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

Human Rights First submits these comments in response to the Department of Justice (DOJ) Executive Office for Immigration Review (EOIR) Notice of Proposed Rulemaking published in the Federal Register on August 26, 2020. The proposed rule would strip critical due process protections from asylum seekers and immigrants with cases pending before the Board of Immigration Appeals (BIA) and the immigration courts.

Through this proposed rule, the administration would deny many asylum seekers a fair day in court and upend years of appellate practice. The proposed rule's timing and simultaneous briefing requirements will make adjudication of BIA appeals even more burdensome and inefficient by requiring litigants to brief every colorable claim, rather than only those disputed by the government. Further, shortened time limits for appeal filings will make it far more difficult for immigrants to be represented by an attorney. The proposed rule would unfairly grant the government authority to submit evidence at the appellate stage, while preventing asylum seekers and immigrants from presenting new evidence favorable to their cases. These changes undermine critical due process protections[1] and stray from well-established international norms of fair appellate procedures for asylum adjudication.[2] Further, these proposals, including the creation of

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[1] Asylum seekers in removal proceedings are entitled to due process. *Zadvydas v. Davis,* 533 U.S. 678, 693, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001); *Reno v. Flores*, 507 U.S. 292 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."). They must be afforded "the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge,* 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Due process protections extend to immigration appeals. *Garcia-Cortez v. Ashcroft*, 366 F.3d 749 (9th Cir. 2004) ("Due process requires that aliens who seek to appeal be given a fair opportunity to present their cases"); *Serrano-Alberto v. Att'y Gen*., 859 F.3d 208 (3d Cir. 2017) ("Throughout all phases of deportation proceedings, petitioners must be afforded due process of law."). The Circuit Courts of Appeal have found due process violations in the context of BIA appellate asylum decision making. *See, e.g.*, *Xiao Ji Chen v. U.S. Dep't of Justice*, 434 F.3d 144 (2d Cir. 2006), reh'g granted, vacated on other grounds by *Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315 (2d Cir. 2006); *Ezeagwuna v. Ashcroft*, 325 F.3d 396 (3d Cir. 2003); *Castellon–Villagra v. INS*, 972 F.2d 1017 (9th Cir. 1992); *de la Llana–Castello v. INS*, 16 F.3d 1093 (10th Cir. 1994).

[2] *See* United Nations High Commissioner for Refugees (UNHCR), "Procedural Standards for Refugee Status Determination under UNHCR's Mandate" (August 2020), *available at* unhcr.org/4317223c9.pdf; UNHCR & Inter-Parliamentary Union, "A guide to international refugee protection and building state asylum systems," *available at* https://www.unhcr.org/3d4aba564.pdf.

certification process of decisions for review by the EOIR Director from immigration judges that object to being overturned on appeal and referral of a large number of appeals pending at the BIA for decision by the EOIR Director, will only further politicize immigration court determinations. Despite DOJ's proffered rationale for the rule of efficiency and speed, the proposed rule would in fact add substantially to the immigration court backlog by ending administrative closure and by extending and complicating the resolution of cases.

The import of just and impartial immigration court and appellate proceedings cannot be overstated. For asylum seekers, a fair day in court can mean the difference between living in safety in the United States or being returned to a country where they fear persecution, torture or death. The proposed regulations, if codified, will result in the illegal deportation of refugees who qualify for asylum and other forms of humanitarian relief in violation of U.S. law and treaty obligations to refrain from returning refugees to danger. We urge DOJ to withdraw the proposed rules in their entirety.

Human Rights First and Its Interest in This Issue

For over 40 years, Human Rights First has provided pro bono legal representation to refugees seeking asylum in the United States and advocated for the protection of the human rights of refugees. Human Rights First grounds its work in the legal standards of the 1951 Refugee Convention, its Protocol, and other international human rights instruments, and we advocate adherence to these standards in U.S. law and policy. Human Rights First operates one of the largest and most successful pro bono asylum representation programs in the country. Working in partnership with volunteer attorneys at many of the nation's leading law firms, we provide legal representation, without charge, to hundreds of refugees each year through our offices in California, New York, and Washington D.C. This extensive experience dealing directly with refugees seeking protection in the United States is the foundation for our advocacy and informs the comments that follow.

Through our pro bono refugee representation program, Human Rights First and our volunteer lawyers know how difficult it already is for asylum seekers to find quality legal representation and to be granted protection in the United States. This rule would substantially limit the due process protections of the refugees we represent and gravely undermine those of the many asylum seekers who are unable to find or afford to retain competent legal counsel. By imposing shortened appeals filing deadlines and restricting remand and reopening of cases, the rule will multiply the barriers asylum seekers face in seeking to retain representation on appeal and will make it more difficult for Human Rights First to locate pro bono attorneys able to take on these cases. Had the provisions of the proposed rules been in place, many of our clients would have been denied the lifesaving protection provided by U.S. asylum law.

The Proposed Rule Would Prevent the BIA and Immigration Judges from Administratively Closing Cases, Harming Immigrants and Worsening the Backlog

Proposed Section 8 C.F.R. § 1003.1(d)(ii) and 8 C.F.R. § 1003.10 would eliminate BIA and immigration judge authority to administratively close cases. This change will result in increasingly overburdened immigration courts and further case delays, deportation of countless

individuals who would have been eligible for immigration relief or status, and the re-traumatization of asylum seekers and children in protracted and unnecessary courtroom proceedings.

Administrative closure (removing a case from the active court docket) is a critical docketing tool that immigration judges have routinely used for decades.[3] It allows immigration judges to exercise discretion over the cases on their dockets by, for example, temporarily pausing proceedings to allow an individual to receive a decision on a pending application for relief with U.S. Citizenship and Immigration Services (USCIS). Administrative closure is both humane and efficient. Indeed, a 2017 report commissioned by EOIR recommended that EOIR and the Department of Homeland Security (DHS) allow administrative closure in cases awaiting adjudication in other agencies or courts.[4] When Attorney General Sessions sought to limit administrative closure in 2018, the National Association of Immigration Judges (NAIJ) wrote: "leaving IJs without this useful docket management tool will result in an enormous increase in our already massive backlog of cases, which will overwhelm the system and require IJs to spend a substantial amount of time and resources on cases that would be handled more efficiently if administratively closed."[5] A recent report by Syracuse University's Transactional Records Access Clearinghouse (TRAC) found that administrative closure has helped to reduce immigration court backlogs.[6]

Contrary to EOIR's specious claims of efficiency, eliminating administrative closure will increase the immigration court backlog and cause additional delays for asylum seekers and immigrants already waiting in some cases years for a decision. If implemented, this rule would prohibit immigration judges from pausing additional cases on their active docket and require re-docketing of the 292,042 cases that are currently administratively closed.[7] In its review of EOIR's claims regarding administration closure, TRAC found that the agency has misrepresented data to justify this rule.[8] Indeed, policies touted by this administration as promoting efficiency have instead worsened the immigration backlog.[9]

Adjudicating rather than closing these cases not only wastes limited court resources but would result in the deportation of immigrants who could eventually have secured lawful status if their immigration court cases had been temporarily closed. Unsurprisingly, immigrants whose cases

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[3] Memorandum from William R. Robie, Chief Immigration Judge, Exec. Office for Immigration Review, to All Immigration Judges 1 (Mar. 7, 1984), https://www.justice.gov/sites/default/files/eoir/legacy/2001/09/26/84-2.pdf.
[4] Booz Allen Hamilton & Exec. Office for Immigration Review, Dep't of Justice, Legal Case Study: Summary Report, at 26, (2017), *available at* https://www.aila.org/casestudy.
[5] National Association of Immigration Judges, *Memorandum to Attorney General Jeff Sessions Re: Administrative Closure of Removal Cases*, (Jan. 30, 2018), *available at* https://www.aila.org/File/DownloadEmbeddedFile/76064.
[6] Syracuse University, Transactional Records Access Clearinghouse (TRAC), "The Life and Death of Administrative Closure," (Sep. 10, 2020), *available at* https://trac.syr.edu/immigration/reports/623/.
[7] *Id.*
[8] *Id.*
[9] Fernanda Echavarri, "'A Fucking Disaster That Is Designed to Fail': How Trump Wrecked America's Immigration Courts," Mother Jones (Feb. 6, 2020), *available at* https://www.motherjones.com/politics/2020/02/trump-immigration-court-backlog-migrant-protection-protocols/; Marissa Esthimer, "Crisis in the Courts: Is the Backlogged U.S. Immigration Court System at Its Breaking Point?", Migration Policy Institute (Feb. 3, 2019), *available at* https://www.migrationpolicy.org/article/backlogged-us-immigration-courts-breaking-point.

are administratively closed are likely to ultimately obtain lawful status.[10] Asylum seekers blocked from administrative close will be barred from seeking relief administered by USCIS including derivative asylum through an asylee parent or spouse, Special Immigrant Juvenile Status (SIJS) for abused and neglected children, U visas for victims of serious crimes, and T visas for trafficking survivors. Ordering these individuals removed from the United States before USCIS can process their applications runs contrary to Congress' intent to provide these forms of relief and, with respect to U and T visas, to encourage survivors of serious crimes to report these incidents to the police. It is particularly unfair to strip immigration judges of the ability to administratively close cases where asylum seekers and immigrants are eligible for relief that only USCIS can grant at the same time that DOJ and DHS are seeking to expedite case adjudications.

Eliminating administrative closure will also unnecessarily re-traumatize vulnerable asylum seekers. With administrative closure, asylum seekers in removal proceedings who are pursuing other forms of relief before USCIS can be spared from testifying about their most traumatic experiences, such as being tortured or raped, in lengthy and difficult adversarial asylum court proceedings. Unaccompanied children fleeing countries such as El Salvador, Honduras, and Guatemala, which have some of the highest murder rates in the world, are often eligible for both asylum and SIJS but under this rule they too would not be spared the trauma of testifying about their fear of return, even if it is entirely unnecessary in light of their pending SIJS application.

The Proposed Rule Would Allow Immigration Judges Who Disagree with BIA Remands to Certify Those Cases to the EOIR Director, Further Politicizing EOIR

Human Rights First strongly opposes the so-called "quality assurance" provision proposed at 8 C.F.R. § 1003.1(k). This provision would allow immigration judges who disagree with a decision remanded to them from the BIA to certify the decision to the EOIR Director. The Director, a political appointee, would be authorized to issue a decision, or to refer the case to the BIA again or the Attorney General. Rather than promoting "quality assurance," this proposed rule undermines the integrity of the immigration court and appellate process. While an adjudicator may disagree with the decision of an appellate body, it is fundamental tenet of our system of jurisprudence that appellate bodies have authority to review decisions by triers of fact. While the proposed rule states that the proposed immigration judge certification process should not be used "as a basis solely to express disapproval of or disagreement with the outcome of a Board decision," the bases on which an immigration judge can certify a case to the EOIR Director are so broad—including, for example, that the judge believes that the BIA decision is contrary to law, or is "vague"—that immigration judges who simply disagree with a BIA decision will be able to certify effectively any case remanded from the BIA for review.[11]

[10] TRAC, "The Life and Death of Administrative Closure."

[11] It was precisely this type of irregular procedure that led to the attorney general's decision in *Matter of A-B-* 27 I&N Dec. 316 (A.G. 2018). In that case, the BIA had remanded a decision to Judge Couch after he had denied asylum to a woman who had survived domestic violence. *See* Center for Gender and Refugee Studies, *Backgrounder and Briefing on Matter of A-B-*, (Aug. 2018), *available at* https://cgrs.uchastings.edu/matter-b/backgrounder-and-briefing-matter-b.

This proposed rule will further undermine the integrity of the BIA and allow immigration judges to effectively circumvent administrative review. For decades, the role of the EOIR Director has been to manage the operations of the agency, not to decide cases or appeals. The EOIR Director was prohibited from adjudicating cases until 2019, when an interim rule published by this administration gave the Director that authority.[12] Immigration judge Ashley Tabbador, president of NAIJ, noted at the time that allowing the EOIR Director to make case decisions "substitute[s] the policy directives of a single political appointee over the legal analysis of non-political, independent adjudicators. . . . By collapsing the policymaking role with the adjudication role into a single individual, the director of EOIR, an unconfirmed political appointee, the immigration court system has effectively been dismantled."[13] DOJ should not adopt rules that further politicize the immigration court system. This administration has already taken steps to politicize the hiring process for immigration judges, to give EOIR political appointees more authority in the immigration judge[14] and BIA Member[15] selection process, resulting in the appointment of immigration judges to the BIA with markedly high asylum denial rates.[16] This proposed rule is at odds with Congress's intent to remove ideological and political bias from asylum adjudication in adopting the Refugee Act of 1980.[17]

The Proposed Rule Rigs the Appeals Process - Preventing the BIA from Remanding Cases in Most Circumstances and Improperly Limiting Immigration Judge Review on Remand

The proposed rule at 8 C.F.R. § 1003.1(d)(3)(iv) and 8 C.F.R. § 1003.1(d)(7) would prevent the BIA from remanding cases in most circumstances and punish asylum seekers for the misfortune of appearing before an immigration judge who failed to develop the record adequately or made egregious errors in applying the law to the facts in the case. Individuals who did not have an attorney when they were before the immigration judge will be particularly harmed by this proposed rule.[18]

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[12] *See* 84 FR 44537 (2019).

[13] Eric Katz, "Trump Administration Expands Political Power Over Career Immigration Judges," Government Executive, Aug. 26, 2019, *available at* https://www.govexec.com/management/2019/08/trump-administration-expands-power-political-appointee-over-career-immigration-judges/159453/.

[14] Human Rights First, *Immigration Court Hiring Politicization*, (Oct. 18, 2018), *available at* https://www.humanrightsfirst.org/sites/default/files/DOJ-FOIA-Immigration-Judges.pdf.

[15] Claudia Valenzuela, "Board of Immigration Appeals' Restructuring and Hiring Plan Reveals Anti-Immigrant Bias," Immigration Impact (May 28, 2020), *available at* https://immigrationimpact.com/2020/05/28/board-of-immigration-appeals-hiring/#.X2wXRmhKhPY.

[16] Of the twelve BIA Members appointed by Attorney General William Barr for whom there is data on asylum denial rates as immigration judges, the average asylum denial rates were 90.7 percent, compared with the national average of 63.1 percent. *See* TRAC Immigration, *Immigration Judge Reports – Asylum* (2019), *available at* https://trac.syr.edu/immigration/reports/judgereports/.

[17] H.R. Rep. No. 96-608, 96th Cong., 2d Sess. 13 (1979) (under the Refugee Act, "the plight of the refugees themselves, as opposed to national origin or political considerations, should be paramount in determining which refugees are to be admitted to the United States"); Anker & Posner, *The Forty-Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 34-56 (1981) (noting Congress' concerns to limit the executive branch's political dominance of asylum and refugee policy).

[18] According to the most recent DOJ Statistical Yearbook, roughly 20 percent of all BIA appeals are by *pro se* appellants. Dep't of Justice, Statistical Yearbook (FY 2018), at 38, *available at*

First, the proposed rule at 8 C.F.R. § 1003.1(d)(3)(iv)(C) would strip the BIA of the ability to remand a case *sua sponte* for further factfinding or where the issue was not adequately raised below unless there is an issue regarding jurisdiction. For asylum seekers who are unrepresented, this means that even if an immigration judge clearly failed to develop the record adequately and even if the BIA Member reviewing the case detects a clear avenue for relief that the immigration judge failed to ask any questions about, the BIA Member would have no authority to prevent a manifest injustice and remand the case for further fact-finding. This provision appears designed to quickly, and with finality, remove asylum seekers and immigrants who do not know that they can request a remand, which would disproportionately harm people who are unrepresented and rely on EOIR to protect their rights.

Second, even where asylum seekers are represented, the proposed rules make remand for further fact-finding nearly impossible. The proposed rule would impose a list of onerous requirements for remand. Under 8 C.F.R. § 1003.1(d)(3)(iv)(D), the BIA could only remand a case for further factfinding if *all* of the following conditions are met:

> (1) The party seeking remand preserved the issue by presenting it before the immigration judge;
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> (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;
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> (3) The additional factfinding would alter the outcome or disposition of the case;
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> (4) The additional factfinding would not be cumulative of the evidence already presented or contained in the record; and
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> (5) One of the following circumstances is present in the case:
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> > (i) The immigration judge's factual findings were clearly erroneous, or
> >
> > (ii) Remand to DHS is warranted following de novo review.

These requirements are virtually impossible to meet and defy common sense. It is illogical to require a condition that "additional factfinding would alter the outcome or disposition of the case." The very purpose of remanding for additional fact-finding is to remedy an undeveloped record; it would be inherently difficult or impossible in many circumstances to know whether fact-finding, where none has been conducted, would alter the outcome. Condition (5)(i) is also impossible to meet where the immigration judge failed to develop the record, as it only addresses a situation where the factual findings were clearly erroneous and not where the findings simply do not exist.

Unrepresented asylum seekers will be particularly disadvantaged. An asylum seeker who does not know what she needs to present in court to establish her asylum claim is unlikely to have

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https://www.justice.gov/eoir/file/1198896/download. EOIR statistics show that overall, 37 percent of pending cases in immigration court are unrepresented. EOIR, *Current Representation Rates,* (Apr. 15, 2020), *available at* https://www.justice.gov/eoir/page/file/1062991/download (last accessed Sep. 23, 2020).

"attempted to adduce the additional facts before the immigration judge," as would be required for the BIA to remand a case under the proposed rule. One of the basic duties of an immigration judge is to make "clear and complete findings of fact;"[19] yet, under this rule unrepresented asylum seekers would be practically prohibited from having their cases remanded where an immigration judge has failed to make sufficient factual findings. Immigration judges, who face a growing backlog and performance metrics that require them to adjudicate 700 cases per year,[20] will have even less incentive to take the time to develop the record in *pro se* cases where there would very little possibility that the case could be remanded for failure to do so.

The proposed rule would even appear to preclude the Board from remanding for further fact-finding in cases where the inadequacy of the factual record was due to ineffective assistance of counsel. One Human Rights First client, for example, had previously been represented before the immigration judge in an asylum claim by a lawyer who had failed to interview his client or conduct any research, and had filed, by way of an application for asylum, an I-589 form listing the client's nationality as "African" and attaching a copy of the sworn statement taken from him by an immigration inspector at the airport in lieu of a statement from the applicant of the facts of his claim. The problem was not that the immigration judge's fact-finding was clearly erroneous, such as to allow for a remand under the proposed regulation, but rather that the immigration judge had not been given sufficient facts to work with. Also, the lawyer representing the applicant before the immigration judge had obviously not raised to the judge the issue of his own ineffectiveness. Human Rights First represented the applicant on appeal to the BIA and along with his appeal brief, filed the evidence that should have been filed at the immigration judge level along with a motion to remand. The BIA remanded the case for a new hearing, and the applicant was granted asylum. These circumstances, where due process would clearly require a remand, would not appear to meet the requirements of the proposed rule. Precluding a remand in circumstances like these, far from favoring efficiency and finality, would merely kick the issue down the road, requiring it to be presented as a motion to reopen (and thus requiring two BIA adjudications rather than one), if not federal judicial review.

Third, the proposed rule at 8 C.F.R. § 1003.1(d)(7)(ii)(B), would bar the BIA from remanding in "the totality of circumstances" unless there is a jurisdictional issue. This provision, along with the proposed 8 C.F.R. § 1003.1(d)(3)(v) allow the BIA to affirm an immigration judge denial for *any reason*, regardless of whether the immigration judge's decision contains other egregious errors. As discussed in more detail below, this change would result in the BIA relying on facts that were not adequately developed or potentially even considered by the immigration judge.

Fourth, under 8 C.F.R. § 1003.1(d)(7)(ii)(C) the BIA would be barred from remanding a case where a change in law has occurred unless that change affected a removability ground under INA 212 or 237 (which does not include a change affecting eligibility for relief including asylum). For example, an asylum seeker denied asylum based on one of the numerous asylum-restricting regulations adopted by this administration that is later invalidated, rescinded, or

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[19] *Matter of S-H-*, 23 I&N Dec. 462, 465 (BIA 2002).
[20] *See*, CLINIC, *DOJ Requires Immigration Judges to Meet Quotas*, (Apr. 27, 2018), *available at* https://cliniclegal.org/resources/doj-requires-immigration-judges-meet-quotas.

superseded would be unable to have the case remanded, and the removal order against them would stand. With asylum regulations and self-certified decisions by the Attorney General putting asylum eligibility rules in a state of near constant flux under the Trump administration, this rule would block the many refugees denied asylum because of these illegal rules from seeking remand for their case to be reconsidered.[21] In contrast, the UN Refugee Agency (UNHCR) recommends that appellate bodies "examine both facts and law based on up-to-date information" and "take into consideration any new information relevant to the claim."[22]

The proposed rule would also severely limit the issues an immigration judge may consider in the rare instance that a case is remanded. Under 8 C.F.R. § 1003.1(d)(7)(iii), the BIA may both divest itself of jurisdiction when it remands the case *and* restrict the issues the immigration judge may consider. Thus, if a new avenue of relief becomes available in the intervening months or years while the asylum seeker is waiting for a hearing, or if the individual identifies another error in the prior decision after obtaining counsel, for instance, the immigration judge could be foreclosed from considering those issues. The judge would be forced to order removal even where relief is available under the law and to deprive the individual of the opportunity to seek all available opportunities to obtain legal status. This will particularly harm individuals who were unrepresented during their appeal and were unable to identify every error committed by the immigration judge.

The Proposed Rule Would Largely Eliminate the BIA's and Immigration Judges' *Sua Sponte* Authority to Reopen Cases

The proposed modifications at 8 C.F.R. § 1003.2(a) and 8 C.F.R. § 1003.23(b)(1) would effectively eliminate the already limited authority of immigration judges and the BIA to reopen immigration cases *sua sponte* in "exceptional situations."[23] Instead, the proposed rule would only allow immigration judges and the BIA to reopen proceedings (other than to correct a typographical error or cure a service defect) based on a motion filed by one of the parties. This provision would greatly reduce the ability of asylum seekers to have motions to reopen granted. Under the rules, with very limited exceptions, only one motion to reopen may be filed and it must be filed within 90 days of a final order. Yet the proposed rules eliminate these requirements for DHS, thereby unfairly allowing the government further EOIR review while shutting out asylum seekers and immigrants seeking to reopen their cases. As a result, an individual who later becomes eligible for relief, for instance as a derivative asylee through a spouse or parent, would be foreclosed from reopening the removal order against her. By contrast, UNHCR guidelines

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[21] For example, for almost a year, asylum seekers were denied asylum under the Interim Final Rule published July 16, 2019 (third-country transit bar), which was vacated on June 30, 2020 by a federal court. *See CAIR Coalition et al. v. Trump*, No. 19-2117 (D.D.C., June 30, 2020). Asylum seekers denied because of this bar may now be eligible for asylum but the immigration judge in their cases may not have conducted adequate fact-finding to determine asylum eligibility, instead relying on the third-country transit bar to deny asylum. Remand for further fact-finding would be crucial to grant many people asylum where they were denied under the existing regulations at the time.
[22] UNHCR, "Procedural Standards for Refugee Status Determination under UNHCR's Mandate" (August 2020), available at unhcr.org/4317223c9.pdf; UNHCR & Inter-Parliamentary Union, "A guide to international refugee protection and building state asylum systems," *available at* https://www.unhcr.org/3d4aba564.pdf.
[23] *See Matter of JJ-*, 21 I&N Dec. 976, 983 (BIA 1997).

note that an applicant should "not be prohibited from presenting new evidence at the appeals stage."[24]

This change would eliminate the discretion of BIA members and immigration judges to remedy injustices. Even where the failure to reopen a case *sua sponte* would result in a manifest injustice, this rule would strip immigration judges and the BIA of their authority to do so. For example, a detained asylum seeker from Mauritania was denied asylum by the immigration judge and was unable to afford counsel to represent him on appeal. An attorney visiting the detention center on behalf of a collective of legal services organizations met with him and assisted him in completing and serving and mailing the notice of appeal form the court had given him. The BIA at that time had recently moved, and the attorney did not notice that the form the court had given was outdated and bore the old address for the BIA clerk's office. The attorney FedExed the appeal form to the BIA and to DHS counsel five days before the due date and confirmed the following day that it had been delivered. The old office forwarded it to the current address of the BIA, but this internal transfer took over five days, with the result that the appeal was docketed late. Upon realizing what had happened, the attorney filed a motion to reopen on the asylum seeker's behalf documenting this fiasco. The BIA exercised *sua sponte* authority to reopen the case and accept the appeal. Human Rights First represented the asylum seeker before the BIA, which reversed the immigration judge's decision. The asylum seeker was subsequently granted asylum. Under the proposed rule, this refugee would have been deported to persecution.

Moreover, while the rule will allow the government to obtain a remand without submitting *any* formal motion, asylum seekers and immigrants will be restricted in the type of motion they can even make. Unrepresented respondents who incorrectly label their submissions to the BIA as a motion to remand rather than a motion to reopen may be unfairly prevented from having their new evidence considered. The rule unfairly creates a new obstacle for asylum seekers and immigrants without requiring the same of the government.

The Proposed Rule Imposes Different and Unfair Procedural Requirements on Asylum Seekers and Immigrants Compared to Those Required of the Government

Under 8 C.F.R. § 1003.2(c)(3)(v)-(vii), DHS would be specifically exempted from time and number limits on motions to reopen before the BIA, while asylum seekers and immigrants would be bound by these strict limitations. EOIR is an adjudication system and as such it should not apply different rules to the parties that appear before it. Congress directed the Attorney General to enact regulations to limit the number and time period for the filing of motions to reopen; it did not authorize the Attorney General to impose one-sided limitations solely on immigrant respondents.[25] While the government may in some instances have good cause to file beyond time and number limitations, asylum seekers and immigrants also have good cause to do so when, among other reasons, new relief becomes available, when they suffered ineffective assistance of counsel in the past, or when a change in country conditions or other extraordinary circumstances warrant reopening. Moreover, the reason for the time and number limitations is that courts

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[24] UNHCR & Inter-Parliamentary Union, "A guide to international refugee protection and building state asylum systems," *available at* https://www.unhcr.org/3d4aba564.pdf.

[25] *See* Immigration Act of 1990, Pub. L. No. 101-649, § 545(d), 104 Stat. 4978, 5066.

generally favor finality of judgments.[26] By allowing the government to move to reopen without any limitations whatsoever, even asylees granted protection in immigration court decades ago could be subject to an attempt by the government to relitigate their cases even years into the future.

Further, C.F.R. § 1003.1(d)(7)(v) specifies that the BIA cannot remand a case based on new evidence presented for the first time on appeal by an asylum seeker or immigrant; instead the only avenue to potentially present new evidence is through a motion to reopen. Yet the proposed rules would allow the BIA to remand a case based on new information filed by the government – a blatant attempt to further rig the process against asylum seekers and immigrants. There is no justification for requiring respondents to formally move to reopen while simultaneously allowing the government, which will always be represented by counsel, to obtain a remand without making a formal motion. This double standard creates the appearance of impropriety and favoritism toward one party in the proceedings.

The Proposed Rule Raises Serious Due Process Concerns by Allowing the BIA to Affirm Denials of Relief on Any Basis, Even if Not Considered by the Immigration Judge

The proposed rules at 8 C.F.R. § 1003.1(d)(3)(v) and 8 C.F.R. § 1003.1(d)(vii) would rig the appeals process against asylum seekers and immigrants by allowing the BIA to affirm immigration judge denials of relief on the basis of reasons or facts entirely unrelated to the immigration judge's grounds for the decision. This change would result in the BIA relying on facts that were not adequately developed or potentially even considered by the immigration judge. This provision is likely to lead to decisions that violate the prohibition on the BIA from engaging in original fact-finding – denying asylum seekers and immigrants an opportunity to testify on the matter or have an opportunity to respond. Moreover, affirming on a legal basis that was not considered by the immigration judge violates due process because it does not give the appellant or his/her lawyer an opportunity to brief the issue to the BIA, as a brief is intended to address the decision articulated by the immigration judge. Granting the BIA this authority would further disadvantage asylum seekers and immigrants, many of whom are unrepresented in an appeals process that is already extremely difficult to navigate.

The Proposed Rule Would Upend Appellate Practice and Undermine Due Process

Proposed 8 C.F.R. § 1003.3(c) undermines fundamental fairness and due process in immigration appeals. By shortening filing deadlines and restricting briefing extensions, this provision will prevent many asylum seekers from completing their appeal briefs and infringes on respondents' due process right to adequate notice and competent representation. The rule also needlessly burdens DHS attorneys, judges, and respondents' counsel by requiring simultaneous briefing on appeal. These requirements will make it even more difficult for unrepresented asylum seekers to find counsel on appeal. UNHCR recommends that "the [appeal] remedy needs to be available in practice as well as in law, meaning, for instance, that the appellant must have sufficient time to

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[26] *Matter of G-D-*, 22 I&N 1132, 1134 (BIA 1999) ("The motions rules respond directly to the legislative interest in setting meaningful and effective limits on motions and ultimately in achieving finality in immigration case adjudications.").

file an appeal and prepare the appeal, or can appeal even in detention."[27] The BIA's current rules on briefing deadlines and extensions are already a significant impediment to placing asylum seekers with pro bono counsel who was not already involved in the case before the immigration judge. The difficulty is that immigration court hearings—typically including the immigration judge's oral decision—are not transcribed until after the Notice of Appeal is filed, so in situations where the respondent was detained and *pro se*, and the client is appealing, appellate counsel often does not have a clear understanding of the basis for the immigration judge's decision, let alone the details of the hearing testimony, until the respondent gets the transcript. Human Rights First has taken on or referred to other legal service organizations a significant number of appeals where the respondent was detained and *pro se* before the immigration judge.

Simultaneous Briefing Is Inefficient and Prejudicial

Despite the government's proffered rationales of speed and efficiency, the proposed simultaneous briefing requirement for BIA appeals will result in unnecessary briefing. In almost every appellate adjudication system in the United States, the appellant files a brief and the appellee is then able to respond to the arguments raised in that brief. The proposed rule would rather require both parties in immigration appeals to simultaneously brief all possible arguments, regardless of whether these issues are actually disputed.

The prejudice in the proposed rule to an asylum seeker or immigrant appealing a negative decision, who will not know what argument to address, far outweighs any alleged efficiency that EOIR would gain through this process. In many cases, appellants include multiple issues in a Notice of Appeal but only ultimately brief a limited number of those issues. With simultaneous briefing, appellees must address every issue raised in the Notice of Appeal, even if those issues are not ultimately briefed by the appellant. For instance, where the government appeals a grant of asylum, the asylee could be required to brief every ground of asylum eligibility and potential bars to asylum, anticipate arguments challenging credibility, address positive and negative discretionary factors, and rebut evidentiary and procedural objections, among other potential appeal grounds. Simultaneous briefing will significantly burden asylees, particularly those without legal counsel. It is likely to result in more appellees requesting to enlarge the page limit on briefs, submitting reply briefs, and requesting extensions, wasting judicial resources to review unnecessary arguments and increasing delays in adjudication. Any efficiencies DOJ anticipates are illusory.[28]

The Proposed Briefing Deadlines Are Virtually Impossible to Meet

The proposed mandatory 14-day limit for reply briefs raises serious due process concerns. Immigration attorneys already face serious difficulties in obtaining transcripts within the 21-day

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[27] UNHCR & Inter-Parliamentary Union, "A guide to international refugee protection and building state asylum systems," *available at* https://www.unhcr.org/3d4aba564.pdf.

[28] Indeed, in 2002, after reviewing comments received to a proposed regulation that would have imposed a simultaneous briefing requirement for non-detained appeals, DOJ eliminated the simultaneous briefing in the final rule. 76 FR 54878, 54895 (2002) ("the Department [of Justice] has decided to change the proposed regulation with respect to the simultaneous briefing process").

briefing period in order to defend existing clients on appeal or to refer these cases to pro bono counsel. Once the transcript is produced, mailing (and, for detained cases, the need to retrieve the transcript from the detainee and copy it) usually eats quite significantly into the 21-day briefing period. Even the single 21-day extension historically available for good cause shown has proved challenging for pro bono volunteers. Referring organizations first need to review the transcript to confirm that the organization can take the case, then assign the case to a law firm. Once assigned, the firm needs to clear conflicts and get other internal reviews. These referral and intake steps are genuinely difficult to accomplish in less than a week. For cases where the client did have counsel before the immigration judge, there are often other delays in obtaining a copy of the immigration judge-level filings from prior counsel, particularly if prior counsel realizes that his or her representation would justify a parallel motion to remand. In short, immigration attorneys need more briefing time, not less.

Further, attorneys representing immigrants and asylum seekers have reported serious errors and delays that result in difficulties in receiving the Notice of Appeal. Attorneys have experienced both (1) substantial delays in receiving mail from DHS, and (2) serious errors resulting in *pro se* appellants never receiving their Notice of Appeal or receiving it after mandatory deadlines have passed. For instance, mail from the ICE Office of the Principal Legal Advisor (OPLA) often takes close to a week to reach Human Rights First's offices in lower Manhattan, even pre-COVID-19 postal delays. Further, attorneys have seen both ICE OPLA and BIA notices sent to unrepresented detainees at the wrong detention centers. For example, one detainee who had won his case before the immigration judge never received DHS's Notice of Appeal because DHS sent it to a jail from which DHS had transferred him months earlier. The BIA also once sent a decision to a client at a jail where he had never been detained at all. Considering the difficulties that already exist in complying with the 21-day limit, the proposed reduction to 14 days would further exacerbate existing difficulties in timely filing appeals.

Because the 14-day period runs from the due date of the initial brief and DHS counsel generally serve briefs via regular mail, appellants may not even receive opposing counsel's brief before the deadline to file a reply. In the best of circumstances, it often takes five days to receive mail from the U.S. postal service; but currently, there are historic delays in U.S. postal service due to COVID-19.[29] Even if an appellant receives the government's brief via mail within the 14-day limit, she would then need to file a motion seeking leave to file a reply and file the reply brief within a few short days. This timeframe would make it virtually impossible for a practitioner to file a quality reply brief without needing to drop all other case work to comply. It would also give unrepresented appellants very little time to obtain counsel willing to file a reply on their behalf on such an accelerated timeline.

The proposed mandatory 14-day briefing limit raises serious due process concerns about the ability of asylum seekers and immigrants to receive notice of briefing and have sufficient time to fairly respond, and would dramatically reduce the likelihood that unrepresented appellants will

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[29] Luke Broadwater, Jack Healy, Michael D. Shear & Hailey Fuchs, "Postal Crisis Ripples Across Nation as Election Looms," New York Times, (Aug. 15 2020), *available at* https://www.nytimes.com/2020/08/15/us/post-office-vote-by-mail.html.

obtain counsel on appeal. When DOJ previously shortened the briefing period for cases before the BIA in 2002, the agency provided a reasonably permissive extension policy.[30] But, as discussed below, this proposed rule would also severely limit briefing extensions.

Limiting Briefing Extensions Undermines Due Process

Finally, the proposed rule would also greatly reduce the amount of time that the BIA is permitted to give for extensions. Under the current rule, the BIA is authorized to give up to 90 days to file a brief or reply brief for good cause shown. Despite this regulatory allowance, it has been longstanding practice of the BIA to generally give only 21-day extensions upon request. Under the proposed rule, the time frame for extensions would be slashed to a maximum of 14 days, with only one extension permitted. By the time a party receives a response from the BIA as to whether an extension is granted, the extension would likely be almost expired. In addition, there may be many circumstances that prevent filing within 14 days, including serious medical issues or major natural disasters. There is no reason to eliminate the BIA's authority to grant extension beyond 14 days no matter how exigent the circumstances may be.

The impact of these time restrictions will be disastrous to asylum seekers without legal representation in immigration court and will make it far more difficult for *pro se* litigants to find representation for appeals. It is extremely difficult for an attorney who did not appear before the immigration court to decide whether to take on an appeal before they can review the transcript. These difficulties are further exacerbated for individuals in detention facilities who likely have to mail copies of the transcript to potential counsel, which adds more delay while the appeal clock is running out. If attorneys cannot receive a reasonable extension to review the record and prepare a quality brief, it is unlikely they would take on the case, thus leaving more asylum seekers without counsel during an appellate process in which they are very unlikely to succeed on their own.

The Proposed BIA Adjudication Time Limits Will Increase Erroneous Decisions

Proposed rules setting artificial limits on the adjudication of BIA appeals will increase the number of erroneous decisions and result in an even more lengthy appeals process with more petitions for review filed in the federal courts of appeal.

The proposed rule at 8 C.F.R. § 1003.1(e)(8) to shorten mandatory adjudication deadlines for the BIA will undermine the quality of appellate review and will result in erroneous denials of relief for countless immigrants and asylum seekers. The proposed rule requires initial case screening by BIA Members for summary dismissal be completed within 14 days of filing and for summary dismissals to be issued within 30 days. Given the number of cases pending before the BIA, this mandatory timeframe will lead to many erroneous dismissals with pressure on the screeners to review cases quickly rather than accurately. For cases not subject to summary dismissal, the proposed rule creates mandatory adjudication deadlines, including requiring a single Board Member to determine within 14 days of receipt of each case whether to issue a single Member or

[30] 67 FR 54878, 54895 (2002) ("The ability of either party to seek an extension of the period for filing a brief or reply brief up to 90 days for good cause shown remains from current Board practice.").

three Member decision. Under these mandatory timeframes, Board Members will make mistakes as they are forced to prioritize speed rather than quality in reviewing case records. Immigration judges have noted that because EOIR has imposed requirements on immigration judges to rapidly complete cases to meet quotas, speeding adjudication compounds errors in the adjudication process. According to retired immigration Judge Jeffrey Chase: "because of the courts being sped up, the BIA should be taking more time to make sure that everything's right."[31] The National Association of Immigration Judges has also questioned whether mandatory adjudication deadlines and quotas conflict with judicial ethics.[32]

Proposed 8 C.F.R. § 1003.1(e)(8)(v) requires any case that has been pending for more than 355 days to be referred to the EOIR Director to render a decision. The proposed rule specifies that the Director cannot further delegate this authority. This artificial 355-day review limitation creates an incentive for BIA Members to provide a less searching review of the cases before them.[33] Given that at the end of fiscal year 2019 over 70,000 cases were pending before the BIA (a body comprised of 23 Members), each Member would have to complete more than 3,000 cases within the 355-day deadline. Of Human Rights First's 30 cases currently before at the BIA, nearly half have been pending for longer than 355 days. It is simply not possible for BIA Members to adequately review this number of cases in this timeframe. Moreover, this rule deepens existing incentives for the BIA to affirm, rather than overturn immigration judge decisions. Because a three-Member review is required to overturn an immigration judge decision, whereas only one Member is required to affirm an immigration judge decision, it takes more time to overturn immigration court decisions than to affirm them. The 355-day time limitation will likely further incentivize BIA Members to affirm immigration judge decisions in order to satisfy the timing requirement. Retired immigration judge Robert Vinikoor has stated that such artificial limits on case adjudication are "not fair to judges, or to the parties that appear in court on either side," and "undermine the quality and thoroughness of our decisions."[34] Judge Vinikoor noted that "quotas will likely produce hastily-made decisions and result in grave errors. . . . poor decisions will directly result in more appeals . . . causing more delays and running contrary to the goals of the Attorney General."

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[31] "BIA Pressed To Speed Cases, Raising Due Process Concerns," Law 360, (Oct. 2, 2019), *available at* https://www.law360.com/articles/1205349/bia-pressed-to-speed-cases-raising-due-process-concerns.

[32] *See* National Association of Immigration Judges, *Testimony Before the Senate Judiciary Committee, Border Security and Immigration Subcommittee Hearing on "Strengthening and Reforming America's Immigration Court System"* at 8 (Apr. 18, 2018) ("In addition to putting the judges in the position of violating a judicial ethical canon, such quotas pits their personal interest against due process considerations."). Aug. 19, 2020, *available at* https://www.washingtonpost.com/business/2020/08/19/postal-problems-could-continue-despite-suspension-policies-blamed-mail-delays/.

[33] *See* DOJ, *EOIR Adjudication Statistics*, *available at* https://www.justice.gov/eoir/page/file/1248501/download (last accessed Sep. 23, 2020).

[34] "Hon. Robert Vinikoor Tells Us Exactly Why Quotas Are a Toxic Idea for US Immigration Courts — One Of the 'Best Ever' Tells It Like It Is!," Immigration Courtside, (Apr. 12, 2018), *available at* https://immigrationcourtside.com/2018/04/12/hon-robert-vinikoor-tells-us-exactly-why-quotas-are-a-toxic-idea-for-us-immigration-courts-one-of-the-best-ever-tells-it-like-it-is/.

The Agencies Have Not Allowed a Sufficient Period for Comment on the Proposed Rule

This sweeping rule would fundamentally rewrite due process protections for asylum seekers and immigrants in violation of U.S. law and decades of practice. The proposed regulations would dramatically alter the BIA appellate process, would prevent many immigrants and asylum seekers with immediate relatives or asylum eligibility from seeking to have their cases reopened, and would prevent the BIA and immigration judges from administratively closing cases, thereby foreclosing avenues of relief and adding to the EOIR backlog. The public should be given adequate time to consider these dramatic revisions to existing law to provide thoughtful and well-researched comments.

By providing only a limited 30-day comment period, DOJ is effectively denying the public the right to meaningfully comment under the notice and comment rulemaking procedures required by the Administrative Procedure Act (APA). Significant agency revisions to established practice should be well-thought out and allow the public the opportunity to fully comment. Instead, the agencies have used the pandemic to rush through proposed rules, which would radically alter procedural protections that have been in place for decades and potentially leave tens of thousands of immigrants and asylum seekers who could qualify for lawful status with no recourse. The shortened comment period presents particular challenges given that the United States continues to be in the midst of an unprecedented pandemic, forcing many members of the public, including our organization, to work from home and balance childcare with work activities. For this procedural reason alone, we urge the administration to rescind the proposed rule. If it wishes to reissue the proposed regulations, it should grant the public at least 60 days to have adequate time to provide comprehensive comments.

Conclusion

These proposed rules rewrite long-established immigration court and appellate practice, imperiling due process and just adjudication. DOJ justifies this rulemaking in terms of efficiency; yet, in prioritizing speed over careful and fair adjudication these rules are likely to worsen backlogs and increase delays. By making it more significantly more difficult to reopen cases and appeal erroneous decisions, asylum seekers, particularly those without legal counsel, the United States risks deporting refugees to persecution and torture in violation of U.S. law and treaty obligations. We urge DOJ to rescind these unfair and dangerous rules.