with shame from the rapes, but she tried her best to establish as normal a life as possible. Koumba\* eventually attended university, earned her degree, and worked as a human resources professional for an insurance company. A decade passed, and she fell in love with a man from her

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[https://en.wikipedia.org/wiki/Female\\_genital\\_mutilation](https://en.wikipedia.org/wiki/Female_genital_mutilation);

[https://en.wikipedia.org/wiki/Forced\\_marriage](https://en.wikipedia.org/wiki/Forced_marriage); <https://www.widowsrights.org/>.

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

<sup>6</sup> [https://www.tahirih.org/pubs/?qmt%5Bpub\\_cat%5D%5B%5D=131](https://www.tahirih.org/pubs/?qmt%5Bpub_cat%5D%5B%5D=131).

<sup>7</sup> [https://www.tahirih.org/pubs/?qmt%5Bpub\\_cat%5D%5B%5D=261](https://www.tahirih.org/pubs/?qmt%5Bpub_cat%5D%5B%5D=261).

<sup>8</sup> Names followed by an asterisk are pseudonyms.

church and married him. Koumba\* put her past abuse behind her and built a happy new life with her husband.

In 2010, Koumba\*'s world was violently upended when the rapist to whom she had been promised in her teens passed away. To her shock and dismay, this man and his family had never forgotten that Koumba\* had been promised to him like property. Now, upon the rapist's death, his brother "inherited" Koumba\*. At his direction, members of a sect from his village kidnapped her. Koumba\* was forced to perform widow rituals, which included washing the dead man's body as well as her own intimate parts with the same water. She was then forced to spend the night lying next to the corpse of her rapist. She knew she would get no help from the local police, so at the first opportunity, she fled to another town.

Unfortunately, her safety was temporary. A few months later, Koumba\* was kidnapped again. This time, the dead man's brother kept her in a dark hut with her arms and legs tied to a bed and raped her every day. Once again she escaped, this time the night before their formal marriage ceremony was to take place. Because she knew that she could no longer live in Benin in safety, she gave up her career and everything she had worked for in her native land and fled to the United States. After facing additional hardship here, she was finally able to apply for and win asylum.

As survivors of gender-based violence, our clients are severely traumatized and uniquely vulnerable. In addition to the abuses they endure, they face searing social stigmas and ostracization from family members and their communities if they dare to come forward and report abuse. They are often disbelieved and internalize shame particularly in the case of rape and sexual assault. As a result, they are isolated and cut off from family and community resources that they desperately need. And abusers and traffickers who target women within the United States use threats of violence to keep them in a chronic state of fear, economic dependence, and social isolation. Ultimately, as further explained below, the nature of gender-based violence itself serves as an obstacle for survivors to expeditiously prepare their cases - even under the most forgiving of circumstances. The formidable challenges survivors already face have only been amplified by the global pandemic. *See, e.g.,* Rená Cutlip-Mason, *For Immigrant Survivors, the Coronavirus Pandemic is Life-Threatening in Other Ways*, Ms. Magazine (Apr. 14, 2020);<sup>9</sup> Tahirih Justice Center, *The Impact of COVID-19 on Immigrant Survivors of Gender-Based Violence* (Mar. 23, 2020).<sup>10</sup>

## **II. Comments on the NPRM as a Whole**

The entirety of the NPRM is invalid for at least six reasons.

### **A. Pretext**

As an initial matter, the NPRM is nothing more than a pretext for lowering representation rates in immigration court and speeding deportations. The Supreme Court recently made clear that

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<sup>9</sup> <https://msmagazine.com/2020/04/14/for-immigrant-survivors-the-coronavirus-pandemic-is-life-threatening-in-other-ways/>.

<sup>10</sup> [https://www.tahirih.org/wp-content/uploads/2020/03/Impact-of-Social-Distancing-on-Immigrant-Survivors-of-Gender-Based-Violence\\_Final-March-23-2020.pdf](https://www.tahirih.org/wp-content/uploads/2020/03/Impact-of-Social-Distancing-on-Immigrant-Survivors-of-Gender-Based-Violence_Final-March-23-2020.pdf).

“[t]he reasoned explanation requirement of administrative law ... is meant to ensure that agencies offer genuine justifications for important decisions.” *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019). To that end, an agency’s actual reasoning must be provided so that it “can be scrutinized by courts and the interested public.” *Id.* at 2576. And as part of disclosing their “actual reasoning,” administrative agencies “must ‘disclose the basis’” of their actions. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) (quoting *Phelps Dodge Corp. v. Labor Bd.*, 313 U.S. 177, 197 (1941)). The provision of “contrived reasons would defeat the purpose of the enterprise.” *Dep’t of Commerce*, 139 S. Ct. at 2576.

Here, there is no rationale at all for the NPRM as a whole. And the agency’s rationales for individual provisions are, as shown in detail below, entirely implausible. Those facts, standing alone, gives rise to a strong inference that the agencies’ stated reasoning is pretextual rather than “genuine.” *Dep’t of Commerce*, 139 S. Ct. at 2575.

That inference is further supported by the fact that the NPRM does not once mention the realities faced by asylum seekers, either in their home countries or after they arrive in the United States. It is also supported by the fact that, in the six sets of proposed or final regulations issued solely or jointly by EOIR in the last year that directly affect asylum applicants, there is not so much as a single major provision, or single legal change, that can fairly be construed as working in favor of the applicant. *See also* EOIR, *Fee Review*, 85 Fed. Reg. 82,750 (Dec. 18, 2020); EOIR, *Procedures for Asylum and Withholding of Removal*, 85 Fed. Reg. 81,698 (Dec. 16, 2020); EOIR, *Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure*, 85 Fed. Reg. 81,588 (Dec. 16, 2020); EOIR & USCIS, *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 80,274 (Dec. 11, 2020); EOIR, *Good Cause for a Continuance in Immigration Proceedings*, 85 Fed. Reg. 75,925 (Nov. 27, 2020); EOIR & USCIS, *Procedures for Asylum and Bars to Asylum Eligibility*, 85 Fed. Reg. 67,202 (Oct. 21, 2020). And it is supported by the fact that, in this rule and its other proposed rules, EOIR has routinely accused asylum seekers and their counsel of misconduct without a shred of supporting evidence. *See, e.g.*, 85 Fed. Reg. at 36,273, 36,283, 52,501, 75,928, 75,929, 75,935-37; *see also* Section III.D *infra*. It is also supported by the fact that, in response to other recent NPRMs, EOIR has failed to engage with commenters in good faith, choosing instead to repeatedly accuse commenters of histrionics and speculation for pointing out the effect of those NPRMs on their clients. An agency actually interested in improving its procedures would carefully consider everything said by those who are directly affected by those procedures; by its recent actions, EOIR has confirmed that it lacks such interest.

The inference of pretext also finds support in the statements of those who signed or influenced the rule. To start at the top, President Donald J. Trump has stated that immigrants attempting to cross the southern border of the United States should be shot. Eugene Scott, *Trump’s most insulting—and violent—language is often reserved for immigrants*, *Wash. Post* (Oct. 2, 2019).<sup>11</sup> He has suggested that the border should include an “electrified” wall with “spikes on top that could pierce human flesh.” *Id.* He has referred to immigrants as “animals” who “infest” the United States. Juan Escalante, *It’s not just rhetoric: Trump’s policies treat immigrants like me as “animals,”* *Vox* (May 19, 2018);<sup>12</sup>

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<sup>11</sup> <https://www.washingtonpost.com/politics/2019/10/02/trumps-most-insulting-violent-language-is-often-reserved-immigrants/>.

<sup>12</sup> <https://www.vox.com/first-person/2018/5/18/17369044/trump-ms-13-gang-animals-immigrants>.

Brian Resnick, *Donald Trump and the disturbing power of dehumanizing language*, Vox (Aug. 14, 2018).<sup>13</sup> And he has, without citing to any evidence, both associated immigrants generally with “[d]rugs, gangs, and violence” (Dara Lind, *Trump just delivered the most chilling speech of his presidency*, Vox (June 28, 2017)),<sup>14</sup> and said that Mexican immigrants “bring[ ] drugs,” “bring[ ] crime,” and are “rapists.” Scott, *supra*.

More specifically, President Trump has referred to asylum seekers as “invas[ing]” and “infest[ing]” the United States. Donald J. Trump (@realDonaldTrump), Twitter (June 19, 2018, 6:52 AM);<sup>15</sup> Donald J. Trump (@realDonaldTrump), Twitter (June 24, 2018, 8:02 AM).<sup>16</sup> He has claimed without evidence that support for asylum seekers is equivalent to support for “crime,” “drugs,” and “human trafficking.” *Remarks: Donald Trump Meets With Representatives of Law Enforcement* (Sept. 26, 2019).<sup>17</sup> And he has made clear his view that all asylum seekers should “IMMEDIATELY” be deported without any legal process whatsoever, in clear contravention of the INA and international law. Donald J. Trump (@realDonaldTrump), Twitter (June 30, 2018, 3:44 PM).<sup>18</sup>

President Trump has also repeatedly claimed that the asylum system routinely grants relief to people without legitimate claims. He has, for instance, claimed that there is routine “abuse” of the asylum process. Exec. Order No. 13,767, *Border Security and Immigration Enforcement* (Jan. 25, 2017). He has referred to the lawful asylum process as a “loophole” exploited by those with “fraudulent or meritless” claims. *Remarks by Pres. Trump on the Illegal Immigration Crisis and Border Security* (Nov. 1, 2018).<sup>19</sup> He has referred to asylum as a “hoax” and a “scam” and claimed, in clear contravention of U.S. and international law, that “we’re not taking [asylum seekers] anymore.” *Trump on Asylum Seekers: ‘It’s a Scam, It’s a Hoax’*, Daily Beast (Apr. 5, 2019).<sup>20</sup> He has expressed the unelaborated view that “asylum procedures are ridiculous” and that “you have to get rid of [immigration] judges” to get the outcomes he prefers. *Remarks by President Trump and NATO Secretary General Jens Stoltenberg Before Bilateral Meeting* (April 2, 2019).<sup>21</sup> He has claimed that asylum laws are “horrible” and “unfair” (*Remarks by President Trump on the National Security and Humanitarian Crisis on our Southern Border* (Mar. 15, 2019))<sup>22</sup> and that asylum claims are “frivolous” and “bogus” (*Remarks: President Trump Signs Taxpayer First Act in the Oval Office*

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<sup>13</sup> <https://www.vox.com/science-and-health/2018/5/17/17364562/trump-dog-omarosa-dehumanization-psychology>.

<sup>14</sup> <https://www.vox.com/policy-and-politics/2017/7/28/16059486/trump-speech-police-hand>.

<sup>15</sup> <https://twitter.com/realDonaldTrump/status/1009071403918864385>.

<sup>16</sup> <https://perma.cc/35AQ-NSDH>.

<sup>17</sup> <https://factba.se/transcript/donald-trump-remarks-law-enforcement-september-26-2019>.

<sup>18</sup> <https://twitter.com/realDonaldTrump/status/1013146187510243328?s=20>.

<sup>19</sup> <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-illegal-immigration-crisis-border-security/>.

<sup>20</sup> <https://www.thedailybeast.com/trump-on-asylum-seekers-its-a-scam-its-a-hoax>.

<sup>21</sup> <https://perma.cc/5ZKY-P53D>.

<sup>22</sup> <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-national-security-humanitarian-crisis-southern-border-2/>.

(July 1, 2019)).<sup>23</sup> None of these statements were supported by so much as a shred of evidence, and no supporting evidence exists for any of them.

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

Attorney General William Barr, who signed the NPRM on behalf of DOJ, likewise has a long history of statements that, at the time of his confirmation, led to the accurate prediction that he would “be a loyal foot soldier for Trump’s aggressive immigration agenda.” Dara Lind, *William Barr hearing: attorney general nominee’s immigration record aligns with Trump’s*, Vox (Jan. 16, 2019).<sup>24</sup> For instance, in 1992, when the acquittal of the white Los Angeles police officers who savagely beat Rodney King led to violence, Barr made the astonishing claim that “[t]he problem of immigration enforcement” was in part responsible for the violence. Ronald J. Ostrow, *William Barr: A “Caretaker” Attorney General Proves Agenda-Setting Conservative*, L.A. Times (Jun 21, 1992).<sup>25</sup> Like Trump, Barr has long believed—without a shred of supporting evidence—that large numbers of asylum seekers present “patently phony claims.” *Asylum and inspections reform: Hearing before the Subcommittee on International Law, Immigration, and Refugees of the Committee on the Judiciary, House of Representatives* (Apr. 27, 1993).<sup>26</sup> And more recently, while criticizing so-called “sanctuary” policies, Barr baselessly referred to all undocumented people as “criminal aliens.” *E.g.*, Justine Coleman, *Barr announces ‘significant escalation’ against ‘sanctuary’ localities*, The Hill (Feb. 10, 2020).<sup>27</sup>

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

## **B. Lack of Justification**

The NPRM states no non-arbitrary basis for its existence, much less any of its individual changes. EOIR’s only general statement about the changes amounts to “we want to change the rules.” *See* 85 Fed. Reg. at 75,945 (“the Department believes that a more comprehensive rulemaking would be the most efficient way to consolidate and address” the issues covered by the rule). But a desire to take an action is not a non-arbitrary justification for doing so. The entire NPRM must accordingly be withdrawn.

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<sup>23</sup> <https://factba.se/transcript/donald-trump-remarks-bill-signing-taxpayer-act-july-1-2019>.

<sup>24</sup> <https://www.vox.com/2018/12/7/18128926/barr-confirmation-senate-immigration-trump>.

<sup>25</sup> <https://www.latimes.com/archives/la-xpm-1992-06-21-op-1236-story.html>.

<sup>26</sup> [https://archive.org/stream/asyluminspection00unit/asyluminspection00unit\\_djvu.txt](https://archive.org/stream/asyluminspection00unit/asyluminspection00unit_djvu.txt).

<sup>27</sup> <https://thehill.com/regulation/court-battles/482425-barr-announces-significant-escalation-against-sanctuary-cities>.

### **C. Failure to Consider Effects of the Proposals**

In addition, EOIR has failed to consider the effects of its proposals on respondents or counsel. The rule never analyzes any impact on anyone who appears before an immigration judge or the BIA. This failure of analysis also renders the entire rule categorically arbitrary under the APA.

### **D. Impermissible Retroactivity**

The NPRM does not state whether its provisions would apply retroactively. That silence cannot stand, because the application of the NPRM to cases pending at the time its provisions take effect would be flatly illegal. A regulation may not be applied retroactively unless Congress has included a clear statement that the agencies may promulgate regulations with that effect. *E.g.*, *INS v. St. Cyr*, 533 U.S. 289, 316-17 (2001). There is no statute that authorizes either DOJ to retroactively apply new rules for cases pending in immigration court.

The application of the NPRM’s proposals to reopened cases, or cases with pending motions to reopen, would therefore be illegal if that application would qualify as “retroactive.” It would. “The inquiry into whether a statute operates retroactively demands a commonsense, functional judgment about ‘whether the new provision attaches new legal consequences to events completed before its enactment.’” *St. Cyr*, 533 U.S. at 317 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994)). The phrase “new legal consequences” encompasses any provision that would “take[ ] away or impair[ ] vested rights acquired under existing laws” or that would “create[ ] a new obligation, impose[ ] a new duty, or attach[ ] a new disability, in respect to transactions or considerations already past.” *Id.* at 321 (quoting *Landgraf*, 511 U.S. at 269)). Here, the vast majority of the proposed changes raise the bar to relief on motions to reopen or reconsider or in proceedings instituted after such a motion is granted. Applying the rule to pending motions or already-reopened proceedings would therefore attach new disabilities to past transactions—and would render the NPRM illegally retroactive.

### **E. Impermissible Staggered Rulemaking**

EOIR has also deprived interested parties of a meaningful chance to comment by engaging in multiple rulemakings and other policy changes that are interrelated without ever considering the combined effect of those rules on respondents and those who represent them. This NPRM interacts directly with, at a minimum, (i) EOIR, *Organization of the Executive Office for Immigration Review*, 85 Fed. Reg. 69,465 (Nov. 3, 2020); (ii) EOIR, *Procedures for Asylum and Withholding of Removal*, 85 Fed. Reg. 81,698 (Dec. 16, 2020); (iii) EOIR, *Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure*, 85 Fed. Reg. 81,588 (Dec. 16, 2020); and (iv) the contemporaneously issued EOIR, *Good Cause for a Continuance in Immigration Proceedings*, 85 Fed. Reg. 75,925 (Nov. 27, 2020). Yet of these closely related policy changes, only one portion of the appellate procedure rule is so much as mentioned in the NPRM—and even that reference is in a footnote intended to undermine a federal court. 85 Fed. Reg. at 75,948-49 n.12. Aside from that footnote, the agency has willfully blinded itself to the interplay between its rules.

### **F. Issued by an Official Lacking Authority**

The NPRM is signed by James R. McHenry III, the Director of EOIR. 85 Fed. Reg. at 75,959. The EOIR Director, however, does not have the statutory or regulatory authority to promulgate

proposed or final regulations; only the Attorney General does. *See* 8 U.S.C. § 1103(g)(2); 8 C.F.R. § 1003.0(b)(1); 28 C.F.R. § 0.115. The Attorney General may delegate additional authority to the EOIR Director. 8 C.F.R. § 1003.0(b)(1)(ix). The NPRM, however, contains no delegation of authority from Attorney General William Barr to McHenry. And we are unaware of any other preexisting delegation of authority that would allow McHenry to issue the NPRM. For this reason, too, the NPRM must be withdrawn in its entirety.

### **G. Insufficient Time for Public Comment**

Finally, EOIR has provided insufficient time for public comment, and it has done so without any attempted justification. The NPRM proposes drastic and sweeping changes for immigrants in proceedings—but the public has been given a mere 30 days to respond. Worse still, EOIR released *two* proposed rules effecting changes to immigration court proceedings on the same day and set a 30-day comment period for both. That is a recipe for minimizing both the number of comments received and the time available for interested organizations and practitioners to respond. The only possible justification for EOIR’s action—rushing through rules before the administration changes in January 2021—is arbitrary.

Even under normal circumstances, at least 60 days would be needed for the public to submit thorough, considered comments on a rule with such sweeping consequences. And these are not normal circumstances: The public is at an even greater disadvantage now due to the COVID-19 pandemic. The 30-day period has also proven insufficient in practice, as our experience highlights. At Tahirih all employees continue to perform mandatory telework, many while simultaneously caring for babies, toddlers, and/or school-age children. As a result, full-time Tahirih employees were expected to work no more than 32 hours per week during the comment period, with the expectations for part-time employees—one of whom was crucial to the drafting of these comments—reduced proportionally.

EOIR also released numerous final rules that apply to many respondents in the days before and after the NPRM was issued. EOIR’s view is therefore apparently that practitioners and other interested parties who are being inundated with uniformly negative (and illegal) policy changes can reasonably be expected to comment on two far-reaching sets of rules over the winter holiday period and in the middle of a pandemic. That is laughable.

Unsurprisingly, then, these comments do not—and cannot—represent Tahirih’s full response to the rule. Among other things, the agency’s actions have prevented us from (1) seeking or analyzing any evidence of which we were not already in possession that relates to the subject-matter of the rule; (2) researching or analyzing case law or secondary sources relevant to the subject matter of the rule; (3) reading most of the authorities cited by EOIR; (4) seeking meaningful input from our attorneys and accredited representatives, who would be directly affected by the NPRM’s proposals; (5) commenting in any way on the proposals concerning motions based on ineffective assistance of counsel; or (6) providing full comments on any provision of the rule. The effect on other commenters is doubtless similar. For this reason, too, the entire NPRM must be withdrawn.

### **III. Comments on Individual Proposals in the NPRM**

The individual proposals in the NPRM are, without exception, contrary to law, arbitrary, and/or lacking any legitimate purpose.



## A. Departure Bar

The modified version of the departure bar in the NPRM is arbitrary on its face. The NPRM claims that it will apply only to “volitional physical departures of an [individual] from the United States.” 85 Fed. Reg. at 75,945. That is, however, a flagrant mischaracterization of what the NPRM does. “Volition” means “a conscious or deliberate decision” or “the act of using the will.” Webster’s New World College Dictionary 1496 (3d ed. 1997). A “volitional” act is therefore one that is conscious, deliberate, or willful. A proposal to craft a departure bar that would apply only to “volitional” acts would therefore exclude all accidental departures as well as all departures forced or coerced by any person besides the individual at issue. The NPRM does no such thing. Rather, it would subject to a departure bar anyone who departs in any manner, volitional or not, except “under the auspices or direction of DHS.” 85 Fed. Reg. at 75,945. The NPRM’s supposed justification for its proposal thus has nothing at all to do with what EOIR has actually proposed—and the proposal is arbitrary as a result.

To be clear, this fundamental disconnect between what the NPRM does and what it says it does infects everything the agency says on the topic—as illustrated by the fact that EOIR misuses the word “volitional” or “volitionally” at least eighteen times in describing the proposal. 85 Fed. Reg. at 75,945-46. For instance, the disconnect belies the claim that the NPRM’s definition is consistent with circuit court cases on voluntary departures (85 Fed. Reg. at 75,946)—none of which even begins to suggest that (to take one example) someone transported out of the United States during a kidnapping could be properly subject to a departure bar. But the NPRM seeks to compel that result.

Further, even if the proposed regulations in the NPRM did limit itself to truly “volitional” departures, it would be contrary to controlling law. After all, Congress has never so much as intimated that a “departure following a motion to reopen should be a jurisdictional bar.” *Luna v. Holder*, 637 F.3d 85, 101 (2d Cir. 2011). And it is hornbook law that when Congress confers jurisdiction on an agency, the agency “may not decline to exercise it.” *Union Pac. R.R. v. Bhd. Of Locomotive Eng’rs & Trainmen Gen. Comm. of Adjustment*, 558 U.S. 67, 71 (2009).

The NPRM also fails to provide a non-arbitrary justification for overruling *Matter of Arrabelly*, 25 I. & N. Dec. 771 (BIA 2012). The NPRM notably fails to mention—much less grapple with—the key piece of reasoning in *Arrabelly*: that when DHS grants advance notice of parole to someone in the United States, it “is well aware that” the only purpose of the parole “is to facilitate foreign travel.” *Id.* at 778. It is, in other words, a *DHS-sanctioned* departure. That is the “qualitative[ ] differen[ce]” between leaving on an advance grant of parole and other departures that the NPRM pretends it does not understand.<sup>28</sup> 85 Fed. Reg. at 75,947.

Further, if DHS grants someone express permission to leave and reenter the United States, there is no sound reason to trigger the departure bar. The NPRM does not even attempt to supply such a reason, because none exists. *See* 85 Fed. Reg. at 75,947. It would, in fact, be absurd to argue that an individual who left the United States with express DHS permission to reenter must be treated as triggering a bar on reentry. That cannot have been Congress’s intent in passing 8 U.S.C. § 1227(a)(1)(B), and contrary to the NPRM, the BIA said nothing at all about advance parole in *Matter of Lemus-Losa*, 25, I & N Dec. 734 (BIA 2012). And in *Matter of R-D-*, 24 I. & N. Dec. 221,

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<sup>28</sup> The assertion that parole “is never guaranteed” (85 Fed. Reg. at 75,947) conveniently ignores that *Arrabelly* exclusively concerns situations in which parole has already been granted.

225 (BIA 2007), the BIA held that a “departure” had occurred in part by distinguishing a situation involving advance parole.

## **B. Dramatic Expansion and Misuse of the Fugitive Disentitlement Doctrine**

The NPRM next proposes to require disclosure in a motion to reopen or reconsider of, and count as an adverse failure, every failure to surrender to DHS. 85 Fed. Reg. at 75,947. That proposal repeats a telling error that infects every recent EOIR NPRM: It assumes without evidence, and in this case without even acknowledging the assumption, that *every* failure to surrender is “a ‘deliberate flouting of the immigration laws.’” *Id.* (quoting *Matter of Barocio*, 19 I. & N. Dec. 255 (BIA 1985)). That is obviously and undeniably false: A failure to surrender could occur because the individual never received notice for any number of reasons beyond the individual’s control, from the mundane (mail delays) to the serious (the control of documents by abusive partners in the United States).<sup>29</sup> And the application of the “fugitive disentitlement” doctrine to circumstances where a notice has not been received would be both inequitable and directly contrary to the teachings of the federal courts. This proposal, too, is therefore arbitrary and must be withdrawn.

## **C. Illegal General Standards Designed to Deport as Many Survivors of Gender-based Violence and Other Individuals as Possible**

The NPRM’s general standards for motions to reopen or reconsider are nothing more than parodies of due process that reflect an unalloyed determination to deport as many respondents as possible as quickly as possible. *First*, the NPRM proposes a rule under which “factual assertions” in support of a motion to reopen or reconsider “should not be accepted as true” if they “are contradicted, unsupported, conclusory, ambiguous, or otherwise unreliable.” 85 Fed. Reg. at 75,950; *see also id.* at 75,956. That rule is contrary to law, because it undermines the entire statutory role of motions to reopen. Congress has specified that such motions, by definition, “state . . . new facts that will be proven at a hearing to be held if the motion is granted.” 8 U.S.C. § 1229a(c)(7)(A). It therefore follows that *all* such motions will, almost by necessity, either “contradict[ ]” or be “unsupported by” other evidence in the record. 85 Fed. Reg. at 75,956. The NPRM’s proposal therefore renders the relevant provisions of the INA entirely nugatory. It accordingly cannot stand.

The proposal is also contrary to law in at least two other ways. Insofar as it applies to affidavits by a respondent, the statement that evidence in support of a motion to reopen may not be credited if it is unsupported by other record evidence also flatly violates 8 U.S.C. § 1158(b)(1)(B)(ii). And the rule’s statement that evidence can be disregarded because it is hearsay conflicts with 8 C.F.R. § 1240.7(a).

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<sup>29</sup> Tahirih has repeatedly explained to EOIR how perpetrators of intimate partner violence and human trafficking notoriously and deliberately confiscate survivors’ official documents including immigration notices, in order to control and punish them by interfering with their legal rights. *See, eg.*: <https://1t1ls613brjl37btzk4eg60v-wpengine.netdna-ssl.com/wp-content/uploads/2020/10/EOIR-comments-10.22.2020.pdf>; <https://www.tahirih.org/wp-content/uploads/2020/10/Tahirih-Comments-on-Proposed-Changes-to-Appellate-Procedures.pdf>; [https://www.tahirih.org/wp-content/uploads/2020/07/Attachment1\\_Tahirih-comment-on-anti-asylum-NPRM.pdf](https://www.tahirih.org/wp-content/uploads/2020/07/Attachment1_Tahirih-comment-on-anti-asylum-NPRM.pdf); <https://www.tahirih.org/wp-content/uploads/2019/09/Tahirih-Comments-9.23.19-Expedited-Removal-Rule.pdf>

These restrictions are also uniformly arbitrary. As an initial and dispositive matter, the NPRM does not pretend to advance a policy justification for any of the restrictions in proposed 8 C.F.R. § 1003.48(b). *See* 85 Fed. Reg. at 75,949-50. Rather, the NPRM simply asserts EOIR's view that the restrictions are consistent with law. *See id.* But as shown above, that assertion is false. And even if it were correct, the agency would still have to advance some non-arbitrary rationale for the restrictions, which it has not done.

Moreover, the proposed restrictions fail to take account of the realities faced by respondents. In cases where changed country conditions are at issue, for example, asylum seekers *cannot* testify to firsthand knowledge of the conditions because they are in the United States. As a result, the BIA has squarely held that hearsay evidence is admissible in removal proceedings so long as it is "probative and its use fundamentally fair" to the respondent. *Matter of Grijalva*, 19 I. & N. Dec. 713, 722 (BIA 1988) (internal quotation marks omitted). The NPRM arbitrarily fails to acknowledge its departure from *Grijalva*, much less explain that departure.

The NPRM's proposal to bar motions to reopen on the basis of applications for relief pending before other agencies (*see* 85 Fed. Reg. at 75,948) is equally arbitrary. As an initial matter, that rule interacts with (1) EOIR's contemporaneous proposal to bar most continuances based on collateral applications for relief, (2) its final rule removing the BIA's power to *sua sponte* reopen cases, and (3) its final rule banning administrative closure on the basis of most applications for relief pending before other agencies. By breaking the effect on those with pending applications for relief before USCIS into four pieces, EOIR has impermissibly staggered closely related rulemakings and has attempted to absolve itself from justifying the consequences of its proposals. To be clear, those consequences will include the waste of EOIR's scarce adjudication resources on removal proceedings that are unnecessary because the respondent will have a legal right to remain in the United States. The consequences will also extend to USCIS, adding adjudicative burdens such as new waiver requests, the Department of State who must process visa applications and conduct interviews, and Customs and Border Protection who will have to conduct additional screenings at Ports of Entry when those granted relief after removal seek reentry - assuming they have the resources to do so.

The consequences of the NPRM will include the removal of many survivors of gender-based violence such as our clients, to face further abuse and persecution—though EOIR has never so much as acknowledged that effect in any of its rules. And EOIR has not acknowledged that effect because it has no rational, non-arbitrary justification for using its resources to return to danger traumatized individuals who have bona fide applications for relief pending before other agencies. Nor does it have any rational, non-arbitrary justification for using USCIS's unconscionable delays as a lever to remove individuals from the United States who would already be entitled to remain in this country if USCIS acted promptly on its applications.

In fact, the NPRM contains no purported justification whatsoever for its proposal concerning collateral applications such as U and T visas. The agency once again asserts that it believes it has the authority to enact the proposal. 85 Fed. Reg. at 75,948. But the ability to do something does not mean the action is non-arbitrary. That absence reflects the lack of any non-arbitrary justification for the proposal.<sup>30</sup>

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<sup>30</sup> The NPRM's implied mention of jurisdictional concerns (85 Fed. Reg. at 75,948) is belied by the fact that, in its contemporaneous NPRM on continuances, EOIR has proposed to require immigration judges to adjudicate petitions for relief over which they lack jurisdiction.

#### **D. Limited Scope Motions to Reopen**

EOIR's proposal to limit the scope of proceedings after a motion to reopen is granted (85 Fed. Reg. at 75,953) is based on another in the series of unfounded assumptions about respondents that belie an institutional animosity to non-citizens. The agency assumes—without any evidence—that respondents who present multiple issues to an immigration judge following a motion to remand are simply gaming the system. That is false. Survivors of gender-based violence may become eligible for relief such as a VAWA Self-Petition or a U visa, if they become the victim of violence following the grant of a motion. Yet, the NPRM would render the respondent barred from having this claim heard. And with regard to establishing availability of evidence, as EOIR well knows from our prior comments, the process of retrieving evidence from a respondent's home country is long, arduous, and ongoing—especially where the evidence is in the control of an abusive partner. The same is true of evidence controlled by an abuser or trafficker present in the United States. *See* n.29, *supra*. Finally, the agency's unfounded assumption also ignores, among other things, the fact that individuals who present multiple grounds for reopening routinely *save* EOIR adjudication time by then presenting only the strongest grounds for relief in reopened proceedings. The NPRM's proposal is thus based on nothing but bias and must accordingly be withdrawn.

#### **E. Effective Bar on Stays of Removal**

The NPRM's proposed changes concerning stays of removal (85 Fed. Reg. at 75,953-54) will make it effectively impossible for any respondent to receive a timely stay of removal from EOIR. In essence, to receive a stay of removal under the NPRM, a respondent would have to: (1) request a stay from DHS and wait for a denial or for five days to elapse; (2) file the relevant form and significant filing fee; (3) accompany that form with a lengthy written motion in support of the stay; (4) submit a contemporaneous motion to reopen or reconsider (unless one is already on file); (5) provide unspecified proof of undefined "diligence"; (6) serve all papers on DHS; and (7) wait three days for DHS's position on the motion. The time limits alone make this mechanism useless; by that point, given the irreparable injury requirement for receiving a stay, anyone alerted to the need for a stay of removal would already have been removed. The time provisions of the proposal therefore completely undercut the purpose of a stay. And the second time limit, concerning DHS's position, is doubly arbitrary, because at that point, the respondent already knows that DHS would not timely consent to a stay.

Even if the timing elements were justifiable—and they are not—the remaining elements would not be. Take the case of a detained, *pro se* respondent. There is no reasonable way to expect that respondent to take the steps in the NPRM. Even counsel could not reasonably be expected to collect and file all of the paperwork above on effectively no notice to prevent a removal. But the NPRM, of course, does not even acknowledge as much, because it never speaks to the obvious effects of its proposal on respondents. Even if a respondent were able to request a stay of removal from DHS, the NPRM also ignores the fact that a denial from DHS is the norm— even for those who USCIS has deemed *prima facie* eligible for collateral relief. According to a 2019 ICE factsheet,<sup>31</sup> ICE's previous

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<sup>31</sup> *See Revision of Stay of Removal Request Reviews for U Visa Petitioners*, United States Dep't of Homeland Security, Immigr. and Customs Enforcement (Aug. 2, 2019),

guidance governing stays of removal is no longer in effect, baselessly claiming that removing U visa petitioners would not impact law enforcement or the petitioner. One of our clients with a very strong U visa case was removed by ICE to Mexico and her abuser followed her there. She is constantly vigilant in case he finds her and is terrified that he will punish her with impunity for trying to escape.

The preamble to the NPRM does not even mention some of the new requirements imposed for stay requests. *See id.* at 75,958 (requiring a “written motion “stating the complete case history and all relevant facts” and, in some cases, additional evidence, as well as a showing of diligence); *id.* at 75,953-54 (failing to mention either requirement). And it appears to misrepresent still another provision of the proposed regulatory text by suggesting that an opposed motion for a stay may never be granted. *Compare id.* at 75,958 (motion can be granted only if the opposing party joins or consents to the motion or *is given* three days to respond); *with id.* at 75,954 (motion can be granted only if opposition “affirmatively consents, joins the motion, or *fails to respond*). It goes without saying that the NPRM does not provide a non-arbitrary justification for any of these requirements.

Finally, in the context of respondents who are asylum seekers, the NPRM violates the duty of *non-refoulement* that springs from the Refugee Convention and has been codified in U.S. law. Removing those individuals to a country where they are likely to be persecuted is, by definition, *refoulement*. The NPRM, however, treats *removal* as the default, even when an asylum seeker has presented evidence of changed country conditions. By doing so, the NPRM will—likely every other rule that EOIR has enacted in the last year—inevitably result in the needless *refoulement* of those with meritorious claims like our clients Koumba, Mariam, and many other survivors of atrocities. Once again, the agency blithely ignores this inevitable consequence. For that reason, too, the NPRM must be withdrawn.

#### **IV. The NPRM Violates Congressional Intent in Enacting Survivor-Based Relief**

A bipartisan Congress deliberately created remedies such as the U and T visas and VAWA Self-Petitions to protect survivors of gender-based and other violence. In doing so, it also sought to prevent abusers from exploiting our immigration system to manipulate and threaten survivors, and to enhance public safety by encouraging survivors to report crime. The NPRM, however, facilitates the swift and arbitrary removal of survivors before they even have a chance to secure these remedies. In this way, the NPRM not only punishes survivors, but rewards perpetrators - including persecutors and those who follow survivors home to retaliate against them for coming forward. And survivors will now have good reason to believe their abusers when they threaten to have them deported. They will wait in limbo with removal orders, deterring them from seeking much needed medical care, childcare, and other services. Not only does the NPRM curtail due process, but it puts survivors in harm’s way. These are precisely the results Congress sought to avoid in creating these forms of relief.<sup>32</sup> The NPRM provides no justification for running afoul of Congressional intent.

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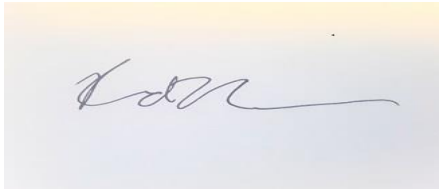
<https://www.ice.gov/factsheets/revision-stay-removal-request-reviews-u-visa-petitioners#wcm-survey-target-id>

<sup>32</sup> *See* 146 Cong. Rec. S10185 (2000) (statement of Sen. Patrick Leahy, stating that the U visa “ma[d]e it easier for abused women and their children to become lawful permanent residents” and ensured that “battered immigrant women should not have to choose to stay with their abusers in order to stay in the United States.”). *See also* 146 Cong. Rec. S8571 (2000) (statement of Sen. Paul Sarbanes likewise explaining that the Violence Against Women Act of 1994 “will also make it easier for battered immigrant women to leave their abusers without fear of deportation” (emphasis added). And

## V. Conclusion

As explained in detail above, the NPRM is arbitrary, unlawful, and particularly harmful to survivors of gender-based violence such as our clients. The NPRM must be withdrawn in its entirety.

Sincerely,



Richard Caldarone  
Litigation Counsel



Irena Sullivan  
Senior Immigration Policy Counsel

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in 2013, Sen. Amy Klobuchar noted the importance of U visas from her perspective as a former prosecutor, describing numerous cases where the perpetrator threatened to have the victim deported if she sought help from law enforcement. 159 Cong. Rec. S497, 498 (2013). Finally, Congress explained that “providing battered immigrant women and children who were experiencing domestic violence at home with protection against deportation . . . frees them to cooperate with law enforcement and prosecutors in criminal cases brought against their abusers.” Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1502(a)(1)(2) (Oct. 28, 2000). (emphasis added). *See also* New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. 53,014 (2007).