Comments Submitted by American Gateways RE: Notice of Proposed Rulemaking (NPRM) by the Executive Office for Immigration Review, Department of Justice, Procedures for Asylum and Withholding of Removal; RIN 1125-AA93 / EOIR Docket No. 19-0010 / A.G. Order No. 4843-2020 (published in the Federal Register on September 23, 2020).

American Gateways provides much needed legal representation for indigent immigrants in Central Texas. Our mission is to champion the dignity and human rights of immigrants, refugees, and survivors of persecution, torture, conflict, and human trafficking through exceptional legal services at low or no cost, education, and advocacy. Our agency began in 1987 as the Political Asylum Project of Austin and was founded to provide legal representation to Central American immigrants fleeing persecution and seeking asylum in the United States. Over the past thirty-three years, American Gateways has become an indispensable legal services provider for low-income asylum seekers and immigrants in Central Texas.

American Gateways opposes the notice of proposed rulemaking regarding Procedures for Asylum and Withholding of Removal (the "Proposed Rule"), published by the Department of Justice (the "Department" or "DOJ") on September 23, 2020, and requests that the Department promptly rescind the Proposed Rule. American Gateways describes below how some of the proposed changes will impact our organization and our clients, and the reasons for our opposition. Omission of any proposed change from these comments should not be interpreted as tacit approval. American Gateways opposes all aspects of the Proposed Rule that would erode the due process rights of asylum seekers or otherwise impede—in any way—the ability of individuals who have suffered persecution to access humanitarian protection in the United States.[1] At the same time, American Gateways expresses heightened concern regarding the disproportionate harms that will befall certain refugees—namely, detained and *pro se* asylum seekers—if the Proposed Rule is not withdrawn. The Department proposes to implement not only arbitrary deadlines for filing and adjudicating asylum claims, but arbitrary standards for assessing whether an I-589 application is complete, thereby making it increasingly difficult for detained and *pro se* applicants to even seek protection, much less present their claims in a full and fair hearing. The proposed changes will inevitably lead to meritorious applications being cursorily rejected for minor technicalities while also making it more challenging for immigration judges and lawyers alike to manage their dockets. Rather than "effectuate congressional intent to resolve cases in an expeditious manner," 85 Fed. Reg. 59692, 59698, the Proposed Rule would only result in lower rates of representation, poorly prepared filings, due process violations, higher denial rates, and the more rapid deportation of refugees back to the persecution from which they fled.

I. GENERAL COMMENTS

A. The shortened comment period does not provide adequate time for meaningful participation in the rulemaking process.

Although the Administrative Procedure Act ("APA") does not prescribe a minimum time period for comments, agencies must afford interested persons a reasonable and meaningful opportunity

[1] American Gateways uses the term "asylum seekers" throughout these comments to refer to individuals seeking asylum, as well as those seeking statutory withholding of removal or withholding under the Convention Against Torture.

to participate in the rulemaking process. *See* 5 U.S.C. § 553(c) ("After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments. . . ."). Furthermore, Executive Order 12866 provides that the public's opportunity to comment "in most cases should include a comment period of not less than 60 days." Exec. Order No. 12866, 58 Fed. Reg. 51735, 51740 (Oct. 4, 1993). Despite having "determined that this proposed rule is a 'significant regulatory action' under . . . Executive Order 12866," 85 Fed. Reg. 52491, 52509, the Department has deviated from the customary 60-day comment period, instead allowing the public only 30 days to submit comments to the Proposed Rule.

American Gateways objects to the shortened 30-day comment period. As discussed herein, the Proposed Rule contains several substantial changes to regulations governing procedures for asylum and withholding of removal that would have a detrimental impact on immigrants seeking asylum and other forms of humanitarian protection. For example, the Proposed Rule would require immigration judges to adjudicate most asylum applications within 180 days of the application's filing and impose a 15-day filing deadline for individuals in asylum-and-withholding-only proceedings, thereby rendering it more difficult for asylum seekers to find representation and to prepare their cases. The Department also seeks to implement new standards for determining when an application for relief would be deemed complete and impose unduly harsh consequences on *pro se* asylum seekers who submit applications with insignificant errors or omissions. The public should be afforded adequate time to meaningfully consider and respond to the complex revisions proposed by the Department. The Department has offered no justification for shortening the comment period, which is particularly unreasonable in light of disruptions resulting from the ongoing COVID-19 public health crisis. The lack of any explanation for shortening the comment period signals that the Department has improperly prejudged the issues and intends to implement the Proposed Rule without having provided interested persons with a *meaningful* opportunity to participate. At the same time, the shortened comment period suggests that the Department desires not to improve the efficiency or quality of procedures governing asylum and withholding of removal, but to push through its divisive political agenda in disregard of public comments. American Gateways therefore respectfully requests that, if the Proposed Rule is not withdrawn, the comment period be extended for at least an additional 30 days.

B. The Department's pattern and practice of staggered rulemaking impedes meaningful participation in the rulemaking process.

The rapid pace at which the current administration has proposed several different and overlapping rules that would drastically alter—and largely upend—current regulations governing procedures for asylum and withholding of removal makes it virtually impossible for the public to comprehend the interplay among the myriad proposed rules. As a result, the public has been denied its right to adequately comment on the impact of the changes in this Proposed Rule. The joint NPRM issued by the DOJ and Department of Homeland Security (DHS) on June 15, 2020, titled "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review," proposed the most sweeping changes to asylum eligibility since the 1996 Illegal Immigration Reform and Immigrant Responsibility Act.[2] At present, it is unclear how the agencies may amend that proposal

[2] *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed Reg. 36264 (proposed June 15, 2020).

based on the 88,933 public comments that were submitted[3] and, therefore, impossible to adequately comment on the currently proposed rule. Then, on August 26, 2020 the DOJ issued another NPRM, titled "Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure," that would dramatically alter the due process rights of asylum seekers and others in removal proceedings, including in proceedings before the Board of Immigration Appeals (BIA, or the "Board").[4] The deadline to comment on that NPRM fell two days after this Proposed Rule was issued, and the Department has not yet responded to the 1,287 comments it received.[5] As noted above, the APA requires that agencies give the public a *meaningful* opportunity to comment on proposed regulatory changes. The Department's increasingly frequent practice of staggered rulemaking hinders meaningful and comprehensive public comments and is, therefore, procedurally improper. *See, e.g. Casa de Maryland, Inc. v. Wolf*, No. 8:20-CV-02118-PX, 2020 WL 5500165, at *26 (D. Md. Sept. 11, 2020) (concluding that plaintiffs are likely to succeed in their argument that agency's failure to meaningfully address the interaction of staggered rules regarding Employment Authorization Documents violated the APA); *N.C. Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 770 (4th Cir. 2012) (finding that agency's staggered rulemaking violated notice-and-comment procedures and precluded consideration of important issues). For this reason alone, American Gateways urges the Department to rescind the Proposed Rule and refrain from issuing any additional notices of proposed rulemaking regarding asylum procedures until its overlapping proposals have been rescinded or finalized.

Throughout these comments, American Gateways highlights how some of the staggered proposals issued by the DOJ and DHS would, when taken together, pose an increased threat to basic due process rights or otherwise contravene fundamental tenets of asylum law. However, in the shortened 30-day comment period, American Gateways cannot fully analyze the impact of the entire series of complex and interrelated proposals. By submitting these comments, American Gateways does not waive its procedural objections to either the shortened comment period or the DOJ's and DHS' staggered rulemaking practice.

C. The Proposed Rule fails to engage in a cost/benefit analysis, as required by law.

Executive Orders 12866 and 13563 require agencies to assess all costs and benefits of regulatory changes, including both quantifiable and qualitative factors, and choose the regulatory alternative that maximizes net benefits.[6] The Department acknowledges that the Office of Information and Regulatory Affairs of the Office of Management and Budget ("OMB") has determined that the

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[3] *See* EOIR, *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, Regulations.gov, https://www.regulations.gov/document?D=EOIR-2020-0003-0001 (last visited Oct. 20, 2020).

[4] Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 52491 (proposed Aug. 26, 2020).

[5] *See* EOIR, *Administrative Closure: Appellate Procedures and Decisional Finality in Immigration Proceedings*, Regulations.gov, https://www.regulations.gov/document?D=EOIR-2020-0004-0001 (last visited Oct. 20, 2020).

[6] *See* Exec. Order No. 12866 § 1(b)(6) (1993), 58 Fed. Reg. 51735, 51736 (Oct. 4, 1993) ("Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs."); Exec. Order No. 13563, 76 Fed. Reg. 3821, 3821 (Jan. 21, 2011) (supplementing and reaffirming the mandate in Executive Order 12866 that agencies "must take into account benefits and costs, both quantitative and qualitative" when implementing regulations).

Proposed Rule is a "significant regulatory action" within the meaning of Executive Order 12866, and also certifies that the Proposed Rule has been drafted in accordance with the principles of Executive Orders 12866 and 13563. 85 Fed. Reg. 59692, 59697. Yet, the Proposed Rule contains no meaningful assessment of costs, benefits, and regulatory alternatives. Instead, the Department claims that the Proposed Rule "would impose only minimal direct costs on the public, to include the costs associated with attorneys and regulated entities familiarizing themselves with this rule" and "*no costs* to the Department or to respondents." *Id.* at 59698 (emphasis added). Similarly, the Department asserts that the Proposed Rule is "not expected to increase any burdens on practitioners." *Id.* The Department cannot discharge its obligation to fully assess costs and benefits of the proposed regulatory changes by simply disregarding the real harms that would flow from the Proposed Rule, especially for detained and *pro se* asylum seekers. Moreover, the Department's bald assertion that its proposed changes shortening deadlines, restricting continuances, and restricting evidentiary submissions would have essentially *no* impact on practitioners or respondents is absurd. Most *pro se* respondents struggle to prepare the Form I-589 application for asylum and withholding of removal, and they would not be able to retain counsel or even *pro se* legal assistance within 15 days of their first Master Calendar Hearing. And, the fact that practitioners are "already subject to professional responsibility rules regarding workload management" and "accustomed" to having to meet deadlines, 85 Fed. Reg. 59692, 59698, does not mean that practitioners' workloads would be unaffected by the arbitrary and unreasonable deadlines the Department seeks to impose. Shortening deadlines for filing the Form I-589 and creating inflexible adjudication timelines that would apply to all cases (absent so-called "exceptional circumstances" that very few respondents would be able to demonstrate) would, without a doubt, make it more difficult for counsel to discharge their ethical duties to provide competent representation and interfere with respondents' ability to secure representation in the first instance.

Agencies may "propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs." Exec. Order No. 12866 § 1(b)(6) (1993). Rather than engage in a cost-benefit analysis, as the law requires, the Department simply asserts that shortened deadlines and adjudication timelines will enhance adjudicatory efficiency, and it improperly discounts obvious costs. Executive Orders cannot be so easily circumvented. Indeed, the Department's unfounded (and unsupported) assumption that its proposal would have *no* costs to respondents and *de minimis* costs to practitioners is so patently erroneous that the Proposed Rule should be rescinded on that basis alone.

D. The Proposed Rule, if implemented, would violate the APA.

Under the APA, 5 U.S.C. §§ 551-559, courts are authorized to "hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . . ." *Id.* § 706(2)(A)-(C). As drafted, the Proposed Rule contravenes or is otherwise inconsistent with several provisions of the governing statute, infringes upon due process rights, is not the product of reasoned decision-making, and is otherwise arbitrary and capricious. If implemented in its current form, the Proposed Rule would be subject to judicial invalidation on multiple grounds.

For example, several provisions of the Proposed Rule are contrary to constitutional rights because they infringe upon the due process rights of asylum seekers. The arbitrary 15-day filing deadline, filing fee for Form I-589, and inflexible 180-day case adjudication timeline, for instance, would substantially interfere with asylum seekers' right to counsel and to a full and fair hearing on their claims for relief. In these comments, American Gateways highlights some of the constitutional violations that would flow from the Proposed Rule. Additionally, the Proposed Rule, as well as the separate provisions thereof, is arbitrary and capricious. The arbitrary-and-capricious standard requires that an agency "examine the relevant data and articulate a satisfactory explanation for its action, including a 'rational connection between the facts and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). When reviewing an agency's proffered explanation, courts "must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *Id.* (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974)). Further, courts require that an agency provide the "essential facts upon which the administrative decision was based," *United States v. Dierckman*, 201 F.3d 915, 926 (7th Cir. 2000) (quoting *Bagdonas v. Dep't of Treasury*, 93 F.3d 422, 426 (7th Cir. 1996)), and explain the justification for its determinations with actual evidence beyond a "conclusory statement," *Allied-Signal, Inc. v. Nuclear Reg. Comm'n*, 988 F.2d 146, 152 (D.C. Cir. 1993). In general, an agency decision is arbitrary and capricious

> if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. In other words, agency actions are subject to invalidation where an agency fails to adequately explain its decision, fails to consider relevant factors, including the policy effects of its decisions, fails to adequately explain illogical actions, or reaches a conclusion that contradicts the underlying record. What counts as "relevant" is context specific, but the U.S. Supreme Court has previously instructed that agency decision-making on immigration matters "must use an approach that is tied to the purposes of the immigration laws or the appropriate operation of the immigration system." *Judulang v. Holder*, 565 U.S. 42, 132 S. Ct. 476, 478 (2011).

American Gateways acknowledges that the Proposed Rule is only at the public comment stage of the rulemaking process. However, the Department's utter failure to consider a host of relevant factors and indifference toward the devastating impact its proposal would have an individuals seeking humanitarian protection are incurable deficiencies. If the Department were to consider all aspects of the issue, as it is required to do under the APA, it cannot possibly conclude that any purported benefits of the Proposed Rule outweigh its tremendous costs. Rather than push forward with a proposal that is doomed for judicial invalidation, the Department should rescind the Proposed Rule.

E. If the Proposed Rule is not withdrawn, it should not have any retroactive applicability.

The Proposed Rule is wholly silent on the issue of retroactive applicability. If the Proposed Rule becomes final and effective, it should not apply to anyone whose latest entry into the United States was prior to the effective date(s).[7] Alternatively, any final rule should specifically identify the individuals and claims to which the Proposed Rule, and any provisions thereof, would apply.

Section 551 of the APA sets forth clear standards for rulemaking. According to subsection 5, "'rule making' means agency process for formulating, amending, or repealing a rule," 5 U.S.C. § 551(5), which is what the Departments seek to do. Subsection 4, however, requires that any such rulemaking have a future effect. The APA defines a "rule" to mean "the whole or a part of an agency statement of general or particular applicability and *future effect* designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." *Id.* § 551(4) (emphasis added). "The only plausible reading of the italicized phrase is that rules have legal consequences only for the future." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 216 (1988). This meaning is bolstered by the remainder of the definition, which goes on to say that a rule "includes the approval or prescription *for the future* of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing." 5 U.S.C. § 551(4) (emphasis added). Indeed, the government's own authority on interpretation of the APA—the *Attorney General's Manual on the Administrative Procedure Act*[8] (a guide given great weight by courts and used by agencies in adjusting their procedures to the requirements of the APA)—notes that "'rule' includes agency statements not only of general applicability but also those of particular applicability applying either to a class or to a single person. In either case, they must be of *future effect*, implementing or prescribing future law."[9]

Simply put, "[r]etroactivity is not favored in the law." *Bowen*, 488 U.S. at 208. "Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Id.*; *see also Criger v. Becton*, 902 F.2d 1348, 1353 (8th Cir. 1990) ("[L]aws are to have prospective effect only, unless the law-making entity has indicated otherwise."). Retroactivity is disfavored because the due process clause "protects the interests in fair notice and repose that may be compromised by retroactive legislation." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994); *Hem v. Maurer*, 458 F.3d 1185, 1190 (10th Cir. 2006). "It is well established that the Fifth Amendment entitles aliens to due process of law in deportation

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[7] This includes individuals who were returned to Mexico under the Migrant Protection Protocols (MPP) before the effective date but enter the U.S. for their hearing(s) after the effective date. *See* U.S. Immigration and Customs Enforcement, Memorandum for Field Office Directors, Enforcement and Removal Operations RE: Migrant Protection Protocols Guidance (Feb. 12, 2019), https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2019/ERO-MPP-Implementation-Memo.pdf ("Aliens returned to Mexico under the MPP pursuant to section 235(b)(2)(C) of the INA will be required to report to a designated POE on their scheduled hearing dates and will be paroled into the United States by CBP for purposes of their hearings.").

[8] Tom C. Clark, U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* (photo. reprint 1973) (1947), https://archive.org/details/AttorneyGeneralsManualOnTheAdministrativeProcedureActOf1947.

[9] *Id.* at 13.

proceedings." *Reno v. Flores*, 507 U.S. 292 (1993) (citing *Yamataya v. Fisher*, 189 U.S. 86, 100-01 (1903) ("[T]his Court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution.")). "[A]liens who have once passed through our gates, *even illegally*, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law." *F.L.B. v. Lynch*, 180 F. Supp. 3d 811, 819 (W.D. Wash. 2016) (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953)).

Retroactivity will necessarily infringe upon due process rights if the Proposed Rule, or any provision thereof, is applied to claims of asylum seekers whose latest entry into the United States preceded the effective date(s) of the proposed changes. The Supreme Court has repeatedly warned against retroactive legislation, because it "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280. If the result of legislation "attaches new legal consequences to events completed before its enactment[,]" courts should be guided by "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Id*. at 269-70. This same principle must be followed here.

Consistent with due process concerns, the Department should specify that *the Proposed Rule does not have any retroactive effect*. As of August 14, 2020, EOIR had over 560,000 pending applications for asylum and withholding of removal. 85 Fed. Reg. 59692, 59698. Applying the Proposed Rule to pending claims would jeopardize the safety and security of more than half a million people, whose cases would be thrown into a state of uncertainty. Such uncertainty would, without doubt, increase the burden on immigration courts and judges as asylum seekers and their representatives attempt to reconcile the effects of the new rules on their own cases. Moreover, applying the Proposed Rule to those who last entered the United States prior to the effective date(s) would undermine reliance interests and add to the uncertainty while the inevitable litigation pends. At the very least, the Department should specify to whom each of the new provisions would apply so that all individuals who might be impacted by the Proposed Rule are on notice of the Department's intentions and can, as appropriate, challenge any attempt at retroactive application.

F. The Proposed Rule would further undermine judicial independence and compromise the integrity of a severely crippled immigration court system.

Since inception, the nation's immigration court system has been afflicted by structural problems—namely the failure to separate adjudication and enforcement functions—that impede fair and impartial adjudications. In addition to hindering judicial independence, the fact that immigration courts are housed within the executive branch makes them prone to political interference. Both immigration judges and members of the BIA are expressly subordinate to the Attorney General who controls their appointment and, through the EOIR Director, oversees case management, including case assignments, and evaluates their performance. *See* 8 C.F.R. § 1003.0(b)(1)(ii), (iv), (v). Additionally, immigration judges and Board members are "subject to removal by the Attorney General, and may be transferred from and to assignments as necessary to fulfill the Department's

mission."[10] This vast authority enjoyed by the Attorney General substantially impedes the fair administration of the nation's immigration laws.

Although government acquiescence to pervasive bias and politicized influences in the immigration court system is long-standing, the current administration's efforts to dismantle the already-crippled court system and transform it into a "weapon of deportation" are unprecedented.[11] For purposes of contextualizing its objections to this Proposed Rule—which would further strip immigration judges of the ability to manage their dockets in the interest of justice while blurring the line between prosecutorial and adjudicatory functions by inviting judges to submit evidence in the very cases over which they preside—American Gateways briefly describes just a few of the administration's most obvious strikes in its multi-pronged assault on the independence of the court system:

- In April 2018, the DOJ rolled out quotas for immigration judges in an "EOIR Performance Plan" memorandum. In order to receive a "satisfactory" rating, judges are required to complete at least 700 cases a year and have fewer than 15% of their decisions overturned on appeal.[12] These onerous numeric quotas that are designed to promote speedy deportations, not fair adjudications, place judges in an untenable position—they must rush through cases to keep their own jobs.[13] As the National Association of Immigration Judges (NAIJ) has explained, performance quotas not only "put[] judges in the position of violating a judicial ethics canon" but "pit[] their personal interest against due process considerations."[14]

- In May 2018, former Attorney General Jeff Sessions held in *Matter of Castro-Tum*—a case he certified to himself for decision—that immigration judges "lack the general authority to administratively close cases" because no regulation expressly grants them such authority. 27 I&N Dec. 271, 282-83, 293 (AG 2018). The decision also called for cases that had previously been administratively closed to be put back on the docket upon the motion of either party, an immigration judge, or the Board.[15] *Id.* at 292-93 A move allegedly

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[10] *Procedural Reforms to Improve Case Management*, 67 Fed. Reg. 54878, 54893 (Aug. 26, 2002).

[11] *See generally* Innovation Law Lab & S. Poverty Law Ctr., *The Attorney General's Judges: How the U.S. Immigration Courts Became a Deportation Tool* (June 2019), https://www.splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf; New York City Bar, *Report on the Independence of Immigration Courts* (Oct. 21, 2020), https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/independence-of-the-immigration-courts.

[12] Joel Rose, *Justice Department Rolls Out Quotas for Immigration Judges*, NPR (Apr. 3, 2018), https://www.npr.org/2018/04/03/599158232/justice-department-rolls-out-quotas-for-immigration-judges.

[13] During Fiscal Year (FY) 2019, two-thirds of immigration judges completed fewer than 700 cases, and 378 out of 380 judges failed to meet either quotas or other mandatory deadlines. Stephen Franklin, *The Revolt of the Judges*, The American Prospect (June 23, 2020), https://prospect.org/justice/revolt-of-the-immigration-judges/.

[14] *See Strengthening and Reforming America's Immigration Court System: Hearing Before the Subcomm. on Border Sec. & Immigration of the S. Comm. of the Judiciary*, 115th Cong. (statement of Judge A. Ashley Tabaddor, President, Nat'l Ass'n of Immigration Judges, at 8) (Apr. 18, 2018).

[15] In August 2018, ICE directed its attorneys to, with limited exceptions, file motions to re-calendar "all cases that were previously administratively closed . . . ." *See* American Immigration Lawyers Association (AILA), Doc. No. 19021900, *FOIA Reveals EOIR Failed Plan for Fixing the Immigration Courts* (Feb. 21, 2019), https://perma.cc/34ER-5ANQ.

designed to reduce a growing case backlog and enhance docket efficiency has instead exacerbated the case backlog and decreased efficiency, as administrative closure had long been a valuable tool utilized by immigration judges to manage their dockets.[16] Simultaneously, *Matter of Castro-Tum* has undermined due process by restricting the ability of immigrants to pursue other forms of relief while in removal proceedings. The Fourth and Seventh Circuits have since overturned *Matter of Castro-Tum*, concluding that immigration judges have an inherent authority to control their dockets. *Romero v. Barr*, 937 F.3d 282 (4th Cir. 2019); *Meza Morales v. Barr*, No. 19-1999, 2020 WL 5268986, at *8-9 (7th Cir. June 26, 2020). Although limited to their respective Circuits, the *Romero* and *Meza Morales* decisions highlight the abusive nature of the administration's attempts to undercut judicial independence. Nonetheless, the Department recently proposed codifying *Matter of Castro-Tum*, thereby stripping immigration judges nationwide, as well as members of the BIA, of the authority to administratively close cases. *See* 85 Fed. Reg. 52491, 52496-97.

- After having tied the hands of immigration judges with respect to administrative closures, the DOJ orchestrated another direct strike on judicial independence in July 2018. For several years, Immigration Judge (IJ) Steven Morley had overseen the immigration case of Reynaldo Castro-Tum.[17] After issuing his ruling in *Matter of Castro-Tum*, Sessions gave IJ Morley fourteen days to issue a new notice of hearing to Castro-Tum, whose whereabouts were unknown.[18] An immigration attorney appeared in court, volunteered to represent Castro-Tum, and requested a brief continuance so that he could attempt to locate Castro-Tum.[19] IJ Morley granted the continuance.[20] Without any explanation and no indication of a legitimate basis for doing so, the DOJ responded by simply taking the case away from IJ Morley.[21] At Castro-Tum's next hearing on July 26, 2018, Assistant Chief Immigration Judge Deepali Nadkarni, who had been reassigned to handle the single preliminary hearing in the Castro-Tum case, ordered Castro-Tum removed *in absentia*.[22] The message was clear—immigration judges must quickly get on board with the administration's agenda or risk having their cases reassigned. This direct attack on judicial independence and due process was widely condemned, including by a group of retired immigration judges and former members of the BIA, who described the maneuver as an "unacceptable" instance of "interference with judicial independence."[23] Politically driven case assignments of this sort are also unlawful, as regulations prohibit the EOIR Director from "direct[ing] the result of an adjudication." 8 C.F.R. § 1003.0(c).

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16 *See id.*

17 Tal Kopan, *Immigrant Ordered Departed after Justice Department Replaces Judge*, CNN (Aug. 7, 2018), https://www.cnn.com/2018/08/07/politics/immigration-judge-replaced-deportation-case-justice-department/index.html.

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.*

23 AILA, Doc. No. 18073072, *Retired Immigration Judges and Former Members of the Board of Immigration Appeals Statement in Response to Latest Attack on Judicial Independence* (July 30, 2018), https://www.aila.org/infonet/retired-ijs-former-bia-mems-attack-on-jud-independ.

- In an apparent effort to speed up decisions and increase removals, former Attorney General Sessions issued yet another decision limiting immigration judges' discretionary authority in August 2018. *Matter of L-A-B-R-* sets forth certain factors that an immigration judge must take into consideration when ruling on a request for a continuance in order "to await the resolution of a collateral matter." 27 I&N Dec. 405, 413 (AG 2018). Although the good cause standard for continuances requires the application of a multi-factor balancing test, *see* 8 C.F.R. § 1003.29, judges must now give more weight to two specific factors: (1) the likelihood that the "collateral" relief will be granted, and (2) whether the relief will materially affect the outcome of the proceedings. *Matter of L-A-B-R-*, 27 I&N Dec. at 413. Combined with the performance evaluation metrics, this decision inappropriately incentivizes immigration judges to grant fewer continuances, thereby restricting an important mechanism for providing respondents with much-needed time to retain counsel and gather evidence.[24]

- In September 2018, former Attorney General Sessions held in *Matter of S-O-G- & F-D-B-*—cases he certified to himself for decision—that immigration judges have no inherent authority to terminate or dismiss removal proceedings. 27 I&N Dec. 462, 462 (2018). Instead judges may only dismiss or terminate proceedings when the regulations expressly permit, or if the charges of removability against a respondent have not been sustained. *Id.* This ruling further inhibits the ability of judges to manage their dockets in a manner that permits respondents to pursue other forms of immigration relief.

- In August 2019, the DOJ moved to decertify the union of immigration judges, an organization whose members have, at times, openly criticized the administration's efforts to conscript immigration judges to carry out its law enforcement agenda.[25] On July 31, 2020, the Federal Labor Relations Authority dismissed the DOJ's petition on the grounds that "IJs are not management officials within the meaning of the [Federal Service Labor-Management Relations statute]."[26]

- In 2017, EOIR implemented a policy requiring immigration judges to obtain government approval before they speak about immigration-related issues, marking a departure from prior policy pursuant to which immigration judges were free to speak on such issues in their personal capacities.[27] Then, in January 2020, EOIR tightened these restrictions,

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[24] Innovation Law Lab & S. Poverty Law Ctr., *supra* note 11, at 25 (describing a "'noticeable increase' in respondents accepting voluntary departure and removal orders due to a lack of continuances to find representation and prepare their cases" after *Matter of L-A-B-R-* was decided (quoting Atlanta focus group)).

[25] Christina Goldbaum, *Trump Administration Moves to Decertify Outspoken Immigration Judges' Union*, N.Y. Times (Aug. 10, 2019), https://www.nytimes.com/2019/08/10/us/immigration-judges-union-justice-department.html.

[26] AILA, Doc. No. 19081303, *Featured Issue: FLRA Rejects DOJ's Petition to Decertify the Immigration Judges Union* (Aug. 3, 2020), https://www.aila.org/advo-media/issues/all/doj-move-decertify-immigration-judge-union (quoting decision).

[27] *Immigration Judges Challenge Justice Department Speech Policy*, Knight First Amendment Inst. at Columbia Univ. (July 1, 2020), https://knightcolumbia.org/content/immigration-judges-challenge-justice-department-speech-policy; Cristian Farias, *The Trump Administration is Gagging America's Immigration Judges*, The Atlantic (Feb. 28, 2020), https://www.theatlantic.com/ideas/archive/2020/02/immigration-judges-first-amendment/607195/.

forbidding judges from publicly discussing immigration law or policy at all.[28] This series of increasingly harsh directives has effectively silenced immigration judges from participating in any public discussion concerning the operation of courts over which they preside—including the impact of COVID-19 on immigration courts—or risk being disciplined or fired.[29] On July 1, 2020, the NAIJ filed suit against the government, challenging the policy on the grounds that it constitutes an unconstitutional prior restraint on immigration judges' ability to write and speak publicly about immigration issues in their personal capacities.[30]

- On July 2, 2020, the DOJ announced the appointment of ICE's chief immigration prosecutor, Tracy Short, as the new Chief Immigration Judge—an appointment that has been described as the "nail in the coffin of judicial neutrality."[31] During his tenure as ICE's chief prosecutor, Short penned a memo instructing ICE attorneys to exclude no one from immigration enforcement, to challenge grants of immigration benefits, and not to consider petitions for prosecutorial discretion.[32] A DOJ employee explained that Short's "hiring is further confirmation that the Executive Office for Immigration Review [EOIR] leadership wishes EOIR to be a tool for enforcement agencies, focused on removal orders and nothing else."[33] Another DOJ employee described Short's appointment as "one step closer to the death knell for impartiality at the Immigration Court and more persuasive evidence that our code of American justice and fairness is not being followed at the Department of Justice."[34]

Similarly, the administration has made several attempts to conscript the BIA for enforcement purposes, stacking the Board with anti-immigrant hardliners and enhancing the power of the attorney general and other political appointees, thereby disrupting critical checks and balances in the court system. Below are but a few of the administration's more notable efforts to consolidate

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[28] *Id.*

[29] *Id.*

[30] *Id.*; *see also* Complaint, *Nat'l Ass'n of Immigration Judges v. McHenry*, No. 1:20-cv-00731-LO-JFA (E.D. Va. July 1, 2020), ECF No. 1.

[31] AILA, Doc. No. 20070696, *Trump Administration Makes Immigration Courts an Enforcement Tool by Appointing Prosecutors to Lead* (July 6, 2020), https://www.aila.org/advo-media/press-releases/2020/trump-administration-makes-immigration-courts-an-e.

Short's appointment followed the resignation of Chief Immigration Judge Christopher Santoro, who called for impartiality in a parting email to staff and colleagues:

> There will always be those who disagree with a judge's (or jury's) decision and our court system is no different. But for the public to *trust* a court system, for the public to believe that a court is providing fair and equitable treatment under the law, that court system must not only dispense justice impartially but also appear to be impartial.

See Hamed Aleaziz, *A Top Immigration Court Official Called for Impartiality in a Memo He Sent as He Resigned*, BuzzFeed News (July 3, 2020), https://www.buzzfeednews.com/article/hamedaleaziz/immigration-court-official-called-impartiality-memo.

[32] *See* Dave Simpson, *Ex-ICE Atty Tapped as Chief DOJ Immigration Judge*, Law360 (July 2, 2020), https://www.law360.com/articles/1289166/ex-ice-atty-tapped-as-chief-doj-immigration-judge.

[33] *See* Aleaziz, *supra* note 31.

[34] *See id.*

power in political appointees who support its anti-immigration agenda and to fast-track deportations by manipulating the appellate process:

- In March 2019, the Department altered its hiring procedures to facilitate the appointment to the BIA of six former immigration judges with high denial rates (all in excess of 80%)—William Cassidy, Stuart Couch, Deborah Goodwin, Stephanie Gorman, Keith Hunsucker, and Earle Wilson.[35] A July 18, 2019 memo from EOIR Director James McHenry recommending four of the judges stated that applicants who are immigration judges would be immediately appointed to the Board on a permanent basis instead of having to complete a two-year probationary period.[36] And, although public complaints had been filed against at least three of the judges, McHenry's recommendation memo made no mention of those grievances or the fact that Couch and Wilson had the third and fourth highest number of board-remanded cases in 2017.[37] (In fact, Couch's remand rate of 28.4% (50 out of 176 cases[38]) was almost double the 15% remand threshold that immigration judges must stay below in order to obtain a "satisfactory" performance review.) All six judges were swiftly sworn in as BIA members on August 23, 2019. The opacity and arbitrariness of BIA hiring procedures have long been criticized, but the current administration's politicized hiring is unrivaled.[39] Former BIA-head Paul Schmidt openly condemned the administration for

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[35] The denial rates of the newly appointed Board members were as follows: Cassidy (95.8%); Couch (92.1%); Goodwin (91%); Gorman (92%); Hunsucker (83.5%); and Wilson (97.8%). *See* TRAC Immigration, *Judge-by-Judge Asylum Decisions in Immigration Courts FY 2014-2019*, https://trac.syr.edu/immigration/reports/judge2019/denialrates.html. Their appointments were made possible by the administration's 2018 expansion of the BIA from seventeen to twenty-one members. *See* Expanding the Size of the Board of Immigration Appeals, 83 Fed. Reg. 8321 (Feb. 27, 2018) (to be codified at 8 C.F.R. pt. 1003).

[36] Tanvi Misra, *DOJ Changed Hiring to Promote Restrictive Immigration Judges*, Roll Call (Oct. 29, 2019), https://www.rollcall.com/2019/10/29/doj-changed-hiring-to-promote-restrictive-immigration-judges/. McHenry's memo was obtained through a FOIA request. *Id.*

[37] Between 2010 and 2012, IJ Cassidy was the subject of eleven complaints that invoked concerns about bias, due process, judicial conduct, and legal analysis. *See* AILA, Doc. No. 19082161, *Complaints Filed Against IJ Cassidy* (Aug. 21, 2019), https://www.aila.org/ijcassidycomplaints. Additionally, IJ Cassidy and IJ Wilson—both of whom were promoted from the Atlanta Immigration Court—were named in two complaints submitted to EOIR by the Southern Poverty Law Center regarding the unfair treatment of immigrants in the Atlanta court. *See* S. Poverty Law Ctr. & Emory Law, Letter re: Observations of Atlanta Immigration Court (Mar. 2, 2017), https://www.splcenter.org/sites/default/files/2017-atl_complaint_letter_final.pdf; S. Poverty Law Ctr., Letter re: Atlanta Immigration Court Hearings for Persons Detained at Irwin County Detention Center (Mar. 7, 2018), https://www.splcenter.org/sites/default/files/20180307_eoir_complaint_letter.pdf.

[38] Tanvi Misra, *Feds Stacking Immigration Appeals Panel with Restrictive Judges, Documents Show*, Record.net (Nov. 2, 2019), https://www.recordnet.com/news/20191102/feds-secretly-stacking-immigration-appeals-panel-with-restrictive-judges-documents-show.

[39] The administration's bias is also evidenced by the appointments it has blocked. For example, the prior administration had offered Thea Lay, who had more than two-decades experience working on immigration law and issues regarding asylum seekers and refugees, an opportunity to serve on the BIA, pending a successful background check. The current administration then abruptly rescinded that offer without explanation, just as it rescinded at least two additional offers to individuals perceived as pro-immigrant. *See* Tal Kopan, *Immigration Judge Applicant Says Trump Administration Blocked Her Over Politics*, CNN (June 21, 2018), https://www.cnn.com/2018/06/21/politics/immigration-judge-applicant-says-trump-administration-blocked-her-over-politics/index.html. Several members of Congress sent a letter to former Attorney General Sessions seeking information regarding allegations that the Department was "using ideological and political considerations to improperly—and illegally—block the hiring of immigration judges and members of the Board of Immigration Appeals." *See Democrats Ask Sessions About Whistleblower Allegations that DOJ is Blocking Immigration Judges*

having "weaponized the [hiring] process" and having "exploited" existing "weaknesses" in the system for its own ends.[40] Additionally, several U.S. Senators pressed Attorney General William Barr for information related to the politicization of the courts, stating in a letter:

> While immigration courts reside within the executive branch, they should not be merely a tool to achieve desired policy outcomes. The administration's recent decisions to subvert normal hiring process to promote partisan judges, and to increase political influence over individual immigration cases, has undermined public confidence in our immigration courts. These actions create the impression that cases are being decided based on political considerations rather than the relevant facts and law. The appearance of bias alone is corrosive to the public trust. [41]

The Senators further admonished that "[t]he administration's gross mismanagement of these courts further prevents them from providing basic due process."[42]

- In July 2019, the Department implemented a final rule amending certain regulations regarding the BIA's administrative review procedures. *See* Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents, 84 Fed. Reg. 31463 (July 2, 2019) (to be codified at 8 C.F.R. pts. 1003 and 1292). That rule affirmed the practice of single Board members issuing an "affirmance without opinion" (AWO)—an order stating that the BIA agrees with the immigration judge's decision with no additional explanation or reasoning. The rule also significantly expanded the power of the attorney general while making it more difficult for respondents to obtain a full and fair review of their claims on appeal. First, the rule permits the Attorney General to order that a BIA-issued decision is binding on immigration judges, as well as all DHS officers and employees. Second, the rule allows the BIA to rule on issues not raised by the parties on appeal. Third, the rule provides that federal courts adjudicating appeals from the BIA must assume that the BIA properly considered all issues, arguments, and claims, regardless of whether such consideration is apparent from the decision, including an AWO decision, thereby depriving immigrants—as well as federal judges—of the ability to adequately review BIA decisions.

Based on Prohibited Political Considerations, U.S. House of Representatives: Don Beyer (Apr. 17, 2018), https://beyer.house.gov/news/documentsingle.aspx?DocumentID=825.

[40] Misra, *supra* note 36.

[41] *Senators Press Barr on Politicization of Justice Department Administration of Immigration Courts*, U.S. Senate: Sheldon Whitehouse, at 7 (Feb. 13, 2020), https://www.whitehouse.senate.gov/imo/media/doc/2020-02-13%20Ltr%20to%20AJ%20Barr%20re%20independence%20of%20immigration%20courts%20(004).pdf.

[42] *Id.* at 1.

- In April 2020, the Attorney General added three additional members to the BIA—Phillip Montante Jr., Kevin W. Riley, and Aaron R. Petty.[43] Former immigration judges, Montante and Riley boast high denial rates—96.3% and 88.1%, respectively.[44] A former DOJ employee, Petty most recently served as counsel in the Department's Office of Immigration Litigation.[45]

- On May 29, 2020, the Attorney General appointed Associate Deputy Attorney General David H. Wetmore as BIA chairman.[46] Wetmore, who joined the DOJ in 2009 and served as a Trial Attorney in the Department's Office of Immigration Litigation's Appellate Section until 2018, also served a detail as immigration advisor to the White House Domestic Policy Council from 2017 to 2018 (during which time the administration implemented the Muslim country travel ban and zero-tolerance family separation policy).[47]

- On June 8, 2020, the Department reassigned nine BIA career members (all of whom were appointed prior to the current administration) to new roles.[48] The retaliatory reassignment, which followed the members' rejection of an April 17, 2020 buy-out offer from the Department, is part and parcel of the ongoing efforts to restructure the BIA with new hires who are more likely to deny relief to immigrants.

- In August 2020, the Department topped off the current BIA membership with three more former immigration judges—Michael P. Baird, Sunita B. Mahtabfar, and Sirce E. Owen.[49] During their time on the bench, Mahtabfar and Baird each had denial rates in excess of 90%.[50] This latest round of appointments confirms that the administration's expansion of

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[43] U.S. Dep't of Justice, *Executive Office for Immigration Review Swears in Three New Board Members* (May 1, 2020), https://www.justice.gov/eoir/page/file/1272731/download.

[44] *See* TRAC Immigration, *supra* note 35.

[45] U.S. Dep't of Justice, *supra* note 43.

[46] U.S. Dep't of Justice, *Executive Office for Immigration Review Announces New Board of Immigration Appeals Chairman* (May 29, 2020), https://www.justice.gov/eoir/page/file/1281596/download.

[47] *Id.* The travel ban and zero-tolerance family separation policy have both been widely condemned. *See, e.g.*, Rick Gladstone and Satoshi Sugiyama, *Trump's Travel Ban: How it Works and Who is Affected*, N.Y. Times (July 1, 2018), https://www.nytimes.com/2018/07/01/world/americas/travel-ban-trump-how-it-works.html; David J. Bier, *Travel Ban Separates Thousands of U.S. Citizens from Their Spouses & Minor Children*, Cato Inst. (Jan. 29, 2019), https://www.cato.org/blog/travel-ban-separates-thousands-us-citizens-their-spouses-minor-children; William Roberts, *US House Approves Bill Reversing Trump's "Muslim Ban"*, Al Jazeera (July 22, 2020), https://www.aljazeera.com/news/2020/07/22/us-house-approves-bill-reversing-trumps-muslim-ban/; Dara Lind, *The Trump Administration's Separation of Families at the Border, Explained*, Vox.com (Aug. 14, 2018), https://www.vox.com/2018/6/11/17443198/children-immigrant-families-separated-parents; Camila Domonoske & Richard Gonzales, *What We Know: Family Separation and 'Zero Tolerance' at the Border* (June 19, 2018), NPR, https://www.npr.org/2018/06/19/621065383/what-we-know-family-separation-and-zero-tolerance-at-the-border.

[48] Tanvi Misra, *DOJ "Reassigned" Career Members of Board of Immigration Appeals*, Roll Call (June 9, 2020), https://www.rollcall.com/2020/06/09/doj-reassigned-career-members-of-board-of-immigration-appeals/.

[49] Suzanne Monyak, *3 Immigration Judges Picked to Top Off Expanded BIA*, Law 360 (Aug. 10, 2020), https://www.law360.com/legalethics/articles/1299942/3-immigration-judges-picked-to-top-off-expanded-bia.

[50] Baird's and Mahtabfar's denial rates were 91.4% and 98.7%, respectively. *See* TRAC Immigration, *supra* note 35. A former ICE prosecutor, Sirce Owen served as a "management judge" in the infamous Atlanta Immigration Court before being appointed to the BIA. *See* Monyak, *supra* note 49. Owen also served as acting deputy director of EOIR from June 2019 to January 2020. *Id.*

the BIA to 23 members in April 2020 (in the midst of a global public health crisis)[51] was done to facilitate the appointment of board members with a documented anti-immigrant bias.

At the same time, the Attorney General has increasingly utilized his certification power, committing several flagrant abuses. Rather than certify cases to review the quality and fairness of decision-making, the Attorney General has instead certified cases to overturn precedent and establish invidious anti-immigrant policies. Certification of all these cases, which has involved an improper assertion of power over immigration courts, is intended to block avenues of relief to which immigrants are entitled, erode due process, and increase deportations. American Gateways highlights below some of the Attorneys General's brazen abuses of power.

Notably, during Attorney General Session's twenty-one-month term, he certified as many cases to himself (at least seven) as did the attorneys general in the entire twelve-year period of the presidencies of Clinton (three) or Obama (four).[52] These cases include *Matter of Castro-Tum*, *Matter of L-A-B-R-*, and *Matter of S-O-G- & F-D-B-* (which are discussed above), as well as the following:

- In March 2018, former Attorney General Sessions issued *Matter of E-F-H-L*, vacating a BIA decision from four years earlier that held an asylum applicant is ordinarily entitled to a full evidentiary hearing. 27 I&N Dec. 226 (AG 2018). The ruling provided no guidance on when an applicant should be entitled to an evidentiary hearing. Additionally, Sessions' decision to certify a seemingly unremarkable case to himself in the first instance was itself peculiar, prompting criticism that Sessions intended to send a message to immigration judges that the Attorney General is monitoring every action they take.[53]

- In June 2018, in *Matter of A-B-*, 27 I&N Dec. 316 (AG 2018), former Attorney General Sessions overturned a prior BIA decision, *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014), which held that domestic violence survivors could in some cases qualify for asylum based on membership in a particular social group. In his decision, Sessions held that "[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum" and that "[t]he mere fact that a country may have problems effectively policing certain crimes—such as domestic violence or gang violence—or that certain populations are more likely to be victims of crime, cannot itself establish an asylum claim." *Id*. at 320. The decision was challenged by a group of twelve asylum applicants who had been denied an opportunity to apply for asylum under *Matter of A-B-* despite presenting credible accounts of sexual abuse, kidnappings, and beatings in their home countries during interviews with asylum officers. The district court granted summary judgment in favor of plaintiffs and issued an injunction preventing the

[51] *See* Expanding the Size of the Board of Immigration Appeals, 85 Fed. Reg. 18105 (Apr. 1, 2020) (to be codified at 8 C.F.R. pt. 1003).

[52] Liz Vinson, *U.S. Attorney General Tips the Scales in Immigration Court, Leaving One Man Fighting for His Freedom—and His Life*, S. Poverty Law Ctr. (Dec. 3, 2019), https://www.splcenter.org/attention-on-detention/us-attorney-general-tips-scales-immigration-court-leaving-one-man-fighting.

[53] *See* Jeffrey S. Chase, *The AG's Strange Decision in Matter of E-F-H-L-* (Mar. 10, 2018), https://www.jeffreyschase.com/blog/2018/3/10/the-ags-strange-decision-in-matter-of-e-f-h-l-.

application of *Matter of A-B-* in future cases and ordering the return of asylum seekers who had been illegally removed. *Grace v. Whitaker*, 344 F. Supp. 3d 96, 146 (D.D.C. 2018). The appellate court affirmed in part, holding that the standard presented in *Matter of A-B-* was arbitrary and capricious. *Grace v. Barr*, 965 F.3d 883, 900 (D.C. Cir. 2020).

The high rate of case certifications has continued under Attorney General William Barr.

- In *Matter of M-S-*, 27 I&N Dec. 509 (AG 2019), Attorney General Barr overturned a 2005 BIA decision, *Matter of X-K-*, 23 I&N Dec. 731 (BIA 2005). 27 I&N 509 (AG 2019). The decision divested immigration judges of jurisdiction to grant bond to arriving aliens, thereby expanding the mandatory detention of asylum seekers. Upon request by the DHS, Barr delayed the effective date of his decision by 90 days so that DHS could undertake "operational planning" for the "sizable population of aliens" who were no longer eligible for bond. 27 I&N Dec. at 519 & n.8.

- In July 2019, Attorney General Barr overturned another BIA decision in *Matter of L-E-A-*, 27 I&N Dec. 581 (AG 2019). The decision reversed a holding that membership in a family that was targeted with violence could constitute a particular social group for an asylum claim, holding instead that "an alien's family-based group will not constitute a particular social group unless it has been shown to be socially distinct in the eyes of its society, not just those of its alleged persecutor." *Id*. at 582. Even though the holding of *Matter of L-E-A-* is itself narrow, the decision is peppered with sweeping dicta about categories of asylum claims that generally will not prevail, thereby urging adjudicators to improperly forego a careful case-by-case analysis regarding respondents' membership in a particular social group (and silently warning adjudicators that exercising their reasoned discretion to grant family-based asylum claims may increase their remand rate). *See, e.g.*, *id.* at 595 ("[U]nless an immediate family carries greater societal import, it is unlikely that a proposed family-based group will be 'distinct' in the way required by the [Immigration and Nationality Act (INA)] for purposes of asylum."); *id.* at 589 ("[I]n the ordinary case, a nuclear family will not, without more, constitute a 'particular social group' because most nuclear families are not inherently socially distinct."). Additionally, Barr reiterated to the Board "that a cursory analysis of a question that was either uncontested, or not dispositive to the outcome" does not "undermine the Board requirement that asylum applicants" establish each element of their claim. *Id.* at 589, 596. In sum, neither judicial nor prosecutorial discretion is welcome in immigration courts.

- In *Matter of Thomas* and *Matter of Thompson*, 27 I&N Dec. 674 (AG 2019), Attorney General Barr overturned BIA decisions from 2016 (*Matter of Estrada*, 26 I&N Dec. 749 (BIA 2016)); 2005 (*Matter of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005)); and 2001 (*Matter of Song*, 23 I&N Dec. 173 (BIA 2001)). The decision imposes new limitations on the effect that vacaturs of conviction or reductions in sentencing have on immigration decisions. In particular, the decision held that "[s]uch an alteration will have legal effect for immigration purposes when based on a procedural or substantive defect in the underlying criminal proceeding, but not when the change was based on reasons unrelated to the merits, such as the alien's rehabilitation or an interest in avoiding an immigration consequence." 27 I&N Dec. at 675.

- In *Matter of R-A-F-*, 27 I&N Dec. 778 (AG 2020), Attorney General Barr overturned an unpublished BIA decision that affirmed the immigration court's finding that a man in his seventies who suffers from Parkinson's disease, dementia, Major Depressive Disorder, traumatic brain injury, post-traumatic stress disorder (PTSD), and chronic kidney disease[54] would be subject to torture if returned to his home country. With respect to asylum claims specifically, Barr instructed that the BIA must examine *de novo* an immigration judge's "application of law to fact." *Id.* at 779. As former Immigration Judge and commentator Jeffrey Chase pointed out, the BIA had issued another decision concerning the "specific intent" requirement for claims seeking protection under the Convention Against Torture (CAT) just 16 months earlier, thus indicating that the "real motive behind [*Matter of R-A-F-*] was not to give guidance, but rather to serve warning."[55] As Chase further explained:

> While published precedential decisions have always received broad attention, individual BIA appellate judges have felt safe affording relief in sympathetic cases in unpublished decisions where the outcome is generally known only to the parties involved. . . . [Yet,] the A.G. . . . chose to unceremoniously refer [*Matter of R-A-F-*] to himself and then slam the BIA's decision. The legacy of such action will be fully felt the next time a single judge at the BIA has the opportunity to affirm a similarly sympathetic grant of relief, but will instead choose not to do so out of fear and self-preservation.[56]

- Most recently, in September 2020, Attorney General Barr—leveraging his and former Attorney General Sessions' prior decisions in *Matter of A-B-*, *Matter of L-E-A-*, and *Matter of R-A-F—*vacated and remanded a Board decision affirming a humanitarian grant of asylum to a Salvadoran refugee who had suffered familial violence at the hands of her parents. *Matter of A-C-A-A-*, 28 I&N Dec. 84 (AG 2020). Despite sanctioning and encouraging the AWO practice (which permits the Board to cursorily affirm immigration judge decisions with no explanation at all), Barr specifically criticized the Board for "deferring to the immigration judge's credibility finding and concluding, in a one-sentence discussion of the merits of the respondent's asylum claim, that it could 'discern no clear error in the Immigration Judge's determination that the respondent established persecution on account of her membership in a particular social group.' " *Id.* at 87 (quoting BIA Op. at 2). Barr then directed the Board, upon remand, to rigorously scrutinize whether respondent had carried her burden of proving past persecution and, if so, whether she merited a grant of humanitarian asylum. *Id.* at 93-96. As evidenced by the summary prefacing the decision, the Attorney General intends to continue rewriting well-established asylum law to reflect the current administration's anti-immigrant animus (particularly

[54] See Jeffrey S. Chase, *The Real Message of Matter of R-A-F-* (Mar. 1, 2020), https://www.jeffreyschase.com/blog/2020/3/1/the-real-message-of-matter-of-r-a-f-.

[55] *Id.*

[56] *Id.*

against women, people of color, and other vulnerable groups) while also policing and punishing the Board, as well as immigration judges, for granting asylum.[57]

The overreach in the decisions the attorneys general have certified to themselves for decision (in many instances to overturn well-established precedent), is compounded by actions that limit the ability of interested parties to provide relevant input during the certification process. These actions include providing insufficient notice that a case is under review, refusing to provide relevant materials and information, and failing to provide a clear statement of the issue(s) under review.[58]

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The foregoing chronology of the administration's vicious attack on the immigration court system is merely illustrative of the issues that warrant attention and careful assessment in connection with the Department's Proposed Rule.[59] For example, the Department's proposal to require immigration judges to impose a 15-day filing deadline for asylum applications in asylum-and-withholding-only proceedings and to limit the ability of judges to grant continuances that would

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[57] Departing from well-established principles of asylum law, the summary of the opinion in *Matter of A-C-A-A-*, 28 I&N Dec. at 84, offers step-by-step guidance on how the Board should approach overturning a grant of asylum on appeal:

> (1) In conducting its review of an alien's asylum claim, the [Board] must examine do novo whether the facts found by the immigration judge satisfy all of the statutory elements of asylum as a matter of law (citing *Matter of R-A-F-*, 27 I&N Dec. 778);
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> (2) When reviewing a grant of asylum, the Board should not accept the parties' stipulations to, or failures to address, any of the particular elements of asylum—including, where necessary, the elements of a particular social group. (citing *Matter of L-E-A-*, 27 I&N Dec. at 589);
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> (3) Even if an applicant is a member of a cognizable particular social group and has suffered persecution, an asylum claim should be denied if the harm inflicted or threatened by the persecutor is not "on account of" the alien's membership in that group. That requirement is especially important to scrutinize where the asserted particular social group encompasses many millions of persons in a particular society; and
>
> (4) An alien's membership in a particular group cannot be "incidental, tangential, or subordinate to the persecutor's motivation . . . [for] why the persecutor[] sought to inflict harm." . . . Accordingly, persecution that results from personal animus or retribution generally does not support eligibility for asylum (second and third alterations in original) (citing *Matter of A-B-*, 27 I&N Dec. at 388).

[58] Dara Lind, *Jeff Sessions is Exerting Unprecedented Control Over Immigration Courts — By Ruling on Cases Himself*, Vox (May 21, 2018), https://www.vox.com/policy-and-politics/2018/5/14/17311314/immigration-jeff-sessions-court-judge-ruling.

[59] The more robust public record documenting the administration's assault on immigrants and the immigration court system is relevant to and should be considered in evaluating the legality, propriety, and prudence of the Proposed Rule. The public record, however, remains incomplete. The interested public continues to seek additional information (via Freedom of Information Act requests and other channels) as it pieces together the details of the administration's sprawling and multi-faceted anti-immigration agenda.

extend the case adjudication deadline beyond 180 days must be assessed in connection with recent judicial decisions that have stripped immigration judges of other critical docket management tools, including administrative closure and termination. Similarly, the 180-day case adjudication timeline must be considered against the backdrop of the onerous case quotas that have been imposed on immigration judges. And the Department's bold proposal to allow immigration judges to submit evidence in the very cases over which they preside must be evaluated alongside the Department's ongoing efforts to erode judicial neutrality while turning judges into prosecutors. American Gateways submits that, when considered in tandem with the administration's broader pattern of conduct, the purpose of the Proposed Rule becomes quite clear—to further erode judicial independence as well as due process of law in immigration court proceedings.

II. SPECIFIC COMMENTS

A. A 15-day filing deadline is facially unreasonable and would result in widespread due process violations.

The Department seeks to amend 8 CFR § 1208.4(d) to create a new, "specific" deadline by which individuals in asylum-and-withholding-only proceedings must file their asylum applications. The proposed addition would impose unnecessary and undue burden on many respondents, as well as immigration practitioners. The Department suggests that this proposal—if adopted—would facilitate efficiency in an otherwise overburdened system. It will not. Immigration judges already impose filing deadlines, and their dockets remain impacted. Instead, the proposed revision would prejudice respondents and deprive immigration judges of the authority to manage asylum proceedings. As drafted, the new deadline would apply only to certain enumerated categories of asylum seekers who are not entitled to full Section 240 proceedings. 85 Fed. Reg. 59692, 59693-94, 59699; *see also* 8 C.F.R. § 1208.2(c)(1). Currently, only a few thousand people go through asylum-and-withholding-only proceedings each year, which are limited to alien crew members, stowaways, individuals who entered the United States through the Visa Waiver Program, and a few other specific categories of individuals.[60] *See* 8 C.F.R. § 208.2(c)(1). Yet, the Department omits any mention, much less meaningful assessment, of the true scope of its proposal, which would impact tens of thousands of asylum seekers if certain regulatory amendments proposed by the Department and DHS on June 15, 2020 were to come to fruition.[61]

[60] These classes of individuals are funneled into limited-scope proceedings because they are given limited and temporary permission to enter the United States and, in the case of those who enter through the Visa Waiver Program, have waived any right to contest removal. *See, e.g.*, 8 U.S.C. § 1282(b) ("[A]ny immigration officer may, in his discretion, if he determines that an alien is not a bona fide crewman, or does not intend to depart on the vessel or aircraft which brought him . . . remove[] [the crewman] from the United States."); *Id.* § 1187(b) ("An alien may not be provided a waiver under the [Visa Waiver Program] unless the alien has waived any right . . . to contest, other than on the basis of an application for asylum, any action for removal of the alien.") Because respondents are already deemed removable, parties in asylum-and-withholding-only proceedings are prohibited from raising "any other issues, including but not limited to issues of admissibility, deportability, eligibility for waivers, and eligibility for any other form of relief." 8 C.F.R. § 208.2(c)(3)(i).

[61] In 2018, DHS found a credible fear of persecution in 74,287 cases. *See* Dep't of Homeland Security, *Credible Fear Cases Completed and Referrals for Credible Fear Interview* (July 24, 2020), https://www.dhs.gov/immigration-statistics/readingroom/RFA/credible-fear-cases-interview.

The DOJ's and DHS's earlier proposal would amend 8 C.F.R. § 1208.2(c) so that migrants who establish a credible (or reasonable[62]) fear of persecution and receive a positive fear finding would be funneled into asylum-and-withholding-only proceedings. 85 Fed. Reg. 36264, 36267. As American Gateways more fully discussed in its comments to the June 15, 2020 proposed rule, the proposal to place nearly all asylum seekers into asylum-and-withholding-only proceedings openly flouts documented congressional intent to place individuals with a positive credible (or reasonable) fear finding into full Section 240 proceedings, which allow respondents to seek other forms of relief.[63] If the Department were to improvidently implement both its prior unlawful proposal to expand asylum-and-withholding-only proceedings and the instant proposal requiring individuals in such proceedings to file their I-589 applications within 15 days of the initial hearing, the consequences would be both widespread and devastating.

For the reasons discussed below, American Gateways opposes the proposed 15-day filing deadline, as well as any other uniform deadline that would hinder asylum seekers' ability to fairly present their claims and/or obtain representation or other legal assistance in connection with completing their application for asylum or withholding of removal. Furthermore, American Gateways submits that the filing deadline proposal must be rescinded because the Department fails to examine the impact of the proposal in light of other proposed regulatory changes and fails to engage in a full and balanced assessment of the relevant issues, including fundamental constitutional rights, as the law requires.[64]

1. The proposed 15-day deadline for individuals in asylum-and-withholding-only proceedings to submit an application for relief is unduly burdensome for both applicants and practitioners.

A review of available data makes quite clear that the burdens of seeking asylum under the *current* regulations are already great. Asylum grant rates have continued to plummet in recent years. In FY 2019, the overall asylum denial rate rose for the seventh straight year to over 69%.[65] The denial rate for unrepresented asylum seekers was a staggering 84%.[66] During the first quarter of FY 2020, less than 27% of asylum requests were granted in immigration court—a 36.6% decline from FY 2016.[67] The asylum grant rate for Central American migrants has declined even more

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[62] American Gateways staunchly opposes the Departments' June 15, 2020 proposal to expand the application of a higher "reasonable possibility" standard when assessing potential eligibility for statutory withholding of removal and withholding or deferral of removal under the CAT. *See* 85 Fed. Reg. 36264, 36268, 36296 (proposed 8 C.F.R. § 208.30(e)(1), (3)).

[63] *See* H.R. Rep. No. 104-828, at 209 (1996) ("If the officer finds that the alien has a credible fear of persecution, the alien shall be detained for further consideration of the application for asylum *under normal non-expedited removal proceedings.*") (emphasis added).

[64] The APA requires that an agency, when promulgating rules, "examine the relevant data and articulate a satisfactory explanation for its action, including a 'rational connection between the facts and the choice made.'" *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (quoting *Burlington Truck Lines*, 371 U.S. at 168).

[65] TRAC Immigration, *Record Number of Asylum Cases in FY 2019* (Jan. 8, 2020), https://trac.syr.edu/immigration/reports/588/.

[66] *Id.*

[67] Human Rights First, *Fact Sheet* 2 (June 2020), https://www.humanrightsfirst.org/sites/default/files/AdministrationDismantlingUSAsylumSystem.pdf. USCIS has

steeply to 13.3%—a 50% decline from FY 2016.[68] For those caged in detention facilities, where myriad barriers frustrate efforts to access counsel and basic legal information, circumstances are even more dire. Only 30% of detained immigrants are represented.[69] This means that thousands of detainees without legal representation rely on legal services organizations like American Gateways for *pro se* assistance with completing the Form I-589. For the reasons discussed herein, among others, a 15-day filing deadline would make it exceedingly difficult for American Gateways and other legal services organizations to provide effective *pro se* assistance to asylum seekers.

Without any mention of the burdens already placed on asylum seekers, the Department proposes a "to revise 8 CFR 1208.4 to add a 15-day deadline from the date of the alien's first hearing to file an application for asylum and withholding of removal for aliens in asylum-and-withholding-only proceedings." 85 Fed. Reg. 59692, 59693. The Department asserts that 15 days is more than sufficient time for individuals to submit applications for relief because asylum-and-withholding-only proceedings are narrow in scope and "thus, there is no reason not to expect the alien to be prepared to state his or her claim as quickly as possible."[70] 85 Fed. Reg. 59692, 59694. This suggestion ignores that asylum seekers include some of the most vulnerable members of society—individuals who have suffered persecution and trauma. The Proposed Rule does not take into account the circumstances surrounding an immigrant's motivations for seeking asylum in the first instance. While 15 days may be sufficient for an average person to complete a 12-page application, asylum seekers are reeling from the trauma involved in seeking refuge—often having expeditiously left their home countries with nothing more than a small bag and the clothes they are wearing.[71] Most persons seeking asylum do not speak English and have little, if any, familiarity with U.S. immigration law, which courts have described as "a maze of hyper-technical statutes and regulations that engender waste, delay, and confusion," including among immigration lawyers. *Drax v. Reno*, 338 F.3d 98, 99 (2d Cir. 2003). Applications for relief must be submitted in English, or they will be deemed abandoned and the applicant ordered removed. Without counsel, few individuals—most of whom are torture or trauma survivors who suffer from PTSD or other mental health ailments—can successfully complete the Form I-589, much less complete it within 15 days.

Moreover, while U.S. law provides arriving asylum seekers the right to remain in the United States while their claim for protection is pending, the Department acknowledges that asylum seekers are often detained upon arrival or apprehension. Detention exacerbates the challenges asylum seekers already face, including challenges accessing basic legal information about the asylum process. By way of example: Limited, inadequate or no access to law libraries and legal materials in detention

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not released data for the first quarter of FY2020. As of FY 2019, the asylum grant rate for affirmative asylum claims adjudicated before USCIS was 30.7%—a decline of 28.8% since FY 2016. *Id.*

[68] *Id.* at 1.

[69] TRAC Immigration, *Who is Represented in Immigration Court?* (Oct. 16, 2017), https://trac.syr.edu/immigration/reports/485/.

[70] The Department also asserts that the proposed deadline "is consistent with existing regulations that specify a 10-day deadline for detained crewmembers to file an asylum application," suggesting it is also appropriate here. 85 Fed. Reg. 59692, 59694 (citing 8 C.F.R. § 1208.5(b)(1)(ii)). The rule imposing a 10-day deadline for crewmembers is in the context of expedited proceedings, including removal without the right to a hearing. The process for such crewmembers is not analogous to any other asylum seeker and, thus, a similar deadline is not particularly relevant.

[71] *See What's in My Bag?: What Refugees Bring When They Run for Their Lives*, Carryology (Sept. 16, 2015), https://www.carryology.com/bags/whats-in-my-bag-what-refugees-bring-when-they-run-for-their-lives/.

centers obstructs immigrants' access to legal assistance;[72] time in the law library is restricted, and most resources are outdated, incomplete, or available only in English;[73] phone calls, if permitted, require notice to the detention facility and are limited in duration;[74] telephones, if operational, are typically located in public areas where privacy is lacking.[75] Such restrictions frustrate efforts to access basic legal information to which detainees are constitutionally entitled. Detained immigrants are also nearly five times less likely to secure legal counsel than those not in detention.[76] This disparity significantly impacts an individual's case, as those with representation are more likely to apply for protection in the first place and successfully obtain the relief sought.[77] For detained asylum seekers, finding and meeting with an attorney, alone, typically takes longer than two weeks.

American Gateways staff work inside four detention centers in Central Texas—T. Don Hutto Residential Center ("Hutto"), South Texas Detention Complex (STDC), Karnes County Residential Center, and Limestone County Detention Center. With limited resources, it is not feasible for American Gateways to represent the thousands of detainees who are seeking asylum. Hence, American Gateways staff often provides *pro se* assistance to detained asylum seekers. When providing *pro se* assistance, American Gateways does not give legal advice, but instead educates individuals about the requirements for asylum and withholding of removal so that they can complete applications on their own. The vast majority of individuals whom American Gateways serves *pro se* are non-English speakers and many of them are illiterate or have minimal education. Most have also experienced high levels of psychological distress that not only impede their quality of life but also inhibit their capacity to effectively present their claims. This means that most asylum seekers, including those whom American Gateways serves, cannot complete the Form I-589 without assistance. On average, it takes several weeks to meet with an individual, gather information regarding the bases of his claims, and review the application in preparation for its submission. The proposed 15-day deadline, which fails to take into consideration language and mental-health barriers, would impede, and in many circumstances foreclose, American Gateways' ability to provide *pro se* assistance to detained asylum seekers.

American Gateways also serves many indigenous language speakers who are detained and have been placed into proceedings without having had a credible fear interview because the government

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[72] *See, e.g.*, Sarah E. Dunaway, *Dónde está la Biblioteca? It's a Damn Shame: Outdated, Inadequate, and Nonexistent Law Libraries in Immigrant Detention Facilities* (May 19, 2016), https://depts.washington.edu/uwlawlib/wordpress/wp-content/uploads/2018/01/Dunaway2016.pdf; Victoria López & Heather L. Weaver, *The Trump Administration is Preventing Detained Immigrants From Practicing Their Religion*, ACLU (Aug. 1, 2018, 5:30 PM), https://www.aclu.org/blog/immigrants-rights/immigrants-rights-and-detention/trump-administration-preventing-detained (reporting that detainees "do not have access to legal materials, and the most basic information is provided solely in English").

[73] Office of Inspector Gen., Dep't of Homeland Security, OIG-07-01, *Treatment of Immigration Detainees Housed at Immigration and Customs Enforcement Facilities* 16-17 (Dec. 2006), https://www.oig.dhs.gov/assets/Mgmt/OIG_07-01_Dec06.pdf.

[74] *Id.* at 23-24.

[75] *Id.*

[76] *See* Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court* (Sept. 28, 2016), https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court.

[77] *Id.*

could not locate an interpreter who speaks their language.[78] In such cases where finding an interpreter is itself difficult, it would be impossible for American Gateways to assist individuals with completing and submitting the Form I-589 within 15-days of their initial hearing. In fact, it would be virtually impossible for American Gateways to meet the proposed deadline even if it were *representing* an indigenous-language speaker.

American Gateways has itself encountered countless obstacles to accessing, communicating with, and representing the detained immigrants it serves. As noted below, these barriers are not anomalous features of rogue facilities but have been widely documented throughout the immigration detention system. Consideration of the following impediments to accessing counsel[79]—and attendant due process concerns—are relevant to and, therefore, must be considered in connection with the Department's perverse filing deadline proposal:

- **Remote Location of Detention Facilities:** The physical geography of the immigration detention system is antithetical to the constitutional right to counsel. A map of the nation's "deportation railway" reveals that ICE has strategically erected detention centers in rural areas, far from major cities where most legal aid organizations, attorneys, and interpreters operate. An analysis of seventy detention facilities revealed that approximately 30% of immigrant detainees are held at facilities more than 100 miles (with a median distance of 56 miles) from the nearest government-listed legal aid provider.[80] For immigrants detained in isolated locations, obtaining counsel is exceedingly difficult, if not impossible. Rates of representation in some remote facilities are so low that the mere fact of detention may itself violate the right to counsel. By way of example, in 2017, the National Immigrant Justice Center identified only 21 attorneys in Texas and New Mexico willing to take removal defense cases out of New Mexico's Cibola County Detention Center (a private prison resurrected as a detention center after the DOJ terminated CoreCivic's federal prison contract on account of human rights violations).[81] Even working at maximum capacity, these 21 attorneys could serve only 42 detainees—a mere 6% of the prison's April 2017 population and less than 4% of the population at capacity.[82]

- **Inadequate Access to Counsel:** Myriad obstacles frustrate attorney-client communications and visitation in detention centers. In fact, the very architecture of detention facilities—designed to imprison hundreds or thousands of detainees in structures

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[78] *See* USCIS, U.S. Dep't of Homeland Sec., Memorandum: Processing Credible Fear Cases When a Rare Language Interpreter is Unavailable (June 14, 2013), https://www.uscis.gov/sites/default/files/document/memos/Processing-CF-RareLanguageInterpreter-Unavailable.pdf; *see also* Ashley Cleek, *The Government Says Border Patrol Agents in the Southwest Speak Spanish—But Many Migrants Speak Indigenous Languages*, The World (July 3, 2018), https://www.pri.org/stories/2018-07-03/government-says-border-patrol-agents-southwest-speaks-spanish-many-migrants-speak (discussing how government delays in locating indigenous-language interpreters lead to "delays in court proceedings and people remaining in jail-like settings longer").

[79] Barriers to accessing counsel are numerous and multifaceted; those identified herein are merely exemplary.

[80] Kyle Kim, *Immigrants Held in Remote ICE Facilities Struggle to Find Legal Aid Before They're Deported*, L.A. Times (Sept. 28, 2017), http://www.latimes.com/projects/la-na-access-to-counsel-deportation/.

[81] Nat'l Immigrant Justice Ctr., *"What Kind of Miracle…"—The Systematic Violation of Immigrants' Right to Counsel at the Cibola County Correctional Center* (Nov. 29, 2017), https://immigrantjustice.org/research-items/report-what-kind-miracle-systematic-violation-immigrants-right-counsel-cibola-county.

[82] *Id.*

with only a handful of attorney visitation rooms—reveals that these barriers were built into the blueprints. For example, the STDC has the capacity to house over 1,850 detainees, but has only four attorney visitation rooms.[83] The Houston Contract Detention Facility has three attorney visitation rooms for up to 1,000 detainees.[84] The IAH Secure Adult Detention Facility has two non-contact attorney visitation rooms for up to 1,000 detainees.[85] At Hutto, attorneys experience recurrent problems accessing their clients. Out-of-state attorneys without bar cards have reported being denied access to the facility for failure to prove their identity as an attorney. Others have reported being turned away by CoreCivic and ICE due to alleged "dress code" violations. Furthermore, the attorney contact visitation rooms at Hutto are also used by ICE and USCIS to conduct interviews, and government officials are given preference over attorneys who wish to visit with their clients. If an attorney is able to access one of the limited visitation rooms, privacy is lacking. The visitation rooms are cubicles surrounded by clear plastic that is not sealed at the top. Although ICE has set up white noise machines and occasionally plays music, these makeshift sound barriers are ineffective. Everyone in the general waiting area can hear the conversations between attorneys and their clients. At STDC, attorneys have reported waiting up to six hours to visit a single client. Staff blame long wait times on a variety of issues, including that clients cannot be moved while in "count," that no specific staff persons are assigned to bring clients to the visitation area, or that a visit was not called in due to a shift change. Regardless of the alleged cause of the long wait times, the result is devastating—attorneys must sit in the waiting area for hours without phone or internet access and without any guarantee of seeing a client. These obstacles have only morphed and multiplied as a result of the COVID-19 pandemic. Even assuming detained asylum seekers could retain counsel to represent them, attorney access to clients in detention centers is so sharply limited that a 15-day deadline would often be impossible for even represented asylum seekers to meet.

- **Inadequate Access to Interpreters:** Detention facilities frequently lack working phone lines to conference in interpreters,[86] or they otherwise limit telephone access in attorney-client visitation rooms. Telephone access in the Hutto visitation space, for example, is limited to non-profits, which means that if an attorney requires an interpreter, that interpreter must obtain security clearance from CoreCivic and ICE and accompany the attorney to the facility for client visits. This policy renders it incredibly difficult for attorneys to communicate with non-English speaking clients. In many instances, it would be impossible for attorneys to (1) locate a competent interpreter, (2) navigate inconsistent and ever-changing policies regarding the use of interpreters, and (3) complete the Form I-589 within 15 days of a client's initial hearing.

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[83] Human Rights First, *Ailing Justice: Texas—Soaring Immigration Detention, Shrinking Due Process* 26 (June 2018), https://www.humanrightsfirst.org/sites/default/files/Ailing_Justice_Texas.pdf.

[84] *Id.*

[85] *Id.*

[86] *See* Cleek, *supra* note 78 (explaining that speaker phones needed to call interpreters are frequently in use or broken).

- **Frequent Transfer of Detainees:** The frequent transfer of detainees among ICE facilities also impedes access to counsel. Between October 1998 and April 2010, 40% of detainees were transferred at least once; 46% of those transferred were moved at least twice, and 3,400 detainees were transferred 10 times or more.[87] The average distance of each transfer was 369 miles.[88] The number of detainees experiencing transfer has also steadily risen over time from 23% in 1999 to 52% in 2009.[89] In FY 2015, there were 374,059 recorded transfers,[90] and 60% of detained adults experienced at least one interfacility transfer.[91] Of those adults who were transferred, about 86% experienced at least one intercity transfer, 37% experienced at least one interstate transfer, and 29% experienced at least one transfer across different federal judicial circuits.[92] Under the current administration, ICE has also initiated the mass transfer of detainees, including asylum seekers, to federal prisons.[93] Because transfers hinder access to legal representation and separate asylum seekers from the evidence needed to support their claims, the Department must take transfer practices into account when assessing the fairness and legality of the proposed filing deadline.

The foregoing concerns regarding the impact of an unreasonably short, uniform filing deadline are further heightened by the fact that the Department, along with DHS, has introduced several proposed changes to the existing Form I-589.[94] The proposed changes to Form I-589 would require applicants to have in-depth knowledge of the asylum laws and regulations. For example, the proposed changes would require an individual to list a cognizable particular social group and make complex legal determinations regarding the agents of their persecution, the inability or unwillingness of their government to protect them, and the "nexus" between their persecution and the protected grounds. They would also require that an individual who is seeking protection from torture explain how the perpetrator of such torture was an official acting in his official capacity or with the acquiescence or consent of an individual acting in his official capacity. American Gateways previously submitted comments to the proposed changes to Form I-589 and, therefore, will not repeat all of its objections to those proposed changes herein. However, American Gateways highlights below a few of the several proposed changes that the Department must carefully consider in connection with its proposed 15-day filing deadline.

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[87] Human Rights Watch, *A Costly Move: Far and Frequent Transfers Impede Hearings for Immigrant Detainees in the United States* 17 (June 2011), https://www.hrw.org/sites/default/files/reports/us0611webwcover_0.pdf.

[88] *Id.* at 13.

[89] *Id.* at 17.

[90] TRAC Immigration, *New Data on 637 Detention Facilities Used by ICE in FY 2015*, (Apr. 12, 2016), http://trac.syr.edu/immigration/reports/422/.

[91] Emily Ryo & Ian Peacock, Am. Immigration Council, *The Landscape of Immigration Detention in the United States* 3 (Dec. 2018), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_landscape_of_immigration_detention_in_the_united_states.pdf.

[92] *Id.*

[93] Sarah N. Lynch & Kristina Cooke, *Exclusive: U.S. Sending 1,600 Immigration Detainees to Federal Prisons*, Reuters (June 7, 2018, 5:10 P.M.), https://www.reuters.com/article/us-usa-immigration-prisons-exclusive/exclusive-u-s-sending-1600-immigration-detainees-to-federal-prisons-idUSKCN1J32W1.

[94] The proposed Form I-589 was published in the Federal Register in connection with Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36264 (proposed June 15, 2020).

- **<u>Particular Social Group</u>:** The proposed Form I-589 would require individuals "claiming membership in a particular social group(s)" to "identify the particular social group(s)" to which they belong. Proposed Form I-589 at 5.[95] Experienced immigration attorneys struggle to craft legally cognizable particular social groups (PSGs). For most *pro se* applicants, having to identify the PSGs to which they belong would be an insurmountable barrier to stating a viable claim. Over the course of more than three decades, American Gateways has provided *pro se* assistance to thousands of asylum seekers, and very few of those individuals have been able to identify the PSGs on which their claim was based, especially in cases involving persecution perpetrated by gangs, intimate partners, or other private actors. Requiring applicants to articulate and define PSGs on the Form I-589 within 15 days of their initial hearing is particularly concerning in light of the Department and DHS's proposed substantive changes to the governing regulations, which include a non-exhaustive list of several bases that would "generally be insufficient to establish a particular social group." 85 Fed. Reg. 36264, 36279. Among the PSGs that would be barred except in "rare circumstances," *see id.*, are those "consisting of or defined by" "interpersonal disputes" or "private criminal acts," *id.* at 36291 (proposed 8 C.F.R. § 208.1(c)), 36300 (proposed 8 C.F.R. § 1208.1(c)). Applicants with no prior knowledge of U.S. immigration law cannot be reasonably expected to craft PSGs that fit within the impermissibly narrow standards or to explain why the harm they experienced at the hands of non-state actors nonetheless qualifies because such "interpersonal" or "private" violence is deeply rooted in societal, cultural, religious, and legal norms and biases that are, in turn, further exacerbated by rampant impunity. *See, e.g.*, *Alvarez Lagos v. Barr*, 927 F.3d 236, 250 (4th Cir. 2019) (reversing immigration judge's finding that the petitioner failed to establish a nexus to her PSG of "unmarried mothers in Honduras living under the control of gangs" and citing to the "very patriarchal" and "'machista' culture" that renders unmarried women "especially vulnerable to gang violence"). The proposed PSG question also conflicts with the affirmative obligation of immigration judges to seek clarification of a PSG's boundaries not clearly defined by the applicant. *See, e.g.*, *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 191 (BIA 2018) ("If an applicant is not clear as to the exact delineation of the proposed social group, the Immigration Judge should seek clarification . . . .").

  Many asylum seekers whom American Gateways serves are unrepresented at the time they file their I-589 application but are later able to secure representation for their final hearing. In these circumstances, individuals quite appropriately rely on their counsel to articulate the PSGs on which their claim is based. If, as proposed, the PSG question is added to the Form I-589 *and* individuals are required to complete and submit the Form I-589 within 15 days of their initial hearing (most likely without any legal assistance), many individuals who have suffered severe persecution (especially at the hands of non-state actors) would be returned to the persecution from which they fled without their claims ever having been heard.

- **<u>Past Persecution:</u>** The current Form I-589 asks applicants for asylum and withholding of removal to describe any harm, mistreatment, or threats they have experienced in the past

[95] A copy of the Proposed Form I-589 and accompanying instructions are available at https://www.regulations.gov/docket?D=EOIR-2020-0003.

or fear experiencing in the future. With guidance from legal services providers like American Gateways, many *pro se* applicants can answer these fact-based questions about their own experiences. The Proposed Form I-589, on the other hand, includes questions that implicate complicated relationships among state and non-state actors that enable persecutory conduct to flourish. Questions regarding whether the agent(s) of an individual's harm were government actors, whether an individual's government was or is unwilling or unable to protect her, and whether a sufficient nexus exists between the harm an individual experienced or fears experiencing, on the one hand, and a protected ground, on the other hand, are not only laden with legal terms of art, but cannot be adequately answered by individuals who are not familiar with the dense and ever-changing body of asylum law that challenges the minds of attorneys and adjudicators alike.

Furthermore, when considered alongside yet another proposal to (1) categorically narrow the universe of conduct that amounts to persecution, *see* 85 Fed. Reg. 36264, 36291-92 (proposed 8 C.F.R. § 208.1(e)), 36300 (proposed 8 C.F.R. § 1208.1(e)), and (2) enumerate circumstances that generally will not satisfy the "nexus" requirement, *see id.* at 36292 (proposed 8 C.F.R. § 208.1(f)), 36300 (proposed 8 C.F.R. § 1208.1(f)), it is abundantly clear that the proposed questions would function as a trap for most *pro se* applicants, especially those who are persecuted by family members, acquaintances, or members of criminal enterprises.

As previously noted, most individuals whom American Gateways serves cannot adequately complete the Form I-589 without legal assistance. Even individuals with advanced education lack the legal knowledge to be able to complete the newly proposed Form I-589 on their own, as doing so would require an advanced knowledge of the ever-changing U.S. asylum laws. Unless applicants have a *reasonable* amount of time to understand and answer the questions asked on the Form I-589, including adequate time to seek legal assistance, they cannot possibly be said to have had a fair opportunity to present their claims. The due process implications of the 15-day filing deadline must therefore be considered.

Lastly, the burdens of the proposed 15-day filing deadline must be evaluated in the context of the current public health crisis. The global COVID-19 pandemic, which has disrupted lives around the world, has had a particularly acute impact on detained asylum seekers. Aside from the health risks of detention, more restrictive visitation policies (or policies prohibiting visitation altogether) have erected additional barriers that detainees must overcome to access basic legal services and, if represented, communicate with their counsel.[96] Many legal services providers like American Gateways have had to fundamentally alter their service delivery models to provide remote legal assistance. This has not only required increased resources and training on the part of thinly resourced organizations, but also has curtailed both the quantity and quality of available legal

[96] *See, e.g.*, Am. Bar Ass'n, *Access to Counsel in Immigration Detention in the Time of COVID-19* (2020), https://www.americanbar.org/groups/public_interest/immigration/publications/access-to-counsel-in-immigration-detention-in-the-time-of-covid-nds-2019/ ("As the ability to visit detention facilities in person has been significantly curtailed due to the pandemic, the need for remote access between detainees and legal service providers is greater than ever."); Am. Immigration Council, *Stopping Government Interference to Attorney Phone Access in Immigration Detention Centers* (2020), https://www.americanimmigrationcouncil.org/litigation/stopping-government-interference-attorney-phone-access-immigration-detention-centers (explaining that "phone access issues have made it extremely difficult to represent detained individuals because in-person visits are impossible due to COVID-19").

services inside detention centers. Out of necessity, American Gateways has quickly adapted to the new environment. Nonetheless, the public health crisis undoubtedly continues to complicate the delivery of services by making it more difficult to communicate with clients, to work with interpreters, to gather documents from clients, to review written applications, and to get applications signed. Both respondents and practitioners are increasingly dependent on the government to set up telephone and video calls and to send and receive critical case documents. In many instances, detainees are only permitted to send documents to their counsel through regular mail. Given recent operational and organizational changes at the U.S. Postal Service, delays in mail delivery service nationwide have only increased, and such delays are expected to persist.[97] The seemingly simple task of transmitting documents between respondents and their counsel could, in the current environment, take several days (and often much longer), not to mention that ICE officials (or the private contractors operating detention centers) control the flow of mail to and from the detention center. The Department's proposed implementation of a 15-day filing deadline for asylum applications in the midst of a global pandemic is both legally and morally reprehensible.

2. An unreasonably short deadline to submit an application for asylum and withholding of removal threatens basis due process protections.

"It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings." *Demore v. Kim*, 538 U.S. 510, 523 (2003) (quoting *Flores*, 507 U.S. at 306). Indeed, for over a century, the Supreme Court has repeatedly affirmed that the "Due Process Clause applies to *all* 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (emphasis added). As early as 1896, the Court held that due process rights applied to an individual detained for unauthorized entry into the United States. *See Wing v. United States*, 163 U.S. 228, 238 (1896). Less than a decade later, the Court reaffirmed that immigrants in removal proceedings are guaranteed due process rights, including the right "to be heard upon the questions involving [the] right to be and remain in the United States." *Yamataya* , 189 U.S. at 101; *see also Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (Fifth Amendment protects all persons "from deprivation of life, liberty, or property without due process of law"); *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (same).

It is similarly well settled that due process requires (1) notice and (2) an opportunity to be heard. *See, e.g.*, *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) (" 'The fundamental requisite of due process of law is the opportunity to be heard. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.") (citations omitted). In the immigration context, due process requires that "[a]n alien who faces deportation is entitled to a *full and fair* hearing of his claims." *Agyeman v. INS*, 296 F.3d 871, 877 (9th Cir. 2002) (emphasis added) (citation omitted). The civil rather than criminal nature of removal proceedings does not diminish this due process right:

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[97] *See, e.g.*, Press Release, Carolyn B. Maloney, Chairwoman, H. Comm. on Oversight and Reform, *New Postal Service Documents Show Nationwide Delays Far Worse than Postal Service has Acknowledged* (Aug. 22, 2020), https://oversight.house.gov/news/press-releases/new-postal-service-documents-show-nationwide-delays-far-worse-than-postal.

> Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty . . . cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.

Bridges v. Wixon, 326 U.S. 135, 154 (1945).

Procedural due process rights have also animated statutory rights that apply to immigration proceedings. Section 240 of the INA delineates the contours of a fair hearing and enumerates the rights that apply to persons in removal proceedings. The INA provides that an "immigration judge *shall* administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses." 8 U.S.C. § 1229a(b)(1) (emphasis added). Moreover, "the alien *shall* have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine the witnesses presented by the Government." *Id.* § 1229a(b)(4)(B) (emphasis added). The INA's implementing regulations also require a hearing. The BIA has acknowledged that "[a]t a minimum, . . . the regulations require that an applicant for asylum and withholding take the stand, be placed under oath, and be questioned as to whether the information in the written application is complete and correct." *Matter of Fefe*, 20 I&N Dec. 116, 118 (BIA 1989). The BIA continued:

> We would not anticipate that the examination would stop at this point unless the parties stipulate that the applicant's testimony would be entirely consistent with the written materials and that the oral statement would be believably presented.
>
> In the ordinary course, however, we consider the full examination of an applicant to be an essential aspect of the asylum adjudication process for reasons related to fairness to the parties and to the integrity of the asylum process itself. . . . [T]here are cases where an alien establishes eligibility for asylum by means of his oral testimony when such eligibility would not have been established by the documents alone.

Id.

The foregoing due process rights are intended to protect against practices and policies that violate precepts of fundamental fairness. Although the Department's proposal requires that a respondent be given 15 days from the date of his first hearing to submit an application for relief, this proposed procedure is patently *unfair* as applied to individuals seeking protection from persecution. And, when considered in connection with other proposed changes, it is abundantly clear that a 15-day filing deadline is intended to strip applicants of their right to present their claims and would result in the waiver or cursory denial of meritorious claims for relief. For example, pursuant to the rules proposed by the DOJ and DHS on June 15, 2020, immigration judges would be allowed to pretermit and deny applications for asylum and withholding of removal that, in their assessment,

fail to establish a *prima facie* claim for relief before a respondent ever has an opportunity to appear before the court. *See* 85 Fed. Reg. 36264, 36277, 36302 (proposed 8 C.F.R. § 1208.13(e)). The pretermission of "legally deficient" claims without a hearing violates both due process of law and the INA, both of which provide for the right to a fair hearing. The Department's current proposal to provide an individual in asylum-and-withholding-only proceedings a mere 15 days to prepare her application would both decrease the likelihood that she can access counsel to assist with the preparation of the Form I-589 and increase the likelihood that her application would be deemed legally deficient and summarily denied by the immigration judge without her having any opportunity to be heard. This indefensible attempt to facilitate the deprivation of basic due process rights and fuel the improper expansion of the administration's invidious enforcement agenda by imposing unreasonable and arbitrary filing deadlines should be withdrawn.

3. The proposed filing deadline is inconsistent with the statutory one-year filing deadline and, therefore, contrary to the INA and congressional intent.

Under the INA, an asylum applicant is required to "demonstrate[ ] by clear and convincing evidence that the application has been filed within 1 year after the date of the [applicant's] arrival in the United States." 8 U.S.C. § 1158(a)(2)(B). An applicant who does not meet the one-year filing deadline is deemed to have waived her claim unless she can demonstrate changed or extraordinary circumstances relating to the delay in filing the application. *Id.* § 1158(a)(2)(D). When Congress enacted the one-year bar, it did so primarily to prevent fraudulent claims. *See, e.g.*, *Vahora v. Holder*, 641 F.3d 1038, 1045 (9th Cir. 2011). Even then, some members of Congress expressed concern that the one-year filing deadline would frustrate legitimate claims. *Id*. Indeed, the one-year bar has been criticized for unfairly penalizing otherwise deserving applicants—including in a number of cases where applicants were granted "withholding of removal" but were denied asylum solely because of the one-year bar.[98] Given that the existing one-year deadline already forecloses some meritorious claims, an inflexible 15-day filing deadline for individuals in removal proceedings would most certainly risk the widespread waiver of meritorious claims. If Congress had wished to prescribe a specific deadline for filing an asylum application aside the existing statutory one-year filing deadline it could and would have done so.

The Department's proposal is a not-so-subtle scheme to further inhibit asylum seekers' ability to obtain a full and fair review of the merits of their asylum claims. The proposal seeks to restrict an already questionable one-year deadline because the Department fears that "important evidence, including personal recollections, may degrade or be lost over time." 85 Fed. Reg. 59692, 59694. The Department's feigned fear of degrade and loss can be disregarded because the asylum seeker—not the government—bears the burden of establishing eligibility for asylum. 8 C.F.R. § 208.13(a). The applicant, thus, has a vested interested in ensuring she can establish a right to remain in the

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[98] *See* Karen Musalo & Marcelle Rice, *The Implementation of the One-Year Bar to Asylum*, 31 Hastings Int'l & Comp. L. Rev. 693, 699-703 (2008).

The substantive standard for granting statutory withholding of removal is even more rigorous than that required for asylum. The withholding of removal standard requires that an applicant demonstrate "a chance greater than fifty percent" that he would be persecuted or tortured if removed, *Hamoui v. Ashcroft*, 389 F.3d 821, 827 (9th Cir. 2004), whereas "a ten percent chance of persecution may establish a well-founded fear" for purposes of an asylum application. *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001). The fact that an applicant can qualify for withholding of removal, but still be denied asylum because he missed a deadline, shows that the bar is frustrating valid claims rather than necessarily serving its intended purpose of weeding out fraudulent claims.

United States. Importantly, without sufficient time to prepare and complete the asylum application, no amount of evidence or personal recollections—and no matter how voluminous or relevant such evidence may be—will help the asylum seeker; her time will have passed before she can even prepare and submit an application for relief. The Department need not erect additional barriers for asylum seekers under the guise of furthering a lofty—albeit manufactured—purpose.

Indeed, an examination of current adjudication timelines for asylum cases reveals that the Department's concern with the preservation of evidence is nothing more than a pretext for implementing a rule that would facilitate the denial of meritorious claims.[99] Wait times for a hearing on the merits vary, but wait times in some cities in Texas, California, Colorado, Massachusetts, Pennsylvania, and Virginia now exceed more than 1,400 days.[100] The average wait time in Arlington, Virginia is 1,607 days, or almost 4.5 years.[101] And, in many instances, the wait time is much longer. American Gateways has three clients who filed asylum applications in 2013 and 2014. The court has reset their cases multiple times, and the asylum seekers have not delayed their proceedings in any way. The following case examples squarely rebut the Department's disingenuous claim that an unreasonably short filing deadline would somehow help asylum seekers preserve their "personal recollections."

American Gateways client Ms. M is an asylum seeker from Rwanda. Her husband was targeted by the Rwandan government because of his work with a political opposition group. Ms. M's husband was arrested and then disappeared. When she went to the police looking for her husband and demanding answers about his whereabouts, she too was arrested, detained for weeks, tortured and sexually assaulted. She was eventually released but told that she was being watched. After this experience, Ms. M made the decision to flee Rwanda as she feared that her husband had been killed and that, if she remained, she too would suffer the same fate. Ms. M entered the United States in October 2012 and was subsequently detained. Ms. M passed her credible fear interview and was placed in Section 240 removal proceedings. She was then released from detention on parole. She had her initial Master Calendar Hearing (MCH) in October 2013. She submitted her Form I-589 asylum application and was set for an additional MCH in December 2013, as a Kinyarwanda interpreter could not be located. Ms. M's MCH was then cancelled by the Court. She has not had another hearing since October 2013. She has had six MCHs, all of which have been reset by the Court. American Gateways has requested via written motions that her hearing be advanced and has also requested an Individual Calendar Hearing (ICH) so that the merits of Ms. M's claim can be adjudicated. Ms. M has now had three ICH's scheduled, all of which have been reset by the court. Ms. M's next ICH is set for July 2022, but she fears that it too will be reset.

American Gateways client Mr. S fled his home country of Sierra Leone due to threats and harm from the Poro society. When he arrived in the United States in May 2012, he was detained at the South Texas Detention Center. While detained, Mr. S proceeded *pro* se, but was unable to complete his case before the immigration judge because the court was unable to locate a Kono

[99] The Department states in the NPRM that the median processing time for non-detained cases with an asylum application is currently 807 days—roughly 2.5 years. 85 Fed. Reg. 59692, 59698.

[100] TRAC Immigration, *Crushing Immigration Judge Caseloads and Lengthening Hearing Wait Times* (Oct. 25, 2019), https://trac.syr.edu/immigration/reports/579/.

[101] *Id.*

interpreter. Mr. S was eventually released from detention on parole by order of the immigration judge because he was unable to locate legal representation while detained and because American Gateways was unable to provide adequate *pro se* assistance services to Mr. S while detained. Specifically, American Gateways could not locate an interpreter whom it could access from the detention center due to the limitations on phone access. Once Mr. S was released from detention, American Gateways took on his case for representation. Mr. S had his first MCH in February 2014. His final ICH was set for September 2014. That hearing was subsequently cancelled by the court. Mr. S has had three additional MCHs, all of which have been cancelled by the court. Mr. S is currently set for another MCH on February 1, 2021 (which is a placeholder date). It is unclear as to when Mr. S will actually have a hearing and have his claim for asylum heard and adjudicated.

The asylum seekers described above desperately want their asylum hearing, and the likelihood that a merits hearing will be set within the next couple of months, or even years, is very low. American Gateways also has several clients with affirmative asylum claims that have been sitting for years. Clients who filed applications between 2015 and 2017 are still waiting for interviews. If they are scheduled for an interview with the asylum office (which could take several more years) and their case gets referred to an immigration judge, it could easily take a decade (or longer) before they even get a first hearing. This reality that many asylum seekers are waiting an average of three to four years for a hearing—and some are waiting much longer—lays bare the absurdity of the Departments' claim that imposing a 15-day filing deadline for the Form I-589 is necessary to preserve "important evidence, including personal recollections." 85 Fed. Reg. 59692, 59694.

4. The proposed filing deadline would not yield increased efficiency.

The Department further argues that, without a specific deadline, "there is a risk that applicants may simply delay proceedings, resulting in inefficiency in what should otherwise be a streamlined proceeding." *Id.* This argument fails as a matter of both law and fact. First, the Department's argument presumes there is no filing deadline—but there is. Asylum seekers have one year from the date of their arrival in the United States to file an application. 8 U.S.C. § 1158(a)(2)(B). The presiding immigration judge also has the authority and discretion to set a specific—and case-appropriate—filing deadline at an MCH. *See* 8 C.F.R. § 1003.31(c). Second, although asylum seekers often seek time to consult with or retain counsel to assist with the preparation of their applications, the Department cites no facts to support its suggestion that asylum seekers unnecessarily delay proceedings. In fact, most asylum seekers American Gateways encounters complain about the *slow* pace of their proceedings, as the government is often responsible for lengthy case delays. *See supra* Section II.A.3. Finally, nothing about the current docket is streamlined. More than one million cases are currently pending in immigration courts nationwide.[102] Nearly 125,000 defensive asylum applications have been filed so far this year,[103] and, as of August 14, 2020, more than 560,000 applications for asylum and withholding of removal were pending with EOIR. 85 Fed. Reg. 59692, 59696. Requiring an unprepared and unrepresented

[102] The total number of pending cases as of June 30, 2020 was 1,206,369. EOIR, *Adjudication Statistics: Pending Cases, New Cases, and Total Completions* (July 14, 2020), https://www.justice.gov/eoir/page/file/1242166/download.

[103] EOIR, *Adjudication Statistics: Defensive Asylum Applications* (July 14, 2020), https://www.justice.gov/eoir/page/file/1163616/download.

applicant to file the Form I-589 within 15 days of his initial MCH would not facilitate expediency in the current backlog of proceedings.

The Department's short-sighted claim that requiring asylum seekers to quickly prepare and submit applications to avoid waiving their claims for relief would enhance efficiency also completely ignores that immigration judges have an affirmative duty to fully develop the record. As the Eighth Circuit has explained,

> [c]onsidering [a] pro se alien's likely lack of legal knowledge, the difficulty of navigating immigration law, and the possibility of expulsion upon failure to do so successfully, we have recognized it is critical that the [immigration judge] scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts.

Ramirez v. Sessions, 902 F.3d 764, 771 (8th Cir. 2018) (citation and quotation marks omitted); *see also Barragan-Ojeda v. Sessions*, 853 F.3d 374, 381 (7th Cir. 2017) ("An IJ, unlike an Article III judge, is not merely the fact finder and adjudicator but also has an obligation to establish the record. Particularly with a pro se respondent . . . , fair questioning by the IJ often is required to obtain information from the alien necessary for a reasoned decision on the claim.") (citations and quotation marks omitted); *Mohamed v. Att'y Gen. U.S.*, 705 F. App'x 108, 114 (3d Cir. 2017) ("The importance of that full examination is all the more apparent when considering the difficulties faced by a *pro se* applicant with little or no reading skills who was forced to seek help from his fellow detainees in a facility where he had already been assaulted, collect evidence and seek testimony while detained, and present his case via videoconference."); *Yang v. McElroy*, 277 F.3d 158, 162 (2d Cir. 2002) (per curiam) ("[T]he IJ whose decision the Board reviews, unlike an Article III judge, is not merely the fact finder and adjudicator but also has an obligation to establish the record."); EOIR, U.S. Dep't of Justice, Immigration Court Practice Manual, § 4.15(g) (rev. July 2, 2020) (rev. July 2, 2020) (instructing immigration judges to "advise[] the respondent of any relief for which the respondent appears to be eligible").[104]

The Department's proposal to require that respondents file applications within 15 days of their initial hearing means that more applications will be poorly prepared without the assistance of counsel or other legal representative, making it more—not less—difficult for judges to identify and evaluate the relevant legal issues, such as a respondent's membership in a particular social group, nexus, or the willingness or ability of a respondent's government to protect her from future

[104] The Immigration Court Practice Manual is available at https://www.justice.gov/eoir/page/file/1258536/download.

The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection* [hereinafter *Handbook*] also explains that "while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner." UNHCR, *Handbook* 43 (reissued Feb. 2019), https://www.unhcr.org/en-us/publications/legal/5ddfcdc47/handbook-procedures-criteria-determiningrefugee-status-under-1951-convention.html. In *INS v. Cardoza-Fonseca*, the U.S. Supreme Court instructed that the *Handbook* "provides significant guidance in construing the [1967] Protocol, to which Congress sought to conform" and "has been widely considered useful in giving content to the obligations that the Protocol establishes." 480 U.S. 421, 439 n.22 (1987); *see also INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) (describing the *Handbook* as a "useful interpretative aid").

persecution. Where a respondent's claim is not clearly articulated in the written application, it takes longer for the immigration judge (as well as the DHS attorney) to prepare for the merits hearing and to elicit relevant information during the hearing. In other words, adjudicating cases with poorly prepared written applications requires *more* judicial resources and is *less* efficient.

5. Imposing an inflexible 15-day filing deadline would improperly deprive immigration judges of their authority to set deadlines and manage their dockets.

"In deciding the individual cases before them . . . immigration judges shall exercise their independent judgment and discretion and may take any action consistent with their authorities under the [INA] and regulations that is appropriate and necessary for the disposition of such cases." 8 C.F.R. § 1003.10(b). The Department's proposed revision would strip immigration judges of their "broad discretion to conduct and control immigration proceedings." *Matter of Interiano-Rosa*, 25 I&N Dec. 264, 265 (BIA 2010). As the Department acknowledges, "[i]t is well established that immigration judges have the authority to set filing deadlines and manage their dockets consistent with applicable law." 85 Fed. Reg. 59692, 59694 (citing 8 C.F.R. §§ 1003.10(b), .14(b), .18, .31(c)); *see also* Immigration Court Practice Manual, § 3.1(b)(i)(B), (ii)(B) (July 2, 2020) ("For [master calendar and individual] hearings involving detained aliens, filing deadlines are as specified by the Immigration Court."). There is good reason that current regulations afford judges the discretion to set deadlines for the filing of applications and related documents. Immigration judges are in the best position to determine case-appropriate deadlines that balance often competing concerns of efficiency and due process. For example, a 45-day filing deadline may be reasonable for a respondent who is already represented by counsel at his first MCH. That same 45-day deadline would be patently unreasonable for an unrepresented respondent who speaks an indigenous language and for whom the government cannot even locate an interpreter.

By instituting a 15-day deadline by which almost all asylum seekers must file an application (assuming the Department charges ahead with its June 15, 2020 proposal to funnel more asylum seekers into asylum-and-withholding-only proceedings), the Department is recommending that immigration judges' longstanding discretion to set filing deadlines and manage their dockets be revoked. The Proposed Rule offers no justification for this change, which appears designed solely to render the asylum process more difficult for respondents and interfere with the ability of immigration judges to conduct fair proceedings. As discussed above, such intentional interference with judicial independence is improper, undermines the integrity of the immigration court system, facilitates due process violations, and fuels inefficient case management. *See supra* Section I.F.

In conjunction with its proposal, the Department seeks to placate dissenters by offering a "good cause" exception to the 15-day filing deadline. 85 Fed. Reg. 59692, 59699 (proposed 8 C.F.R. § 1208.4(d)). A good cause exception cannot cure an *unreasonable* deadline and provides no assurance that respondents would be afforded a full and fair opportunity to present their claims. Instead, it simply shifts yet another burden to the already-overwhelmed immigrant to explain why it missed the application deadline. Furthermore, if an asylum seeker misses a newly set deadline, the Proposed Rule does not authorize immigration judges to further extend the deadline; instead the rule provides that the immigration judge "shall" deem the ability to file waived and "the case shall be returned to the [DHS] for execution of an order of removal." *Id.* In other words, what

little discretion would remain under the Proposed Rule appears to itself be limited to a single extension of the filing deadline only upon a showing of "good cause."

Lastly, the proposed "good cause" exception to the filing deadline does nothing to mitigate American Gateways' concerns because immigration judges are under tremendous pressure to complete cases quickly. Recently imposed case quotas and performance metrics incentivize judges to prioritize speed at the expense of due process in order to keep their jobs. *See supra* Section I.F. The attorney general has also limited the "good cause" standard for granting continuances, expressly cautioning judges that the standard is "an important check on [their] authority." *Matter of L-A-B-R-*, 27 I&N Dec. at 406. Given these circumstances, many immigration judges would be unwilling or unable to grant continuances even when doing so would advance the interests of justice.

B. Requiring immigration judges to automatically reject "incomplete" applications based on minor, technical errors and instituting a strict 30-day deadline for correcting applications would impose unjustified burdens on asylum seekers.

Under the current rules, if an immigration court fails to return an incomplete asylum application within 30 days, the application is deemed to be complete. *See* 8 C.F.R. § 1208.3(c)(3). The Department proposes to remove this provision without offering any rational reason for doing so. If the Department wishes to process applications efficiently, as it asserts, then the current allowance actually promotes efficiency because it creates a "floor" such that certain applications are automatically deemed "complete" within 30 days of receipt. In fact, if the Department wishes to make its process more efficient, it could shorten this period so that applications pending for a period of less than 30 days would automatically be deemed complete if not returned to the applicant. Yet, instead of setting forth a proposal that would actually enhance efficiency, the Department seeks to modify the current rules in a manner that will prejudice asylum seekers under the guise of efficiency.

Beginning in 2019, USCIS began rejecting affirmative asylum applications if any field on the Form I-589 is left blank, even if that field has no legal relevance to the case or simply does not apply.[105] Take for example, American Gateways clients FG and OG, a husband and wife who are seeking asylum due to religious persecution in Russia. They are Jehovah's Witnesses, and the Russian Supreme Court has declared the Administrative Centre of Jehovah's Witnesses in Russia an "extremist organisation." FG was an elder in his church and was targeted because of his participation in his church. American Gateways submitted FG's and OG's I-589 applications on September 25, 2019. In November 2019, USCIS rejected the two Form I-589s for incompleteness due to not placing "N/A" in blank fields. They also noted that the applications were deficient because the applicants signed their names in their native alphabet (as instructed) in Answer Part D. Lastly, the applications were rejected because the applicant and preparer signed in blue ink. American Gateways resubmitted the applications and again they were rejected because

[105] U.S. Dep't of Homeland Sec., *I-589, Application for Asylum and for Withholding of Removal Instructions*, Instructions at 5 (Aug. 25, 2020), https://www.uscis.gov/sites/default/files/document/forms/i-589instr.pdf; s*ee also* Catherine Rampell, *This Latest Trick From the Trump Administration is One of the Most Despicable Yet*, Washington Post (Feb. 13, 2020, 4:24 p.m. PST), https://www.washingtonpost.com/opinions/the-trump-administrations-kafkaesque-new-way-to-thwart-visa-applications/2020/02/13/190a3862-4ea3-11ea-bf44-f5043eb3918a_story.html (discussing USCIS's rejection of U-Visa application because the applicant left certain fields on the form blank).

some of the explanation boxes in Part B stated that the applicants would provide a supplementary declaration at a later time. The other reason cited for the rejection—that American Gateways had submitted separate Form I-589 packets for the husband and wife and "only one family member can file as primary applicant"—is legally incorrect.[106] Although American Gateways recognizes that "RAPS [Refugees, Asylum, and Parole System] is not structured to accommodate [] simultaneous claims," the Affirmative Asylum Procedures Manual (AAPM) provides instructions for how to deal with them.[107] In short, the applicants should not have to forego available claims in order for their applications to be processed.

The Department now seeks to codify and expand this ridiculous practice of deeming applications incomplete for immaterial reasons, such as failing to write "none," "not applicable," or "unknown" in response to questions that clearly do not apply to the applicant or that the applicant does not understand, or failing to sign the form. *See* 85 Fed. Reg. 59692, 59694, 59699 (proposed 8 C.F.R. § 1208.3(c)(3)). And, as the above case example demonstrates, a rule that would *encourage* the rejection of applications would also inevitably result in legally erroneous rejections. Under the Proposed Rule, immigration judges and EOIR support staff would be required to sift through every Form I-589 that is filed and reject those that are "incomplete." Once the court rejects the application, the respondent would then have only 30 days to correct and resubmit the application to avoid waiver of his asylum claim. *See id*. An already overwhelmed court system with a massive case backlog does not have the resources to (1) comb through the several thousands of applications it receives each year looking for minor errors and (2) return those applications that are not technically complete. Even it did have sufficient resources, such expenditure of government resources is, on its face, objectionable.

Aside from wasting resources and making an already inefficient process less efficient, the Proposed Rule would unduly harm asylum seekers, especially *pro se* asylum seekers who may not fully understand the requirements for completing the Form I-589. The current rule pursuant to which technically "incomplete" applications are deemed complete if not rejected within 30 days is both appropriate and necessary given that few asylum seekers are able to retain counsel before they submit the application (and even fewer would be able to do so if given a mere 15 days to file the application following their first hearing). Because asylum seekers are entitled to a full and fair hearing, any substantive gaps in an application that is automatically deemed complete under the current rule can be determined at a later time by the immigration judge when she is considering the factual record.

The proposed modification to the automatic completion rule is wholly unwarranted and fails to take into account several relevant factors. First, individuals in removal proceedings do not have a right to appointed counsel and, therefore, must often complete the Form I-589 without the assistance of a lawyer. This is especially true of (1) detained asylum seekers whom the government

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[106] *See* 8 C.F.R. § 208.14(f) (stating that denial of a principal's application "shall not preclude a grant of asylum for an otherwise *eligible dependent who has filed a separate asylum application*") (emphasis added); U.S. Dep't of Homeland Sec., USCIS, Affirmative Asylum Procedures Manual (AAPM) at 49 (May 2016), https://www.uscis.gov/sites/default/files/document/guides/AAPM-2016.pdf ("There is no statutory or regulatory bar to an individual being both a principal applicant and a dependent. *An individual may pursue an asylum application as a principal applicant and as a dependent* on a parent or spouse's asylum claim.") (emphasis added).

[107] *Id.*

cages in facilities in remote locations, far from service providers and potential counsel and (2) individuals subject to the Migrant Protection Protocols (MPP),[108] less than 2% of which have a lawyer.[109] Second, the Form I-589 must be submitted in English notwithstanding the fact that most asylum seekers are non-English speakers. This means that many applicants are forced to rely on fellow detainees with limited English proficiency to assist them with completing the application, and they have no means of reading the instructions or reviewing the application to ensure that it is accurate and complete. A rule that requires immigration courts to reject applications because they are missing a word (such as "N/A") is not only unduly harsh, but runs afoul of U.S. obligations under international law to afford protections to individuals who have a well-founded fear of being persecuted in their home countries, as well as the 1980 Refugee Act, which was enacted to enforce the "historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands." [110]

The Department's proposal to institute a strict 30-day timeline for applicants to fix any deficiencies in applications that are rejected is equally problematic and would result in the abandonment or waiver of meritorious claims. An applicant who does not have a social security number and does not understand that he is required to write "none" in that field instead of leaving it blank may not even understand why his application was rejected. The Proposed Rule does not contain any requirement that an immigration court specifically identify the deficiencies that caused an application to be rejected or explain how they can be remedied, nor does it require that applicants

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[108] On December 20, 2018, then-DHS Secretary Kirstjen Nielsen announced the implementation of the MPP, which she described as a "historic action to confront the illegal immigration crisis facing the United States." Dep't of Homeland Security, *Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration* (Dec. 20, 2018), https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration. Under the MPP, individuals who arrive at the southern border and ask for asylum are issued notices to appear in immigration court and sent back to Mexico to await their court date. AILA, *Policies Affecting Asylum Seekers at the Border* 2 (Jan. 29, 2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/policies_affecting_asylum_seekers_at_the_border.pdf. Between January and mid-November 2019, nearly 60,000 migrants—including women (among them pregnant mothers), LGBTQ persons, disabled persons, more than 16,000 children, and nearly 500 infants—were returned to Mexico to await their court hearings. Most of these individuals are living in conditions without access to adequate housing, food, sanitation, or medical care. Rochelle Garza, *Trump's War on Asylum-Seekers is Endangering Pregnant Women*, ACLU (Oct. 13, 2019 4:15 PM), https://www.aclu.org/blog/immigrants-rights/trumps-war-asylum-seekers-endangering-pregnant-women. As of November 2019, more than 2,000 asylum seekers resided in a tent camp with no running water or electricity. Nomaan Merchant, *Tents, Stench, Smoke: Health Risks are Gripping Migrant Camp*, Associated Press (Nov. 14, 2019), https://apnews.com/337b139ed4fa4d208b93d491364e04da. As of May 13, 2020, there were at least 1,114 *publicly* reported cases of murder, rape, torture, kidnapping, and other violent assaults against asylum seekers subject to MPP. *See* Human Rights First, *Delivered to Danger: Trump Administration Sending Asylum Seekers and Migrants to Danger* (May 13, 2020), https://www.humanrightsfirst.org/campaign/remain-mexico; *see also* Human Rights Watch, *DHS OIG Formal Complaint Regarding "Remain in Mexico"* (June 2, 2020 10:00 AM), https://www.hrw.org/news/2020/06/02/dhs-oig-formal-complaint-regarding-remain-mexico. After waiting months for a hearing, thousands of asylum seekers have been unable to return to the border for their scheduled court hearings—some were kidnapped and prevented from attending their hearings; others abandoned their cases due to the dangers faced in the border region. AILA, *Policies Affecting Asylum Seekers at the Border*, at 5-6. The Department's complete failure to assess how individuals funneled into the MPP would be able to navigate paying a fee to DHS prior to filing the Form I-589 (much less within 15 days of their initial hearing) renders the fee proposal arbitrary and capricious.

[109] TRAC Immigration, *Access to Attorneys Difficult for Those Required to Remain in Mexico* (July 29, 2019), https://trac.syr.edu/immigration/reports/568/.

[110] Refugee Act of 1980, § 101(a), Pub. L. No. 96-212, 94 Stat. 102 (1980) (hereinafter the *1980 Refugee Act*).

be clearly advised, in a language that they understand, of the harsh consequences of failing to promptly resubmit a complete application. Under ordinary circumstances, advisals regarding filing deadlines would be explained to a respondent in court by an interpreter. Sending a rejected application to a respondent by mail without any explanation of the deficiencies in the application or instructions regarding resubmission in a language that the respondent can understand would constitute a flagrant due process violation.

The 30-day resubmission window is also inconsistent with the statutory one-year filing deadline. By statute, "[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival . . .), irrespective of such alien's status may apply for asylum" "within 1 year after the date of the alien's arrival in the United States." 8 U.S.C. § 1158(a)(1), (2)(B). Under the Department's proposal, an applicant who fails to return an incomplete application within 30 days of the application having been rejected by the immigration court would be deemed to have abandoned or waived her claim even if one year from the date of her last entry into the United States has not yet passed. Although the attorney general is permitted to set conditions or limitations on the consideration of asylum applications, *see* 8 U.S.C. § 1158(d)(5)(B), he cannot override by regulation Congress's clear mandate that asylum seekers have one year from the date of their last entry to apply for humanitarian protection.

Additionally, the proposal ignores several practical concerns that arise from the fact that EOIR does not have a universal electronic filing system and *pro se* respondents do not have any access to e-filing. Immigration courts serve official documents via regular (non-certified) mail, which takes several days, thereby cutting into the 30-day timeframe for respondents to make corrections to and re-file rejected applications. And although individuals in removal proceedings are required to keep their address updated with the court, many asylum seekers are transient (in large part because they cannot seek work authorization prior to filing the Form I-589 and therefore face obstacles accessing shelter, food, and other basic necessities) and are not properly advised of the obligation to update their address. Even under the current rule, the risk that an application rejected within 30 days of its filing will not reach an applicant is substantial. This risk is further elevated under the Proposed Rule because the government would be free to sit on an application for as long as it wishes before rejecting it, thereby undermining any reasonable expectation on the part of the applicant that, following the passage of a certain amount of time, her application has been accepted.

Lastly, the Proposed Rule invites gamesmanship on the part of the Department. The preface to the Proposed Rule provides that "immigration courts will reject all incomplete applications and return them to the applicant in a timely fashion." 85 Fed. Reg. 59692, 59694. Yet, the proposed regulation itself does not contain any requirement that rejected applications be "timely" returned. This means that immigration courts could take several months to review an application and reject it based on a minor technicality right before or, even worse, after an applicant's one-year filing deadline has passed. The Department does not provide any guidance regarding situations in which an application is submitted before an applicant's one-year filing deadline and is either (1) rejected right before the one-year filing deadline such that the 30-day time period for resubmission extends beyond one year, or (2) rejected after the one-year filing deadline. These ambiguities will needlessly generate confusion and inevitably lead to litigation.

The Department claims that the changes it proposes are necessary to "ensure that cases . . . are processed efficiently by minimizing any delay between the return of an incomplete asylum application and the re-filing of a complete one." 85 Fed. Reg. 59692, 59694. This claim is undermined by the fact that immigration courts would be permitted to review and reject applications as slowly as they like, not to mention that rejecting applications based on legally irrelevant technicalities would itself result in a tremendous waste of judicial resources. In this regard, the current rule whereby applications are deemed complete upon the passage of 30 days is much more efficient. Additionally, the Department offers no evidence that asylum seekers are dilatory in completing and re-filing applications that are rejected. Presumably, an individual files the Form I-589 because she wishes to assert a claim for relief. If her application is rejected, the statutory one-year filing deadline and rules governing work authorization provide more than sufficient incentive for her to correct and re-file her application in a timely manner.

The Department nonetheless insists that a deadline is necessary because applicants will otherwise "delay proceedings based on an assertion that a corrected application will be forthcoming, resulting in wasted immigration judge time and increasing the likelihood that . . . the eventual application may not be adjudicated within 180 days as contemplated by the [INA]." 85 Fed. Reg. 59692, 59694. This proffered justification is equally spurious. Immigration judges have the inherent authority to control their dockets. *Romero v. Barr*, 937 F.3d 282, 288 (4th Cir. 2019); *Morales v. Barr*, 973 F.3d 656, 666-67 (7th Cir. 2020). As the Department acknowledges, this includes "the authority to set filing deadlines and manage their dockets consistent with applicable law." 85 Fed. Reg. 59692, 59694. The Department's claim that writing an inflexible 30-day timeline into the regulations is "fully consistent with" the authority of immigration judges to set deadlines is risible. The blanket 30-day timeline flies in the face of immigration's judges' authority and obligation to control their own dockets. Immigration judges are best suited to set appropriate filing deadlines, based on the facts and circumstances of each individual case, so that asylum claims are adjudicated based on principles of fairness and a full consideration of the facts, not prematurely cut off by artificial deadlines.

The only potential purpose of the proposed changes to 8 C.F.R. § 1208.3(c)(3) is to facilitate the inadvertent (and perhaps unknowing) waiver of asylum claims. The proposed changes should therefore be withdrawn. If they are not, the Department should at least set a specific deadline by which immigration courts must review and return technically incomplete applications so that lengthy processing delays on the part of the government do not result in applicants missing their one-year filing deadline. Moreover, the Department must implement sufficient safeguards for *pro se* respondents, including that (1) any rejected application must be accompanied by a written advisal, in a language that the respondent understands, that her application will be deemed abandoned and her claim waived if the application is not resubmitted within the 30-day timeline and (2) a respondent's illiteracy should constitute exceptional circumstances such that a failure to timely resubmit the application does not constitute abandonment of the application.

C. Requiring immigration courts to reject applications as incomplete if they are not accompanied by any required fee receipt would create unfair obstacles for asylum seekers and violate due process.

The Department seeks to amend 85 C.F.R. § 1208.3(c)(3) such that "any required filing fee must be submitted in connection with the asylum application at the time of filing." 85 Fed. Reg. 59692, 59695. As the Department explains in the preface to the Proposed Rule, 8 C.F.R. § 1103.7(b)(4)(ii), when EOIR uses a DHS form in immigration proceedings, the fee imposed by DHS applies. *Id.* Because EOIR uses the USCIS Form I-589, "the DHS fee would also apply to any filings of USCIS Form I-589 in EOIR proceedings." *Id.* On August 3, 2020, DHS published a final rule, titled U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, that requires a $50 fee for Form I-589 applications for asylum filed with USCIS. *See* 85 Fed. Reg. 46788, 46791. Hence, individuals in removal proceedings would similarly be required under the Proposed Rule to submit a $50 fee at the time of filing their Form I-589 defensively with the immigration court. Requiring asylum seekers in removal proceedings to pay to raise a defense to their removal is legally suspect under both domestic and international law, which provides asylum seekers both with a right to seek asylum and a right to a full and fair hearing of their claims. Charging a filing fee for asylum applications is also out of step with the vast majority of asylum systems around the world. Nearly all of the 147 nations that are party to the 1951 Refugee Convention, to which the United States is also a party, do not charge any fee for asylum applications.[111] At present, the only other signatory nations that charge a fee to apply for asylum are Iran, Fiji, and Australia.[112]

Furthermore, current Department regulations state that immigration judges cannot grant any fee waiver for filing a DHS form where the fee is identified as non-waivable in DHS regulations. *See* 8 C.F.R. § 1103.7(c) ("No waiver may be granted with respect to the fee prescribed for a [DHS] form or action that is identified as non-waivable in regulations of the [DHS]."). The August 2, 2020 DHS regulations governing USCIS filing fees eliminate fee waivers except where the INA statutorily requires DHS to provide them. Under that rule (which was set to go into effect on October 2, 2020 but is currently enjoined), only VAWA self-petitioners, T nonimmigrants, U nonimmigrants, some battered spouses and children, Temporary Protected Status (TPS) applicants, Special Immigrant Juvenile Status (SJIS) applicants, and Afghan/Iraqi special immigrants will be eligible for fee waivers. 85 Fed. Reg. 46788, 46812. Because the DHS rule does not make a fee waiver available for Form I-589 applications for asylum, an immigration judge would lack the authority to waive the applicable fee for applications filed with the immigration court. If the filing fee itself does not implicate due process rights, a *non-waivable* filing fee most certainly does.[113]

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[111] *See* Beth Daley, *Charging Asylum Application Fees Is the Latest Way the US Could Make Immigrants Pay for Its Red Tape* (May 13, 2019), https://theconversation.com/charging-asylum-application-fees-is-the-latest-way-the-us-could-make-immigrants-pay-for-its-red-tape-116404; The Law Library of Congress, Global Legal Research Center, *Fees Charged for Asylum Applications by States Parties to the 1951 Refugee Convention* (Dec. 2017), https://www.loc.gov/law/help/asylum-application-fees/asylum-application-fees.pdf.

[112] Victor Valdez Gonzalez, *USCIS Fee Increases Effective October 2, 2020* Immigrant Legal Resource Center (Aug. 2020), https://www.ilrc.org/sites/default/files/resources/revised_uscis_fee_increases_october_2020.pdf.

[113] *See* Brandon L. Garrett, *Wealth, Equal Protection, and Due Process*, 61 Wm. & Mary L. Rev. 397, 411 (2019) ("The Supreme Court has held that the Due Process Clause, therefore, does not ensure full and free access to courts, but where important individual interests are at stake . . . and where the state has created a monopoly on the ability to access that interest, the ability to pay cannot be unduly relied upon.") (citing *Boddie v. Connecticut*, 401

Notably, on September 29, 2020, the U.S. District Court for the Northern District of California issued an order preliminarily enjoining the implementation of the new USCIS fee schedule. *See* Order Granting Plaintiffs' Motion for Preliminary Injunction and Request for Stay of Effective Date of Rule and Denying Request for Administrative Stay, *Immigration Legal Res. Ctr. v. Wolf*, No. 20-cv-05883-JSW, 2020 WL 5798269 (N.D. Cal. Sept. 29, 2020). The Court found that the "Defendants do not provide a persuasive explanation of why it is more likely that those with legitimate claims for asylum are more likely to have $50 than those who do not; nor do they supply data to support that proposition. DHS also acknowledged there is no quantitative benefit from the fee." *Id.* at 16 (citing Final Rule, 85 Fed. Reg. at 46,894). Further, the court found, and DHS acknowledged, that the fee schedule changes are a shift in policy from an ability-to-pay principle to a beneficiary-pays principle. This policy shift does not reflect the realities that asylum seekers face. Many refugees with meritorious claims simply lack the ability to pay any filing fee, however modest the Department may consider it to be.[114] Individuals seeking asylum often flee their home countries under the threat of imminent harm or death with few, if any, financial resources. Many are detained in privately run detention centers where they are encouraged, or forced, to participate in "voluntary" work programs for well below the federal minimum wage and sometimes for just one dollar per day (or less).[115] Even if detained asylum seekers were to work every day and save every cent they earn, those without access to outside resources could not pay a $50 filing fee on or before the 15-day filing deadline the Department seeks to impose. *See supra* Section II.A. As the court in *ILRC v. Wolf* explained, "Defendants' deviations from a beneficiary-pays principle are inconsistent and conflict with the comments presented on the effects of these changes on low-income and vulnerable immigrant populations." *ILRC*, at 16 (citing Final Rule, 85 Fed. Reg. at 46841).

The Department's fee proposal also fails to take into consideration the logistical complications that are implicit in imposing a filing fee on individuals who are detained or subject to MPP. The

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U.S. 371, 374 (1971) (court finds that making access to courts dependent on ability to pay filing fees violates procedural due process)); *see also generally*, Yale Law School, *Ability to Pay*: *Prepared for The 22nd Annual Liman Center Colloquium* (Mar. 2019), https://law.yale.edu/sites/default/files/area/center/liman/document/liman_colloquium_book_combined_cover_march_21_2019.pdf.

[114] *See, e.g.*, Lindsay M. Harris & Joan Hodges-Wu, *Asylum Seekers Leave Everything Behind. There's no Way They Can Pay Trump's Fee*, Washington Post (May 1, 2019), https://www.washingtonpost.com/outlook/2019/05/01/asylum-seekers-leave-everything-behind-theres-no-way-they-can-pay-trumps-fee/.

[115] *See, e.g.*, Gene Johnson, *DOJ Says Immigration Facility Shouldn't Have to Pay Minimum Wage*, PBS News (Aug. 23, 2019), https://www.pbs.org/newshour/nation/doj-says-immigration-facility-shouldnt-have-to-pay-minimum-wage; Claire Heddles, *Lawsuit Could Force For-Profit Detention Centers to Pay Detainees Minimum Wage* (July 17, 2019), https://truthout.org/articles/lawsuit-could-force-for-profit-detention-centers-to-pay-detainees-minimum-wage/.

The one dollar per day wages paid to ICE detainees are themselves unconstitutional. *See* Jacqueline Stevens, *One Dollar Per Day: The Slaving Wages of Immigration Jail, from 1943 to Present*, Georgetown Immigration L.J. 29, issue 3, 2015, 391-500, https://www.prisonlegalnews.org/media/publications/One%20Dollar%20Per%20Day%20Analysis%20of%20ICE%20Detainee%20Work%20Programs%20Jacqueline%20Stevens%202011.pdf. In recent years, several private contractors that operate detention facilities have employed ICE detainees for millions of shifts of four to eight hours at the rate of one dollar per day. *Id.* at 402. By one estimate, profits from labor savings account for roughly one-fourth of the net profits of ICE's top contractor, Geo Group, Inc. *Id.*

Department sets forth the steps an asylum seeker must take to "fee in" an asylum application with DHS. *See* 85 Fed. Reg. 59692, 59695 n.8 ("All fees for DHS applications adjudicated by the Department are payable to DHS, and DHS deposits the funds in the Immigration Examinations Fee Account") (citing INA 286, 8 U.S.C. § 1356). The "fee receipt" must then be submitted with the asylum application at the time of filing. 85 Fed. Reg. 59692, 59699 (proposed 8 C.F.R. § 1208.3(c)(3)). The Department provides no explanation as to how *pro se* detained asylum seekers who cannot visit a DHS office to pay the fee in person and do not have U.S. bank accounts from which to write a check can accomplish paying the filing fee. It is also unclear how a detained asylum seeker who learns for the first time at his first MCH that he must submit his application within 15 days is to pay the requisite fee to DHS, obtain a fee receipt, and submit the fee receipt with his application at the time of filing. It often takes weeks for USCIS to acknowledge the receipt of an application, the COVID-19 pandemic has caused USCIS to slow down the processing of almost all types of applications,[116] and mail procedures in detention facilities create further delays in sending and receiving mail. Hence, even a detained applicant who has the resources to pay the filing fee likely will not have received a fee receipt on or before the date on which his asylum application is due to be filed. It is equally unclear how individuals who are living in shelters or tent camps in Mexico as a result of MPP are to "fee in" an asylum application. In both scenarios, immigration judges would be required to reject asylum applications submitted without a fee receipt. And, under the Proposed Rule, the asylum seekers would have only 30 days to resubmit the application with the fee in order to avoid waiving their asylum claim. *See* 85 Fed. Reg. 59692, 59699 (proposed 8 C.F.R. § 1208.3). The logistical complications of imposing filing fees on *pro se* asylum seekers who are detained or subject to MPP counsel against imposing any fee. And, if the Department were to nonetheless improvidently impose a fee, immigration judges should be allowed and encouraged to generously grant fee waivers based solely on self-sworn affidavits. In the vast majority of circumstances, detained asylum seekers and individuals subject to MPP would be unable to pay a filing fee; requiring them to marshal documentary evidence proving they lack the means to pay the fee would undermine any waiver process.

Finally, the Department fails to evaluate the impact of the fee proposal on nonprofit legal service providers like American Gateways. If detained respondents were required to pay a fee in connection with submitting an asylum application, American Gateways' ability to provide ethical and competent *pro se* assistance to detained asylum seekers would be negatively affected. The need for legal services is tremendous, and current resources are limited. American Gateways, and similarly situated legal services organizations, would be placed in the position of having to pay filing fees for asylum applicants, which would inevitably deplete organizational resources and limit the number of individuals it can serve. American Gateways would also have to refocus some of its energies to assist those individuals who have no family or friends in the United States and cannot pay the fee at all. That would require devoting time and resources to developing partnerships with other organizations willing to cover the fee for some applications, fundraising, and grant writing, all of which would also require navigating novel challenges relating to the current public health crisis. Finally, American Gateways relies on a robust network of *pro bono*

[116] *See* AILA, Doc. No. 19012834, *AILA Policy Brief: USCIS Processing Delays Have Reached Crisis Levels Under the Trump Administration* (Jan. 30, 2019), https://www.aila.org/infonet/aila-policy-brief-uscis-processing-delays; Muzaffar Christi & Sarah Pierce, *Crisis Within a Crisis: Immigration in the United States in a Time of COVID-19*, Migration Policy Inst. (Mar. 26, 2020), https://www.migrationpolicy.org/article/crisis-within-crisis-immigration-time-covid-19 (discussing how COVID-19 pandemic has increased USCIS processing times).

attorneys to help provide representation to the immigrants it serves. Mandatory filing fees make it more difficult to refer cases to *pro bono* volunteers who are willing to donate their time and legal expertise but may not be able to also pay for filing fees. Proposing regulations that would require non-profit legal services organizations to seek out additional resources and modify their service delivery models to take into account unanticipated and unreasonable filing fees during an extraordinary public health crisis is both imprudent and unwarranted.

While American Gateways vehemently opposes the implementation of any fee for asylum applications, the Department should—at a minimum—wait until the pending litigation regarding the new USCIS fee schedule is resolved before proposing a rule that would preemptively apply the challenged USCIS filing fee for affirmative asylum applications to those filed defensively with immigration courts. At that time, the Department, as required by statute and executive order, must first assess all of the relevant factors relating to the imposition of a fee for filing the Form I-589 in removal proceedings, including the devastating costs of imposing such fee on asylum seekers, as well as the follow-on consequences for legal services providers and other immigration practitioners. The Department is not, as it suggests, somehow obligated to impose a fee for asylum applications filed as a defense against removal just because DHS has imposed a fee for affirmative asylum applications with USCIS. (As the Department has proven through its prolific spate of rulemaking, it is quite capable of modifying existing regulations such that filing fees for DHS forms do not automatically apply when those forms are filed with EOIR.) Relatedly, the fact that fees set by DHS are generally applicable when EOIR uses a DHS form in immigration proceedings does not give the Department a free pass to bypass the basic requirements of the rulemaking process. The Department is obligated to weigh the costs and benefits of imposing a filing fee for defensive asylum applications, and it has not done so here.

D. The Department's proposal to limit immigration judges' ability to consider country conditions evidence submitted by asylum seekers and to allow immigration judges to introduce their own evidence would tilt the scales against asylum seekers while improperly blurring the line between adjudicative and prosecutorial functions.

The Department proposes three modifications to 8 C.F.R. § 1208.12: (1) broadening the scope of country conditions evidence published by U.S. government sources on which immigration judges may rely; (2) limiting an immigration judge's ability to consider country conditions evidence submitted by asylum seekers; and (3) allowing immigration judges to submit their own evidence into the record. *See* 85 Fed. Reg. 59692, 59699-700 (proposed 8 C.F.R. § 1208.12). American Gateways objects to all three changes on the grounds that they would harm asylum seekers and allow immigration judges to act as prosecutors rather than neutral adjudicators.

With respect to the first two changes, the Department proposes a bifurcated standard for the consideration of country conditions evidence submitted in connection with a claim for asylum or withholding of removal. Under the Proposed Rule, an immigration judge "may rely" on country conditions evidence published by U.S. government sources but cannot rely on country conditions evidence from non-governmental sources *unless* those sources are first determined to be "credible and probative." *Id.* It is quite apparent that this double standard tracks the types of evidence submitted by DHS prosecutors and asylum seekers. In the immigration court system, the executive branch serves as both prosecutor and adjudicator. This structural problem already impedes fair

and impartial adjudications. The Department's proposal to also make the executive branch (e.g., the Department of State, DOJ, and DHS) the favored source of evidence in asylum proceedings is a bridge too far, especially given the current administration's brazen anti-immigrant agenda.

For several years, Country Reports on Human Rights Practices published annually by the Department of State ("State Department Country Reports") have been considered a conservative baseline regarding country conditions evidence in asylum cases. Because government reporting is subject to political pressures, asylum seekers often supplement country conditions evidence with non-governmental sources so that decisions in asylum cases are made based on a full and fair evidentiary record. Under the current administration, U.S. government publications regarding the social and economic conditions, as well as human rights records, in foreign countries—and State Department Country Reports in particular—have become increasingly politicized, making non-governmental country conditions evidence all the more important. Furthermore, recent allegations regarding the deliberate manipulation of State Department Country Reports so that they align with the administration's "policy objectives with respect to asylum" are alarming.[117]

American Gateways identifies below just a few of several instances of alleged bias in U.S. government reports regarding human rights abroad:

- In early 2018, a top aide to Secretary of State Rex Tillerson issued a directive to State Department officials to strip from the State Department Country Reports passages describing women's reproductive rights and discrimination, including societal views on family planning, women's access to contraceptives, and abortion.[118] When the 2017 reports were published in April 2018, the "Reproductive Rights" section had disappeared from all 195 country reports—a move criticized for undermining "efforts by international actors to hold nations accountable and intervene on behalf of vulnerable populations."[119] Commentators have noted that the 2017 reports were "overshadowed by an unprecedented and alarming level of politicized editing by the Trump administration"[120] and that the "[f]ailure to collect evidence of violations to reproductive rights aligns with the

[117] *See* Dep't of Homeland Security, Office of the Inspector General, Whistleblower Reprisal Complaint, *Matter of Brian Murphy* (Sept. 8, 2020), https://intelligence.house.gov/uploadedfiles/murphy_wb_dhs_oig_complaint9.8.20.pdf.

[118] *See* Nahal Toosi, *State Department Report Will Trim Language on Women's Rights, Discrimination*, Politico (updated Feb. 22, 2018, 12:24 AM), https://www.politico.com/story/2018/02/21/department-women-rights-abortion-420361; *see also* Center for Reproductive Rights, *Trump Administration to Strip Mention of Reproductive Health and Rights in State Department Human Rights Report* (Feb. 22, 2018), https://www.reproductiverights.org/Trump-Administration-Strip-Mention-Reproductive-Health-Rights-State-Department.

[119] Nancy Northup, *State Department Removes Reproductive Rights Indicators From Annual Country Reporting*, The Hill (Apr. 26, 2018, 5:30 PM), https://thehill.com/opinion/healthcare/385077-state-department-removes-reproductive-rights-indicators-from-annual ("[L]ast year's country reports covered the harsh penal consequences of criminal abortion laws for women in El Salvador and Uganda and the denial of medical care to Filipino women suffering complications from unsafe abortion. In the just-released reports, the "Reproductive Rights" section has been eliminated altogether. Instead, the only reporting on women's human rights with respect to reproduction is a section labelled "Coercion in Population Control.").

[120] Tarah Demant, *A Critique of the US Department of State 2017 Country Reports on Human Rights Practices*, Amnesty International USA (May 8, 2018), https://medium.com/@amnestyusa/a-critique-of-the-us-department-of-state-2017-country-reports-on-human-rights-practices-f313ec5fe8ca.

administration's scornful treatment of women, survivors of sexual violence and abuse and, increasingly, the very large world beyond U.S. borders."[121]

- The administration doubled down on its decision to edit out gender-based violence from the 2018 and 2019 State Department Country Reports, omitting important "analysis of women's reproductive health and rights, including country-level analysis of material mortality and unmet contraceptive needs."[122]

- Reporting on LGBTI rights and issues in State Department Country Reports has also decreased under the current administration.[123]

Furthermore, the politicized editing of State Department reports has specifically targeted certain countries (e.g., Central American countries from which many asylum seekers flee) and certain types of violence (e.g., gender-based violence). Given that the administration has made little effort to disguise its special animus toward asylum seekers from Central American or unwillingness to grant asylum to those fleeing gender-based violence, the calculated manipulation of human rights reports was at once predictable and unseemly. Below are a few representative examples of material omitted from State Department Country Reports, which renders problematic the Department's current proposal to elevate these reports as the "gold standard" for country conditions evidence in asylum cases.

- The 2017 State Department report for El Salvador omitted several key issues. According to Amnesty International, "[t]here was no information about the dangers that Salvadorians who are deported from the United States face back in their home communities. The omission of such a key issue derails understanding of the impact US policies have on El Salvador and the human rights consequences they bring. Also, there was no mention of the failures of the government in regard to the investigation of missing persons, the utter denial of the existence of Internally Displaced Persons, and the role the national security forces play in forced displacements. Additionally, there is no discussion of how gangs force women and girls into what amounts to sex slavery. Though there was mention of the ban on abortion, and how women are charged with murder if they are caught receiving abortion services, the lack of further information on reproductive rights meant that this

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[121] Northup, *supra* note 119.

[122] Amanda Klasing & Elisa Epstein, *US Again Cuts Women from State Department's Human Rights Reports. Trump Administration Removes Data on Global Reproductive Rights*, Human Rights Watch (Mar. 13, 2019, 10:23 AM), https://www.hrw.org/news/2019/03/13/us-again-cuts-women-state-departments-human-rights-reports; *see also* Rebecca Rewald, *What's Still Missing From The State Department's Human Rights Reports*, Oxfam America (May 6, 2019), https://politicsofpoverty.oxfamamerica.org/human-rights-reports-women-lgbti/; Amanda Klasing, *US State Department Again Ignores Women's Reproductive Rights. Explanatory Note Can't Make Up for Administration's Awful Record*, Human Rights Watch (Mar. 11, 2020, 6:36 PM), https://www.hrw.org/news/2020/03/11/us-state-department-again-ignores-womens-reproductive-rights; Amnesty International USA, *State Department's Human Rights Report Highlights Trump Administration's Anti-Human Rights Policies* (Mar. 11, 2020), https://www.amnestyusa.org/press-releases/state-departments-human-rights-report-highlights-trump-administrations-anti-human-rights-policies/.

[123] Oxfam Research Report, *Sins Of Omission. Women's and LGBTI Rights Reporting Under The Trump Administration* (Nov. 2018, Updated Apr. 2019), https://s3.amazonaws.com/oxfam-us/www/static/media/files/Sins_of_Omission.pdf (documenting 21% decrease in reporting on LGBTI issues in 2017 reports).

human rights crisis is not understandable in its context: a total abortion ban that is a denial of basic reproductive rights and leads to these arrests and erroneous murder charges."[124]

- Data compiled by Oxfam on women's and LGBTI rights and issues from the 2017 State Department Country Reports revealed that reporting on women's rights and issues was pared back more for countries from which large number of asylum seekers flee.[125] "Holding other factors equal, every 1,000 successful asylum petitions from a sending country was associated with a decrease of one and a half mentions. That is, a country whose citizens received 4,687 grants of asylum between 2014 and 2016, like El Salvador, would see a 50 percent decrease in reporting on women's issues and rights relative to a country with no asylum grantees."[126] The material cut from the 2017 State Department Country Report for El Salvador included references to widespread rates of sexual violence, femicide, and domestic abuse, the impunity with which perpetrators of these crimes operate, and the state's response to such crimes.[127] Oxfam also observed that, despite the sharp decline in reporting on gender-based violence between the 2016 and 2017 State Department Country Reports on El Salvador, actual conditions in El Salvador remain unchanged: "As of 2015, the most recent year that data are available, women in the country had the third highest rate of violent death for women in the world. In the first 10 months of 2017, the Salvadoran Women's Organization for Peace registered nearly 2,000 reported cases of sexual assault. Moreover, the country has the world's most restrictive ban on abortion; women have been imprisoned after miscarriages on charges of 'aggravated homicide.'"[128]

- In a September 2020 complaint submitted to the DHS Office of the Inspector General, long-time public servant Brian Murphy described allegedly retaliatory actions taken in response to certain public disclosures he made criticizing the compilation of intelligence reports that conflicted with policy objectives set forth by the White House and senior DHS personnel.[129] One of the five groups of protected disclosures identified in the complaint relates to attempted abuse of authority and improper administration of an intelligence program that involved reports about Guatemala, Honduras, and El Salvador.[130] According to Murphy, the intelligence reports in question "were designed to help asylum officers render better determinations regarding their legal standards."[131] However, upon delivery of the reports, the Senior Official serving as Deputy DHS Secretary, Mr. Cuccinelli, requested changes to information that outlined the high levels of corruption, violence, and

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[124] Demant, *supra* note 120.

[125] Oxfam Research Report, *supra* note 123, at 4.

[126] *Id.* at 4.

[127] *Id.* at 6-7.

[128] *Id.* at 6 (internal citations omitted)

[129] *See* Whistleblower Reprisal Complaint, *supra* note 117; *see also* Letter from Chairman Adam B Schiff to Mr. Joseph B. Maher, Dep't of Homeland Security (Sept. 29, 2020), https://intelligence.house.gov/uploadedfiles/20200929_-_hpsci_chm_cover_letter_-_subpeonas.pdf.

[130] *See* Whistleblower Reprisal Complaint, *supra* note 117, at 9.

[131] *Id.*

poor economic conditions in the three respective countries.[132] Mr. Cuccinelli further "accused 'deep state intelligence analysts' of compiling the intelligence information to undermine President Donald J. Trump's policy objectives with respect to asylum."[133]

The overt politicization of inter-agency memoranda relating to the recommendation to terminate temporary protected status (TPS) for thousands of immigrants from El Salvador, Haiti, Nicaragua, and Sudan further evidences the administration's inappropriate and damaging efforts to align the government's documentation of human rights abroad with its anti-immigrant policy objectives.

- In late 2017, the Trump administration announced its intent to terminate temporary protected status (TPS) for nearly 1,000 Sudanese immigrants on the grounds that security in Sudan had improved and that armed conflict was no longer ongoing.[134] Interagency emails obtained by the American Civil Liberties Union reveal that, because neither of these assertions were "factually accurate" or "credible," "officials at DHS searched for 'positive gems' they could use to justify arguments that conditions in disaster-afflicted or war-torn countries had improved" and that thousands of TPS recipients living legally in the United States—some for as long as two decades—no longer needed protection from deportation.[135] Senior DHS official L. Francis Cissna told staffers in an email that the agency's report recommending termination of TPS for Sudan "indicates that it remains unsafe for individuals to return" and that "termination does not appear to be warranted" but went on to recommend termination anyway—which is the recommendation the administration sought.[136]

- Tom Shannon, the State Department's highest-ranking career diplomat (prior to his June 2018 retirement), explained that ending the TPS program for Salvadoran, Nicaraguan, Haitian, and Sudanese immigrants was a foregone conclusion and described how certain people unfairly influenced the content of a memo on the issue for Secretary Tillerson so that it contained what "the White House wanted."[137] The politicization of the State Department's recommendations to terminate TPS is also detailed in a November 2019 report by the Senate Foreign Relations Committee Democratic Staff which describes the "open contradiction" between Secretary Tillerson's recommendation to end TPS for El Salvador, Honduras, and Haiti, on the one hand, and State Department assessments on the three countries, on the other hand.[138] The report concludes that "the recommendation to

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[132] *Id.*

[133] *Id.*

[134] Nick Miroff, *Government Emails Reveal Internal Debates Over Ending Immigrant Protections,*' The Washington Post (Aug. 23, 2018, 7:03 PM), https://www.washingtonpost.com/world/national-security/government-emails-reveal-internal-debates-over-ending-immigrant-protections/2018/08/23/721c88c2-a640-11e8-97ce-cc9042272f07_story.html.

[135] *Id.*

[136] *Id.*

[137] Robbie Gramer, *How One Top Diplomat Took a Stand Against Trump's Immigration Policy*, Foreign Policy (Nov. 23, 2018, 10:30 AM), https://foreignpolicy.com/2018/11/23/how-one-top-diplomat-protested-trump-on-immigration-tom-shannon-temporary-protected-status-central-america-haiti-nicaragua-el-salvador-dissent-state-department-diplomacy/.

[138] Senate Committee Print, 116th Congress, *Playing Politics With Humanitarian Protections: How Political Aims Trumped U.S. National Security and the Safety of TPS Recipients*, A Minority Staff Report Prepared for the

> end TPS more quickly was based on political, not policy reasons. This recommendation effectively prioritized electoral calculations over considerations of U.S. national security, not to mention the personal safety of nearly 400,000 TPS recipients and their estimated 273,000 American children."[139]

As State Department reports become less critical of government abuses abroad, especially in countries of origin for large numbers of asylum seekers, it is imperative that asylum seekers be able to supplement the evidentiary record with non-governmental materials. The Department's proposal whereby immigration judges would first have to analyze such non-governmental sources to determine whether they are "credible and probative" would unfairly restrict the submission of this critical evidence. American Gateways is particularly concerned that this added requirement would, in many instances, be an insurmountable barrier for *pro se* respondents who largely lack the legal expertise and advocacy skills to establish the credibility and probative value of documentary evidence that an immigration judge may otherwise be disinclined to consider. At the same time, immigration judges could rely on obviously biased U.S. government reports without conducting a comparable analysis. Application of this double-standard cannot possibly result in a full and fair record. The proposal, therefore, should be rejected.

Furthermore, restricting asylum seekers' ability to submit country conditions evidence in support of their claims implicates due process. As discussed above, it is well-established that immigrants in removal proceedings are entitled to due process of law. *See supra* pp. 6-7, 28-29. Due process affords an alien threatened with deportation the right to a "full and fair" hearing with a "*reasonable opportunity to present evidence*." *See, e.g.*, *Abdulrahman v. Ashcroft*, 330 F.3d 587, 596 (3d Cir. 2003) (quoting *Sanchez–Cruz v. INS*, 255 F.3d 775, 779 (9th Cir. 2001)); *Tjen v. Gonzales*, 143 F. App'x 405, 407 (3d Cir. 2005) (emphasis added). Immigrants who are unrepresented face countless barriers in preparing and presenting their claims. Gathering evidence is challenging because individuals do not understand *what* evidence is relevant or *how* to obtain and present such evidence.[140] And, in many instances, corroborating evidence is either unavailable or inaccessible. Many asylum seekers, for example, do not have documentary evidence to support their claims of persecution because of the circumstances under which they fled their home countries and, once in the United States, they are unable to obtain that evidence because doing so would endanger their lives (or those of their family members or friends). Or, having fled "their home country with little other than the clothes on their backs,"[141] limited resources may render evidence unavailable, not to mention that detention itself impedes access to evidence. Moreover, the little evidence individuals are able to access must be translated into English and be accompanied by a certificate of translation, which precludes the use of computer programs to

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Committee on Foreign Relations (Nov. 7, 2019), https://www.govinfo.gov/content/pkg/CPRT-116SPRT38237/html/CPRT-116SPRT38237.htm.

[139] *Id.* at 14.

[140] *See, e.g.*, Tara Patel, *Distant Voices Then and Now: The Impact of Isolation on the Courtroom Narratives of Slave Ship Captives and Asylum Seekers*, 23 Mich. J. Race & L. 155, 180 (2018) ("[A] client . . . did not realize that his brother's murder was a key piece of evidence substantiating his fear of return to his home country. Another client . . . shared that she had been detained and beaten for her work with an opposition political party, but failed to recognize that her experience with female genital mutilation was key evidence given that it is a recognized basis for asylum.").

[141] *Id.* at 173.

translate foreign language documents. Without counsel, few asylum seekers can access and present evidence in support of their claims.

To the extent *pro se* asylum seekers are able to gather non-governmental publications relevant to their claims, that evidence should not be ignored simply because the presiding immigration judge determines, in his own assessment, that the evidence is not "credible" or "probative." It is not uncommon that cases are overturned on appeal because immigration judges or the BIA failed to consider or give proper weight to certain country conditions evidence in the record. *See, e.g.*, *Marouf v. Lynch*, 811 F.3d 174, 187 (6th Cir. 2016) (vacating denial of asylum claimed based on lack of credibility because the immigration judge failed to properly consider all country conditions evidence; "Instead of relying on the many reports of hostile relations between Muslims and Christians in the West Bank, in particular in the region where the [respondents] lived, the IJ relied on one statement in that same report that 'Palestinian Christians and Muslims generally shared good relations' and concluded that the [respondents'] account was not 'consistent with the country conditions.' […] In so doing, he impermissibly 'cherry-pick[ed]' a general statement that was belied by more specific and relevant evidence in the same report, and indicated a general state of mind hostile to the [respondents]" (quoting *Ilunga v. Holder*, 777 F.3d 199, 207 (4th Cir. 2015); *Inestroza-Antonelli v. Barr*, 954 F.3d 813, 818 (5th Cir. 2020) (describing how the BIA had cherry-picked excerpts from the country conditions evidence and holding that the BIA's "complete failure to address uncontroverted evidence of a clearly significant turning point in the country's history and the central role that it played in [petitioner's] arguments regarding changes in country conditions […] constituted an abuse of its discretion") (citing *Rivera-Gomez v. Holder*, 584 F. App'x 729, 730 (9th Cir. 2014) (unpublished). If immigration judges (who have wildly divergent grant rates[142]) are left to make individual determinations regarding the admissibility of country conditions evidence from non-governmental sources, there is a substantial risk that judges who are predisposed to denying asylum claims will simply refuse to consider any country conditions evidence favorable to the asylum seekers' claim, thereby depriving the asylum seeker of his fundamental right to a *reasonable* opportunity present evidence. The Department's invitation for immigration judges to engage in biased decision-making that involves increased scrutiny of the evidence submitted by only one party to the proceedings also offends the due process right to an impartial decisionmaker. *See Tjen*, 143 F. App'x at 407 (Due process "entitles the alien to an impartial decisionmaker."); *Antia-Perea v. Holder*, 768 F.3d 647, 661 (7th Cir. 2014) ("The Fifth Amendment's due process clause guarantees the right to an impartial decisionmaker[.]") (citing *Firishchak v. Holder*, 636 F.3d 305, 309 (7th Cir. 2011)).

American Gateways' concern with immigration judges failing (perhaps intentionally) to consider country conditions evidence favorable to asylum seekers is not merely hypothetical. American Gateways has served as counsel in multiple asylum cases where immigration judges made decisions based on selective passages from State Department Country Reports while ignoring other passages more favorable to the asylum seeker. For example, the immigration judge in a case involving domestic violence cited the State Department Country Report for the proposition that the respondent's home country had enacted laws to protect women from domestic violence and improved enforcement efforts with respect to those laws, but he ignored sections of the very same report stating that domestic violence remained a substantial problem in respondent's home country.

[142] *See infra* p. 50 & nn. 143-45.

In addition to calling the judge's attention to his cherry-picking of country conditions evidence from the State Department Country Report, American Gateways was able to submit credible non-governmental sources in order to establish an overall more accurate picture of the conditions in the respondent's home country. By simultaneously rubber-stamping the credibility of U.S. government sources while requiring immigration judges to scrutinize the credibility of non-governmental sources, the Department's proposed rule improperly *discourages* the full and fair consideration of all relevant evidence.

The Department's related proposal to allow immigration judges to submit their own evidence into the record is similarly objectionable. American Gateways agrees that immigration judges have an affirmative duty to develop the record, especially with respect to *pro se* asylum seekers. Yet allowing immigration judges to compile and submit their own evidence, thereby transforming judges (who are ethically obligated to preside over cases as neutral adjudicators) into prosecutors is a different matter altogether. The immigration judge's obligation to elicit testimony about an asylum seeker's claims is consistent with the judge's role as a fact-finding adjudicator tasked with weighing the facts that the parties introduce into the record. Allowing an immigration judge to introduce her own facts into the record, on other hand, would radically alter the role of the immigration judge in removal proceedings and infringe upon respondents' due process right to an impartial decisionmaker. For example, under the Department's Proposed Rule, immigration judges could enlist staff to compile one-sided country conditions packets designed to undermine asylum claims, determine themselves that the evidence is "credible and probative," submit that biased evidence into the record, and then deny the claims based on that evidence. Under no set of circumstances could such a decision be characterized as fair or impartial.

The risk of biased decision-making is real. It has long been the case that judge assignments in asylum cases may themselves be outcome-determinative. Between 2014 and 2019, immigration judge denial rates in asylum cases ranged from 2.6% (IJ Joanna Bukszpan in New York) to 100% (IJ Emily Farrar-Crockett in Atlanta and IJ Grady A. Crooks in Jena).[143] During that same time period, there was also enormous fluctuation in asylum denial rates across immigration courts. Twelve immigration courts accumulated denial rates in excess of 90%, while seven immigration courts denied less than 50% of cases.[144] Among the five largest immigration courts that decided half of all asylum cases during this period, the Houston Immigration Court denied more than 91% of asylum cases while the New York Immigration Court denied less than 27%.[145] The LaSalle Immigration Court in Jena, Louisiana denied 99% of the 397 asylum cases adjudicated between 2014 and 2019.

Additionally, the current administration's attacks on judicial independence are unparalleled. *See supra* Section I.F. In addition to largely eradicating the authority of immigration judges to manage their dockets, *see id.*, "attorneys general have plainly encouraged biased decision-making, including by fomenting judges' distrust of asylum seekers."[146] The administration has also

[143] TRAC Immigration, *Judge-by-Judge Asylum Decisions in Immigration Courts FY 2014-2019* (2019), https://trac.syr.edu/immigration/reports/judge2019/denialrates.html.

[144] TRAC Immigration, *Asylum Decisions Vary Widely Across Judges and Courts—Latest Results* (Jan. 13, 2020), https://trac.syr.edu/immigration/reports/590/.

[145] *Id.*

[146] Innovation Law Lab & S. Poverty Law Ctr., *supra* note 11.

overwhelmingly hired immigration judges from within its own ranks. An astonishing 88% of immigration judges appointed in 2018 were former DHS or other government attorneys.[147] More than half were former DHS attorneys who were vetted and hired precisely because of their prosecutorial experience.[148] An additional 37% previously held other federal or state government positions.[149] Very few recent hires have backgrounds in public interest or private immigration law.[150] A review of the immigration courts commissioned by the Department itself revealed that 41% of current immigration judges were previously employed by DHS and almost 20% had worked for the DOJ.[151] With immigration courts having already been transformed "into another battalion marching in the Trump administration's war on asylum," former ICE prosecutors masquerading as so-called neutral adjudicators should not be permitted or expected—and cannot be trusted—to impartially decide cases based on evidence they themselves submitted into the record.

The only procedural safeguard provided for in the Proposed Rule is woefully inadequate. An immigration judge who wishes to play prosecutor would only be required to provide "both parties" with "a copy of the evidence" and an "opportunity to comment or object to the evidence prior to the issuance of the immigration judge's decision." 85 Fed. Reg. 59692, 59699-700 (proposed 8 C.F.R. § 1208.12). Unlike asylum seekers and DHS, who are required to submit evidence at least 15 days prior to an individual hearing,[152] immigration judges would be permitted to submit evidence at any time *prior to the issuance of the judge's decision*. This means that immigration judges could provide the parties with copies of supplemental evidence at the hearing itself. A last-minute evidentiary submission by an immigration judge should constitute grounds for an automatic continuance, yet the Proposed Rule is completely silent regarding any allowance for the parties to review and respond to the evidence. Even more troubling is the Proposed Rule's utter disregard for *pro se* respondents. It is unclear how unrepresented asylum seekers who are handed a packet of English-language country conditions evidence compiled by an immigration judge could even read the evidence much less understand and "comment on or object to the evidence" before a decision is issued. If the Department declines to withdraw its absurd proposal, it must implement more robust procedural safeguards, including (1) requiring judges, like the parties, to submit evidence 15 days prior to a respondent's individual hearing and (2) providing a free interpreter and free legal assistance to the respondent so that the respondent can both understand the evidence and be given a reasonable and meaningful opportunity to comment on or object to the evidence and submit responsive evidence. Even with additional procedural safeguards, this proposal is an affront to basic notions of fairness and justice.

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[147] Human Rights First, *Immigration Court Hiring Politicization*, https://www.humanrightsfirst.org/sites/default/files/DOJ-FOIA-Immigration-Judges.pdf.

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *See* Immigration Court Practice Manual, § 3.1(b)(i)(II)(B), at 34 (July 2, 2020).

E. The Department's proposed requirement that all asylum cases be adjudicated within 180 days prioritizes speed over fairness and erodes judicial independence

Proposed sections 8 CFR §§ 1003.10(b), 1003.29, 1003.31, and 1240.6 would require immigration judges to complete all asylum cases within 180 days after the asylum application is filed unless the respondent can demonstrate exceptional circumstances. *See* 85 Fed. Reg. 59692, 59699, 59700. This mandatory adjudication timeline is unreasonable, unachievable, and unlawful.

The INA provides that asylum applications must be adjudicated within 180 days absent "exceptional circumstances." 8 U.S.C. § 1158(d)(5)(A)(iii). However, in 1996, when Congress passed the Illegal Immigration Reform and Immigration Responsibility Act imposing the 180-day completion deadline, there were only 231,649 cases pending before EOIR.[153] Since that time, the immigration court backlog has ballooned by more than one million cases, and currently stands at 1,246,164 cases,[154] including more than 560,000 asylum cases. *See* 85 Fed. Reg. 59692, 59696. While 180 days may have been a realistic timeframe for adjudicating an asylum case in 1996, it is patently unreasonable and practically unattainable today given the extraordinary backlog of cases pending in immigration courts.[155] Implementing the 180-day case adjudication deadline now, at a time when the immigration courts are unable to efficiently adjudicate already-pending cases, would illogically put more stress on an already overburdened system.

As a practical matter, the Department offers no explanation as to how immigration judges are supposed to adjudicate cases within 180 days given the current backlog. The Proposed rule is also silent as to retroactivity. Regardless of whether the rule would have retroactive or prospective effect, the 180-day adjudication timeline raises serious due process concerns. Many cases in the current backlog have been pending for years. If the 180-day adjudication timeline were applied retroactively, courts would be overwhelmed and there would also massive fallout for immigration attorneys who have caseloads of, in some instances, hundreds of asylum cases with individual hearing dates scheduled years in advance. Attorneys would be forced to choose between withdrawing from cases or providing inadequate representation. On the other hand, if the rule were applied only prospectively, those who would file asylum cases after the rule is implemented would have to go forward on their applications, in many cases before they are ready to do so. Because immigration judges would be barred from granting continuances beyond the 180-day adjudication deadline, even upon a showing of "good cause," respondents would have a more difficult time securing representation because attorneys would have less flexibility in managing their own caseloads and, therefore, be less inclined to take cases that do not allow adequate time for preparation. At the same time, asylum seekers whose cases have already been languishing in the backlog, would be pushed to the end of the line as immigration judges would struggle to comply with the newly imposed requirement that no asylum adjudication could take more than 180 days absent exceptional circumstances. Asylum seekers face serious due process concerns if their cases are scheduled too quickly for them to adequately prepare, and equally grave concerns if their cases

[153] U.S. Dep't of Justice, EOIR, *Statistical Yearbook 2000*, at 6 (amended Apr. 30, 2001), https://www.justice.gov/sites/default/files/eoir/legacy/2001/05/09/SYB2000Final.pdf.

[154] TRAC Immigration, *Immigration Court Backlog Tool* (data through Sept. 2020), https://trac.syr.edu/phptools/immigration/court_backlog/.

[155] It is also important to note that in the two decades since Congress added that language to the asylum statute, it has never been implemented through regulations.

languish so long that evidence becomes stale, corroborating witnesses become difficult to locate, and detailed memories fade.[156] Long delays also prevent asylum seekers from reuniting with their family, as derivative spouses and children may be left in unsafe situations outside the United States.

The Department also fails to explain how pending cases involving unaccompanied alien children (UACs) could possibly be adjudicated within 180 days. As of June 30, 2020, the backlog of pending UAC cases had reached 99,966—roughly *25 times* the number of cases pending a decade ago.[157] UACs are entitled to have their cases adjudicated by USCIS in a non-adversarial process even though they are in removal proceedings before an immigration judge. *See* 8 U.S.C. § 1158(b)(3)(C) ("An asylum officer . . . shall have initial jurisdiction over any asylum application filed by [a UAC] . . . , regardless of whether filed in accordance with this section or section 1225(b) of this title.").[158] In the following scenarios, a child's initial asylum application will be heard before the USCIS Asylum Office: (1) the child has never been in removal proceedings and will affirmatively apply for asylum under preexisting procedures; (2) the child was placed in removal proceedings on or after March 23, 2009 and seeks to file for asylum; or (3) the child was in pending removal proceedings, with a case on appeal to the BIA, or with a petition for review in federal court as of December 23, 2008, and had previously submitted an asylum application as a UAC.[159] If the Asylum Office does not grant a UAC's asylum claim, the case is referred to immigration court for further consideration. Under the Department's proposal, all applications for asylum would have to be adjudicated within 180 days, and immigration judges would have almost no

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[156] *See, e.g.*, Innovation Law Lab & S. Poverty Law Ctr., *supra* note 11, at 20 ("'[A]rbitrary prioritizations wreak havoc on case management,' giving so-called 'priority' cases inadequate time to prepare while further extending the backlog for pending cases that may have been waiting for years.").

[157] EOIR, *Adjudication Statistics: Pending Unaccompanied Alien Child (UAC) Cases* (July 14, 2020), https://www.justice.gov/eoir/page/file/1060871/download.

Citing a public health order issued by the Centers for Disease Control and Prevention, the U.S. government has illegally expelled more than 6,500 UACs by land to Mexico amidst the COVID-19 pandemic. *See* Camilo Montoya-Galvez, *Nearly 9,000 Migrant Children Have Been Expelled Under Pandemic Border Policy, Court Documents Say*, CBS News (Sept. 11, 2020, 5:00 PM), https://www.cbsnews.com/news/8800-migrant-children-have-been-expelled-under-pandemic-border-policy-per-court-documents/. Before expelling the children, the administration has been detaining them in hotels (overseen by a private security company) where they have no access to lawyers, social workers, or family. *See* Caitlin Dickerson, *A Private Security Company is Detaining Migrant Children at Hotels*, N.Y. Times (Aug. 16, 2020), https://www.nytimes.com/2020/08/16/us/migrant-children-hotels-coronavirus.html. The children held in this opaque "shadow system of detention," *id.*, are not issued a primary registration number that DHS uses to track immigrants in its care, rendering the children "virtually impossible" to locate. Lomi Kriel, *Federal Agents are Expelling Asylum Seekers as Young as 8 Months From the Border, Citing COVID-19 Risks*, Texas Tribune (Aug. 4, 2020), https://www.texastribune.org/2020/08/04/border-migrant-children-hotels/. The administration has also invoked COVID-19 to justify its deportation of several hundred UACs. *See* Caitlin Dickerson, *10 Years Old, Tearful and Confused After a Sudden Deportation*, N.Y. Times (May 20, 2020), https://www.nytimes.com/2020/05/20/us/coronavirus-migrant-children-unaccompanied-minors.html. In light of these polices, it is impossible to ascertain the true number of UACs who have been detained and summarily expelled.

[158] Section 235(d)(7)(B) of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) amended INA § 208(b)(3) to provide that USCIS Asylum Offices shall have initial jurisdiction over asylum applications filed by UACs.

[159] *See* Joseph E. Langlois, Chief, USCIS Asylum Division, *Memorandum: Implementation of Statutory Change Providing USCIS with Initial Jurisdiction Over Asylum Applications Filed by Unaccompanied Alien Children*, HQRAIO 120/12a (Mar. 25, 2009), https://www.uscis.gov/sites/default/files/document/memos/jurisdiction-provision-tvpra-alien-children2.pdf.

authority to extend that timeline. It would be impossible to adjudicate the nearly 100,000 pending UAC claims within 180 days, and, in most instances, it would be extremely difficult for UACs to both have their asylum claims considered by the Asylum Office and, if referred to immigration court, considered by an immigration judge within 180 days of filing their asylum applications.[160] As of June 30, 2020, only 8.2% of cases involving UACs had been pending less than six months.[161] Roughly 30% had been pending between six months and two years; more than 53% had been pending for between two and five years; and 8% had been pending for more than five years.[162] Hence, the Department does not even need to look beyond its own case adjudication statistics to discern the irrationality of its proposal. Although American Gateways objects to the 180-day case adjudication timeline in its totality, it is particularly concerned that the timeline fails to take into account special procedures for adjudicating UAC claims, which are carefully tailored to account for the unique vulnerabilities of children fleeing persecution and harm in their home countries. If the Department declines to rescind the 180-day adjudication deadline, it should at least include a uniform exemption for UACs.

The Proposed Rule also improperly restricts immigration judges' ability to grant continuances if doing so would delay adjudication of an asylum application past the 180-day deadline. *See* 85 Fed. Reg. 59692, 59696. American Gateways objects to any proposed changes that would further impair the few remnants of judicial autonomy that have survived the current administration's assault on the immigration court system. *See supra* Section I.F. Moreover, American Gateways submits that the reasonableness of the proposed 180-day case adjudication deadline must be evaluated in light of the string of recent judicial decisions, as well as other proposed rules that would restrict the ability of immigration judges to manage their dockets. For example, immigration judges no longer have the ability to administratively close or terminate cases to allow respondents to pursue other benefits for which they may be eligible (e.g., alien relative petitions, T non-immigrant visas, and U non-immigrant visas). *See supra* pp. 8-10 (discussing *Matter of Castro-Tum* and *Matter of S-O-G- & F-D-B-*). The Department's proposal is a not-so-thinly-veiled attempt to strip immigration judges of the only remaining docket management tool (i.e., continuances) they can use to prolong proceedings to allow time for USCIS to adjudicate other pending applications for relief. The average adjudication time for most USCIS applications exceeds 180 days, and case processing times have slowed even further as a result of the COVID-19 pandemic. The current estimated processing time for U nonimmigrant visas is roughly 56 months.[163] The processing time for T non-immigrant visas is considerably less, ranging from 18 to 29 months. Processing times for alien relative petitions, which vary depending on the type of petition and office with which the petition was filed, range from one week to 126.5 months, with estimated processing times for most types of petitions exceeding 180 days. It is quite clear that

[160] Docketing instructions regarding cases involving UACs have frequently shifted, and not all UAC cases are currently deemed priority cases. In 2015 and 2016, immigration judges were instructed to process *all* cases involving UACs quickly. In January 2017, the instructions were modified such that only UACs who are in the care and custody of the Department of Health and Human Services, Office of Refugee Resettlement and do not have a potential sponsor are a docketing priority. MaryBeth Keller, Chief Immigration Judge, *Memorandum: Case Processing Priorities* (Jan. 31, 2017), https://www.justice.gov/sites/default/files/pages/attachments/2017/01/31/caseprocessingpriorities.pdf.

[161] EOIR, *Adjudication Statistics*, *supra* note 157.

[162] *Id.*

[163] The USCIS case processing times cited herein are available online at https://egov.uscis.gov/processing-times/ (last visited Oct. 20, 2020).

the Department's 180-day adjudication mandate for asylum claims would foreclose the ability of respondents in removal proceedings to seek alternate forms of relief.

A 180-day deadline is also not reasonable in many cases involving *pro se* respondents. Immigration judges often grant continuances to *pro se* respondents to give them an opportunity to retain counsel. If all cases have to be adjudicated within six months of an application being filed, immigration judges would be less inclined to grant continuances for this purpose. Access to counsel is already scarce and unevenly distributed across the country. Access to counsel also impacts the outcome of asylum cases. In 2019, only 16% of unrepresented asylum seekers received asylum or other forms of relief, such as withholding of removal—less than half the grant rate for asylum seekers who were represented by counsel.[164] And, if the Department's proposal to require respondents to submit asylum applications within 15 days of their initial hearing is also implemented, the 180-day deadline is even more irrational. By virtue of their detention, detained asylum seekers have limited access to counsel. The average length of detention has increased under the current administration,[165] and parole practices vary widely across ICE Field Offices.[166] Asylum seekers are often detained for several months, and those who cannot overcome insurmountable barriers to accessing counsel while detained are only able to secure counsel after they are released. *See supra* Section II.A.1 (discussing access to counsel barriers arising from detention). If forced to file their asylum application within 15 days of their first hearing (most likely without representation), it would be extremely challenging for individuals who are released from detention to find an attorney willing and able to represent them when a substantial portion of their 180-day case timeline has already elapsed. Additionally, the Proposed Rule fails to take into

[164] TRAC Immigration, *Record Number of Asylum Cases in FY 2019* (Jan. 8, 2020), https://trac.syr.edu/immigration/reports/588/.

[165] Detention levels have skyrocketed under the current administration. In 2016, ICE detained an average of approximately 34,000 immigrants per day. By summer 2019, that number had risen more than 20,000 to a daily average of 55,000. *See* ICE, *Detention Statistics: Currently Detained Population by Arresting Agency as of 09/14/2019*, https://tinyurl.com/yxzn6llc. According to the American Civil Liberties Union (ACLU), about 85,000 adults and children were held in various forms of immigration detention in summer 2019. *See* ACLU, Written Statement of the Record Submitted to the House Comm. on the Judiciary Immigration & Citizenship Subcomm., Hearing on The Expansion and Troubling Use of ICE Detention (Sept. 26, 2019), https://www.congress.gov/116/meeting/house/110017/documents/HHRG-116-JU01-20190926-SD001.pdf. Various factors, including more restrictive immigration policies that prevent immigrants from entering the country (e.g., metering, MPP) and the closure of ports of entry to asylum seekers amidst COVID-19, have driven detention levels down in FY 2020. *See* Strauss Center, *Metering Update: May 2020*, at 1 (University of Texas, Austin, May 2020), https://www.strausscenter.org/wp-content/uploads/MeteringUpdate_200528.pdf (explaining that Customs and Border Patrol stopped processing asylum seekers at ports of entry altogether on March 20, 2020 and also closed asylum waitlists to new entrants). Largely as a result of COVID-19, the daily average number of detained immigrants decreased from 37,688 to 20,365 between March and September 2020. *See* ICE, *2020 ICE Statistics* (Sept. 2020), https://www.ice.gov/detention-management#tab2. During this same time period, the average *length* of detention *increased* from 51 days to 90.3 days. *Id.*

[166] As late as 2013, ICE field offices covering detention centers in seven states, including Texas, granted 95% of asylum seekers' applications for humanitarian parole. *See, e.g.*, Class Complaint for Injunctive and Declaratory Relief at 14, *Damus v. Nielsen*, No. 1:18-cv-578-JEB (D.D.C., filed Mar. 15, 2018). Under the current administration, however, release rates in these same facilities have dropped to nearly zero. *Id.* (alleging that, from February to September 2017, three ICE field offices denied 100% of parole applications and two additional offices denied more than 90% of applications); *see also* Human Rights First, *Parole vs. Bond in the Asylum System* (Sept. 5, 2018), https://www.humanrightsfirst.org/resource/parole-vs-bond-asylum-system ("The government's own data shows that in at least five ICE field office districts nationwide, ICE has ignored its own parole guidance and denied parole to an average of 96 percent of arriving asylum seekers since early 2017.").

account the recently implemented employment authorization document (EAD) rule, which prohibits asylum seekers from applying for an EAD until 365 days after they file their asylum application.[167] *See* 8 C.F.R. § 208.7(a)(ii). This means that asylum seekers who file defensive asylum applications would not be eligible to seek work authorization until *after* their asylum case has been decided, thereby reducing the likelihood that they could afford counsel for their individual hearing. Although the attorney general is authorized to set conditions or limitations on the consideration of asylum applications, *see* 8 U.S.C. § 1158(d)(5)(B), that authority is not boundless. Regulatory changes carefully calculated to interfere with asylum seekers' constitutional and statutory rights, including the right to counsel[168] and to a full and fair hearing, are impermissible.

The Department suggests that the 180-day deadline would afford sufficient flexibility because immigration judges could still grant continuances beyond the deadline for "exceptional circumstances." But the Proposed Rule seeks to define "exceptional circumstances" in a way that ensures the standard is nearly impossible to meet. INA § 208(d)(5)(A)(iii), which provides for the adjudication of asylum applications within 180 days absent exceptional circumstances, does not itself define the term, so the Department proposes adopting the definition of "exceptional circumstances" from INA § 204(e)(1), 8 U.S.C. § 1229a(e)(1). Examples of qualifying "exceptional circumstances" would include "battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances." 85 Fed. Reg. 59592, 59699 (proposed 8 CFR § 1003.10(b)). Had Congress wished to define "exceptional circumstances" this narrowly for purposes of INA § 208(d)(5)(A)(iii), 8 U.S.C. § 1158(d)(5)(A)(iii), it could and would have done so. The Department does not explain why the definition applicable to circumstances that might warrant rescission of an *in absentia* removal order where an individual received notice of the hearing and failed to appear should apply to a request for a continuance.

There are several reasons that an asylum seeker might not be able to proceed within 180 days of filing her asylum application that would not meet the heightened "exceptional circumstances" standard. Consider the following cases of American Gateways' clients:

- Ms. RV is an asylum seeker from Mexico. Ms. RV's mental competency was called into question by the Immigration Judge, as well as by DHS. Due to these questions regarding

[167] On September 11, 2020, the U.S. District Court for the District of Maryland preliminarily enjoined the government from enforcing several of the rule changes regarding EADs for asylum seekers as applied to members of plaintiff organizations Casa de Maryland, Inc. and Asylum Seeker Advocacy Project. *See Casa de Maryland, Inc., et al. v. Wolf*, No. 8:20-CV-02118-PX, 2020 WL 5500165, at *33-34 (D. Md. Sept. 11, 2020). The court concluded that plaintiffs are likely to succeed in their arguments that (1) chad Wolf's installation as Acting Secretary of DHS was invalid, *id.* at *22-23, and (2) the new asylum rule violates the APA because DHS "failed to respond to significant concerns raised or to consider an important aspect of the problem," *id.* at *24.

[168] "Although there is no Sixth Amendment right to counsel in an immigration hearing, Congress has recognized it among the rights stemming from the Fifth Amendment guarantee of due process that adhere[s] to individuals that are the subject of removal proceedings." *Tawadrus v. Ashcroft*, 364 F.3d 1099, 1103 (9th Cir. 2004). "Th[is] right to counsel is a particularly important procedural safeguard because of the grave consequences of removal ... [which] 'visits a great hardship on the individual and deprives him of the right to stay and work in this land of freedom.'" *Leslie v. Atty. Gen. of U.S.*, 611 F.3d 171, 181 (3d Cir. 2010) (quoting *Bridges*, 326 U.S. at 154). The constitutional right to counsel is also codified in the INA. *See* 8 U.S.C. § 1362 ("In any removal proceedings before an immigration judge … the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel … as he shall choose.").

Ms. RV's competency, as well as her ability to understand the nature of the removal proceedings in which she has been placed, American Gateways was asked to assist with representation in her asylum case. The Immigration Judge granted a continuance for a mental health evaluation. During the pendency of her asylum case, Ms. RV was the victim of an aggravated sexual assault. Based on her reporting of the crime and cooperation with the District Attorney's office, Ms. RV was able to file an application for a U visa. The Immigration Judge granted a subsequent continuance in Ms. RV's case to allow for the adjudication of the U visa by USCIS. The bases of the continuances granted by the Immigration Judge would not have met the "exceptional circumstances" standard laid out in this Proposed Rule. Given that that the current processing time for U nonimmigrant visas is more than 4.5 *years*, asylum seekers in removal proceedings would be virtually foreclosed from seeking U nonimmigrant visas even if they meet the relevant eligibility requirements.

- Ms. B is an asylum seeker from El Salvador. She was placed in removal proceedings when her young daughters were released from immigration custody to her care. American Gateways filed Form I-589 on behalf of Ms. B before the Immigration Judge. Because Ms. B was the victim of a severe form of human trafficking, American Gateways also filed a T visa application on behalf of Ms. B with USCIS. American Gateways was able to request multiple continuances from the Immigration Judge to allow for the adjudication of the T visa application. Under the Proposed Rule, most human trafficking victims like Ms. B would no longer be able to obtain a continuance beyond 180 days even though the current processing time for T nonimmigrant visas is between 18 and 29 months—at least three times as long.

Prohibiting judges from granting "good cause" continuances where doing so would push the decision beyond the 180-day mark would inevitably give rise to due process violations. Individuals in immigration removal proceedings are entitled to due process of law, which can only be achieved if decision makers have sufficient time to develop, review, and thoroughly consider each case. As AILA has pointed out, "Federal Courts have already expressed concerns that attempts to increase emphasis on the quantity of administrative law judge decisions could negatively affect the quality of those decisions."[169] Specifically, the Seventh Circuit Court of Appeals has stated that it could imagine a case where a change in immigration judges' working conditions could have an "effect on decisional independence so great as to create a serious issue of due process." *Ass'n of Admin. Law Judges v. Colvin*, 777 F.3d 402 (7th Cir. 2015). Ultimately, the mandatory adjudication timeline would have an effect on decisional independence so great as to create a serious issue of due process.

The Department implies that a 180-deadline is necessary because asylum seekers often seek to delay adjudication of their applications without good cause. Yet, it cites no evidence for this assumption. As a general matter, respondents are eager to have their applications timely adjudicated, and delays often operate to the detriment of respondents, not the government. In several instances American Gateways has filed motions to advance individual hearings and

[169] AILA, Doc. No. 17101234, *AILA Policy Brief: Imposing Numeric Quotas on Judges Threatens the Independence and Integrity of Courts*, at 2 (Oct. 12, 2017), https://www.aila.org/infonet/aila-policy-brief-imposing-numeric-quotas-judges.

motions to accept written pleadings on behalf of clients who just want their day in court. *All of these motions have been denied* by immigration judges who have no space on their dockets and do not view pending asylum cases as a priority.

- American Gateways client Ms. M, an asylum seeker from Rwanda, has been waiting for her merits hearing since she filed her asylum application in 2013. She has filed two motions to advance her hearings. Both of these motions were denied by the court because her case was not seen as a priority.

- In 2017, American Gateways client Ms. R filed a motion to advance her hearing as her final hearing had been cancelled and reset twice. The court denied both of her motions, stating that other cases took priority.

- In 2019, American Gateways client Mr. B filed a motion to advance his rescheduled merits hearing, after his initial hearing had been cancelled and reset for a date almost two years out. The court denied his motion stating that there were no earlier merits hearing dates available.

Aside from repeatedly invoking the more than two-decades-old provision in the INA providing that asylum cases should be adjudicated within 180 days absent exceptional circumstances—a provision that has never before been enforced by regulation—the Department offers no further justification for its proposal and no explanation as to how it could possibly be implemented without causing pervasive due process violations and ultimately contributing to the collapse of the immigration court system. Because of the Department's staggered rule-making, American Gateways cannot fully evaluate the instant proposal. Yet, given that implementation of the proposal is wholly infeasible, American Gateways fears that the Department intends to charge ahead with several of its other unlawful proposed rules, such as allowing immigration judges to pretermit and deny asylum claims without a hearing—a proposal that so clearly offends due process that it would not withstand legal challenge.

For the foregoing reasons, among others, American Gateways implores the Department to rescind the proposed "asylum adjudication clock" rule in its totality.

III. CONCLUSION

For all of the reasons stated herein, American Gateways opposes the Proposed Rule and respectfully requests that the Department rescind the Proposed Rule in its totality. American Gateways also requests that the Department extend the truncated 30-day comment period and refrain from staggered rulemaking that impedes the public's ability to fully assess and meaningfully comment on the implications of the Department's increasingly frequent proposed regulations that would impact asylum seekers and other immigrants seeking humanitarian protection.