September 25, 2020

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

Submitted via https://www.regulations.gov

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

Dear Ms. Reid:

The City Bar Justice Center ("CBJC"), in conjunction with *pro bono* partner Willkie Farr & Gallagher LLP ("Willkie Farr"), submits this Comment in response to Proposed Rules on Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure published in the Federal Register on August 26, 2020 (the "Proposed Rule"). The Proposed Rule would radically restructure the immigration courts, substituting the decision-making of experienced immigration judges with that of a politically-motivated appointee who is removed from the facts and their application in a constantly evolving legal landscape. The Proposed Rule will result in unacceptably high burdens on *pro se* applicants and impede the participation of *pro bono* advocates who could otherwise contribute to increased efficiency of immigration courts. The Proposed Rule will also compromise due process for individuals (many of whom are *pro se* applicants) in pursuit of supposed efficiency.

As the nonprofit affiliate of the New York City Bar Association, CBJC increases access to justice by leveraging the *pro bono* efforts of New York lawyers, law firms, and corporate legal departments. Each year, CBJC assists more than 25,000 low income and vulnerable New Yorkers through limited and direct legal representation, community outreach, and education efforts on a wide range of civil-justice matters. CBJC's Immigrant Justice Project assists asylum seekers fleeing persecution, survivors of violent crimes and trafficking here in the United States, and individuals seeking humanitarian protection and other forms of relief. We represent clients before U.S. Citizenship & Immigration Services ("USCIS"), Executive Office for Immigration Review ("EOIR"), including both the immigration courts and the Board of Immigration Appeals ("BIA"), as well as federal courts. Our *pro bono* volunteers, in partnership with CBJC, have increased access to justice.

Willkie Farr is an international law firm with over 700 attorneys, and a longstanding *pro bono* partner of CBJC. The firm takes great pride in the volume and variety of the work it performs on a *pro bono* basis and has a long-standing commitment to serving the underprivileged and promoting social justice. Through its partnership with CBJC and similar nonprofit organizations,

Willkie Farr attorneys across the United States have provided legal representation to individuals from across the world. Through its partnership with CBJC, Willkie represents clients before EOIR, USCIS, the BIA, and the federal appeals courts. The Proposed Rule would severely impede the ability of Willkie Farr (and other law firms) to continue its *pro bono* practice in the aid of those seeking asylum and other relief under the immigration system.

As a threshold matter, we object to the 30-day comment period. The Administrative Procedures Act ("APA") requires agencies to "afford interested persons an opportunity to participate" in rulemaking. Administrative Procedure Act, 5 U.S.C. § 555 (2006). Consistent with the APA, Executive Order 12866 requires agencies to "…afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days." The paltry 30 days provided, particularly during a global pandemic, and including a federal holiday, does not allow adequate time to respond meaningfully to the myriad of proposed changes. Indeed, it seems designed to overwhelm and stifle public comment on these drastic changes to procedure.

Based solely on the foregoing, we urge the withdrawal of the rulemaking and its republication with significant additional time allowed for public comment, particularly given the current pandemic. Beyond this threshold objection to the time available for public comment, we also object to the substantive content of the Proposed Rule. Given the grave consequences to both individuals' due process rights and the immigration court's sheen of judicial independence and process, we call for the Proposed Rule to be withdrawn in its entirety.

The Proposed Rule seeks to amend both the procedural and substantive decision-making landscapes of the immigration court system. The procedural changes, addressed in Sections I and II below, attack an individual's ability to prepare a proper appeal by shortening the time for briefing, requiring simultaneous briefing for non-detained appellants, and removing from the BIA its ability to remand to immigration judges ("IJs"). The substantive, decision-making changes, addressed in Sections III, IV, V, VI and VII below, strip IJs of their authority and discretion in deciding cases and instead place such decision-making power into the hands of politically-charged actors. Each of these twin aims of the Proposed Rule are thinly veiled attempts to deny appellants their due process rights and promote the current Administration's anti-immigrant agenda.

PROPOSED PROCEDURAL CHANGES

I. The Proposed Rule Would Dismantle Current Appellate Practice and Render it Functionally Impossible For *Pro Se* Appellants to Engage Counsel.

A. The Proposed Rule's Slashing of Briefing Extensions Significantly Disadvantages Appellants.

The Proposed Rule seeks to amend applicable law to prioritize "efficiency" over fairness, resulting in an even higher burden on *pro se* applicants who already face substantial obstacles in navigating our complex immigration system. Under the current regulation, the BIA is authorized to give up to 90 days extension to file an initial brief or reply brief; however, despite this allowance, it has been the BIA's longstanding policy to generally give only a 21-day extension, regardless of the amount of time requested. *See Proposed Rule* at 52498; *see also* Bd. Of Immigration Appeals,

Dep't of Justice, Practice Manual 63, 65 (2018), https://www.justice.gov/eoir/page/file/1101411/download (''BIA Practice Manual''). The Proposed Rule would slash this already shortened period to a maximum extension of 14 days, with only one possible extension permitted. *Proposed Rule* at 52498. This upending of appellate practice is purportedly justified by promoting the "efficient use of administrative resources" and does not give careful (if any) consideration to the resulting burdens such a change would place on both *pro se* applicants and those who seek to represent them. *Id*. This is especially true for applicants who seek representation for the first time on appeal.

The shortened 14-day extension period presents a host of logistical issues that impedes an individual's constitutional right to actually file an appeal. By the time an individual's request for an extension is granted by the BIA, it is likely that a large portion, if not most of, the 14-day period would have expired. Assuming the appellant is *pro se*, best case scenario leaves the applicant with a couple of days to pull together a complex legal brief, in an immigration system they may not be familiar with, in a language that they may not yet be fluent in, based on an underlying record including transcripts to which they do not have access.

Similarly, and of particular concern to both the CBJC and Willkie Farr, the shortened time period will lead to fewer individuals who appeared *pro se* in the underlying action finding counsel for the first time for their appeal.[1] An individual who appeared *pro se* in immigration court would need to first locate an attorney to take on their appeal and then provide such attorney with enough detail for them to decide whether or not to take on the case (and perhaps without a transcript), all within a needlessly shortened period and likely without resources. As the attorneys at the Department of Justice (the "Department") can likely appreciate, it is a heavy lift for an attorney who did not appear in the underlying action to take on an appeal. Such difficulties are heightened when the timeframe is tightly constrained and the appellant may not be able to provide a transcript of the immigration court hearing. This issue will prove insurmountable to those individuals who are detained, without access to computers, and who will likely be required to mail copies of their files and transcripts (if provided) to potential counsel. If attorneys are unable to receive a reasonable extension to review the underlying record and prepare a response, they are unlikely to take on the appeal and thus even more individuals will be unrepresented on appeal. *Pro bono* counsel, who are often engaged during the appeals process itself, will be particularly disadvantaged by the shortened period and thus those populations that they seek to help (namely the indigent) will suffer most significantly. The Proposed Rule's statement that attorneys will still be able to file a brief with "ample time even without access to the transcript to address the issues in most cases" is just wrong and ignores the reality of the appeals process, particularly where attorneys are engaged for the first time for an appeal and are otherwise unfamiliar with the facts and issues in the case.

The Proposed Rule, citing to EOIR Adjudication Statistics, states that 78% of respondents have representation on appeal (and DHS is represented in all appeals)—meaning that roughly 22%

[1] It is important to note, too, that a significant portion of individuals are unrepresented in immigration court. *See A National Study of Access to Counsel in Immigration Court*, University of Pennsylvania Law Review, Vol 164: 1, 7 ("By looking at individual removal cases decided on the merits, we find that only 37% of immigrants had counsel during our study period from 2007 to 2012. Importantly, this percentage is lower than what is reported in government publications that do not rely on the proportion of cases with representation, but rather rely on the proportion of court proceedings with representation.")

(410,152) of respondents are not represented on appeal. *Id*. The Proposed Rule continues by stating that "the parties frequently do not file a brief at all" and that in fiscal year 2019 "the Board issued a briefing schedule in approximately 17,069 cases. Of those, the respondent did not file a brief in approximately 4,400 cases, DHS did not file a brief in roughly 10,900 cases, and neither party filed a brief in over 3,000 cases." *Id*. The 4,000 out of 17,069 cases (roughly 25%) in which briefs are not filed correlates with the fact that almost the same percentage of respondents are unrepresented on appeal. This seems to indicate that those who are not represented on appeal are not filing briefs, which in turn means that ***those who are capable of filing briefs (i.e., the represented) are, in fact, filing them***, and therefore the procedure, timing, and ability to provide for a reasonable extension are important. Similarly, the Proposed Rule cannot cite the government's own failures to file a brief in over 80% of cases as evidence that "the *parties* frequently do not file a brief at all" when even of the barest scrutiny of the figures indicates that nearly all of those respondents who are capable of filing briefs do indeed file a brief. The Proposed Rule's statement that the changes "should have relatively little impact on the preparation of the parties on appeal" seems to be relevant only to the government, as the party that infrequently files briefs.

The Proposed Rule indicates that these changes to briefing extensions will allow for final adjudication of cases more quickly; in reality, these changes will just push cases to federal courts more quickly, particularly if appellants are not given ample opportunity to brief the issues properly. This will just create a backlog in federal courts and an extension of the bottle-necking, which by no means accomplishes the Proposed Rule's purported goal of efficiency.

B. The Proposed Rule's Application of Simultaneous Briefing to Non-Detained Appellants is Contrary to Legislative Intent and Will Hinder Efficient Adjudication.

Current law allows for consecutive briefing schedules for cases involving individuals who are not in custody (*i.e*., the non-detained). In pursuit of efficiency at the cost of fairness, the Proposed Rule would change this and instead impose simultaneous briefing schedules for non-detained individuals. *Proposed Rule* at 52499. The shortened briefing period for non-detained cases would be shortened from a total of 63 days to a total of 35 days.[2] *Id*. The Proposed Rule, cavalierly and in complete disregard for legislative drafting and intent, states that "[w]hatever basis there may have been previously to treat the two categories of cases differently […] are no longer sufficiently compelling to warrant the continued disparate treatment of detained and non-detained cases on appeal." *Id*. The Proposed Rule correctly states that the Department previously "considered simultaneous briefing for all appeals but ultimately adopted the practice only for detained appeals." *Id*., citing 67 FR 54895. However, the Proposed Rule conveniently fails to address that the Department *created* the distinction, changing the proposed regulation, in response to and in agreement with, public comment, which it clearly listed and enumerated in its final rule as follows:

> Several commenters expressed concern that the practice of simultaneous briefing, coupled with a shorter time frame, *raises due process concerns* because it would be *unfairly burdensome* to immigration practitioners and pro se litigants. Some commenters believe

[2] This 35-day period is, in fact, inflated, as it is the BIA's practice, as demonstrated and set forth in the BIA Practice Manual, to not hold adjudication for consideration of a reply brief.

> that, as a consequence of the compressed time frame, *pro bono representation would decrease because of the difficulties associated with the new rule*. Many commenters asserted that pro se respondents who are unfamiliar with English and the immigration laws will be unable to effectively articulate their position on appeal or to anticipate and rebut arguments presented by the Service. Furthermore, a few commenters argued that detained respondents will not even have the benefit of the 21-day period due to systemic problems in receiving the transcripts and briefing schedules in a timely manner while they are either detained or being moved to other detention facilities. Finally, multiple commenters suggested that the reduced time frame would result in hastily drafted briefs that would be unhelpful to the Board in deciding appeals. 67 FR 54895 (emphasis added).

Like the Department in 2002, we agree with the previous commenters. There is a material difference between proceedings involving a detained and non-detained appellant. There is a particular need to expedite proceedings when an individual is detained, that does not logically apply when an individual is not detained. The Proposed Rule ignores both this obvious difference in circumstance and clear legislative understanding and intent when creating the distinction between the two.

Additionally, the Proposed Rule states that "there is no apparent reason not to apply [simultaneous briefing] to non-detained cases as well, particularly when both parties are frequently represented on appeal and one or both parties may often choose not to file a brief at all." *Id.* As discussed above, these figures ignore the clear truth that represented appellants who are able to file a brief do so, and that it is the government that "often" (*i.e.*, in over 80% of cases) chooses not a file a brief. Similarly, when briefs are in fact filed, simultaneous briefing will lead to a number a logistical hurdles and general confusion. The Proposed Rule works to disadvantage the appellee, who will not be aware of what arguments to focus on in their brief, resulting in the BIA likely receiving disjointed briefs that focus on different aspects of a claim or disagree as to the prevailing precedent. This result will not aid the BIA "to more expeditiously review and adjudicate non-detained appeals." *Id.* Rather, simultaneous briefing is likely to have the complete opposite effect: delaying BIA resolution because of incomplete briefing that does not actually respond to each side's arguments.

II. <u>The Proposed Rule Would Prevent the BIA from Remanding Cases for Additional Findings in All But Limited Circumstances, Thus Preventing the BIA From Effectively Managing Its Docket</u>.

A. Disallowing the BIA to Remand to IJs for Background Information Will Clog the BIA's Docket.

Current law permits the BIA to remand a case to an IJ for the completion of various background information, including identity, law enforcement, or security investigations or examinations. Under the Proposed Rule, when a case before the BIA requires completing or updating background information, "the exclusive course of action would be for the BIA to place the case on hold" while such item "is being completed or updated," unless DHS reports that such is no longer necessary or DHS does not "timely report" (i.e., 180 days) the results. *Proposed Rule* at 52499. Thus, the BIA would be no longer permitted to remand a case to immigration court for

the sole purpose of completing or updating background information, and, further the BIA would be permitted to dismiss the case if a respondent does not comply with 90 days.

The Proposed Rule states that "[t]here is no apparent operational reason why the BIA cannot hold a decision until it receives information from DHS" and that "routinely remanding cases solely for that purpose both needlessly delays resolution of a case and takes up space on an immigration court docket that could otherwise be used to address another case." *Id*. Allowing the BIA to keep cases at the BIA level for the banal purpose of certifying background information would only work to prolong the case's life in the immigration system and thus keep the individual similarly tied up in it and waiting, perhaps for up to half a year, for the confirmation of simple information. This Proposed Rule will not "preserve overburdened judicial resources," but rather just delay the usage of such at the BIA-level that has less capacity than IJs to provide the detailed attention necessary to make a proper assessment.

B. Providing the BIA with Enhanced Abilities to Make Additional Final Decisions Will Preclude Potential Avenues of Relief.

Under the Proposed Rule, (i) the BIA would be given the authority to issue a final order of removability when a finding of removability has been made by an IJ and an application for protection has been denied, (ii) authority would be delegated to the BIA to consider issues relating to the IJ's decision on voluntary departure *de novo* and, within the scope of the BIA's review authority on appeal, to issue final decisions on requests for voluntary departure based on the record of proceedings and (iii) the BIA would be unable to remand a case to the immigration court solely to consider a request for voluntary departure. In so doing, the Department once again inappropriately seeks to shift the locus of fact finding to an appellate body at the cost of due process.

As noted above, the BIA has limited fact-finding abilities and even less capacity than an IJ to hear and make determinations on such facts. The Proposed Rule, in line with previous reasoning, states that there is "no operational reason that the BIA" cannot make these determinations and that permitting the BIA to remand for these reasons invites "an additional appeal if the respondent disagrees with the immigration judge's determination." *Id*. First, this statement ignores that it is an individual's right to appeal a decision in our immigration system—and the regulations should not aim to curtail those rights. Second, it does not justify or provide adequate reasoning as to why this expansion of the BIA's ability to issue a final order is needed.

This grant of enhanced discretion to make final decisions to the BIA necessarily means that IJs will have less authority and power to consider the specific facts at issue and the BIA, in turn, will have more power to make final decisions despite not being a fact-finding body. Allowing the BIA to review decisions regarding voluntary departure *de novo* and to issue final decisions following that review blurs the role of IJs and the BIA. So, too, does the restriction on remanding cases solely to consider requests for voluntary departures. This will result in enhanced power to the BIA, at the expense of additional evidence or avenues of relief that applicants may be able to present in front of IJs. If a new avenue of relief should arise in such a situation, the applicant would have no opportunity to present that relief to the BIA—which is limited to the facts and arguments in the record—and may, as a result, have a final order of removal entered despite actually having a form of relief available to them. This will, in fact, preclude *any* ability to present

that new form of relief, as even an appeal of the BIA's final order would not allow for the presentation of new facts or arguments before the federal court.

PROPOSED DECISION-MAKING CHANGES

III. The Proposed Rule Would Prevent the BIA from Remanding Cases for Consideration in All But Limited Circumstances, Severely Limiting Avenues of Relief for Appellees.

While increasing the decision-making and finality of the BIA, the Proposed Rule also simultaneously seeks to limit the evidence considered by the BIA and the scope of motions to remand. Specifically, the Proposed Rule would prevent the BIA from receiving new evidence on appeal and from remanding the case to the IJ to consider new evidence outside of three very specific circumstances: (1) new evidence that is the result of identity, law enforcement, or security investigations or examinations, including civil or criminal investigations of immigration fraud; (2) new evidence pertaining to a respondent's removability; (3) new evidence that would call into question an aspect of the jurisdiction of the immigration courts. *Proposed Rule* at 52500.

The Department attempts to justify this rule change by stating that there is a lack of clarity in how the BIA currently handles new evidence on appeal which has led to inconsistent treatment, concluding that a clear, bright line rule is necessary. *Proposed Rule* at 52501. The Department highlights three competing views whereby the BIA can decide not to consider the new evidence on appeal, remand a case for consideration of new evidence, or allow the submission of new evidence on appeal as a motion to remand for further fact-finding pursuant to 8 CFR § 1003.1(d)(3)(iv). *Proposed Rule* at 52500-52501.

However, in proposing this change, the Department is stripping IJs of their authority as the fact-finders in asylum cases. Additionally, along with the quotas and remand caps that are used to track an IJ's performance,[3] the proposed rule exacerbates and further enables the perverse incentive for IJs to clear out cases as quickly as possible and not develop the record fully, secure in the knowledge that the case will likely not be remanded. The provision further stacks the deck against asylum seekers by expressly creating a double standard allowing the BIA to remand a case at any time, and without a formal motion, based on derogatory evidence presented by the government while requiring an asylum seeker to file a motion to reopen in order for new evidence to be considered. *Proposed Rule* at 52500.

The Proposed Rule also specifically strips the BIA of the ability to remand a case *sua sponte* for further fact-finding or where the issue was not adequately raised below unless there is an issue regarding jurisdiction. This means that even if an IJ clearly failed to develop the record adequately and even if the BIA notices that there is a clear avenue for relief on which the IJ did not ask any questions, the BIA would no longer have the authority to remand the case for further fact-finding and prevent an unjust order for removal. This provision appears designed to quickly, and with finality, remove those without representation who would be least likely to understand

[3] In 2018, EOIR issued Performance Metrics requiring IJs to complete 700 cases per year, 95% at the first scheduled individual hearing, and further requiring a remand rate of less than 15%. *See* EOIR Performance Plan Adjudicative Employees, March 30, 2018 *available at* https://www.aila.org/infonet/eoir-memo-immigration-judge-performance-metrics.

that they have the ability to seek remand and would therefore most heavily rely on EOIR to protect their rights.

Even where noncitizens are represented, it would be almost impossible in most cases to successfully argue for remand to the IJ even for some of the most common reasons cases are currently remanded. Under 8 CFR § 1003.1(d)(3)(iv)(D), *Proposed Rule* at 52510, the BIA could only remand a case for further fact-finding if all of the following conditions are met:

1) The party seeking remand preserved the issue by presenting it before the immigration judge;

2) The party seeking remand, if it bore the burden of proof before the immigration judge, attempted to adduce the additional facts before the immigration judge;

3) The additional fact-finding would alter the outcome or disposition of the case;

4) The additional fact-finding would not be cumulative of the evidence already presented or contained in the record; and

5) One of the following circumstances is present in the case:

    a) The immigration judge's factual findings were clearly erroneous, or

    b) Remand to DHS is warranted following de novo review.

The Department further justifies their proposed rule by claiming that the lack of clarity allows for "gamesmanship" on appeal, stating that the proposed rule seeks to eliminate situations where "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." *Proposed Rule* at 52501. However, while the Department states that approximately 78% of respondents have representation on appeal, the Department fails to recognize that nationally, only 37% of asylum seekers are represented at the Immigration Court level.[4] Asylum seekers without representation face the difficulties inherent in navigating a complex legal system and may not have the knowledge or resources to present facts that would support their claim.

The Proposed Rule also specifically states the BIA is prohibited from remanding a case based on the "totality of the circumstances," further limiting an asylum seeker's ability to introduce favorable evidence. *Proposed Rule* at 52501. This restriction, combined with the limited circumstances in which the BIA can remand a case for further fact finding, means that even in cases where the BIA feels there is a grave injustice or that the IJ did not fully develop the record, the BIA would be forced to deny the motion for remand. The "totality of the circumstances" standard and the BIA's *sua sponte* remand power are hallmarks of judicial independence and

[4] See American Immigration Council, Access to Counsel in Immigration Court (2016), available at https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf.

safeguards of due process when the underlying action has proven problematic. To remove these needed tools from the purview of the BIA is to render with BIA without teeth as an appellate branch.

IV. The Proposed Rule Would Authorize the BIA to Remand for Limited Purposes and Prohibit IJs From Considering New Evidence or Changes to Laws Outside the Scope of the Remand.

In addition to limiting the situations in which the BIA may remand a case to the Immigration Courts, the proposed rule would authorize the BIA to remand for express limited purposes and prohibit IJs from considering anything else on remand, including new evidence, while simultaneously divesting itself of jurisdiction. The Department notes that "Circuit courts have construed *Matter of Patel* to mean that the BIA can only limit the scope of its remand if it (1) expressly retains jurisdiction and (2) qualifies or limits the scope of remand. *Bermudez-Ariza*, 893 F.3d at 688; Johnson, 286 F.3d at 701." *Proposed Rule* at 52502. The Department states that the proposed rule is necessary as the BIA rarely retains jurisdiction and that the BIA's failure to expressly state that it is retaining jurisdiction over appeal while remanding the case results in situations where the remand is not limited despite the BIA's intention. *Id*.

This Proposed Rule places additional restrictions on IJs, further stripping them of their authority as fact finders. For example, if a new avenue of relief became available during the waiting period before a new individual hearing is scheduled, or if the noncitizen identified another error in the prior decision—separate and apart from that addressed on appeal—the IJ would nonetheless be prohibited from considering those issues. The result would be that an IJ would be required to order removal even in cases where there is an avenue of relief available, depriving the noncitizen of the opportunity to seek all available opportunities to obtain legal status. Taking into consideration both the significantly limited ability of the BIA to remand cases for further fact-finding and the IJ's inability to review other aspects of the case, a potential avenue of relief that would be available to a noncitizen, either based on new evidence or a holistic review of the remanded case, will be significantly less likely to succeed. The Department does not explain why such a harsh result is justified, or how it comports with basic notions of fairness and due process.

V. The Proposed Rule Authorizes "Quality Assurance" Certification to the EOIR Director, Shifting Power and Decision Making to a Single Political Appointee.

Further to its goal of limiting the independence and decision-making of the BIA, the Proposed Rule proposes to allow IJs to certify BIA decisions reopening or remanding proceedings for review to the Director of EOIR (the "Director")—an individual appointed by the Attorney General—in situations where the IJ alleges that the BIA made an error. Certification would give the Director the authority to dismiss the certification and return the case to the IJ—effectively circumventing the BIA's decision—or to remand the case back to the BIA for further proceedings. *Proposed Rule* at 52503.

The Department claims the rationale for evading the BIA's authority is to ensure "quality assurance" of BIA decisions. However, the Proposed Rule does not explain why a single individual would be any more capable of ensuring adherence to the law than a multi-judge panel that regularly hears immigration cases. Moreover, the Department's claim that "there is no clear mechanism to

efficiently address concerns regarding errors made by the BIA in reopening or remanding proceedings" is erroneous and immediately contradicted by the Proposed Rule itself, which then subsequently describes exactly that process. *Proposed Rule* at 53502. As the Proposed Rule explains, currently, "parties may file a motion to reconsider." *Proposed Rule* at 53502. "If the error inures to the favor of DHS," the respondent may "bring another appeal, either to the BIA or to federal court through a petition for review." *Proposed Rule* at 53502. "If the error inures to the favor of the respondent," DHS may correct the alleged error "through another hearing and an appeal to the BIA." *Proposed Rule* at 53502. This allegedly "cumbersome" process guarantees individuals' due process rights, ensures fairness in decision-making, and provides for the orderly administration of BIA appeals.

It should not be a quick or easy process to overrule the decision of a three-judge appellate panel. The Proposed Rule would only serve to introduce uncertainty to the established appellate process, encourage IJs to evade the authority of the BIA when they disagree with a decision, and further undermine the independence of the immigration court system. The mechanism for direct certification to the Director in the event of a disagreement between an IJ and the BIA is unlike any other in the American system of justice, where decisions are appealed to more senior panels of judges for adjudication and assurance of quality control. Requiring multiple judges to agree on a final decision promotes fairness, safeguards quality assurance, and avoids corruption. Allowing a single political appointee to overrule a panel of appellate court judges is contrary to the structure and spirit of the American system, which is built on respecting established precedent and requires adjudicators to have a robust understanding of the law. *See The Federalist No. 78* (Alexander Hamilton) ("To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them. Hence it is, that there can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges."). The founding fathers recognized the importance of adhering to precedent and leaving decision-making to judges who have studied the law extensively. The Department should do the same.

As written, the Proposed Rule would encourage IJs to certify appellate decisions they simply disagree with to the Director—an individual likely without the legal training or practice required to adequately evaluate the BIA's interpretation of the law. The Department implicitly acknowledges as much by admitting they would have to put procedures in place to clarify the rule to avoid such a situation. The Proposed Rule states "the Department's quality assurance certification process would make clear that it is a mechanism to ensure that BIA decisions are accurate and dispositive—and not a mechanism solely to express disagreements with Board decisions or to lodge objections to particular legal interpretations." The Proposed Rule does not provide any detail on what that quality assurance process is or how this directive would be made clear. Moreover, this claim is not supported by the Department's own practices, as the genesis of one of the most significant recent limitations to asylum case law was a self-certification by Attorney General Sessions based on an IJ's refusal to abide by the BIA's decision, which was supported by decades of precedent and summarily overturned by the Attorney General. *See Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) (A-B-'s case was initially heard and denied on all grounds

by the IJ. On appeal, the BIA reversed on all grounds, determined A-B- was eligible for asylum, and remanded the case for issuance of a decision. On remand, the IJ refused to follow the BIA's order, and instead attempted to certify the case to the BIA, erroneously asserting that established precedent was no longer clear.[5] Attorney General Sessions subsequently self-certified the case to himself, overturning established precedent and ruling in favor of the IJ.). The Department now seeks to make the practice of ignoring the BIA's authority customary, requiring certification not even to the Attorney General, but to a single lower-level political appointee. Given the great lengths the Department has gone to spell out in excessive detail the specific procedures for limiting IJs' and the BIA's powers, the Proposed Rule's lack of any information whatsoever on what process will be put in place to ensure the Director's decisions remain well-reasoned and free from political interference is notable.

Moreover, the supposedly "narrow" set of circumstances in which IJs may certify a case to the Director offer little protection from abuse given the breadth of each criteria: "(1) The Board decision contains a typographical or clerical error affecting the outcome of the case; (2) the Board decision is clearly contrary to a provision of the INA, any other immigration law or statute, any applicable regulation, or a published, binding precedent; (3) the Board decision is vague, ambiguous, internally inconsistent, or otherwise did not resolve the basis for the appeal; or (4) a material factor pertinent to the issue(s) before the immigration judge was clearly not considered in the Board decision." *Proposed Rule* at 52502.

Not only are these criteria overly broad, but even if they were met, certification to the Director is still not the appropriate forum to resolve the issues raised in the Proposed Rule. As an initial matter, a typographical or clerical error can easily be corrected by the BIA. There is no need to put procedures in place to circumvent the authority of the BIA in order to correct an error it is fully capable of correcting itself. In the same vein, in the event an IJ feels the BIA clearly did not consider a material factor pertinent to the issues before it, the appropriate avenue for correcting that error would be a motion to reconsider submitted to the BIA, who would determine whether the factor truly is "material" and needs to be considered. The *only* way it makes sense to certify a case to the Director based on this criteria is if an IJ simply disagrees with the BIA on what factors are material. In that case, it is completely inappropriate to elevate the matter for further review—and certainly not to an individual instead of a higher court. The same is true for a decision that an IJ believes is clearly contrary to the law. It is difficult to understand why a single IJ's interpretation of the law should override an appellate panel's interpretation to the contrary. These criteria would allow an IJ to circumvent the BIA entirely by simply alleging—not proving—a decision (even one that three appellate judges have considered carefully and agreed complies with the law) is clearly contrary to the law or does not consider a material factor. Similarly, certification based on a "vague" or "ambiguous" decision is such a broad criteria that an IJ could argue it applies to virtually any decision. This is especially problematic given that the Proposed Rule provides no

[5] The case the IJ relied on to express concern about the viability of *Matter of A-R-C-G-* (which *Matter of A-B-* overturned) did not dispute the viability of the underlying particular social group, but was instead based on nexus, which was not at issue in *A-R-C-G-*. *See Velasquez v. Sessions*, 866 F.3d 188, 195 n. 5 (4th Cir. 2017) ("The validity of the social group identified by Velasquez is not at issue in this case. Moreover, *A-R-C-G-* does not bear on our nexus analysis" because the government already conceded to the nexus element.). Therefore, the IJ's initial certification was not based in law. Nonetheless, the IJ's antics were rewarded by Attorney General Sessions' landmark decision.

detail on if, how, and by whom an IJ's certification would be reviewed to ensure it has a valid basis in law prior to review by the Director.

The breadth and substance of the above criteria invites IJs to circumvent the appeals process if they disagree with the BIA's decision, especially given the role remand rates play in IJs' performance evaluations. *See Proposed Rule* at 52502 ("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."). With this in mind, IJs may actually be further incentivized to certify cases to the Director to "pad their stats" because their performance evaluation would also be negatively affected by a BIA decision with which they disagree.

Despite the Department's purported goal to ensure quality assurance of decision-making, the Proposed Rule creates more problems than it seeks to solve. The Proposed Rule advocates for circumventing an appellate process based on decades of established precedent, and substituting it with the judgment of a single political appointee. Worse, in addition to the problems discussed above, the Proposed Rule provides *no* detail on how the Director will guarantee quality assurance, such as what standard of review the Director would use in reviewing cases, who (if anyone) would determine whether an IJ's certification was based on valid grounds, what processes would be in place to discipline IJs who abuse the certification process, and what (if any) opportunity respondents (or IJs or BIA judges, for that matter) would have to appeal the Director's decision. The Proposed Rule would give the Director *carte blanche* authority to upend decades of established precedent. This shift in power and decision-making is contrary to the Department's stated goal of ensuring quality assurance of decision-making and is, instead, aligned with their clear goal of making immigration decisions based on politics instead of the law.

VI. Removing From IJs the Tool of Administrative Closure Will Hamper Their Ability to Efficiently Manage Their Dockets.

With the growing backlog of cases in immigration court, IJs and the BIA are in desperate need of tools to manage their dockets effectively. Despite the Department's allegations to the contrary, administrative closures have proven to be an extremely efficient docket management tool. IJs routinely use administrative closures to manage their growing caseloads as well as manage the unresolved overlapping of jurisdictions between the EOIR and other immigration agencies, which creates redundancy for multiple courts and agencies. For decades, IJs and the BIA have used administrative closures in appropriate circumstances, including: (i) to allow noncitizens adequate time to pursue actions outside of immigration court that could lead to relief from removal, such as an application with USCIS or a state court;[6] (ii) where DHS has chosen to exercise

[6] These include, among others, petitions for alien removal (Form I-130); petitions seeking relief under the Violence Against Women Act or Special Immigrant Juvenile Status provisions (Form I-360), petitions for refugees and asylum seekers (Form I-730); petitions to remove conditions on residence (Form 1-751); petitions for U-Nonimmigrant Status (Form I-918), and state family court proceedings necessary to determine SIJS. In each of these cases, a grant of relief would eliminate the need for the immigration court to rule, freeing up the court to focus on the substantial backlog of active cases. Notably, according to TRAC, a nonprofit data research center affiliated with Syracuse University, "when cases were administratively closed, recalendared, and decided, most immigrants met the legal standard to remain in the country lawfully. For example, for those cases in which the government was seeking removal orders, six out of ten (60.1%) immigrants met the high legal threshold of remaining in the country. The largest proportion of these had their cases terminated since the Court ultimately found there were no longer valid grounds to deport them." *See*

prosecutorial discretion in a particular case, including where the individual has received a grant of deferred action (for example, pursuant to DACA); and (iii) to ensure a fair hearing for noncitizens with significant mental competency issues; for example, to allow time for treatment before the proceeding. *Matter of M-A-M-*, 25 I&N Dec. 272, 292-93. In a blatant reversal of established precedent, the Proposed Rule would amend 8 CFR §§ 1003.1(d)(1)(ii) and 1003.10(b) "to make clear that those provisions—and similar provisions in 8 CFR part 1240—provide no freestanding authority for immigration judges or Board members to administratively close immigration cases absent an express regulatory or judicially approved settlement basis to do so." *Proposed Rule* at 52503.

The Department's supposed rationale for removing the power of IJs and the BIA to administratively close cases is that administrative closure, framed as a recent phenomenon, has "exacerbated both the extent of the existing backlog of immigration court cases and the difficulty in addressing that backlog in a fair and timely manner," "failed as a policy matter and is unsupported by the law." *Proposed Rule* at 52503. This is not so. The practice of administrative closure began in the 1980s when it was presented as an available option to judges when a person failed to appear at a hearing. *See Matter of Castro-Tum*, 27 I. & N. Dec. at 273 (citing Memorandum from William R. Robie, Chief Immigration Judge, Exec. Office for Immigration Review, to All Immigration Judges 1 (Mar. 7, 1984)). Immigration courts over the next three decades recognized the general authority to administratively close cases flowed from the BIA's powers to "take any action consistent with their authorities under the [INA] and the regulations as is appropriate and necessary for the disposition of the case." 8 CFR § 1003.10(b) (2019); *see id.* § 1240.1(a)(1)(iv) (2019) (granting immigration judges the authority in removal proceedings to take "any action consistent with applicable law and regulations as may be appropriate"). The BIA has similar authority. *See id.* § 1003.1(d)(1)(ii) (2019) (stating that the BIA may "take any action consistent with their authorities under the [Immigration and Nationality] Act and the regulations as is appropriate and necessary for the disposition of the case").

The Department seeks to overturn decades of regulatory precedent in support of administrative closure based on a single case, *Matter of Castro-Tum*, which the Attorney General certified to himself in 2018. Notably, the Fourth Circuit (the only circuit court to consider the matter) expressly disagreed with the Attorney General and recently held that "8 CFR §§ 1003.10(b) and 1003.1(d)(1)(ii) unambiguously confer upon IJs and the BIA the general authority to administratively close cases." *Zuniga Romero v. Barr*, 937 F.3d 282 (4th Cir. 2019). In its decision, the court concluded the ruling in *Castro-Tum*, cited repeatedly by the Department as the only basis for its position that administrative closure is inappropriate, was unreasonable because it "breaks with decades of the agency's use and acceptance of administrative closure." Moreover, the Court criticized the Department's "purported concerns with efficient and timely administration" as "internally inconsistent" with its effects of lengthening and delaying proceedings and inviting the reopening of more than 330,000 cases. *Zuniga* at 297. The same is true here.

The Fourth Circuit's view of the Department's arguments as internally inconsistent is unsurprising when considered in relation to the misleading statistics the Department presents as evidence in the Proposed Rule. The Department cites the increase in active and inactive pending

---

Transactional Records Access Clearinghouse, *The Life and Death of Administrative Closure*, Syracuse University (2020), available at https://trac.syr.edu/immigration/reports/623/.

cases in immigration proceedings since 2012 as evidence of the failure of administrative closure as a policy matter. *See Proposed Rule* at 52504 ("In the six-plus years between the decisions in *Matter of Avetisyan* in 2012 and *Matter of Castro-Tum* in 2018, despite the lowest levels of new case filings by DHS since the early and mid-2000s, the active pending caseload in immigration court proceedings increased from 301,250 cases to 715,246 cases and the inactive pending caseload increased from 149,000 cases to 306,785 cases"). At first glance, the Department's figures seem staggering. However, like much of the Proposed Rule, they are misleading. While it is true that the number of active and inactive pending cases has increased exponentially since *Matter of Avetisyan* was decided in 2012, the data shows administrative closures are clearly not the cause.

From 2012 (when *Matter of Avetisyan* was decided) through 2015, the number of active pending cases rose steadily from 327,624 to 460,054 (a 40% increase) and the number of inactive pending immigration cases went from 172,503 to 263,945 (a 53% increase). *See* EOIR, *Adjudication Statistics: Active and Inactive Pending Cases* (April 15, 2020), *available at* https://www.justice.gov/eoir/page/file/1139516/download. However, from 2016 to 2019, the number of active cases skyrocketed from 521,465 to 1,079,168 (a 107% increase) and the number of inactive cases went from 304,520 to 300,513 (a 1.3% decrease). *Id.* Thus, it is clear that any changes to the administrative closure policy in 2012 were not the cause of the dramatic increase in active cases that began in 2016.

These statistics are especially relevant when considered in relation to the timing of *Matter of Castro-Tum*. In 2019 (the first year that the number of administrative closures fell in more than a decade, due to enforcement of the *Matter of Castro-Tum* decision), the number of active pending cases increased by a stunning 35%—almost as much as the 40% increase that occurred in the entire 3-year period following *Matter of Avetisyan*, and by far the greatest single-year increase in available data. *Id.* Notably, this information was published on April 15, 2020 and was certainly available to the Department when it filed the Proposed Rule on August 26, 2020. However, the Department instead cited to an outdated report tracking the same information (active and inactive pending cases),[7] presumably because the most recent data blatantly refutes the Department's position that administrative closures exacerbate the backlog of cases in immigration courts. As the Fourth Circuit recognized, the Department's purported concerns about efficiency and timely administration of cases are internally inconsistent with its efforts to remove the power and decision-making ability of IJs and the BIA, including with respect to administratively closing cases.

VII. The Proposed Rule Removes the BIA's Authority to Certify Cases to Itself and Review *Sua Sponte*, Contrary to Established Case Law.

In its seemingly never-ending quest to limit the power and independence of IJs and the BIA, the Department also seeks to rescind the Attorney General's delegation of *sua sponte* authority to the BIA and IJs to reopen or reconsider cases. The Department claims the BIA "has never utilized genuine *sua sponte* authority—rather than in response to a motion—as the direct

[7] *See Proposed Rule* at 52504 (citing "EOIR, *Adjudication Statistics: Active and Inactive Pending Cases Between February 1, 2012 and May 17, 2018* (Jan. 30, 2019)" instead of "EOIR, *Adjudication Statistics: Active and Inactive Pending Cases* (April 15, 2020)", which includes statistics since 2008 and is EOIR's most recent data on the subject).

basis for any precedential decision" and the many cases in which judges have exercised their *sua sponte* authority were misapplications of the law. Proposed Rule at 52505. As with many of the Department's assertions, the law does not support its narrative. The authority to exercise *sua sponte* authority has been recognized by numerous circuit courts for decades. *See e.g. Luis v. INS*, 196 F.3d 36 (1st Cir. 1999); *Ali v. Gonzales*, 448 F.3d 515 (2d Cir. 2006); *Calle-Vujiles v. Ashcroft* 320 F.3d 472 (3d Cir. 2003); *Mosere v. Muksey*, 552 F.3d 397 (4th Cir. 2009); *Enriquez-Alvarado v. Ashcroft*, 371 F.3d 246, 249 (5th Cir. 2004); *Harchenko v. INS*, 379 F.3d 405, 410-411 (6th Cir. 2004); *Pilch v. Ashcroft*, 353 F.3d 585 (7th Cir. 2003); *Tamenut v. Mukasey* 521 F.3d 1000 (8th Cir. 2008). This is just another of many attempts the Department has taken to strip as much power and independence from IJs and the BIA as possible in pursuit of making the immigration process more dictated by, and integrated with, the political Executive branch. Like the other rules proposed in the Proposed Rule, the Department should not be permitted to do so.

CONCLUSION

As immigration law currently stands, *pro se* applicants have the odds stacked against them. Navigating the system is already a daunting task and the Proposed Rule aims to make it even more difficult for applicants by further reducing their access to legal representation and a fair process. The Proposed Rule's revisions to appellate procedure will make it more difficult for applicants to secure legal representation during the appeals process, almost ensuring that *pro se* applicants will remain unrepresented during the complex appeals process. As stated throughout this comment, the Proposed Rule will impede the participation of *pro bono* advocates, which necessarily means that more applicants will be unrepresented. Denials of relief will undoubtedly increase just as a result of applicants' inability to present cases properly. Similarly, the proposed changes to the decision-making process aim to further strip IJs of their fact-finding role and the discretion afforded to them. They also seek to take power away from the BIA and, instead, place that power with politically-driven actors, resulting in a further deprivation of due process. Put simply, if implemented, the changes under the Proposed Rule would make it harder for individuals to access the immigration system and obtain justice. For all of the above reasons, we vehemently object to the substance of the proposed changes, which will place often insurmountable obstacles in front of *pro se* individuals and *pro bono* representatives.

Finally, we are again compelled to lodge our overarching objection to the Proposed Rule in its entirety. The United States is currently grappling with a global health pandemic of unprecedented scope, a modern civil rights movement, and uncertain future effects. The unique challenges posed by the pandemic have been recognized by the Department in other contexts, yet ignored here. The Proposed Rule, with its inexcusably short 30-day comment period, operates to rewrite the entire immigration court system by regulation without affording the public a meaningful opportunity to respond. Through its evisceration of any quasi-judicial powers influenced by a desire to hastily ram cases (many of which are life or death decisions for applicants) through the system, the Proposed Rule upends decades of established case law and, in multiple instances, ignores the very statute it supposedly implements.

For all the reasons set out above, the City Bar Justice Center and the undersigned Willkie Farr attorneys urge the Department not to put into effect the drastic changes to immigration law and procedure set forth in the Proposed Rule.

By: _____

Jennifer H. Kim
Caitlin Miner-Le Grand

CITY BAR JUSTICE CENTER
42 West 44th Street
New York, NY 10036
(212) 382-6727

By: _____

Richard Mancino
Shaimaa M. Hussein
Ciara A. Copell
Danielle K. Bradley
Ahmad El-Gamal

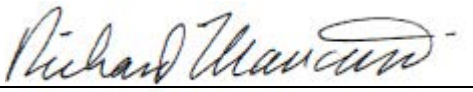
WILLKIE FARR & GALLAGHER LLP
787 Seventh Avenue
New York, NY 10019
(212) 728-8000

For all the reasons set out above, the City Bar Justice Center and the undersigned Willkie Farr attorneys urge the Department not to put into effect the drastic changes to immigration law and procedure set forth in the Proposed Rule.

By:_____

Jennifer H. Kim
Caitlin Miner-Le Grand

CITY BAR JUSTICE CENTER
42 West 44th Street
New York, NY 10036
(212) 382-6727

By: 

Richard Mancino
Shaimaa M. Hussein
Ciara A. Copell
Danielle K. Bradley
Ahmad El-Gamal

WILLKIE FARR & GALLAGHER LLP
787 Seventh Avenue
New York, NY 10019
(212) 728-8000