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

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

Dear Ms. Reid:

The American Immigration Lawyers Association (AILA) and the American Immigration Council (Council), through their joint initiative, the Immigration Justice Campaign (Justice Campaign), submit the following comments in response to the above-referenced Executive Office for Immigration Review (EOIR) Notice of Proposed Rulemaking, *Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure* (EOIR Docket No. 19-0022; A.G. Order No. 4800-2020, RIN 1125-AA96). 85 Fed. Reg. 52491 (August 26, 2020).

Established in 1946, AILA is a voluntary bar association of more than 15,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. AILA's mission includes the advancement of the law pertaining to immigration and naturalization and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws.

The Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for just and fair administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Council litigates in the federal courts to protect the statutory, regulatory, and Constitutional rights of noncitizens, advocates on behalf of noncitizens before Congress, and has a direct interest in ensuring that those seeking protection in the United States have a meaningful opportunity to do so.

The Immigration Justice Campaign is a joint initiative of AILA and the Council. The Campaign's mission is to strengthen the community of defenders, comprised of attorneys and other supporters, who are ready to vigorously advocate for the rights of detained immigrants in removal proceedings and advocate for systemic change. The primary focus of the Campaign is to channel the energy of the broader legal community into pro bono work for detained immigrants

and asylum seekers. The Campaign has a network of more than 12,000 volunteers across the country who serve noncitizens detained in Texas, Colorado, New Jersey, California, and throughout the southeast.

I. AILA, the Council, and the Justice Campaign Strongly Oppose the Proposed Rule

AILA and the Council, through their joint initiative the Immigration Justice Campaign, strongly oppose the proposed rule because it strips EOIR of the ability to make a reasoned decision on a fully developed record and blocks respondents from mounting an effective appeal. Throughout the rule, the Department of Justice (Department) removes procedural protection after procedural protection, emphasizing a perceived need to speed appeals and prevent “gamesmanship.” However, procedural protections like adequate time to brief issues raised by opposing counsel, the ability for adjudicators to reopen cases in the interest of justice, and maintenance of impartiality are key to ensuring both sides have a fair chance to be heard. What the Department refers to as gamesmanship is instead merely a normal, fair appeals process – meant to allow judges to pull out the relevant issues and facts, hear arguments, and decide what justice demands. The Department should withdraw the proposed rule.

II. The Notice of Proposed Rulemaking Should Be Withdrawn Because It Failed to Provide the Default 60-Day Comment Period Required “In Most Cases” by Executive Order 12866

Pursuant to Executive Order 12866, agencies which proceed with notice and comment rulemaking under the Administrative Procedure Act (APA) should “in most cases” provide “a comment period of not less than 60 days,” in order to “afford the public a meaningful opportunity to comment on any proposed regulation.” The length of the comment period should be related to the overall complexity of the regulation, with short comment periods justified only for simple rulemaking.¹ However, despite the sweeping scope of the changes in the Proposed Rule, the public was only provided 30 days to comment.

Foregoing a 60-day comment period has had an enormous effect on the ability of organizations and individuals to properly respond to this comment, especially given other immigration-related proposed regulations with overlapping comment periods.² Indeed, just four days before comments were due on this regulation, the Department published a new regulation, *Procedures for Asylum and Withholding of Removal*, which could have significant effects on immigration court practice and may implicate the changes proposed in this rule. Unfortunately, because the Department has only provided a 30-day comment period on this regulation, we were unable to comment on the interaction of these two proposals, something that we would have done if we had been provided sufficient time. For this reason alone, the Department should withdraw the rule and reissue it to permit opportunity to comment. In addition, the ongoing COVID-19

¹ See Office of the Federal Register, *A Guide to the Rulemaking Process Prepared by the Office of the Federal Register*, https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf (“For complex rulemakings, agencies may provide for longer time periods, such as 180 days or more. Agencies may also use shorter comment periods when that can be justified.”).

² See, e.g., Department of Homeland Security, *Collection and Use of Biometrics by U.S. Citizenship and Immigration Services*, 85 Fed. Reg. 56338 (Sept. 11, 2020); Department of Justice, *Procedures for Asylum and Withholding of Removal*, 85 Fed. Reg. 59692 (Sept. 23, 2020).

pandemic has created substantial difficulties for commenters, a fact that other agencies have acknowledged when granting significant extensions of comment periods.³

These factors have impaired the ability to provide in-depth comments on the Proposed Rule. But despite the fact that Executive Order 12866 requires agencies to ensure that the public has “a meaningful opportunity to comment,” EOIR has not explained why it has departed from the 60-day default time period for what it acknowledges is a “significant regulatory action.”⁴ In order to provide that meaningful opportunity, EOIR must withdraw the Proposed Rule and reissue it with an extended comment period.

III. Proposed Changes

A. Briefing Extensions

The proposed rule seeks to greatly reduce the amount of time the Board of Immigration Appeals (BIA) is permitted to grant for briefing extensions.⁵ Currently, the BIA is authorized to allow up to 90 days to file a brief or reply brief for good cause shown, though its practice is to generally only give 21-day extensions. The proposed rule would cut the BIA’s authority to extend briefing to a maximum of 14 days, with only one possible extension permitted.

The Department’s proposed rule needlessly hamstrings the ability of the BIA to appropriately extend briefing schedules. Where a party shows good cause, it may be that the extension is based on circumstances calling for an extension of over two weeks—natural disasters, a death in the family, parental leave, or serious illness or the death of counsel of record, etc. While many extension requests might only necessitate a short briefing extension, inevitably there will be situations where a longer extension is required. There is no reason to eliminate the BIA’s authority to grant any extension beyond 14 days without consideration of the specific circumstances supporting the extension request.

The limitation to a single 14-day briefing extension will be particularly devastating to pro se respondents who file notices of appeal while seeking appellate counsel. Attorneys may be unwilling or unable to represent an immigrant if the briefing schedule has already been issued, knowing that they would be forced to rush through writing a brief in a matter of days while simultaneously familiarizing themselves with the record. The Proposed Rule speculates that limiting briefing extensions will not harm respondents because they would be able to begin preparing a brief after filing the notice of appeal. However, it fails to consider that pro se respondents in the process of finding counsel would be entirely unable to do so.

The Department also fails to acknowledge the interaction between the limitation on briefing extensions and the new proposal to allow the BIA to affirm decisions of immigration judges or

³ See e.g., Bureau of Consumer Financial Protection, *Debt Collection Practices (Regulation F); Extension of Comment Period*, 85 Fed. Reg. 30890 (May 21, 2020) (agreeing that “the pandemic makes it difficult to respond to the SNPRM thoroughly” and providing an additional 90 days to comment on a proposal “in light of the challenges posed by the COVID-19 pandemic”).

⁴ Proposed Rule, 85 Fed. Reg. at 52509.

⁵ Proposed Rule, 85 Fed. Reg. at 52498.

DHS “on any basis supported by the record.”⁶ Previously, respondents limited their briefing to the issues raised in the notice of appeal. But, under this new standard, respondents appealing a denial would be required to brief every *potentially affirmable* issue that could plausibly be supported by the record, regardless of whether the issue was mentioned in the notice of appeal. Given the additional work required under this rule, respondents will often require more than the 35-day maximum period contemplated by the rule to submit their briefs.

B. Simultaneous Briefing

The proposed rule seeks to adopt simultaneous briefing in non-detained appeals. In support of the proposed change, the Department states that simultaneous briefing will enable the BIA to provide for more expeditious review and that “there is currently no legal or operational reason to adjudicate non-detained cases in a less efficient manner than detained cases.”⁷ Simultaneous briefing requires the appellee to anticipate or guess the appellant’s lines of argument. While the Department seems to assume that the parties will be familiar enough with the record and from the issues raised in the Notice of Appeal to do so, often arguments are developed, added, or changed based on a review of the transcript, which is not available at the time of the Notice of Appeal.

Respondents also often retain counsel specifically for the appeal. In addition to lacking a transcript of proceedings, newly retained counsel will not have notes from the proceedings in front of the immigration court for cases handled pro se at the immigration court level and may not have a complete or comprehensive record of the proceedings when taking over cases handled by another attorney at the immigration court level. In such cases, the respondents will be unable to effectively counter arguments presented by the Department of Homeland Security (DHS) in the simultaneous briefing.

The Department indicates that this concern is ameliorated by the fact that the proposed regulation maintains the BIA’s ability to permit reply briefs in certain cases. But the proposed regulation only permits filing reply briefs “within 14 days of the deadline for the initial briefs.”⁸ Because respondents generally file and receive by mail, this timeline may leave them with only a few days to research and draft responses to any unexpected arguments by DHS. Furthermore, the proposed regulation only allows the filing of a reply brief “by leave of the board.” And the BIA requires a motion which lays out why the moving party was “surprised” by the opposing party’s arguments or assertions.⁹ When the party filing the reply brief files the required motion, the Board decides whether to accept and consider the reply brief as a matter of discretion.¹⁰

Because discretionary decisions are shielded from judicial review under 8 U.S.C. 1252(a)(2)(B), the parties have no assurance that their responses to the opposition’s arguments will ever be heard or considered. The potential that the BIA might grant a motion for leave to file a reply

⁶ Proposed Rule, 85 Fed. Reg. at 52501.

⁷ Proposed Rule, 85 Fed. Reg. at 52499.

⁸ Proposed Rule, 85 Fed. Reg. at 52513.

⁹ BIA Practice Manual, Ch. 4.6(h).

¹⁰ BIA Practice Manual, Ch. 4.6(h).

brief is inadequate to ensure the issues are fully addressed and could ultimately lead parties and the BIA to need *more* time to complete appeals.

The simultaneous briefing procedures currently employed for detained cases suffer from the same issues. But contrary to the Department's assertion that there is no reason to adjudicate those cases differently, the liberty interest of the noncitizen and the government's interest in limiting the cost of detention at least provide a rationale for acceleration of the completion of all briefing. For non-detained cases, that rationale is not present and while all parties have an interest in the timely adjudication of the appeal, there is no justification for not allowing a properly briefed record where the appellee has a full and fair opportunity to respond to the appellant's arguments and characterization of the record on appeal. The Department should thus maintain consecutive briefing from the parties.

C. Finality of BIA Decisions and Voluntary Departure Authority

The Department proposes to prohibit the BIA from remanding solely to consider a request for voluntary departure under INA 240B(b).¹¹ This proposal presumes that records below will in all circumstances be developed for consideration of a voluntary departure request. This is not correct. For example, where a noncitizen focused their efforts toward another form of relief, the relief was granted, and then the Board overturns the grant and wishes to order removal or voluntary departure, it is likely that the record will not have been fully developed on establishing eligibility for post-conclusion voluntary departure. The respondent may not have had reason to emphasize why the adjudicator should find that they have been a person of good moral character for the preceding five years because voluntary departure was never at issue in the underlying proceedings.

Similarly, if the immigration judge granted Respondent's motion to terminate in a case where there were no applications for relief and the Board then overturns the termination, there will have been no record developed on whether Respondent is eligible for voluntary departure or deserves it as a matter of discretion. In many such cases, remand for the consideration of voluntary departure is the only way to make sure that the decision is made on a developed record. Because the proposed rule serves to strip EOIR of the ability to make sure that it makes a reasoned decision on a fully developed record, this proposal should be abandoned.

D. Prohibition on Consideration of New Evidence, Limitations on Motions to Remand, Factfinding by the BIA, and the Standard of Review

The Department proposes to prohibit motions to remand to the immigration court for consideration of new evidence during the pendency of an appeal to the BIA unless the new evidence goes to identity or background investigations, jurisdiction over applications in proceedings, or a question regarding a ground of removability or inadmissibility.¹² Instead, the proposal directs that a party seeking to introduce other new evidence file a motion to reopen.

¹¹ Proposed Rule, 85 Fed. Reg. at 52499.

¹² Proposed Rule, 85 Fed. Reg. at 52500.

A motion to reopen while an appeal is pending at the BIA makes little sense. The immigration judge's order is not administratively final until the BIA resolves the appeal under 8 C.F.R. 1241.1(a). There is simply not a final order to reopen. The exceptions provided to the limitation on submission of new evidence also show a deliberate preference towards DHS, undermining fundamental principles of fairness. While respondents would now be barred from submitting evidence that "would likely change the result of the case,"¹³ the Department would be expressly permitted to submit new evidence that "is the result of identity, law enforcement, or security investigations." Thus, the Department would be permitted to submit evidence that would change the result of the case, while the respondent would not be so allowed.

This prohibition on motions to remand will prejudice respondents with cases that were delayed through no fault of their own. For example, an immigration judge cannot adjudicate an application for adjustment of status by a respondent applying through their U.S. citizen spouse until after another agency, USCIS, approves the I-130 visa petition. Where USCIS delays in adjudicating the petition, respondents are forced to seek continuances of their removal proceedings. But such continuances are not automatic, and at some point an immigration judge may deny the continuances, citing *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018). If the immigration judge denies the continuance and orders removal and the respondent appeals that decision to the Board, the proposed rule would preclude a motion to remand even if the I-130 petition were approved by USCIS the day after the Notice of Appeal to the BIA was filed. Whereas under current rules this might have been a simple remand followed by a straightforward adjustment in immigration court, under the proposed rule the Board may have to produce a transcript, order briefing, and review briefing by both sides before rendering a decision on whether the denial of the continuance was appropriate. Instead of preserving resources, this rule would create further burden on the Board and inefficient use of resources by all parties.

The proposed rule would also prohibit the BIA from remanding a case based on "the totality of the circumstances." Where a Board Member observes a potential gross injustice coming out of the proceedings below, but the record requires further development before the potential issuance of a final order of termination, removal, or relief from removal, the Board must have the authority to remand to develop the record. A blanket prohibition on such remands will tie the hands of the BIA and force the issuance of decisions based on undeveloped records. The Department should therefore abandon its proposal to generally prohibit motions to remand.

The Department further proposes to allow the BIA to affirm a decision of the immigration judge "on any basis."¹⁴ This change would create significant additional work for attorneys, respondents, and the BIA itself, imposing inefficiencies on the BIA and additional costs on respondents and their counsel. Under current procedures, respondents generally limit their brief only to the issues contained in the notice of appeal or which were raised during the hearing. But under this proposal, both DHS and respondents would be required to devote time and effort to brief every issue that could potentially be affirmed by the BIA. As the scope of every appeal would be expanded, the BIA would be forced to spend more time adjudicating appeals.

¹³ *Matter of L-O-G-*, 21 I&N Dec. 413, 420 (BIA 1996) (quoting *Matter of Coelho*, 20 I&N Dec. at 473).

¹⁴ Proposed Rule, 85 Fed. Reg. at 52501.

Also concerning is a proposal to allow the BIA to “take administrative notice of any undisputed facts contained in the record.”¹⁵ The proposal would require parties to resolve disputes about such factfinding before the BIA and would provide respondents only 14 days to respond to independent appellate administrative factfinding. Under the proposed rule, the BIA may affirm an immigration judge on *any* basis, and so such allegedly undisputed facts could relate to issues that are not the basis of the appeal and/or were not the focus of proceedings before the immigration court and thus were not fully developed. In these circumstances, the BIA should remand to allow the parties to fully address the issue. Furthermore, even if it were appropriate to resolve factfinding issues on appeal, 14 days is simply not enough time to respond, especially given the lack of electronic docketing at the BIA. Under the current system, the US Postal Service routinely takes at least 7 days to deliver mail from the BIA. In addition, unless respondents send mail to the BIA through expensive overnight delivery services, mail can take multiple days to arrive at the BIA. Because of those delays, which the Proposed Rule entirely fails to consider, a 14-day schedule would in most cases provide less than a week for the respondent to prepare and submit a response.

E. Scope of a Board Remand

The Department proposes to amend regulations to allow the BIA to remand cases for narrowly prescribed purposes and to forbid immigration judges from considering any issues beyond the scope of the remand.¹⁶ The proposal indicates that this change will eliminate confusion for immigration judges. However, this radical change to EOIR adjudications is not supported by any evidence or data suggesting any widespread confusion among immigration judges. On the contrary, the proposal itself notes that almost all remands are “interpreted to be general remands allowing for consideration” of issues not contemplated by the Board at the time of remand.¹⁷ The proposed change is nothing more than a solution in search of a problem.

As a practical matter, there are compelling reasons to allow the immigration court to consider issues not contemplated on appeal. With appeals regularly taking many months or years, it is exceedingly common for the law or the respondent circumstances to change in ways which affect both removability and eligibility for relief. Where a respondent has become eligible for relief that the immigration judge can quickly grant even if it wasn’t at issue in the appeal, doing so is more efficient than issuing an order that all parties know is likely to be appealed again to the BIA, requiring another transcript, another round of briefing, and another decision. Again, in seeking speed over quality, the proposed changes would achieve neither.

F. Consolidation of Power in EOIR Director Position: Immigration Judge “Quality Assurance” Certifications and Timeliness Certifications

The proposed rule would impermissibly politicize the immigration court system by giving the EOIR Director unprecedented authority to issue decisions in two scenarios. First, the proposed rule would allow immigration judges to “request the correction of errors by the Board” by the

¹⁵ Proposed Rule, 85 Fed. Reg. At 52501.

¹⁶ Proposed Rule, 85 Fed. Reg. at 52502.

¹⁷ Proposed Rule, 85 Fed. Reg. at 52502.

Director in cases remanded to them by the BIA.¹⁸ The certification would allow for review by the EOIR Director where the immigration judge alleges a BIA error. The proposal would allow the immigration judge to request review by the EOIR Director where (1) the Board decision has a typographical error; (2) the Board decision is clearly contrary to a provision of the INA, any other immigration law or statute, any applicable regulation, or binding precedent; (3) the Board decision is vague, ambiguous, or internally inconsistent, or does not resolve the basis for the appeal; or (4) a material factor was clearly not considered by the Board. Though the proposal describes these criteria as narrow, it is hard to imagine a case where the immigration judge disagrees with the decision that could not meet one of these criteria from the disagreeing immigration judge's perspective.

The immigration judge, in complying with the requirements to advise the Director of the reasons for certification, must specify the procedural, factual, and legal basis. In other words, the immigration judge would be drafting the equivalent of a brief or memo to the Director, who provides the review "to ensure a neutral arbiter between the immigration judge and the Board."¹⁹ This system sets up a parallel legal battle affecting the parties' rights, but in which they are not a party. In addition, it undermines the immigration judge's role as a neutral arbiter between DHS and the respondent. For example, where an immigration judge denies an application of relief and the Board overturns the decision, the immigration judge would be drafting a brief arguing against respondent--outside the normal record of proceedings. Should the Director issue a remand, a respondent would understandably struggle to view the immigration judge as a neutral arbiter in continued proceedings, rather than an adversary who had gone outside of the normal record of proceedings to advocate against respondent's position.

The Department justifies the move by saying that "there is no clear mechanism to efficiently address concerns regarding errors made by the BIA" and that "an immigration judge is in the best position to identify an error made by the BIA."²⁰ However, this logic turns the appeals process on its head, disregarding the point of having a superior and inferior court and ignoring that the federal courts are, ultimately, the mechanism for correcting errors.

Notably, the proposal is justified in part by citing to similar principles that currently exist in the Social Security Administration. This comparison is completely inapposite. As the Supreme Court has repeatedly explained, "[d]eportation is always a particularly severe penalty," and "the severity of deportation [is] the equivalent of banishment or exile."²¹ While not downplaying the important role that Social Security adjudicators play in determining whether someone is entitled to benefits, the stakes at issue are significantly lower—exile, torture, or death is never on the line.

Second, the proposal would require the Chairman to refer any case pending at the BIA for more than 335 days to the Director for him to render a decision.²² This proposal would strip

¹⁸ Proposed Rule, 85 Fed. Reg. at 52502.

¹⁹ Proposed Rule, 85 Fed. Reg. at 52502.

²⁰ Proposed Rule, 85 Fed. Reg. at 52502.

²¹ *Lee v. U.S.*, 137 S. Ct. 1958, 1968 (2017) (citations omitted); *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010) (citations omitted).

²² Proposed Rule, 85 Fed. Reg. at 52508.

respondents of the ability to have their case decided by career adjudicators at the Board and instead place substantial numbers of individual cases in the hands of the Director, a government bureaucrat susceptible to the political whims of the Executive branch. The proposed rule itself acknowledges the median case appeal takes 323 days—meaning the Director could potentially decide thousands of appeals each year.²³ Those cases which have been pending appeal for the longest are also the most likely to be complex cases and would be ill-suited to decision by the Director.

The proposed rule does not, however, address how the Director will have the time to personally write potentially thousands of decisions, or alternatively, who will write them under the Director's name and what kind of training and oversight they will receive. The rule entirely fails to consider the administrative inefficiencies that adding this additional responsibility to the Director would cause, nor does the proposed rule consider the costs it would impose on the agency to hire additional staff attorneys to draft decisions for the Director. Importantly, the Director position is a non-adjudicatory, bureaucratic position that is meant to run EOIR operations. The Director does not have expertise, training, or impartiality necessary to decide cases and should not be given adjudicatory powers.

The Proposed Rule further fails to address the high likelihood that the referral process would cause additional delays in adjudicating appeals. Even if the BIA was set to issue a decision on Day 336, the regulation mandates a referral on Day 335, regardless of whether the decision was ready to be finalized.²⁴ But once an appeal is taken out of the hands of the BIA and sent to the Director, the Director could disagree with the direction of the decision the panel had been about to issue and begin drafting a new decision from scratch. Given that the proposed rule does not create a mandatory timeframe for the Director to issue a decision, this could lead to months or more of additional delay.

The mandatory referral process would also waste resources that BIA panels had dedicated towards deciding complex appeals. More complex cases are likely to require the most time prior to the issuance of a BIA decision. Even though those complex cases would benefit most from a decision by a career immigration adjudicator on the BIA, they would be the most likely to be shuffled to the Director's office. It could also lead to rushed adjudication, when a panel which had mostly completed a decision would have to rush through the final stages of completing the decision in order to issue it before the day 335 deadline, knowing that their initial work would be lost if the Director disagreed with the outcome.

The mandatory referral process could disrupt normal BIA procedure by eliminating BIA *en banc* decisions. Under the BIA's current adjudication workflow, a case is not referred for an *en banc* decision until after the merits panel has drafted and reviewed an initial decision. This can add significant time to the decision process, time which is not accounted for in the mandatory referral to the Director at 335 days. But while the Department proposes an exception to the 335-day

²³ While the Department states that the median time for all case appeals is 323 days, that statistic includes both detained and nondetained appeals—suggesting that the median nondetained appeal takes more than 335 days.

²⁴ Proposed Rule, 85 Fed. Reg. at 52512 (mandating that “the Chairman shall refer” a decision to the Director, who “shall exercise delegated authority” to issue a decision).

referral for cases where there is “an impending *en banc* Board decision” that may affect the appeal, it does not propose an exception where a case itself has been referred to the BIA *en banc*.

G. Elimination of Administrative Closure - 8 CFR 1003.1(d)(1)(ii) and 1003.10(b)

The Department proposes to amend the regulations to explicitly forbid the BIA and immigration judges from administratively closing cases.²⁵ The proposal justifies this change by arguing that “administrative closure does little to manage immigration courts effectively and does much to undermine the efficient and timely administration of immigration proceedings.”²⁶

However, administrative closure has long been a key docketing tool for immigration judges, allowing them to effectively manage their burgeoning caseloads.²⁷ For example, administrative closure can be used to manage cases where the respondent is seeking an I-130 visa petition, so that the case can be quickly adjudicated and terminated if it is re-calendared; VAWA, U or T relief awaiting adjudication by USCIS; or an order in another court system – for example, family court – that would affect eligibility for relief in proceedings to name a few. Instead of wasting court resources by bringing all parties, the judge, and court personnel back into the courtroom, an immigration judge can administratively close the case until it is once again ripe to be on the active docket. Both parties can file motions to recalendar at any time. As the President of the National Association of Immigration Judges has made clear, administrative closure is “an effective and common docket management tool” used across judicial systems.²⁸

In fact, an independent report commissioned by the Department itself identifies administrative closure as a helpful tool and recommends working with DHS to implement a policy to administratively close cases awaiting adjudication in other agencies or courts.²⁹ And a recent TRAC report found that contrary to the Department’s assertions: (1) administrative closure was routinely used by immigration judges to manage growing caseloads as well as unresolved overlapping of jurisdictions between EOIR and other agencies; (2) administrative closure helped reduce the backlog; and (3) EOIR misrepresented the data it used to justify its proposed rule by artificially eliminating cases that were administratively closed and failing to recognize that

²⁵ See Proposed Rule, 85 Fed. Reg. at 52503.

²⁶ In making this argument, the proposal ignores the BIA’s assertion that “[a]dministrative closure is an attractive option … [that] assist[s] in ensuring that only those cases that are likely to be resolved are before the Immigration Judge” by “avoid[ing] the repeated rescheduling of a case that is clearly not ready to be concluded.” *Matter of Hashmi*, 24 I&N Dec. 785, 791 n.4 (BIA 2009).

²⁷ See AILA Submits Amicus Brief on Administrative Closure Authority, AILA Doc. No. 18032634 (February 16, 2018), available at <https://www.aila.org/infonet/aila-submits-amicus-brief-administrative-closure>.

²⁸ Lorelei Laird, *ABA urges DOJ to continue allowing immigration judges to close appropriate cases*, ABA Journal, Feb. 20, 2018, available at https://www.abajournal.com/news/article/aba_urges_doj_to_continue_allowing_immigration_judges_to_close_appropriate.

²⁹ FOIA Response: Booz Allen Hamilton Report on Immigration Courts, AILA Doc. No. 18042011 (April 4, 2017), available at <https://www.aila.org/infonet/foia-response-booz-allen-hamilton-report>; AILA Policy Brief: Recommendations from Independent Study of Immigration Courts Contradict DOJ Policy Changes, AILA Doc. No. 18042303 (April 23, 2018), available at <https://www.aila.org/infonet/independent-study-of-courts-contradict-doj-policy>

manual case completions per judge had actually *declined*, not increased, since the elimination of most administrative closure through *Matter of Castro Tum*, 27 I&N Dec. 187 (A.G. 2018).³⁰

The data that the Department relies on for its claim that administrative closure failed “as a policy matter” is simply incorrect. The Department attempts to link the immigration court backlog increase between 2012 and 2018 to the BIA’s decision on administrative closure in *Matter of Avetisyan*. But this growth in the backlog was driven primarily by the sudden increase in the number of people seeking asylum at the border, with asylum applications rising from 44,588 in 2012 to 164,372 in 2018.³¹ And, as the Department itself has acknowledged, docket reshuffling procedures implemented from 2015 to 2017 helped to drive the backlog.

Similarly, the Department errs when it claims that administrative closure was responsible for a decrease in case completions during the years in which *Matter of Avetisyan* was precedent. This is mostly because the Department has intentionally chosen not to define an administratively closed case as a “completion,” even where DHS has decided in the exercise of prosecutorial discretion not to pursue the case. Furthermore, completions declined during that period because the Department was in a hiring freeze and the number of immigration judges fell while case complexity increased with the rise of asylum in immigration court.

The Department also points to the growth in administratively closed cases during the years following *Matter of Avetisyan* as a basis to drastically limit administrative closure.³² However, this data is also misleading. The Department entirely ignores that more than 88,000 of those cases³³ were administratively closed in the exercise of prosecutorial discretion, the single-most-common use of administrative closure between 2012 and 2017. Every one of those 88,000 administrative closures were permitted under precedent existing prior to *Matter of Avestiyan*.³⁴ Despite the widespread use of prosecutorial discretion during the period the Department cites as proving that administrative closure failed “as a policy matter,” the Department does not discuss the effect of prosecutorial discretion on the inactive caseload, nor does it address that the proposed rule would eliminate the ability of DHS to grant prosecutorial discretion through an unopposed motion to administratively close the case.

Taken together, the policy rationales offered by the Department to end administrative closure are based on bad data, ignored history, and misrepresentations. By getting rid of administrative closure, the Department is wasting court resources, growing the court backlog by hundreds of thousands of cases, and taking away adjudicators’ power to manage their dockets.

³⁰ TRAC, *The Life and Death of Administrative Closure*, Sept. 10, 2020, <https://trac.syr.edu/immigration/reports/623/>; Aaron Reichlin-Melnick, *New Data Disproves Trump Administration’s Push to End Administrative Closure*, Immigration Impact, Sept. 16, 2020 <https://immigrationimpact.com/2020/09/16/administrative-closure-regulation/>.

³¹ Executive Office for Immigration Review, *Total Asylum Applications*, last updated July 14, 2020, <https://www.justice.gov/eoir/page/file/1106366/download>.

³² See Proposed Rule, 85 Fed. Reg. at 52504 (noting that the “inactive pending caseload” grew by more than 150,000 cases between *Matter of Avetisyan* and *Matter of Castro-Tum*).

³³ See TRAC, *The Life and Death of Administrative Closure*, Sept. 10, 2020, <https://trac.syr.edu/immigration/reports/623/>.

³⁴ See *Matter of Gutierrez*, 21 I&N Dec. 479 (BIA 1996) (requiring consent of both parties to administratively close a case), overruled by *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012).

H. Sua Sponte Authority

The Department proposes to eliminate the authority to reopen cases *sua sponte*.³⁵ As justification, the proposal asserts that noncitizens improperly request *sua sponte* reopening as a general cure for motions to reopen that would otherwise be time or number-barred by regulation. But noncitizens, when they request that adjudicators exercise their *sua sponte* authority, are not getting the equivalent of a motion to reopen. As the proposal acknowledges, with rare and narrow exceptions, requests for the use of *sua sponte* authority are not subject to judicial review. And binding precedent already limits the use of *sua sponte* authority to “exceptional situations.”³⁶

The BIA’s ability to reopen *sua sponte* has been used to reopen and terminate proceedings where the Respondent has subsequently acquired lawful status.³⁷ This may be especially important in the cases of long-time U.S. residents that the government has been unwilling or unable to deport.³⁸ The ability to reopen removal orders for those who have gained lawful status is not adequately preserved by the potential for the filing of a joint motion to reopen. DHS is under no obligation to agree to join a motion to reopen, even for someone who has become a lawful permanent resident.³⁹

The proposed rule would also prevent the Board from correcting grave injustices. For example, if a lawful permanent resident is precluded from applying for cancellation of removal due to a conviction which is later vacated due to constitutional defect or proof of actual innocence, the Board can currently use its *sua sponte* authority to reopen proceedings to allow the noncitizen to seek the cancellation of removal they were wrongly barred from requesting from the immigration court.⁴⁰ Under the proposed rule, the Board would have limited authority to correct the injustice in the absence of a joint motion. Again, DHS is under no obligation to join a motion to reopen and, as a practical matter, it rarely agrees to do so.

The proposed rule rests on a flawed justification that an interest in “finality” outweighs all other considerations. Importantly, the cases that the Department cites for the proposition that motions to reopen are disfavored were all decided before the passage of the Illegal Immigration Reform

³⁵ See Proposed Rule, 85 Fed. Reg. at 52504.

³⁶ Matter of J-J-, 21 I&N Dec. 976 (BIA 1997).

³⁷ See *Lilian Karla Dias-Gomes*, A098 723 878 (BIA Feb. 12, 2020) (reopening and terminating proceedings *sua sponte* in light of adjustment from U to LPR status); *A-N-A-*, AXXX XXX 918 (BIA Jan. 22, 2020) (reopening and terminating proceedings *sua sponte* in light of grant of derivative asylee status); *Wenzhong Lin*, A079 390 497 (BIA Nov. 22, 2019) (reopening and terminating proceedings in light of evidence that respondent was granted LPR status by USCIS).

³⁸ See, e.g., *Devitri v. Cronen*, 289 F. Supp. 3d 287, 290-91 (D. Mass. 2018) (describing group seeking reopening after immigration authorities abruptly halted program of staying deportation of Indonesian nationals in New Hampshire); *Chhoeun v. Marin*, 306 F. Supp. 3d 1147, 1150 (C.D. Cal. 2018) (describing group seeking reopening after abrupt restart of deportations to Cambodia).

³⁹ See, e.g., *C-J-, AXXX XXX 149* (BIA Jan. 31, 2020) (reopening and terminating proceedings *sua sponte* over DHS opposition in light of evidence that USCIS granted LPR status shortly before decision denying prior motion to reopen).

⁴⁰ See, e.g., *L-M-S-C-, AXXX XXX 284* (BIA Jan. 6, 2020) (reopening proceedings *sua sponte* in light of vacatur of aggravated felony conviction that previously prevented respondent from applying for relief from removal).

and Immigrant Responsibility Act of 1996, in which Congress created a statutory motion to reopen.⁴¹ Here, the Department relies on dicta from those cases, which arose out of a no-longer-extant regulatory scheme where motions to reopen triggered automatic stays of removal.

Notably, more recent Supreme Court decisions recognize that motions to reopen provide an ‘important safeguard’ intended ‘to ensure a proper and lawful disposition’ of immigration proceedings.”⁴²

The Department should not rely on outdated caselaw to eliminate a key procedural protection that helps to preserve accuracy in removal proceedings, as well as key purposes of immigration law like family unity and the right to remain in the United States if there are viable options for relief. As the Supreme Court has repeatedly made clear, deportation is an extremely harsh penalty and there is a clear interest in adopting procedures that limit the extent to which that penalty is employed. By failing to consider any interests beyond finality, the Department misunderstands the basic purpose of motions to reopen.

Finally, while stripping away a key mechanism to reopen time or number-barred orders from the noncitizen in exceptional circumstances, the proposal would continue to exempt DHS motions from time or number bars, effectively locking in decisions against respondents in the name of finality while continuing to allow DHS to seek to reopen a case without any limitations. This type of unequal treatment is unacceptable in any court system, much less one with such high stakes. In sum, because the proposal to eliminate *sua sponte* authority removes the ability of the Board to reopen and terminate removal orders for those who acquire immigration status and eliminates the ability to correct manifest injustices, the Department should abandon this proposal.

I. Certification Authority

Citing a lack of clear governing standards and the interest in finality, the Department proposes to eliminate the BIA’s self-certification authority. As with *sua sponte* authority, the self-certification is currently only used in exceptional situations.⁴³ Though uncommonly used, the authority allows the BIA to correct injustices. For example, where extended and unanticipated delay by the postal service results in a notice of appeal being delivered a day after the deadline, the BIA can currently assess the efforts of the appealing party to timely file the appeal and the extent to which the delay was outside of the party’s control. If warranted, the BIA can accept the appeal by certification and avoid error by the postal service resulting in dismissal.⁴⁴ Elimination of this authority removes an important though uncommonly used tool to prevent injustice and ensure that cases are decided on the merits.

J. Timeliness of Adjudication of BIA Appeals

⁴¹ See Proposed Rule, 85 Fed. Reg. at 52493 (citing *INS v. Doherty*, 502 U.S. 314 (1992) and *INS v. Abudu*, 485 U.S. 94, 107 (1988)).

⁴² *Kucana v. Holder*, 558 U.S. 233, 242 (2010) (quoting *Dada v. Mukasey*, 554 U.S. 1, 18 (2008)).

⁴³ *Matter of Jean*, 23 I&N Dec. 373, 380 n. 9 (A.G. 2002).

⁴⁴ See, e.g., *R-L-R-L-*, AXXX XXX 540 (BIA Nov. 2, 2018) (certifies appeal to itself where Notice of Appeal was filed one day late due to delay caused by U.S. Postal Service).

The Department proposes a requirement that initial screening for summary dismissal be completed within 14 days of filing and a decision must be issued within 30 days.⁴⁵ A mandatory deadline together with a large volume of cases is a recipe for erroneous summary dismissals. While screeners should work as quickly as possible, their priority should be in getting decisions correct—not in complying with an arbitrary deadline set without regard for variations in their workload at any given time. Similarly, the proposal’s requirement that cases not subject to summary dismissal be decided within 14 days of receipt of the record prioritizes speed over fairness and quality.

IV. The Proposed Rule Will Hinder Pro Bono Representation

The Immigration Justice Campaign works with a network of lawyers to provide pro bono representation to immigration detainees across the country. The vast majority of our volunteers are new to immigration practice and it requires a significant amount of time to train and mentor them on the intricacies of immigration law practice and procedure, especially as it pertains to appellate work. While our volunteers are a diverse mix of large law firm attorneys who practice in areas other than immigration, solo practitioners, and other independent volunteers, they share the common need for extensive training and mentorship.

The BIA cases that the Immigration Justice Campaign places often come to us after a respondent has appeared *pro se* and we frequently have incomplete records when we place the cases. It is already difficult for us to find lawyers willing and able to sign on to pro bono representation before the BIA given the 21-day simultaneous briefing schedule for detained cases. Reducing the length of time granted for extension requests from 21 to 14 days, prohibiting the ability to seek extensions greater than 14 days, and permitting the BIA to affirm decisions on the basis of “any reason contained in the record” will make placing detained cases even more challenging and shrink our pool of potential volunteers.

In addition, the shortened length of time granted for extension requests will undoubtedly strain our mentors’ capacity since they will need to work with volunteers on a more expedited timeline. Within a matter of weeks, mentors will need to quickly parse out the issues ripe for appeal by reviewing hundreds of pages of case records, teach volunteers immigration law and appellate procedures, and review draft briefs. This will make mentors unavailable to assist pro bono attorneys working on other matters and may ultimately impact the quality of the briefs.

Finally, the proposed rule will not only limit our ability to place cases but will also limit our pro bono volunteers’ ability to effectively represent their clients. As described above, the proposed rule prohibits motions to remand to the immigration court for the consideration of new evidence during the pendency of an appeal to the BIA with few narrow exceptions. Because the Immigration Justice Campaign works with clients who often appeared *pro se* at the immigration court stage, our pro bono attorneys frequently argue that remand is appropriate for consideration of evidence that was improperly excluded at the immigration court level or that wasn’t available then. Eliminating this critical option will hamper pro bono attorneys’ ability to provide effective representation.

⁴⁵ Proposed Rule, 85 Fed. Reg. at 52507.

V. Conclusion

AILA and the Council, through the Justice Campaign, oppose the proposed regulations because it strips EOIR of the ability to make a reasoned decision on a fully developed record, blocks respondents from mounting an effective appeal, and undermines due process. We urge the Department to reconsider the proposed rule and withdraw it from consideration.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCATION

THE AMERICAN IMMIGRATION COUNCIL