SAN FRANCISCO
1458 Howard Street
San Francisco, CA 94103

WASHINGTON, D.C.
1015 15th Street, NW
Suite 600
Washington, D.C. 20005

SAN ANTONIO
500 Sixth Street
Suite 204
San Antonio, TX 78215

AUSTIN
6633 East Hwy 290
Suite 102
Austin, TX 78723

ilrc@ilrc.org
www.ilrc.org

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Lauren Alder Reid, Assistant Director
Office of Policy
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 2616
Falls Church, VA 22041

Submitted via http://www.regulations.gov

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

Dear Assistant Director Reid,

The Immigrant Legal Resource Center (ILRC) submits this comment on the proposed rule, issued by the U.S. Department of Justice, Proposed Rules on Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, RIN 1125-AA96; EOIR Docket No. 19-0022; A.G. Order No. 4800-2020 (August 26, 2020) and asks that these proposed rules be withdrawn.

ILRC is a national non-profit organization that works to advance immigrant rights through advocacy, educational materials, and legal trainings. Since 1979, the ILRC's mission has been to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. We serve the individuals and community of organizations that are most impacted by this rule.

The ILRC builds the capacity of immigration advocates to assist immigrants in their removal defense cases in order to provide more immigrants with a meaningful chance at justice. We support immigration legal service providers nationwide, serving hundreds of organizations and practitioners that work with immigrants. The ILRC provides technical assistance on immigration court procedure through our webinars and our Attorney of the Day service, in which we work with advocates on their specific cases and questions. As experts in the field, the ILRC publishes *Removal Defense: Defending Immigrants in Immigration Court*, a manual which provides a thorough guide to the immigration court process with practice tips.

The Department's proposed rule is an unlawful attempt to curb Immigration Judges' authority, limit case review, and drastically restrict due process for immigrants. The rule undermines the appellate process and curtails the efficient adjudication of the courts.

I. Time to Comment

This rule marks a drastic departure from current immigration court practice. As such, a 30-day comment period, during a pandemic, does not provide a meaningful opportunity to provide comments. These comments do not represent the full comments of ILRC. Should the comment period be extended to appropriately reflect the breadth of the new rule, we would have more input. The Department has provided no reasonable explanation for the short timeframe given the broad-sweeping nature of the rule, the lack of urgency, and the current health crisis.

II. The Proposed "Quality Assurance" Provision Provides an Incentive for Immigration Judges to Seek Review of Remand Orders, Politicizes the Process, and Ignores the Heightened Need for Due Process Protections in Immigration Proceedings Compared to Other Administrative Proceedings.

A. The Proposed Rule Would Create an Incentive for Immigration Judges to Seek Review of Remand Orders by the Director, Thus Contributing to the Politicization of Immigration Adjudications.

The Proposed Rule creates a new and unnecessary review process that allows immigration judges to seek alternative review of remand orders by a political appointee, outside of the traditional Board of Immigration Appeals ("Board" or "BIA") process: "To ensure the quality of Board decision-making, the Department of Justice ("the Department") proposes to allow immigration judges to certify BIA decisions reopening or remanding proceedings for further review by the Director in situations in which the immigration judge alleges that the BIA made an error."[1]

As the Department recognizes, "an erroneous remand by the BIA inappropriately affects an immigration judge's performance evaluation by affecting that judge's remand rate, which is a component of the judge's performance evaluation."[2] While the Department states that the Director will act as a "neutral arbiter between the immigration judge and the Board,"[3] it is incomprehensible that the Director, who is directly appointed by the Attorney General, would be expected to serve as a neutral arbiter. In recognition of the Director's purely managerial role, the current regulations *specifically prohibit* the Director from adjudicating cases. 8 C.F.R. § 1003.0(c).

As Immigration Judge Ashley Tabaddor testified before the House Judiciary's Subcommittee on Immigration and Citizenship:

> The Director is the senior official within EOIR who is responsible for the administration and management of all EOIR components, including the Immigration Court. The position entails regular ex-parte communications with high-level DOJ and DHS officials and is incompatible with serving in an adjudicatory capacity over any pending cases before EOIR. Accordingly, there is no statutory language that requires the "Director" of EOIR to even be an attorney. The regulation only requires that "[w]ithin the Department of Justice, there shall be an Executive Office for Immigration Review (EOIR), headed by a Director who is appointed by the Attorney General." 8 C.F.R. § 1003.0(a). This is in sharp contrast to the language describing the Board of Immigration Appeals, which states that the "Board members shall be attorneys appointed by the Attorney General." 8 C.F.R. § 1003.1(a)(1). Similarly, the term "immigration judge" is defined by statute as "an attorney whom the Attorney General appoints as an administrative judge." 8 U.S.C. § 1101(b)(4).

[1] 85 FR at 52502.
[2] *Id.*
[3] *Id.*

The Director's lack of adjudicatory power, consistent with the statutory scheme of proceedings before EOIR, was codified in 2007 in 8 C.F.R. § 1003.0(c), which stated that *'[t]he Director shall have no authority to adjudicate cases arising under the Act or regulations and shall not direct the result of an adjudication assigned to the [BIA], an immigration judge, the Chief Administrative Hearing Officer, or an Administrative Law Judge.*' With the promulgation of the regulation, the Director of EOIR was expressly prohibited from interfering in the decision-making of BIA members and immigration judges and from adjudicating cases arising under the INA."[4]

As Immigration Judge Tabaddor pointed out in her testimony, the Director is neither qualified nor properly positioned to "clarify" decisions by the Board.

The provision is so broad that an immigration judge could seek certification for any disagreement with the Board's decision. The regulation 8 CFR 1003.1(k) would allow certification by an immigration judge (IJ) to the Director if the BIA's remand order is "clearly contrary to a provision of the Act, any other immigration law or statute, any applicable regulation, or a published, binding precedent" or the decision is "vague, ambiguous, internally inconsistent, or otherwise did not resolve the basis for the appeal." This is nothing more than permission to seek reversal of a BIA remand order that the IJ disagrees with or which the IJ wishes to take off the court's docket for any reason whatsoever, including in order to boost his or her performance evaluation. If an immigration judge believes that the BIA's decision is contrary to law or "internally inconsistent," it is the existing adjudicatory process, not review by a government administrator, that would help clarify the BIA's reasoning. In fact, the very purpose of an appellate review process is to provide a critical check on practices and interpretations of frontline judges. By providing IJs an opportunity to override an appellate body that disagrees, the proposed rule would curtail the very structure of the adjudicatory framework. This will have a heavy, one-sided impact on respondents who have been granted an opportunity for a hearing before an immigration judge, thus further eroding confidence in EOIR's ability to serve as a neutral decisionmaker.

The Hon. Bernadette D'Souza of the Civil District Court in New Orleans recently stated:

> Due process by adjudicatory tribunals requires case by case adjudication in which a neutral decision maker, using his/her independent judgment, renders a decision based entirely on the record before him/her, the facts of the case, the submissions of the parties, and the governing law and regulations, without direction from above or consideration of outside (ex parte) influences. The current structure of the Immigration Courts, however, presents a systemic problem to neutral adjudication, as the structure allows: (1) a supervisory role regarding the content of Immigration Judges' rulings and decisions, as a factor in their performance evaluations, and (2) participation in the adjudicatory process by policy makers who are, in turn, answerable to one of the parties, an executive agency of the Government.[5]

The proposed rule would only weaken the neutral adjudicatory function of the immigration courts. The Director is not qualified to interpret BIA decisions, nor in the position of a "neutral arbiter." At the same time, it would severely undermine the immigration judges' and the BIA's roles as independent, quasi-judicial decisionmakers.

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[4] Testimony of Hon. Ashley Tabaddor Before House Judiciary Subcommittee on Immigration and Citizenship, Jan. 29, 2020 (emphasis in original) (available at: https://docs.house.gov/meetings/JU/JU01/20200129/110402/HHRG-116-JU01-Wstate-TabaddorA-20200129.pdf).

[5] Letter to Rep. Zoe Lofgren, Chair of Immigration Subcommittee of House Judiciary Committee, from Hon. Bernadette D'Souza, President, National Association of Women Judges (Feb. 28, 2020) (available at: https://immigrationcourtside.com/2020/03/10/article-i-national-association-of-women-judges-nawj-advocates-independent-u-s-immigration-court/)

B. *The Department's Comparison of EOIR to Other Federal Agencies Ignores the Unique Impact that EOIR's Decisions Have on Individuals' Life and Liberty Interests, Requiring More Rigorous Due Process Protections Than Other Areas of Administrative Law.*

The Department posits that EOIR should, like other agencies, such as the Social Security Administration, have a "quality assurance process" whereby an immigration judge can seek "further clarification or further explication" where the BIA, in the judge's opinion, made a "specific error."[6] This comparison ignores the unique difference between EOIR and other federal agencies.

The social security program is a "noncontractual interest," and there is no vested interest in social security benefits.[7] By contrast, the Supreme Court has long recognized that deportation is a particularly severe "penalty," more akin to a criminal, rather than a civil, sanction.[8] Even though removal proceedings are civil in nature,[9] the harsh consequences of deportation and detention that arise from removal proceedings make the process much more consequential than other administrative processes that are labeled "civil."[10]

"The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication."[11] Given the harsh consequence of deportation, which oftentimes affects respondents' life and liberty interests, the procedural protections afforded through the adjudicatory process, without interference from politically-influenced appointees, is of paramount importance. The Department should not, therefore, make false comparisons with different areas of law as a justification to implement a process for immigration courts to certify cases to the Director for clarification.

III. Allowing the BIA to Remand a Case to the Immigration Judge Based on the Results of DHS Investigations, While Disallowing Similar Remands Based on Results of "Investigations" Conducted by Respondents, Is Flagrantly Biased in Favor of DHS.

The proposed rule states: "If [the Department of Homeland Security] DHS obtains relevant information as a result of the identity, law enforcement, or security investigations or examinations, including civil or criminal investigations of immigration fraud, DHS may move the Board to remand the record to the immigration judge for consideration of whether, in view of the new information, any pending applications for immigration relief or protection should be denied, either on grounds of eligibility or, where applicable, as a matter of discretion."[12] At the same time, the rule would disallow respondents to do the same if results of their own "investigations" reveal information tending to support their claims for relief or rebut findings such as immigration fraud. The rule makes no attempt to justify this flagrantly biased exception to the proposed no-remand rule, thus leading to the conclusion that the rule has no purpose other than to create a one-sided advantage to DHS where it delays the discovery of previously available evidence.

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[6] 85 FR at 52496, 52502.
[7] *Flemming v. Nestor*, 363 U.S. 603, 610 (1960).
[8] *Fong Yue Ting v. United States,* 149 U.S. 698, 740, 13 S.Ct. 1016, 37 L.Ed. 905 (1893).
[9] *See INS v. Lopez–Mendoza,* 468 U.S. 1032, 1038 (1984).
[10] *Padilla v. Kentucky*, 559 U.S. 356, 365–66 (2010) (deportation is "uniquely difficult to classify").
[11] *Goldberg v. Kelly*, 397 U.S. 254, 262-63 (1970); *see also Mathews v. Eldridge*, 424 U.S. 319 (1976) (weighing interest in the benefit, the probability of erroneous deprivation under various procedural regimes, and the government's interest in efficiency and minimal administrative burden); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).
[12] 8 CFR § 1003.1(d)(6)(iii) (proposed) (emphasis added); *see also* 8 CFR § 1003.1(d)(7)(v)(B) (proposed); 85 FR at 52499; 85 FR at 52499 n. 16.

Allowing DHS to submit such evidence while disallowing similar evidence by respondents is a clear violation of EOIR's role as a neutral arbiter, favoring DHS over respondents. The provision would, therefore, violate the immigration court's and the BIA's duties of impartiality and independent judgment.[13]

While results from identity, law enforcement, or security checks can reveal information not previously available to the agency, the results of security *investigations* are generally available during the course of proceedings before the immigration judge. Incredibly, the rule neither requires that the newly-discovered evidence be material nor previously unavailable, thus allowing DHS to decide whether to conduct further investigations based on the results of proceedings before the immigration judge. Not only is this unfair to respondents who would not be afforded this same right, but also, it would defeat the provision's primary purpose of promoting "prompt adjudication of cases."[14]

At a minimum, the rule should require DHS to prove that the results of investigations are material and were previously unavailable in addition to allowing the same opportunity for respondents. There is simply no justification for allowing DHS to seek remand based on evidence that was previously discoverable. The Department expresses concern that motions to remand by respondents encourage "gamesmanship on appeal—e.g., a respondent whose application is denied might seek additional evidence to present on appeal in order to procure a second attempt at establishing eligibility, even though such evidence should have been presented in the first instance."[15] But by allowing DHS to seek remand based on newly-discovered evidence that may have been previously available, the Department fails to recognize that DHS, which is an adversarial party in removal proceedings, is not immune from "gamesmanship." While alienage and removability are issues affecting EOIR's jurisdiction, newly-discovered evidence of "fraud" is relevant to the *merits* of a claim. There is no justification for allowing DHS to submit such evidence after proceedings before the immigration court have been completed, where the evidence is either immaterial or was previously available.

IV. The Requirement that Respondents Complete Biometrics Within 90 Days of Board Notice Will Unfairly Result in Countless Applications Being Deemed Abandoned Due to Lack of Timely Notice From DHS, as the Provision Contains No Timeframe for DHS to Effectuate Such Communications With Respondents.

The proposed rule seeks to "authorize the BIA to deem an application abandoned when the applicant fails, after being notified by DHS, to comply with the requisite procedures for DHS to complete the identity, law enforcement, or security investigations or examinations within 90 days of the BIA's notice that the case is being placed on hold."[16] The regulation will read as follows: "If a non-detained alien fails to comply with necessary procedures for collecting biometrics or other biographical information within 90 days of the Board's notice under paragraph (d)(6)(ii) of this section, the Board shall deem the application abandoned unless the alien shows good cause before the 90-day period has elapsed, in which case the alien should be given no more than an additional 30 days to comply with the procedures."[17]

This provision has the very real potential of effectively stripping numerous noncitizens of their right to appeal. It will likely result in large numbers of applications being deemed abandoned due to DHS's failure to provide reasonable notice to respondents regarding the actions required of them. Moreover, it will create significant confusion for respondents who may not receive a biometrics notice from DHS after being informed by the BIA that they will.

[13] 8 CFR §§ 1003.1(d)(1), 1003.10(b).
[14] 85 FR at 52499.
[15] *Id.* at 52501.
[16] 85 FR at 52499.
[17] 8 CFR § 1003.1(d)(iii) (proposed).

While the provision tasks DHS with notifying respondents about the "additional steps" needed to complete or update the identity, law enforcement, or security investigations or examinations, it provides no timeframe by when DHS must provide such notice. As such, it is entirely conceivable that a respondent would miss the 90-day deadline to complete biometrics due to a delay by DHS in informing the respondent of the biometrics requirement. The proposed rule also states that unless DHS specifically provides notice to the BIA that such information is no longer necessary, the Board will notify the respondent that DHS will send a notice.[18] Particularly given that no avenue is being provided to contact DHS directly to obtain the information, the chance that respondents will be unsure if biometrics are required is high. This undermines the review process by vesting DHS with the ability to strip individuals of their right to review through untimely notification of biometrics requirements.

V. The Proposed Elimination of Sua Sponte Authority of the Immigration Courts and the BIA to Reopen Proceedings is Unnecessary and Based on Deeply Flawed Reasoning that Would Remove an Important Exception to Time and Numerical Limitations.

Immigration procedure recognizes there are some situations where reopening is warranted although noncitizens may not be able to meet certain time and numerical requirements for motions to reopen. The Department improperly proposes to eliminate the immigration courts' and the BIA's sua sponte authority to reopen proceedings. The Department gives three primary reasons for this sweeping change, all of which fail to sufficiently justify the rule.[19]

First, the Department states that the BIA has rarely used "genuine sua sponte authority," meaning reopening not in response to a party's motion.[20] This reasoning fails to recognize that motions to reopen requesting the exercise of an immigration judge's or the BIA's sua sponte authority are almost always accompanied by other bases for reopening. A party will generally *alternatively* request sua sponte reopening based on the new evidence or information provided with the motion. The immigration court and the BIA would otherwise be unaware of the relevant developments that would support reopening. Being informed of the relevant information with a request to exercise sua sponte authority does not make a motion to reopen improper. Nor does it justify removing the authority altogether, especially where the agency already only exercises such authority in "exceptional situations."[21]

Second, the Department states that "there is no right by a respondent to the exercise of sua sponte authority; to the contrary, the Board maintains 'unfettered discretion to reopen, or not, sua sponte.'"[22] There is simply no logical connection between this point and eliminating the Board's sua sponte authority. The fact that respondents do not have a *right* to sua sponte reopening of proceedings is not a valid justification for removing the authority altogether. Sua sponte reopening is meant as a mechanism to address only "exceptional situations" and it is well-established that there is no right to sua sponte reopening. But it is an important tool for immigration judges and the Board to avoid grave miscarriages of justice.

Third, the Department reasons that "the regulations already contemplate a mechanism for overcoming time and numerical limitations in order to reopen cases, thus making sua sponte authority unnecessary, as the time or numerical limitations that would otherwise prompt a request for sua sponte reopening do not apply to joint motions

[18] 8 CFR § 1003.1(d)(ii) (proposed).
[19] See 8 CFR §§ 1003.2(a), 1003.23(b)(1).
[20] 85 FR at 52505.
[21] *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997).
[22] 85 FR at 52505 (quoting *Malukas v. Barr*, 940 F.3d 968, 970 (7th Cir. 2019)).

to reopen."[23] DHS is an adversarial party in removal proceedings. By justifying the removal of sua sponte authority on the fact that joint motions to reopen would still be allowed, the Department misses this point. As the BIA has noted, giving DHS such "veto" power over what are rightfully the agency's decisions, is fundamentally contrary to the adversarial process.[24]

The removal of the BIA's and immigration courts' sua sponte authority would eliminate the main mechanism currently available to remedy injustices as a result of material and previously unavailable evidence. Even if a Board Member or immigration judge sees that there is a good reason to reopen a case or that failing to do so would result in manifest injustice to a respondent, this rule would strip them of the authority to reopen the proceedings unless DHS, the very party seeking to remove the respondent, were to join in a motion to reopen. This rule, if promulgated, would unnecessarily remove an important mechanism by which the agency can mend gross miscarriages of justice.

VI. Giving the BIA Authority to Make *De Novo* Determinations Regarding Voluntary Departure Ignores the Unique Position of an Immigration Judge to Make Findings of Fact and Credibility.

By allowing the BIA to make a *de novo* determination regarding a respondent's voluntary departure application, the proposed rule allows the BIA to make a factual decision without the advantage of a trial judge's perspective.[25] This flies in the face of the well-recognized principle that immigration judges are in the unique position to determine respondents' credibility based on live observation of demeanor, expression, and cadence.[26] Such observations can also have a heavy influence on an adjudicator's findings regarding good moral character and the exercise of discretion. Allowing the Board to rely on the record below to make a *de novo* determination regarding a respondent's voluntary departure application, which is discretionary and requires a showing of good moral character, fails to recognize the unique role of immigration judges to make findings of fact based on observation of live testimony.

Additionally, the Department's justification for the new rule fails to consider that in cases where an immigration judge has granted some other relief or protection to the respondent, and where DHS has appealed the decision to the BIA, respondents do not generally separately file an appeal to preserve the issue of voluntary departure. Rather, if the BIA reverses the immigration judge's decision on the relief initially granted, the BIA will remand the matter for a determination regarding voluntary departure. Under the new rule, respondents will need to raise the issue of voluntary departure even if the immigration judge did not reach a decision on the application. Again, this will defeat the Department's goal of avoiding wasting resources and prolonging proceedings.[27]

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[23] 85 FR 52505.

[24] *Matter of Lamus-Pava*, 25 I&N Dec. 61, 65 (BIA 2009); *see also Matter of Hashmi*, 24 I&N Dec. 785, 790-91 (BIA 2009).

[25] 8 CFR§§ 1003.1(d)(7)(iv) (proposed); 1240.26(k) (proposed).

[26] *Matter of A-S-*, 21 I&N Dec. 1106, 1111 (BIA 1998) ("the Immigration Judge is in the unique position of witnessing the live testimony of the alien at the hearing") (citing *Matter of V-T-S-*, 21 I&N Dec. 792, 796 (BIA 1997); *Sarvia-Quintanilla v. INS*, 767 F.2d 1387, 1395 (9th Cir. 1985)).

[27] The Department's explanation for the rule is that "because appeals raising the issue of voluntary departure will proffer a respondent's eligibility for that relief before the immigration court (or else the issue will be deemed waived); and because the record will otherwise contain evidence of such eligibility (or else the opportunity to present such evidence will be deemed waived), a remand solely to consider that issue is a waste of resources and places wholly unnecessary burdens on immigration courts. In short, there is no operational reason that the BIA cannot resolve a request for voluntary departure rather than remanding the case to an immigration judge, prolonging the case unnecessarily, and inviting an additional appeal if the respondent disagrees with the immigration judge's determination." 85 FR at 52500. This reasoning ignores how the consideration of a voluntary departure application plays out in practice. If a respondent prevails on an application for relief or protection, an immigration judge will not generally reach the issue of voluntary departure. The respondent would not, therefore file an appeal of the immigration judge's decision. Under the new rule, respondents will need to file an appeal in order to

VII. The Proposed Rule's Broad Interpretation of the Term "Undisputed Facts" Will Drastically Increase the Number of Appeals Filed, By Encouraging the Party That Prevails Before the Immigration Judge to File an Appeal Simply to Preserve an Issue for Appeal.

The proposed rule allows the BIA to take administrative notice of "undisputed facts" and to affirm the IJ's decision "on any basis supported by the record, including a basis supported by facts that are not reasonably subject to dispute such as undisputed facts in the record."[28] The rule allows the BIA to affirm decisions on any basis, which includes "facts that are not disputed."[29] As with *de novo* voluntary departure determinations, this will only encourage parties to appeal an immigration judge's decision, even when they prevail, to establish a fact is disputed. Without doing so, the party will leave themselves vulnerable to a Board's decision that relies on findings in contention. As such, the rule would encourage a "kitchen sink" approach to appeals by both parties, seeking to avoid a finding by the BIA certain "facts" are "undisputed."

Following is an example to illustrate this point: Joseph applies for asylum before an immigration judge based on his past experiences with the police in his country. Joseph's asylum claim is also based on his fear that he will be mistreated in the future if forced to return to his country. The immigration judge denies Joseph's claim of past persecution but grants him asylum based on a finding that Joseph has an independent, well-founded fear of future persecution. But, in rejecting the past persecution claim, the immigration judge incorrectly states that Joseph was arrested twice by police and only suffered minor beatings. In fact, Joseph was arrested three times and, in addition to beatings, he suffered cigarette burns, deprivation of sleep, and threats against his family. Under the rule proposed by the Department, if DHS appeals the immigration judge's decision, the BIA can affirm the immigration judge's decision based on the same factual errors regarding Joseph's past experiences. In order for the BIA to consider Joseph's past persecution claim under the correct fact pattern, Joseph will have to file his own appeal even though he prevailed before the immigration judge. Otherwise, the BIA will consider the facts, as misstated by the immigration judge, to be "undisputed" and therefore a legitimate basis for affirming the immigration judge's decision.

This rule will thus increase the backlog and thwart judicial efficiency by forcing the parties who prevailed before the immigration judge to file appeals to preserve issues and ward off the possibility that erroneous factual findings will be deemed "undisputed." Because this rule creates tangible scenarios that would compel a prevailing party to file an appeal in order to dispute a factual finding, it will likely increase the BIA's backlog of cases and create uncertainty and confusion in the appellate process.

VIII. The Proposed 8 CFR § 1003.3(c) Simultaneous Briefing and Reduced Time for Reply Brief and Briefing Extension Provisions Would Impede Fairness and Efficiency.

The proposed changes in 8 CFR § 1003.3(c) to eliminate consecutive briefing in non-detained appeals and to severely limit briefing extensions in all appeals would prioritize haste over justice. In appellate courts in the United States, consecutive briefing is nearly universal—the appellant files an opening brief and then the appellee files a responsive brief addressing the arguments raised in the opening brief. For example, Federal Rule of Appellate Procedure 28 sets forth the rules regarding the appellant's brief, the appellee's brief, and the appellant's optional

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preserve the issue before the Board, in case the Board were to reverse the immigration judge's decision granting relief or protection. It is difficult to imagine how this change would free administrative resources. To the contrary, it would encourage wasting resources by necessitating that respondents file additional appeals to protect their rights.

[28] 8 CFR §§ 1003.1(d)(3)(iv)(A)(4), (v).

[29] 85 FR at 52501.

reply brief and California Rule of Court 8.200(a) sets forth that the appellant must file an opening brief, the respondent must file a respondent's brief, and the appellant may then file a reply brief. Similarly, Federal Rule of Appellate Procedure 26 permits the United States Courts of Appeal to "extend time" "[f]or good cause" and California Rule of Court 8.882(b) permits the parties to stipulate to 30 day extensions of each briefing deadline, as well as permitting the parties to apply to the judge for an extension of time for good cause. Not only do the proposed rule changes prejudice all appellees before the BIA, but also, they reduce the efficiency of adjudications by the Board.

First, regarding simultaneous briefing, the prejudice in the proposed rule to the appellee, who will not know what argument to focus on in their brief, far outweighs any efficiency that EOIR purports to achieve. In many cases, an appellant may include multiple issues in their Notice of Appeal but, after receipt of the transcript of proceeding, elect to only brief the most salient issues. With simultaneous briefing, the appellee would have to address every issue raised in the Notice of Appeal, even if those issues are not ultimately briefed. This would be unfair to the appellee, and would result in overburdened counsel for both respondents and DHS having to brief issues that will never be considered by the BIA. Furthermore, if there are many issues raised in the Notice of Appeal, there is a greater likelihood that the appellee will have to submit a motion asking to enlarge the page limit on their brief so that they can address issues that may never be raised in the appellant's brief, further resulting in wasted resources by the BIA in adjudicating these motions and receiving enlarged briefs for consideration. This new requirement, in tandem with the ability to take administrative notice of facts determined to not be "reasonably" subject to dispute, will impede the efficient functioning of the court. Parties will necessarily have to speculate both to the possible universe of information the Board might consider not in dispute and the full universe of potential arguments of the opposing party, making the appeal process unwieldy and ineffective, while encouraging all parties to appeal. Second, given that EOIR still requires filings in person, by courier, or by mail, rather than electronically, the proposal to only permit 14 days to file a reply brief with BIA permission would virtually do away with reply briefing altogether. Because the 14 day clock would commence on the due date of the initial brief, which is generally a few days prior to the date that the parties actually receive their service copies of the opposing briefs, the initial brief may not be received until it would be too late to draft and file both a reply brief and a motion for leave to accept the reply brief. This is of particular concern today, given the recent significant delays in first-class mail delivery by the United States Postal Service.[30]

Third, the proposed rule would reduce the amount of time that the BIA is permitted to extend briefing deadlines from 90 days to 14 days, even where good cause for a longer extension is established, despite that longstanding BIA policy has been to only grant 21-day briefing extensions. There is no justification for the elimination of the BIA's authority to grant a longer extension for good cause shown, particularly given the BIA's longstanding policy of only granting 21-day extensions in the vast majority of cases where an extension is requested. Such a proposed rule change is particularly alarming during the current unprecedented public health crisis. The novel coronavirus pandemic causes COVID-19 infections that can last anywhere from one to six weeks or more.[31] And illness is but one example of what might constitute good cause for an extension of a briefing deadline. Other compelling examples that might necessitate an extension exceeding 14 days include a death in the family or a natural disaster such as a hurricane or wildfires. The proposal to impose an arbitrary and extremely restrictive cap on extensions is unprecedented and, given the current 21-day extension policy, entirely unwarranted.

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[30] Emily Badger et al., *The Upshot: Is the Mail Getting Slower? We're Tracking It*, THE NEW YORK TIMES (Sep. 14, 2020), https://www.nytimes.com/interactive/2020/09/14/upshot/is-the-mail-getting-slower-tracker.html.

[31] Lisa Maragakis, M.D., M.P.H., *Coronavirus Diagnosis: What Should I Expect?*, John Hopkins Medicine, Jul. 7, 2020, https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/diagnosed-with-covid-19-what-to-expect.

In addition, the proposed rule change would be particularly difficult for unrepresented detained respondents who rely on their custodians to deliver mail to them and face the additional delays of detention facility mail sorting and delivery on top of the abovementioned well-documented United States Postal Service delays.

Even respondents who had been unrepresented who are fortunate enough to find potential counsel on appeal would be prejudiced by this rule change because of the difficulties that attorneys face in assessing appeals before they can review the transcript, which are compounded for individuals in detention who likely have to mail copies of the transcript to potential counsel, all while the 21-day clock is running. Without the possibility of obtaining a reasonable extension to review the record and prepare a quality brief, counsel would be unlikely to take on the case, thus leaving more respondents without counsel during an appellate process in which they are very unlikely to succeed on their own.

IX. The Proposed 8 CFR § 1003.1 (e)(1), (8) "Initial Screening" and "Timeliness" Provisions Incentivize Haste over Fairness

The proposed changes would require that the BIA complete initial screening for summary dismissal within 14 days of filing and issue a decision within 30 days. Given the enormous number of cases pending before the Board, and the serious interests at stake, the ILRC is concerned that the pressure of this short time period will lead the Board to erroneously summarily dismiss cases. BIA staff conducting initial screenings could not determine whether or not a given case falls within one of the eight summary dismissal categories until they actually screen the case. The imposition of arbitrary, mandatory adjudication periods will pressure screeners to review cases hastily rather than fairly and judiciously, which is likely to lead to erroneous summary dismissals of appeals.

As the Supreme Court has averred:

> The essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.' " *Mathews v. Eldridge,* 424 U.S. 319, 348, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (quoting *Joint Anti–Fascist Refugee Comm. v. McGrath,* 341 U.S. 123, 171–172, 71 S.Ct. 624, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring)).[32]

Even under the current regulations that do not entail the proposed added time pressure, in the Ninth Circuit alone, the Court of Appeals has remanded numerous cases to the Board for improper summary dismissal. *See e.g. Vargas Garcia v. INS*, 287 F.3d 882, 885-86 (9th Cir. 2002) (holding that the BIA Notice of Appeal form was inadequate for an unrepresented respondent given the BIA's standards of specificity and lack of notice in summarily dismissing the appeal); *Casas Chavez v. INS*, 300 F.3d 1088, 1090 (9th Cir. 2002) (The court held that the notice of the reasons for appeal sought by the summary dismissal regulation can be met *either* in the Notice of Appeal or in the brief and "there is an underlying assumption in the regulation that both requirements need not be satisfied as long as sufficient notice is conveyed to the BIA." The court reasoned that "[i]f this were not true, the constitutionality of the regulation would be called into question on the basis of denial of due process . . . . In the context of deportation proceedings, 'due process requires that aliens who seek to appeal be given a fair opportunity to present their cases.'") (internal citations omitted); *Ramirez Tovar v. Ashcroft*, No. 02-70938, 91 Fed. Appx. 599, 599 (9th Cir. Mar. 23, 2004) (holding that "[s]ummary dismissal was not appropriate because Petitioners' Notice of Appeal sufficiently specified their grounds for appeal"). Imposition of this new timeframe will encourage unfair and improper summary dismissal.

[32] *Casas Chavez v. INS*, 300 F.3d 1088, 1090 (9th Cir. 2002).

Alarmingly, unrepresented detained individuals who are not English speakers would be at a particular disadvantage on appeal under the proposed regulation. Detained individuals currently appear for immigration court proceedings in numerous jurisdictions by video teleconference, without any possibility of simultaneous interpretation. Only a very short summary of the Immigration Judge's decision is interpreted to these respondents in their native languages and these respondents have no way of understanding much of the discussion between the Immigration Judge and counsel for the Department of Homeland Security, as only comments and questions directed to the Respondent are interpreted. Such individuals would be expected to articulate reasons for appeal that they likely are unable to understand without the transcript of proceedings and significant assistance. Imposing a strict and narrow deadline for summary dismissal on the BIA would encourage the curtailment of due process for such individuals who are already at a significant disadvantage on appeal.[33]

Additionally, for cases that the Board does not summarily dismiss, the proposed 8 CFR § 1003.1 (e)(8) creates mandatory adjudication timeframes, including requiring a single Board Member to determine within 14 days of receipt of each case whether to issue a single Member or three Member decision. The ILRC is concerned that these arbitrary and mandatory deadlines will encourage the Board to make mistakes as they will be forced to prioritize speed over fairness.

Moreover, the proposed 8 CFR § 1003.1(e)(8)(v) requires that the Board refer any case that has been pending for more than 355 days to the Director for adjudication, in addition to specifying that the Director cannot further delegate this authority. This proposed change would pressure Board Members to adjudicate cases at a speed that would prevent due process. Recent statistics show that anywhere from 66,000 to 92,000 cases may be before the Board, a body currently comprised of 23 Members, each year.[34] Each Member would have to complete more than 3,000 cases per year to comply with the proposed 355-day deadline. No single Board Member could possibly fairly and thoroughly review thousands of cases in this timeframe. In addition, because it is faster for a single Board Member to affirm an IJ decision than to refer a case for three-Member review (which is required to overturn an IJ decision), individual Board Members would be incentivized to deny cases rather than to determine that the cases require three-Member review. Just as the National Immigration Judges Association has questioned whether EOIR case completion quotas conflict with "their oath of office to provide impartial justice," imposing such quotas on the Board would interfere with their ability to impartially and fairly adjudicate appeals.[35] Furthermore, this proposed rule encourages the Director, who is tasked with "regular ex-parte communications with high-level DOJ and DHS officials" as well as saddled with "the administration and management of all EOIR components, including the Immigration Court" to adjudicate a large number of cases. But, as pointed out by the National Association of Immigration Judges, the EOIR Director need not be an attorney, unlike Board Members who are required to be attorneys, and "[t]he position . . . is incompatible with serving in an adjudicatory capacity over any pending cases before EOIR."[36]

X. Conclusion

[33] DOJ, A Ten-Year Review of the BIA Pro Bono Project: 2002-2011 (Feb. 2014), https://www.justice.gov/sites/default/files/pages/attachments/2015/11/17/bia_pbp_eval_2012-1-13-14.pdf.
[34] *See* DOJ, *EOIR Adjudication Statistics*, https://www.justice.gov/eoir/page/file/1248501/download; EOIR, *Meet the Board of Immigration Appeals* (last accessed Sept. 21, 2020), https://www.justice.gov/eoir/board-of-immigration-appeals-bios.
[35] *See* National Association of Immigration Judges, *Testimony Before the Senate Judiciary Committee, Border Security and Immigration Subcommittee Hearing on "Strengthening and Reforming America's Immigration Court System"* at 7 (Apr. 18, 2018), https://docs.house.gov/meetings/JU/JU01/20200129/110402/HHRG-116-JU01-Wstate-TabaddorA-20200129.pdf
[36] *Id.*, *citing* 8 C.F.R. § 1003.1(a)(1).

The ILRC strongly opposes the proposed rule. We urge the Department to consider these comments and withdraw the proposed rules. These changes will create a staggering cost to legal advocates offering representation to protect procedural due process rights to immigrants in removal proceedings. The arbitrary and confounding nature of the rules will require representatives to appeal in most cases and brief all issues broadly. This will impose a huge time burden on advocates and pro se respondents, and additionally defeat the Department's purpose of streamlining adjudications and decreasing backlog.

The ILRC, whose role is to support practitioners in the field, will spend many additional hours offering technical support due to the severe burden these rules will place on respondents. Each case, even where the respondent is the prevailing party before the immigration court, will require line-by-line review of the record, in addition to analysis of the immigration judge's decision. Service providers and respondents will invest a great deal of time investigating biometric requirements in order to prevent a finding of abandonment. Overall, if implemented, the rules would decrease administrative efficiency, curtail respondents' due process rights, and create confusion regarding biometric and remand procedures.

Sincerely,

Aruna Sury
Legal Consultant

Valerie Anne Zukin
Special Projects Attorney