Comments Submitted by American Gateways RE: Notice of Proposed Rulemaking (NPRM) by the Executive Office for Immigration Review, Department of Justice: Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure; RIN 1125-AA96 / EOIR Docket No. 19-0022/ A.G. Order No. 4800-2020 (published in the Federal Register on August 26, 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 Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure (the "Proposed Rule"), published by the Department of Justice (the "Department" or "DOJ") on August 26, 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 interfere with judicial independence, undermine the integrity of the immigration court system, and/or erode the due process rights of people in immigration proceedings. At the same time, American Gateways expresses heightened concern regarding the disproportionate harms that would befall certain immigrants, especially *pro se* and detained individuals, as well as other vulnerable individuals seeking humanitarian protection in the United States.

I. GENERAL COMMENTS

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

Although the Administrative Procedures Act ("APA") does not prescribe a minimum time period for comments, agencies must afford interested persons a reasonable and meaningful opportunity 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 the 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 the Board of Immigration Appeals ("BIA" or the "Board") that will have a detrimental impact on immigrants in removal proceedings. 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 "consistency, efficiency, and quality of [appellate] adjudications," 85 Fed. Reg. 52491, 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 Proposed Rule would undermine judicial independence and further 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. As it concerns the BIA specifically, BIA members are "attorneys appointed by the Attorney General to act as the Attorney General's delegates in the cases that come before them." 8 C.F.R. § 1003.1(a)(1). Or, as stated in the Proposed Rule, "the BIA is simply a regulatory creature of the Attorney General, to which he has delegated much of his authority under the applicable statutes." 85 Fed. Reg. 52491, 52492 (quoting *INS v. Doherty*, 502 U.S. 315, 327 (1992)). This means that BIA members—like immigration judges—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, Board members—like other DOJ employees—are "subject to removal by the Attorney General, and may be transferred from and to assignment as necessary to fulfill the Department's mission."[1] This vast authority enjoyed by the Attorney General substantially impairs the BIA's ability to fairly administer the nation's immigration laws in accordance with its statutory mandate to "provide clear and uniform guidance . . . on the proper interpretation and administration of the [INA] and its implementing regulations." 8 C.F.R. § 1003.1(d)(1).

Although government acquiescence to pervasive bias and politicized influences in the 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.[2] For purposes of contextualizing its objections to the Proposed Rule, American Gateways briefly describes just a

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

[2] *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.

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.[3] 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.[4] As the National Immigration Judges Association 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."[5]

- 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.[6] *Id.* at 292-93 A move allegedly 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.[7] 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 now proposes to codify *Matter of Castro-Tum*, thereby stripping immigration judges nationwide, as well as members of the BIA, of the authority to administratively close cases.

- 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

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[3] 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.

[4] 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/.

[5] *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).

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

[7] AILA, *supra* note 6.

Reynaldo Castro-Tum.[8] 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.[9] 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.[10] IJ Morley granted the continuance.[11] 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.[12] 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*.[13] 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."[14] 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).

- 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 improperly 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.[15]

- 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).

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[8] 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.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] 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.

[15] Innovation Law Lab & S. Poverty Law Ctr., *supra* note 2, 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)).

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.[16] 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]."[17]

- 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.[18] Then, in January 2020, EOIR tightened the restrictions, forbidding judges from publicly discussing immigration law or policy at all.[19] 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.[20] On July 1, 2020, the National Association of Immigration Judges 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.[21]

- 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."[22] During his tenure as ICE's

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16 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

17 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).

18 *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/.

19 *Id.*

20 *Id.*

21 *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.

22 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

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.[23] 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."[24] 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."[25]

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. Because many of the changes set forth in the Proposed Rule are designed to further consolidate power in political appointees who support the administration's anti-immigration agenda and to fast-track deportations by manipulating the appellate process, American Gateways highlights a few of the current administration's efforts to weaponize the BIA in its war against immigrants:

- 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.[26] 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.[27] 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

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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.

[23] *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.

[24] *See* Aleaziz, *supra* note 22.

[25] *See id.*

[26] 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 appointment was 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).

[27] 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.*

board-remanded cases in 2017.[28] (In fact, Couch's remand rate of 28.4% (50 out of 176 cases[29]) 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.[30] Former BIA-head Paul Schmidt openly condemned the administration for having "weaponized the [hiring] process" and having "exploited" existing "weaknesses" in the system for its own ends.[31] 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. [32]

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[28] 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.

[29] 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.

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

[31] Misra, *supra* note 27.

[32] *Senators Press Barr on Politicization of Justice Department Administration of Immigration Courts*, U.S. Senate: Sheldon Whitehouse (Feb. 13, 2020), https://www.whitehouse.senate.gov/news/release/senators-press-barr-on-politicization-of-justice-department-administration-of-immigration-courts.

The Senators further admonished that "[t]he administration's gross mismanagement of these courts further prevents them from providing basic due process."[33]

- 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 Department of Homeland Security (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 review BIA decisions.

- In April 2020, the Attorney General added three additional members to the BIA—Phillip Montante Jr., Kevin W. Riley, and Aaron R. Petty.[34] Former immigration judges, Montante and Riley boast high denial rates—96.3% and 88.1%, respectively.[35] A former DOJ employee, Petty most recently served as counsel in the Department's Office of Immigration Litigation.[36]

- On May 29, 2020, the Attorney General appointed Associate Deputy Attorney General David H. Wetmore as BIA chairman.[37] 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).[38]

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33 *Id.*

34 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.

35 *See* TRAC Immigration, *supra* note 26.

36 U.S. Dep't of Justice, *supra* note 34.

37 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.

38 *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 &

- On June 8, 2020, the DOJ reassigned nine BIA career members (all of whom were appointed prior to the current administration) to new roles.[39] The retaliatory reassignment, which followed the members' rejection of an April 17, 2020 buy-out offer from the DOJ, 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.[40] During their time on the bench, Mahtabfar and Baird each had denial rates in excess of 90%.[41] This latest round of appointments confirms that the administration's expansion of the BIA to 23 members in April 2020 (in the midst of a global public health crisis)[42] 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. All of the cases, which have involved an improper assertion of power over immigration courts, are intended to block avenues of relief to which immigrants are entitled, erode due process, and increase deportations. American Gateways briefly describes below some of the Attorneys General's brazen misuses of power.

Notably, during Attorney General Session's 21-month term, he certified as many cases to himself (at least seven) as did the attorneys general in the entire twelve year periods of the presidencies of Clinton (three) or Obama (four).[43] 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*—a case he certified to himself for decision—and vacated 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

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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.

[39] 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/.

[40] 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.

[41] Baird's and Mahtabfar's denial rates were 91.4% and 98.7%, respectively. TRAC Immigration, *supra* note 26. 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 40. Owen also served as acting deputy director of EOIR from June 2019 to January 2020. *Id.*

[42] *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).

[43] Liz Vinson, *U.S. Attorney General Tips the Scales in Immigration court, leaving one man fighting for his freedom – and his life*, Southern Poverty Law Center (December 3, 2019) https://www.splcenter.org/attention-on-detention/us-attorney-general-tips-scales-immigration-court-leaving-one-man-fighting.

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.[44]

- 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 judgement in favor of plaintiffs and issued an injunction preventing the 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-*, 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 mandatory detention. 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. *Id*. 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 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)]

[44] *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-.

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 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*, 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)). 27 I&N Dec. 674 (AG 2019). 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." *Id*. at 675.

- In *Matter of R-A-F-*, Attorney General Barr overturned an unpublished BIA decision that affirmed the immigration court's finding that a man in his 70s who suffers from Parkinson's disease, dementia, Major Depressive Disorder, traumatic brain injury, PTSD, and chronic kidney disease[45] would be subject to torture if returned to his home country. 27 I&N Dec. 778 (AG 2020). 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."[46] 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.[47]

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[45] *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-*.

[46] *Id.*

[47] *Id.*

- Just yesterday, 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 86 (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 93-94. 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 against women, people of color, and other vulnerable groups) while also policing and punishing the Board, as well as immigration judges, for granting asylum.[48]

The overreach in the decisions the attorney general has certified to himself (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.[49]

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The foregoing chronology of the administration's 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.[50] American Gateways submits that, when considered in tandem

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[48] Departing from well-established principles of asylum law, the summary of the opinion 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); "(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); "(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" (citing *Matter of A-B-*, 27 I&N Dec. at 388). *Matter of A-C-A-A-*, 28 I&N Dec. at 84.

[49] 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.

[50] The more robust public record documenting the 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

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.

C. The Proposed Rule improperly elevates speed over fairness, disregarding due process protections for the sake of purported efficiency.

The Department claims that an increase in the number of cases pending before the EOIR both necessitates and justifies the Proposed Rule. American Gateways does not dispute that the immigration court system—including the BIA—would benefit from enhanced efficiency and consistency in decision-making, but the Department fails to adequately explain how the Proposed Rule would reduce delays and "ensure the efficient use of BIA and EOIR resources." 85 Fed. Reg. 52491, 52492. Moreover, the Department grossly mischaracterizes the causes of the current backlog,[51] pointing the finger at alleged "gamesmanship" by respondents and their counsel without acknowledging the surge of appeals brought by DHS, which has exercised less and less prosecutorial discretion pursuant to directives to ramp up enforcement.[52] Finally, the Department focuses solely on expeditious—not fair—decision-making, failing to balance its purported efficiency goals with ensuring that the appellate process remains fair for respondents, especially *pro se* respondents. The Department's cursory assurances that appeals will be handled "consistent with due process," *see, e.g.*, 85 Fed. Reg. 52491, 52493, does not reflect a full and balanced assessment of the relevant issues, including fundamental constitutional rights, as the law requires.[53]

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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.

[51] Pending appeals before the BIA have increased more than sevenfold, from 11,128 in FY 2016 to 91,042 through the first three quarters of 2020. Executive Office for Immigration Review (EOIR), Dep't of Justice, *Adjudication Statistics: Case Appeals Filed, Completed, and Pending* (July 14, 2020), https://www.justice.gov/eoir/page/file/1248501/download.

[52] In a January 2017 executive order, President Trump directed all "executive departments and agencies . . . to employ all lawful means to enforce the immigration laws of the United States," emphasizing that faithful execution of the immigration laws does not permit departments or agencies to "exempt classes or categories of removable aliens from potential enforcement." Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13768, 82 Fed. Reg. 8799, 8799 (Jan. 25, 2017). In a subsequent memorandum implementing these "new policies designed to stem illegal immigration and facilitate the detection, apprehension, detention and removal of aliens who have no lawful basis to enter or remain in the United States," then-DHS Secretary John Kelly rescinded most prior guidance regarding the exercise of prosecutorial discretion. DHS, *Implementing the President's Border Security and Immigration Enforcement Improvement Policies* (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf. Additionally, Kelly specifically instructed that "prosecutorial discretion shall not be exercised in a manner that exempts or excludes a specified class or category of aliens from enforcement of the immigration laws." DHS, *Enforcement of the Immigration Laws to Serve the National Interest* (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf. In short, the exercise of prosecutorial discretion under the current administration has been almost completely wiped out.

[53] The Administrative Procedures Act 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 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)).

American Gateways describes herein its opposition to some of the specific proposed changes that threaten due process rights. By way of example, the Department proposes a near-blanket prohibition on remands based on new evidence without any consideration of the obstacles that prevent respondents, especially *pro se* and detained respondents, from accessing and gathering evidence to support their claims. Limiting the circumstances in which the BIA can remand cases for additional fact-finding based on new evidence without any regard for whether the respondent has had a full and fair opportunity to be heard violates due process. Similarly, the Department's proposed "quality assurance certification process" provides for notice to the parties that an immigration judge has certified a decision to the EOIR Director for review but does not provide any opportunity for parties to respond. At the same time, American Gateways expresses deep concern that the Proposed Rule—in its totality—is intended to encourage the quick and cursory denial of claims for relief while restricting access to the appellate process and further stripping respondents of a full and fair opportunity to present their claims.

D. The Proposed Rule distorts the factors that have contributed to the case backlog it purports to address.

The Department's primary justification for the Proposed Rule is the sharp increase in pending cases before EOIR in recent years, including the 65,201 appeals pending with the BIA at the end of FY 2019 (a number that has since grown to 91,042 pending appeals at the end of the third quarter of 2020). *See* 85 Fed Reg. 52491, 52492. American Gateways agrees that the growing case backlog needs to be addressed. Long delays in adjudication are harmful to immigrants who are forced to endure years of uncertainty while waiting for an opportunity to be heard. During that time, evidence grows old, witnesses become unavailable, and memories fade. In other words, lengthy delays are generally far more harmful to respondents and their legal claims than they are to the government. At the same time, American Gateways strongly disagrees with the Department's suggestion that (1) immigrants themselves have somehow impaired the "efficient use of BIA and EOIR resources," thereby causing delay, 85 Fed. Reg. 52491, 52492, and (2) the responsible exercise of judicial discretion by Board members "needlessly prolong[s] case adjudications . . . straining the limited court resources," *id.*

Neither immigrants themselves nor the judges who seek to fairly apply the law while protecting the due process rights of those who appear in their courts are to blame for the broken immigration court system. Over the past fifteen years, the government has ramped up immigration enforcement, both within the interior of the United States and, more recently, along the southern border, and it has failed to provide the resources needed to meet the rising number of cases on the dockets of immigration courts. And, although there have been shifts in migration patterns and an increase in migration from Central America, the factors that have led people to flee are complex, and the United States has itself played a defining role in creating the political and economic conditions in Central America that allow state violence to flourish.[54] Hence, regardless the angle from which one views the issue, it is readily apparent that the government itself is to blame for the backlog crisis it claims must be addressed. Resources have simply failed to keep pace with growing case numbers because the government spends far more on enforcement and removal

[54] *See* Julian Borger, *Fleeing a Hell the U.S. Helped Create: Why Central Americans Journey North*, The Guardian (Dec. 19, 2018), https://www.theguardian.com/us-news/2018/dec/19/central-america-migrants-us-foreign-policy.

efforts than on immigration courts. For example, in 2018, Congress appropriated $16.7 billion for Customs and Border Patrol (CBP), $7.5 billion for Immigration and Customs Enforcement (ICE), and only $437 million for immigration courts.[55] The inevitable consequence of this mismatch in resources is an overburdened immigration court system.

The current administration has only aggravated the backlog it inherited. Rather than devoting much needed resources to the court system, it has continued to pour billions of dollars into enforcement—including more than $11 billion on a "border wall system" that cost nearly $20 million per mile, making it "the most expensive wall of its kind anywhere in the world."[56] Had the administration spent just a fraction of the funds it diverted to construct the President's "powerful, terrific wall"[57]—or even a smaller fraction of the $57 billion in discretionary funding it awarded to CBP ($49.4 billion) and ICE ($7.6 billion) in FY 2019[58]—on the nation's immigration courts, the resource shortage of which the Department now complains would be far less dire. Additionally, the current administration has almost completely suppressed the exercise of prosecutorial discretion, insisting that everyone, including refugees, families, and children, be pursued and prosecuted with equal vigor—another irrational policy shift that has inevitably increased burdens on the immigration court system. *See supra* Section I.C. In short, the crumbling court system, as well as the logjam of cases, is a problem of the government's own making.

II. COMMENTS REGARDING SPECIFIC PROVISIONS

A. The proposed changes to existing briefing practices would unfairly prejudice respondents without improving adjudicatory efficiency.

Under the current regulations, the BIA utilizes a sequential briefing schedule for appeals in non-detained cases—the appellant has 21 days to file a brief, and the appellee than has 21 days to file a response brief. 8 C.F.R. § 1003.3(c)(1). The Department proposes to (1) alter the standard briefing schedule to require that briefs be filed simultaneously within 21 days and (2) shorten the maximum period of time by which the BIA may extend the period for filing a brief from 90 days to 14 days. *See* 85 Fed. Reg. 52491, 52513 (proposed 8 C.F.R. § 1003.3(c)(1) and (2)). The Department contends these changes would reduce delays in the appeals process and alleviate the backlog of appeals but fails to acknowledge the several inefficiencies and inequities that would inevitably result from the changes.

First, the simultaneous briefing proposal would prejudice the appellee who would be required to address all issues raised in a notice of appeal, regardless of whether the appellant elects to brief those issues. This unnecessary burden on counsel for both respondents and for DHS, as well as *pro se* respondents, far outweighs any purported efficiency gain to EOIR. Moreover, the added

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55 Marissa Esthimer, *Crisis in the Courts: Is the Backlogged U.S. Immigration System at Its Breaking Point?* Migration Policy Inst. (Oct. 3, 2019), https://www.migrationpolicy.org/article/backlogged-us-immigration-courts-breaking-point.

56 John Burnett, *$11 Billion and Counting: Trump's Border Wall Would Be the World's Most Costly*, NPR (Jan. 19, 2020), https://www.npr.org/2020/01/19/797319968/-11-billion-and-counting-trumps-border-wall-would-be-the-world-s-most-costly.

57 *Id.*

58 Cristobal Ramón, *The FY2019 Senate Appropriations Bill: Funding Immigration Activities Prioritized by Both Parties*, Bipartisan Policy Ctr. (Mar. 21, 2019), https://bipartisanpolicy.org/blog/the-fy2019-senate-appropriations-bill-funding-immigration-activities-prioritized-by-both-parties/.

burden will inevitably weigh heavier on respondents than the government (as DHS frequently elects not to file a brief), and heaviest on *pro se* respondents.[59] The proposed change may also result in appellees needing to file a motion to enlarge the page limits of their brief in order to address issues not ultimately raised in the appellant's brief, thereby resulting in BIA resources being wasted on adjudicating such motions (and, subsequently, sifting through any extraneous arguments raised in the appellee's brief).

Second, the Proposed Rule would make filing a reply brief nearly impossible. A reply brief would "be permitted only by leave of the Board and only if filed within 14 days of the deadline for the initial briefs." 85 Fed. Reg. 52491, 52513 (proposed 8 C.F.R. § 1003.3(c)(1) and (2)). This proposal ignores several practical concerns that result from the fact that EOIR does not have a universal electronic filing system.[60] For respondents who are represented, their counsel can serve the ICE Office of Chief Counsel (OCC) using ICE's e-service portal, which means government attorneys often timely receive service of respondents' briefs. ICE attorneys, on the other hand, routinely serve their briefs on respondents and their counsel via regular mail, thereby delaying service, often by several days. It is common for American Gateways attorneys to receive copies of briefs in the mail a full week after they were filed. *Pro se* respondents do not have any access to e-filing and therefore would be disproportionately prejudiced by delays arising from mail service. 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.[61] If the Department's proposal were to be implemented, each party—and more often respondents—may not even receive the opposing party's brief until shortly before the 14-day time period for filing a reply brief has expired. In most circumstances, 14 days (or less) is simply not adequate time for an appellant to prepare and file a reply brief. For *pro se* respondents, the time period is wholly unreasonable.

The Department touts the importance of "harmoniz[ing] the briefing requirements" in all appeals, 85 Fed. Reg. 52491, 52499, yet fails to acknowledge the liberty interests at stake in detained appeals. And, expediency aside, the Department offers no further justification for expanding the existing practice of simultaneous briefing in detained cases, which American Gateways submits remains less than ideal in all cases because parties do not have a fair opportunity to adequately respond to the issues presented on appeal.

Third, the Department's proposal to reduce the maximum length of briefing extensions from 21 days to 14 days serves no rational purpose. Under the current regulations, the BIA may extend the period for filing a brief or reply brief by up to 90 days for good cause shown. 8 C.F.R. § 1003.3(c)(1). The previous practice of the BIA was to grant 21-day extensions as a matter of

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[59] In the preface to the Proposed Rule, the Department notes that, in "FY 2019, the Board issued a briefing schedule in approximately 17,069 cases. Of those, the respondent did not file a brief in approximately 4,400 cases, DHS did not file a brief in roughly 10,900 cases, and neither party filed a brief in over 3,000." 85 Fed. Reg. 52491, 52498. In other words, respondents filed briefs in roughly 75% cases while the government filed briefs in less than 37% of cases.

[60] The Department asserts in the preface to the Proposed Rule that EOIR is "currently in the midst of a nationwide rollout" of the EOIR Court and Appeals System (ECAS), but then concedes in a footnote that the "rollout was temporarily paused on March 16, 2020, due to the outbreak of COVID-19" and has not yet resumed. 85 Fed. Reg. 52491, 52509. Thus, universal electronic filing will likely remain unavailable for some time.

[61] *See, e.g.*, H. Comm. on Oversight and Reform, *New Postal Service Documents Show Nationwide Delays Far Worse than Postal Service has Acknowledged* (Aug. 22, 2020).

course regardless the length of the extension requested. Additionally, up until June 2019, the BIA Practice Manual stated: "It is the Board's policy to grant one briefing extension per case, if requested in a timely fashion."[62] In June 2019, EOIR updated the language in the policy manual to reflect that "extension requests are not favored."[63] The EOIR also reiterated its disfavor for briefing extensions in an October 2019 policy memorandum, explaining that "[b]ecause extension requests are not favored, they should not be granted as a matter of course, and there is no automatic entitlement to an extension of the briefing schedule by either party."[64] Then, earlier this year, the BIA again updated its Practice Manual to expressly provide that extension requests "will not be granted as a matter of course," [65] and it also began enforcing the requirement that the movant show "good cause" for an extension. The BIA's enforcement of a "good cause" standard for briefing extensions has not only made it more difficult for respondents and their counsel to obtain extensions, but has further undermined the purpose of a briefing extension. The BIA sends briefing notices and responds to requests for extension by mail. This means that, even under current practice that allows for a 21-day extension upon a showing of "good cause," mail delays mean that respondents and their counsel have to request an extension almost immediately upon receipt of a briefing notice and often do not receive a response to that request until just before their briefing deadline.[66] Further reducing the maximum length of an extension to 14 days would largely defeat the purpose of requesting an extension in the first instance. Parties would be forced to prepare their briefs while an extension request is pending, especially given that the Board would be expressly prohibited from adopting "a policy of granting all extension requests without individualized consideration of good cause." 85 Fed. Reg. 52491, 52513 (proposed 8 C.F.R. § 1003.3(c)(1)). Additionally, where "good cause" exists, exigent circumstances (including those arising from the current public health crisis) may warrant an extension of longer than 14 days. Eliminating the BIA's authority to grant a longer extension in order to ensure fair adjudication is unnecessary. In light of the challenges that have already emerged from the BIA's increasingly restrictive policy regarding briefing extensions, American Gateways requests that the Department not only refrain from further shortening the length of extensions but revert to its earlier practice of granting 21-day briefing extensions if timely requested.

Fourth, the proposed changes would disproportionately harm individuals who represented themselves *pro se* in immigration court by making it more difficult to retain counsel on appeal. The Department asserts that the changes "should have relatively little impact on the preparation of cases by the parties on appeal" because both parties will have already reviewed the case at the time an appeal is filed. 85 Fed. Reg. 52491, 52498. This is plainly not the case for *pro se* respondents who obtain counsel for the first time on appeal. In such circumstances, prospective counsel may wish to review the transcript of the immigration court proceedings before deciding whether to take on an appeal and, in any event, newly retained appellate counsel needs adequate time to familiarize

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[62] *See, e.g.*, BIA Practice Manual, ch. 4.7(c)(i)(A), (B) (revised Oct. 16, 2018), https://www.justice.gov/eoir/page/file/1101411/download.

[63] BIA Practice Manual, ch. 4.7(c)(i) (revised June 7, 2019), https://www.justice.gov/eoir/page/file/1173091/download.

[64] EOIR, Memorandum from EOIR Director James R. McHenry III, *Case Processing at the Board of Immigration Appeals* (Oct. 1, 2019), https://www.justice.gov/eoir/page/file/1206316/download.

[65] BIA Practice Manual, ch. 4.7(c)(i) (revised June 10, 2020), https://www.justice.gov/eoir/page/file/1284741/download.

[66] Alternatively, counsel can repeatedly call the BIA clerk's office to see if their request for an extension has been granted, wasting the time and resources of both counsel and the BIA alike.

themselves with the record of proceedings. The likely results of restricting the availability and duration of briefing extensions are lower rates of representation on appeal and, ultimately, more cursory denials of meritorious appeals.

Finally, any alleged efficiencies that might be gained by these proposed changes would be immaterial given the average timeline for non-detained appeals and, in any event, do not justify depriving an appellant of the opportunity to thoughtfully review and respond to the appellee's arguments. Most non-detained appeals take at least a year to adjudicate, and, in some instances the BIA takes more than two years to issue a briefing schedule. As previously noted, the BIA issues briefing schedules via the U.S. postal service, which means both parties would have less than 21 days to prepare their briefs. With even shorter briefing timetables, the quality of briefing would most certainly suffer to the detriment of the parties and the BIA, as well as the court system as a whole.

For the foregoing reasons, among others, American Gateways objects to the Department's proposal, as well as any similar proposal that would reduce the timeline of appellate briefing schedules and any extensions thereof. Such arbitrary and superficial changes to briefing schedules would unfairly burden the parties and their counsel, thereby compromising the quality and availability of legal representation, not to mention the briefing itself, with no corresponding benefit to EOIR. If the Department genuinely desires to "shorten the time required for a case to work through the BIA's adjudicatory process" or to "complete cases in an expeditious manner," 85 Fed. Reg. 52491, 52498, it must address the myriad systemic flaws that have resulted in a backlog of appellate cases—a backlog that has nothing to do with briefing schedules. *See supra* Section I.D-C.

B. The Department's proposal to delegate authority to the BIA to issue final decisions on requests for voluntary departure risks that such requests will be denied without due consideration while merely shifting the case backlog from immigration courts to the BIA.

The Department proposes to add a new regulation delegating authority to the BIA to issue final decisions on requests for voluntary departure, claiming that doing so will conserve resources and lessen burdens on immigration courts. *See* 85 Fed. Reg. 52491, 52500, 52511 (proposed rule 8 C.F.R. § 1003.1(d)(7)(iv)). American Gateways is concerned that the intended result of this amendment will be an increase in the rate at which requests for voluntary departure are denied. Any supposed efficiency is illusory, as the proposal would simply shift the "burden" of adjudicating such requests from immigration courts to the BIA. As a smaller adjudicatory body, the BIA is even less equipped than immigration courts to take on additional decision-making responsibilities. Coupled with increased pressures to render quick decisions, the near-certain outcome would be less grants of voluntary departure.

American Gateways is equally concerned that the proposal heightens the risk that respondents will accept a grant of voluntary departure from the BIA without receiving sufficient voluntary departure advisals. The Department claims that merely enumerating the "procedural and substantive requirements" for voluntary departure in the regulations will ensure that BIA-issued advisals are appropriate. 85 Fed. Reg. 52491, 52500. The reality is that a small, appellate body already buckling under pressure to quickly decide cases in a manner that advances the administration's

political agenda cannot be trusted to give appropriate advisals, especially where the sufficiency of those advisals would not be subject to any further appellate review.

C. The proposed limitations on the availability and scope of remand are unreasonable, unfair, and would allow due process violations to flourish.

The Department proposes sharply circumscribing the scope of motions to remand the BIA may consider, largely foreclosing the consideration of new evidence once appellate proceedings have commenced, and, concomitantly, limiting the issues immigration judges can consider when a case is remanded. The Department's intention is quite obvious—to transform the BIA into an assembly-line that will churn out denials with little or no regard for respondents' due process rights. And, having covertly modified its hiring procedures to stack the BIA with former immigration judges whose credentials are defined by their high denial rates, *see supra* Section I.B, the Department has already installed the infrastructure to ensure that its intended purpose is carried out.

1. The Proposed Rule would impose unreasonable limitations on the BIA's ability to remand cases for further factfinding.

As the BIA has long-recognized, motions to remand "are an accepted part of appellate civil procedure and serve a useful function." *Matter of Coelho*, 20 I&N Dec. 464, 471 (BIA 1992). Under current regulations, the BIA itself is prohibited from engaging in factfinding in the course of deciding appeals, but it may remand proceedings to the immigration judge "[i]f further factfinding is needed in a particular case." 8 C.F.R. § 1003.1(d)(3)(iv). As it should, the regulations afford the BIA discretion to review cases on an individualized basis and, as appropriate, remand cases so that the factual record can be developed. The Proposed Rule, by contrast, would greatly restrict the BIA's discretion, making it nearly impossible for respondents to obtain remand for further fact finding. Specifically, the Proposed Rule would prohibit the BIA from remanding a case for further factfinding unless *all* of the following five conditions are met:

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

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

(3) The additional factfinding would alter the outcome or disposition of the case;

(4) The additional factfinding would not be cumulative of the evidence already presented or contained in the record; and

(5) One of the following circumstances is present in the case: (i) The immigration judge's factual findings were clearly erroneous, or (ii) Remand to DHS is warranted following de novo review.

85 Fed. Reg. 52491, 52510 (proposed 8 C.F.R. § 1003.1(d)(3)(iv)(D)(1)-(5)).

The first two proposed conditions, which would divest the BIA of the ability to remand based on an immigration judge's failure to adequately develop the record, are fundamentally unfair as applied to *pro se* respondents. Most *pro se* respondents 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). A respondent who was unaware that she was required to carry a certain burden of proof would not have "attempted to adduce the additional facts before the immigration judge," as the Proposed Rule would require. 85 Fed. Reg. 52491, 52510 (proposed 8 C.F.R. § 1003.1(d)(3)(iv)(D)(2)).

Moreover, the Department's proposal is squarely at odds with the well-established principle that immigration judges have an affirmative duty to fully develop the record, especially as it concerns *pro se* litigants. 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.*, 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."); Immigration Court Practical Manual ch. 4.15(g) (rev. July 2, 2020) (instructing immigration judges to "advise[] the respondent of any relief for which the respondent appears to be eligible").[67]

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[67] In *INS v. Cardoza-Fonseca*, the U.S. Supreme Court instructed that the UNHCR Handbook "provides significant guidance in construing the [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"). The Handbook 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 on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection, at 43 (reissued Feb. 2019), https://www.unhcr.org/en-us/publications/legal/5ddfcdc47/handbook-procedures-criteria-determiningrefugee-status-under-1951-convention.html (hereinafter the UNHCR Handbook). The UNHCR Handbook continues: "Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be

Leaving no stone unturned, the Department also proposes to wholly eliminate the BIA's authority to *sua sponte* remand a case for further factfinding or where an issue was not adequately raised below "unless the factfinding is necessary to determine whether the immigration judge had jurisdiction over the case." *See* 85 Fed. Reg. 52491, 52510 (proposed 8 C.F.R. § 1003.1(d)(3)(iv)(C)). *Sua sponte* remand is already a rare remedy reserved for special circumstances, such as "when a profound change in the law renders a noncitizen eligible for relief from removal." *Richards v. Sessions*, 711 F. App'x 50, 53 (2d Cir. 2017); *see also generally Matter of G-D-*, 22 I&N Dec. 1132, 1133-34 (BIA 1999) ("As a general matter, [the BIA] invoke[s] [its] sua sponte authority sparingly, treating it not as a general remedy for any hardships created by enforcement of the time and number limits in the motions regulations, but as an extraordinary remedy reserved for truly exceptional situations."). The Department provides no rational explanation for eliminating this sparsely utilized procedural tool, which affords the BIA discretion to facilitate more just appellate outcomes, particularly for *pro se* respondents who may be unaware of the ability to seek remand and/or the procedural mechanisms for doing so. Indeed, the Department's harsh proposal would prevent *sua sponte* remand even where the BIA acknowledges that there is a clear avenue for relief, but the immigration judge failed to adequately develop the record.

In circumstances where an immigration judge failed to discharge her duty to develop the factual record, especially in cases involving *pro se* respondents, fairness dictates that *sua sponte* remand is not only appropriate, but necessary to ensure just outcomes. *See, e.g.*, *In re Mirzakhani, Mais*, 2004 WL 2952210, at *1 (BIA Nov. 3, 2004) (remanding case *sua sponte* where the immigration judge failed to mention the numerous positive factors that weighed in favor of cancelling an order of removal); *In re Kleber Pompilio Pacheco Rojas*, 2009 WL 1799998, at *1-2 (BIA May 29, 2009) (remanding case *sua sponte* where insufficient record prevented meaningful review of appeal); *In re Cristian Castro-Garcia*, 2010 WL 4500902, at *1 (BIA Oct. 18, 2010) (remanding case *sua sponte* where, during the pendency of the appeal, the *pro se* respondent submitted evidence that his wife had filed a Petition for Alien Relative). The Department provides no compelling reason to eliminate the BIA's *sua sponte* remand authority, which the BIA already cautiously exercises in the interests of justice.

Even where respondents are represented, winning remand for further factfinding would be exceedingly difficult under the proposed regulations. For example, the Proposed Rule does not include any provision that would allow the BIA to remand a case based on intervening changes in the law that require further factfinding. Given the rapidly changing nature of U.S. asylum law, especially under the current administration, and a pending proposal by the DOJ and DHS to effectively dismantle the asylum system altogether,[68] this omission must be addressed. In recent years, the Attorney General has issued several decisions substantially altering accepted norms in asylum law. For example, *Matter of A-B-*, 27 I&N Dec. 316 (AG 2018) and *Matter of L-E-A-*, 27 I&N Dec. 581 (AG 2019) require respondents to establish every particular social group (PSG) on which their claims are based through a specific cognizability test (even where DHS concedes that

successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt." *Id.*

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

respondent's proposed PSGs are cognizable). Several cases pending before the BIA predated one or both of these decisions, and immigration judges may have decided those cases in reliance on precedent that has since been overturned. Intervening precedent requires that those cases be remanded so that asylum seekers have an opportunity to present evidence that the immigration judge did not require or consider during the initial hearing. *See, e.g.*, *Godines v. Mukasey*, 276 F. App'x 674, 675 (9th Cir. 2008) (holding that intervening change in the law required remand for further factfinding); *In re Driss Sabrane*, 2010 WL 1284441, at *1 (BIA Mar. 12, 2010) (remanding case to immigration judge to consider impact of intervening decision that could necessitate factfinding); *In re Rigoberto Angel-Nunez*, 2016 WL 6519946, at *1 (BIA Oct. 3, 2016) (remanding case where resolution of respondent's ineffective assistance of counsel claim required consideration of intervening precedent and additional factfinding regarding respondent's membership in PSG). Yet, the Proposed Rule would not permit that result.

Consider, for example, the case of American Gateways client Ms. D, who suffered years of horrific violence at the hands of her spouse in her home country of Honduras. She relocated several times to flee from him, but each time he was able to locate her and force her to return with him—most often using violence. Unable to escape the violence, Ms. D eventually fled her home country and came to the United States seeking asylum. In 2002, the immigration judge denied her asylum case. Ms. D filed a timely appeal with the BIA. In 2010, the BIA remanded the case to the immigration judge for further development of the record in light of the Attorney General's 2008 decision in *Matter of R-A-*, 24 I&N Dec. 629, 631 (AG 2008). Ms. D was given the opportunity to present additional evidence that supported her claim and, in 2010, was granted asylum by the immigration judge.

American Gateways also objects to the Department's proposal to clarify "that the BIA may affirm the decision of the immigration judge or DHS on any basis supported by the record, including a basis supported by facts that are not disputed." 85 Fed. Reg. 52491, 52501, 52510 (proposed rule 8 C.F.R. § 1003.1(d)(v)). Allowing the BIA to rely on facts that did not constitute part of the immigration judge's decision-making to uphold denials risks particular harm for *pro se* respondents who are unlikely to dispute facts that the immigration judge did not develop through questioning. Coupled with the fact that a single member of the BIA may affirm an immigration judge's decision without opinion—a practice that the Department recently condoned and expanded beyond specific categories of cases despite widespread criticism that it sacrifices constitutional due process for political expediency—this means that the BIA could not only rubber-stamp denials without any explanation, but could do so for any reason (or for no reason at all), including those that did not bear on the original decision.

The unavoidable trickle-down impact of the Department's proposal to limit the BIA's ability to exercise its remand authority on the fairness of immigration court proceedings is equally concerning. The BIA has previously acknowledged that limitations on the BIA's fact-finding ability on appeal[69] heighten the need for immigration judges to include clear and complete findings of fact in their decisions. *See, e.g.*, *In re S-H-*, 23 I&N Dec. 462, 462 (BIA 2002) (explaining that the Board's limited fact-finding ability on appeal makes remand an appropriate remedy when the record is inadequate for review); *Ye v. Dep't of Homeland Sec.*, 446 F.3d 289, 296 (2d Cir. 2006)

[69] *See Board of Immigration Appeals: Procedural Reforms To Improve Case Management*, 67 Fed. Reg. 54878, 54902 (2002) (codified at 8 C.F.R. § 3.1(d)(3)).

("[W]hen the BIA determines that further fact-finding is needed, the appropriate course is remand to the IJ.") Yet, the Proposed Rule would promote just the opposite. If there is no risk of remand for failing to adequately develop the factual record, immigration judges will have little incentive to develop the record in proceedings, especially those involving *pro se* respondents. Taken in connection with the performance quotas imposed on immigration judges, *see supra* Section I.B, broad restrictions on the availability of remand for further factfinding would most certainly encourage—if not implicitly sanction—due process violations.

2. Prohibiting remands based on new evidence is irrational and would result in due process violations.

The BIA already enjoys broad discretion to deny a motion to remand grounded on new evidence. *See generally Matter of Coelho*, 20 I&N Dec. 464, 471-72 (BIA 1992). As the Department acknowledges, the BIA denies such motions as a matter of course unless the movant meets the "heavy burden" of showing that the new evidence "would likely change the result in the case." 85 Fed. Reg. 52491, 52500 (quoting *Matter of L-O-G-*, 21 I&N Dec. 413, 420 (BIA 1996)); *see also, e.g.*, *Cao v. U.S. Dep't of Justice*, 421 F.3d 149, 156 (2d Cir. 2005) ("[T]the BIA has held that it ordinarily will not grant [a motion to remand based on new evidence] unless the movant has met the 'heavy burden' of demonstrating a likelihood that the new evidence presented would alter the result in the case."). In sum, obtaining a remand for consideration of new evidence is already challenging, and the Department does not argue otherwise. Yet, in the interests of efficiency and consistency—and with no mention of fairness or regard for the integrity of the appellate process—the Department seeks to impose a near-blanket prohibition on any remand based on new evidence.

Under the Proposed Rule, the BIA would be proscribed from (1) remanding a case for the immigration judge to consider new evidence in the course of adjudicating an appeal and (2) considering a motion to remand based on new evidence. The Department claims that a "bright-line rule" is necessary because a "lack of clarity" in how the BIA treats new evidence on appeal facilitates "gamesmanship on appeal." 85 Fed. Reg. 52491, 52500-01. Yet, there is no evidence—and the Department cites none—of widespread abuse of motions to remand based on new evidence. Even accepting that occasional "gamesmanship" in BIA proceedings is inevitable, as it is in any court of law, the alleged benefits of the proposal are far outweighed by its harms. Moreover, the Department's utter disregard of the devastating implications the rule would have for *pro se* respondents is troublesome. At best, the Department's failure to consider all relevant issues renders the Proposed Rule arbitrary and capricious. At worst, the Proposed Rule is unconstitutional.

a. Immigrants in removal proceedings are entitled to due process of law, including on appeal.

"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 *Reno v. Flores*, 507 U.S. 292, 306 (1993)). 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. *Wing v. United States*, 163 U.S. 228, 238-39 (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 v. Fisher*, 189 U.S. 86, 101 (1903); *see also Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (explaining that the 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) ("[T]he 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.") (citation and quotation marks 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) (citation and quotation marks omitted) (emphasis added). A full and fair hearing, in turn, requires that a respondent have an opportunity to "fairly present evidence, offer arguments, and develop the record." *Tun v. Gonzales,* 485 F.3d 1014, 1025 (8th Cir. 2007); *see also* 8 U.S.C. § 1229a(b)(1) ("The immigration judge shall . . . receive evidence. . . ."); *de la Llana–Castellon v. INS*, 16 F.3d 1093, 1096 (10th Cir. 1994) (explaining that due process "requires that the decisionmaker actually consider the evidence and argument that a party presents"); *see also Kaur v. Ashcroft*, 388 F.3d 734, 737 (9th Cir. 2004) (explaining that a "full and fair hearing" requires allowing an asylum applicant to complete her own testimony, and/or to present corroborating witnesses). Moreover, the civil rather than criminal nature of removal proceedings does not diminish this due process right:

> 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).

Importantly, due process rights do not evaporate when an immigration judge renders a decision. "A BIA decision violates due process if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case." *Sanchez-Cruz v. I.N.S.*, 255 F.3d 775, 779 (9th Cir. 2001) (citations and quotation marks omitted); *see also Zahedi v. INS*, 222 F.3d 1157, 1164 n.6 (9th Cir. 2000) (stating that "immigration proceedings as a whole" are governed "by the Fifth Amendment's Due Process Clause"). Hence, despite the fact that "[t]here is no administrative rule requiring the Board to review all relevant evidence submitted on appeal[,][i]t is beyond argument, . . . that the Due Process Clause requirement of a 'full and fair hearing' mandates that the Board do so in its capacity as a reviewing tribunal." *Larita–Martinez v. INS*, 220 F.3d 1092, 1095 (9th Cir. 2000) (internal citation and quotations omitted).

b. Overly strict limitations on the consideration of new evidence infringe upon due process rights.

Although the BIA is permitted to implement procedures that limit the consideration of new evidence, limitations that impair a respondent's ability to fully and fairly present her case infringe upon due process rights. Prohibiting the BIA from remanding a case based on new evidence in all but the most limited of circumstances cannot be squared with this constitutional mandate. Indeed, federal courts have specifically held that the BIA's failure to consider new evidence implicates due process rights. *See, e.g.*, *Alzainati v. Holder*, 568 F.3d 844, 850 (10th Cir. 2009) (explaining that the BIA's refusal "to consider new and pertinent evidence" implicates "due process rights"); *Hernandez v. Holder*, 412 F. App'x 155, 158 (10th Cir. 2011) ("[W]e retain jurisdiction to consider constitutional claims and questions of law, . . . including whether the BIA violated due process by ignoring new and pertinent evidence or case law.") (internal citation omitted); *Hanan v. Mukasey*, 519 F.3d 760, 764 (8th Cir. 2008) ("[A]n allegation of wholesale failure to consider evidence implicates due process.").

The Department proposes a blanket prohibition on remands based on new evidence with only three narrow exceptions: (1) new evidence that is the result of identity, law enforcement, or security investigations or examinations, including civil or criminal investigations of immigration fraud; (2) new evidence pertaining to a respondent's removability; and (3) new evidence that bears on an immigration court's jurisdiction. 85 Fed. Reg. 52491, 52500, 52511 (proposed rule 8 C.F.R. § 1003.1(d)(7)(v)(B)). But there are several other situations that may justify remand for further factfinding based on new evidence, including but not limited to cases involving respondents who become eligible for relief based on a change of law or fact while the appeal is pending. Consider, for instance, *In re Cristian Castro-Garcia*, 2010 WL 4500902, at *1 (BIA Oct. 18, 2010). In that case, a *pro se* respondent appealed a final removal order, arguing that the immigration judge violated his due process rights by denying his access to any attorney. *Id.* During the pendency of the appeal, the respondent submitted evidence to the Board that his wife had filed a Petition for Alien Relative. *Id.* Even though the respondent did not file a motion to remand based on that new evidence, the Board nonetheless remanded the case to the immigration court, reasoning that "the respondent should be provided a hearing to address whether he is eligible for adjustment of status." *Id.*

American Gateways has represented asylum seekers whose family members were killed while their case was pending on appeal, as well as non-legal permanent resident (non-LPR) cancellation of removal applicants whose qualifying relative fell ill during an appeal. Under the Proposed Rule, the BIA could no longer remand a case to address these changed circumstances. Such prohibition is a clear due process violation. *See, e.g.*, *Ramirez-Alejandre v. Ashcroft*, 319 F.3d 365, 378, 380 (9th Cir. 2003) (holding that BIA violated respondent's "right to due process of law by stating that it was entirely precluded from considering new evidence on appeal," including evidence regarding his daughter's "medical condition that had arisen subsequent to the IJ hearing"). *Id.* at 378. In this regard, the Department's proposal both exceeds its statutory authority and is contrary to constitutional right.[70]

[70] Under the Administrative Procedure Act (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 law; (B) contrary to constitutional right, power, privilege, or immunity;

Lastly (and unsurprisingly), the narrow exceptions proposed by the Department align with the types of evidence typically offered by DHS and would largely preserve the BIA's ability to remand cases based on unfavorable evidence presented by the government notwithstanding its inability to remand based on favorable evidence presented by respondents. This double standard is inherently unfair.

c. Sharply limiting the consideration of new evidence would disproportionately impact *pro se* respondents and other vulnerable people, including those seeking humanitarian protection.

According to EOIR statistics, the rate of representation in all matters pending before the agency is only 63%.[71] While representation rates vary across case types, unrepresented immigrants uniformly fare worse in terms of case outcomes. For example, in FY 2019, the overall asylum denial rate rose for the seventh straight year to over 69%.[72] The denial rate for unrepresented asylum seekers was much higher—a staggering 84%.[73] For those caged in detention facilities, circumstances are even more dire. Only 30% of detained immigrants are represented.[74]

Immigrants who are unrepresented face countless barriers in preparing and presenting their claims. Many do not speak English and have little, if any, familiarity with U.S. immigration law. Applications for relief must be submitted in English, or they will be deemed abandoned and the applicant ordered removed. Gathering evidence is challenging because individuals do not understand *what* evidence is relevant or *how* to obtain and present such evidence.[75] 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,"[76] 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 translate foreign language documents. Without counsel, few asylum seekers—many of whom are torture or trauma survivors who suffer from post-traumatic stress

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(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . . ." 5 U.S.C. § 706(2)(A)-(C).

[71] EOIR, *Adjudication Statistics: Representation Rates* (Apr. 15, 2020), https://www.justice.gov/eoir/page/file/1062991/download.

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

[73] *Id.*

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

[75] *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.").

[76] *Id.* at 173.

disorder or other mental health ailments—can access and present evidence in support of their claims.

American Gateways staff work inside four detention centers in Central Texas—T. Don Hutto Residential Center, South Texas Detention Complex, Karnes County Residential Center, and Limestone County Detention Center. With limited resources, it is impossible for American Gateways to represent the thousands of detainees who are seeking asylum. Hence, American Gateways staff often provides *pro se* assistance to detained individuals, helping them complete written applications that lay out the basic elements of their claims. Several of these individuals cannot reasonably access documentary evidence from their home countries to support their claims. To the extent their claims for relief are denied by the immigration judge and new, potentially outcome-determinative evidence becomes available for the first time on appeal, fairness dictates that the BIA should be permitted to consider the evidence and, if appropriate, remand the case back to the immigration judge for further proceedings. To the extent the BIA grants remands in these circumstances, it does so in the interests of justice, not because it has fallen prey to "gamesmanship," as the Department suggests.

None of the Department's proposed justifications, taken separately or together, outweighs the enhanced risk of due process violations under the Proposed Rule. As previously noted, the Department has failed to support its claim that the appellate process is rife with "gamesmanship" (aside from its own). The alleged "operational burden" of sending a case back to an immigration judge to consider new evidence is a problem largely of the government's own making, as immigration laws are so dense and complex that even experienced immigration attorneys struggle to navigate them. For *pro se* respondents, the laws are virtually inaccessible. And the fact that the proposed framework would permit respondents to "submit newly discovered or previously unavailable evidence as a part of a motion to reopen," 85 Fed. Reg. 52491, 52501, does not somehow rebalance the equities, particularly for *pro se* respondents. As the Department knows, motions to remand—unlike motions to reopen—are not subject to time and number limits, which means that respondents do not need to prove timeliness and are not required to use their single shot at a motion to reopen. Further, if respondents are unaware of the requirement that new evidence must be submitted as part of a request to reopen proceedings or inadvertently label their submission to the BIA as a motion to remand, rather than a motion to reconsider, consideration of their new evidence would, as a result, be foreclosed.

Finally, the egregiousness of the Department's promulgating a proposal to largely divest the BIA of its authority to remand cases based on new evidence in the midst of the global COVID-19 pandemic that has disrupted lives around the world cannot be overstated. The closure of government agencies and business, quarantines, and interruptions in package delivery services are but a few of several disruptions that have further hindered access to evidence, which is often located in distant countries. While the pandemic continues to upend daily lives on an unprecedented scale, the government's war against immigrants continues unabated. The Department's proposed changes to remand procedures are not only legally, but morally reprehensible.

d. The proposed amendments to remand procedures would not result in a more efficient appellate process.

The Department repeatedly asserts that reducing the number of cases remanded to immigration judges will create a more efficient system. In reality, adjudicatory burdens will merely be reallocated, not lessened. A BIA decision that denies due process does not involve the exercise of discretion and, therefore, does not preclude review of due process challenges. *See Antonio–Cruz v. INS*, 147 F.3d 1129, 1130 (9th Cir. 1998) ("This court has jurisdiction to hear due process challenges to immigration decisions."). Because federal courts retain the power to review constitutional due process challenges to immigration decisions notwithstanding any statutory limitations on judicial review, the proposed changes to remand procedures will only lead to the proliferation of petitions for review and lawsuits in federal courts.

3. Prohibiting the BIA from remanding cases based on the "totality of the circumstances" would impede the exercise of judicial discretion and yield unjust results.

The BIA utilizes "totality of the circumstances" review to prevent clear miscarriages of justice, often in cases that do not fit neatly into a complex regulatory framework that cramps judicial decision-making. For example, the BIA has remanded cases based on the "totality of the circumstances" where a respondent was provided with only a brief time to prepare his applications for relief and it was "unclear whether he understood the consequences of not filing his applications in a timely manner," *In re Virgilio Fidelino Cifuentes*, 2017 WL 1951518, at *1 (BIA Apr. 13, 2017); where a respondent, who was the father of two U.S. citizen children, was eligible but failed to apply for cancellation of removal because he "reasonably [but mistakenly] believed that he would be eligible to adjust his status to a lawful permanent resident of the United States based upon his marriage," *In re Oswaldo Raul Herrera-Baltazar*, 2016 WL 6392691, at *1 (BIA Aug. 30, 2016); where a respondent "was not given a meaningful opportunity to request voluntary departure due to a misunderstanding," *In re Jose Miguel Rocha-Leal A.K.A. Jose Rocha*, 2017 WL 4418350, at *1 (BIA July 18, 2017); where a respondent received ineffective assistance of counsel, *In re Yefri Bertin Sorto-Hernandez*, 2016 WL 3226657, at *2 (BIA May 6, 2016); and where the immigration judge improperly denied a request by newly-retained counsel to continue the proceedings to allow respondent to complete an application for relief, *In re Mubarak O. Raifiu*, 2017 WL 1230009, at *1 (BIA Feb. 27, 2017). As evident from these few examples, the BIA has historically relied on "totality of the circumstances" review to ensure fair outcomes, often for *pro se* respondents, including those who did not pursue relief because they misunderstood their rights or did not have a fair opportunity to present their claims due to lack of representation.

Consider the case of Ms. M.P., a *pro se* respondent who was detained. She could not afford an attorney and, due to an increase in the number of detainees at the detention center where Ms. M.P. was held, American Gateways was unable to offer *pro se* assistance to her in filing her asylum application by the deadline set by the immigration judge. Ms. M.P. had not previously requested a continuance from the immigration judge and sought one in this instance, explaining that she could not complete the application in English, a language she did not speak or read. Ms. M.P. asked for a two-week continuance, which would have allowed staff at American Gateways to assist her with a translation for her asylum application. The immigration judge denied this request and

ordered Ms. M.P. removed. American Gateways represented Ms. M.P. on appeal as her right to due process had clearly been denied. The BIA found that Ms. M.P.'s request for a two-week continuance was wholly reasonable and, based on the totality of the circumstances, remanded the case back to the immigration judge to give Ms. M.P. the opportunity to apply for asylum.

American Gateways opposes eliminating a vital tool that permits the BIA to exercise its discretion in favor of respondents as justice requires. The Department's only complaint regarding the BIA's "totality of the circumstances" remand practice is that the standard lacks an express "statutory or regulatory basis." 85 Fed. Reg. 52491, 52501. The Department's proposed solution—eliminate it. *See* 85 Fed. Reg. 52491, 52511 (proposed 8 C.F.R. § 1003.1(d)(7)(ii)(B)). The Department alleges neither that the BIA has abused the standard, nor that the standard has resulted in incorrect or unfair case outcomes. The only conceivable purpose of the change is to remind board members that they are "the attorney general's proxies for enforcing deportations," not independent adjudicators.[77]

4. Strictly limiting the scope of remand is improper and unfair.

The Department does not only seek to bar the BIA from remanding cases in most circumstances, but to limit the issues that an immigration judge would be permitted to consider in the rare instances in which remand would be authorized. *See* 85 Fed. Reg. 52491, 52511 (proposed 8 C.F.R. § 1003.1(d)(7)(iii)). In cases remanded for the completion of identity, law enforcement or security investigations, or for the court to determine questions of removability or jurisdiction (effectively the only types of remand that would survive implementation of the Proposed Rule), the immigration judge would be prohibited from considering any other issues even though the BIA would also divest itself of jurisdiction. *Id.* Were a new avenue of relief to become available while a respondent awaits her individual hearing—a likelihood that only continues to increase as the pace of adjudications has slowed even further amidst the public health crisis—the immigration judge would not be allowed to consider those changed circumstances or grant relief. Similarly, if a respondent identifies other errors in the immigration judge's prior decision, the judge would not be allowed to grant relief upon remand even in the face of clear error. Instead, immigration judges would be *required* to issue an order of removal, senselessly and unfairly depriving the respondent of an opportunity to obtain legal status. American Gateways opposes the Department's invidious attempt to force immigration judges to improperly issue removal orders under the guise of eliminating "confusion" *for* immigration judges. *See* 85 Fed. Reg. 52491, 52502. As the Department well knows, limiting the scope of remand would harm respondents and immigration judges alike, whose independence would be further eroded for political gain.

[77] Innovation Law Lab & S. Poverty Law Ctr., *supra* note 2, at 3.

D. The Department's proposal to allow immigration judges to certify decisions to the EOIR Director for review has separation-of-powers and due-process implications.

1. The "quality assurance" certification procedure contravenes an established appeals structure and would exposes immigration court decisions to political influence.

The United States judicial system has an established appeals structure, whereby a judicial body is the final authority on a matter. For matters involving immigration law, the Board serves as the appellate authority whose decisions are subject to review by the Attorney General and, in certain cases, by federal courts. However, the Proposed Rule seeks to create another level of authority above the Board by allowing immigration judges to certify cases to the EOIR Director (the "Director") for review. Apart from deviating from an established appeals structure that mirrors other federal agencies,[78] the Proposed Rule raises several other concerns.

First, the Proposed Rule creates a mechanism by which an immigration judge can bypass the ruling of the Board and bring a case to the Director, who is a political appointee,[79] for review. This mechanism would allow immigration judges who may be politically aligned with the Director to seek review in hopes of a different outcome. Further, the vesting of the review authority in the Director alone creates an opportunity for review decisions to be made consistent with the Director's own political ideologies. Also, the Director is not a judicial body. If, as the Department claims, immigration judges are "in the best position to identify error made by the BIA" and that another level of review is warranted, 85 Fed. Reg. 52491, 52502, then, at a minimum, a review of Board decisions should be made by other experts in immigration law or another independent body, not by the Director.

Second, the Department claims that the Proposed Rule is needed because (1) the court system lacks a "clear mechanism to efficiently address concerns regarding errors made by the BIA in reopening or remanding proceedings" and (2) existing procedures are inefficient, namely that the process for filing a motion to reconsider is "cumbersome, time-consuming, and may not fully address the

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[78] *See, e.g.*, U.S. Sec. and Exch. Comm'n Office of Admin. L. Judges (Jan. 26, 2017), https://www.sec.gov/page/aljsectionlanding (an administrative law judge's decision is subject to review by a five-member, bi-partisan Commission, whose decisions are subject to further appeals to an appropriate U.S. Court of Appeals); U.S. Internal Revenue Serv. Taxpayer Advocate Service, https://taxpayeradvocate.irs.gov/taxpayer-rights/right-5 (IRS decisions can be appealed with the independent Office of Appeals or the United States Tax Court, and, in some cases, issues can be brought in a United States District Court or the United States Court of Federal Claims).

[79] The EOIR Director is appointed by the attorney general. 8 C.F.R. § 1003.0(a). Despite the Director being a political appointee, the Department claims that its proposed certification procedure is designed "[t]o ensure a neutral arbiter between the immigration judge and the Board." 85 Fed. Reg. 52491, 52502. This claim is risible. A career government attorney appointed as EOIR Director by former Attorney General Sessions in January 2018 (following a seven-month tenure as Acting Director of EOIR), McHenry has overseen the implementation of case quotas for immigration judges, the covert manipulation of BIA hiring procedures to appoint immigration judges with high denial rates, the implementation of a policy restricting immigration judges' ability to speak about immigration matters, even in their personal capacity, and efforts to decertify the immigration judges' union, to name just a few less-than-neutral policy changes. *See* Dep't of Justice, Office of Public Affairs, *Attorney General Sessions Announces Appointment of James McHenry as Director of the Executive Office of Immigration Review* (Jan. 10, 2018); *see also supra* Section I.B (discussing several additional actions taken to erode the independence of immigration judges and the BIA).

alleged error." 85 Fed. Reg. 52491, 52502. The Department further complains that the process for filing subsequent appeals with the BIA or federal circuit courts is time-consuming. But the Attorney General—whose authority is itself problematic because of the potential for political influence and rulemaking without public input, *see supra* Section I.C—already has the authority to review cases brought before the Board.[80] Delegating to the Director a similar authority to review Board decisions would simply expand these existing abuses, further divesting power from the BIA and consolidating it into a single political appointee.

If the Department sincerely believes that current processes in place for the adjudication of appeals are unclear and inefficient, the Department should engage in reasoned decision-making and implement procedures to solve the issues with the current appeals system, not promulgate a proposal that contravenes an established appellate structure by adding a third avenue for appeal to a political appointee.

2. The proposed certification procedure would violate due process because it does not provide the parties with an opportunity to respond to a review of Board decisions.

The Department's proposal raises due process concerns because the certification process would not include the parties involved. The Proposed Rule would only require "notice of the certification to both parties" and does not provide for an opportunity for either party to respond to the certification for review. 85 Fed. Reg. 52491, 52512 (proposed 8 C.F.R. § 1003.1(k)(2)(iii)). In the current procedure for a motion to reconsider, the non-moving party has an opportunity to respond. *See* 8 C.F.R. § 1003.2(g)(3). Likewise, petitions and appeals filed with the Federal Circuit Courts of Appeal allow for the non-moving party to respond. The "quality assurance" process, on the other hand, would strip the parties of their right to be heard in a proceeding that ultimately impacts them. If the Department declines to withdraw this proposal, it should, at a minimum, include a mechanism for parties to respond to any further review.

3. The proposed certification procedure openly encourages immigration judges to dispense with due process for personal gain.

In its prefatory comments, the Department notes that "an erroneous remand by the BIA inappropriately affects an immigration judge's performance evaluation by affecting that judge's remand rate, which is a component of the judge's performance evaluation." 85 Fed. Reg. 52491, 52502. In doing so, the Department candidly reminds immigration judges that they can fired at the whim of the Department and encourages them to leverage the certification procedure to improve their own performance evaluations. As with performance quotas, the certification procedure puts judges in an untenable position—they can enhance their personal interests in job security by certifying decisions remanded by the BIA to the Director, but only at the expense of due process.[81]

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[80] *See generally* Margaret H. Taylor, *Midnight Agency Adjudication: Attorney General Review of Board of Immigration Appeals Decisions*, 102 Iowa L. Rev. Online (2016); Laura S. Trice, *Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions*, 85 N.Y.U. L. Rev. (2010).

[81] *See supra* Section I.B at 3 & n.5.

4. The standards for allowing review by the Director are vague and would allow for too much discretion in reviewing the Board's decisions.

Although the Proposed Rule expressly states that the quality assurance certification process "shall not be used as a basis solely to express disapproval of or disagreement with . . . a Board decision," 85 Fed. Reg. 52491, 52512 (proposed 8 C.F.R. § 1003.1(k)(4)), the factors that would permit an immigration judge to certify a case to the Director for review are broad and do not provide clear standards, *id.* (proposed 8 C.F.R. § 1003.1(k)(1)(i)-(iv)). For example, it is unclear what it means for a Board decision to be "vague," "ambiguous," or "internally inconsistent." *Id.* (proposed 8 C.F.R. § 1003.2(k)(1)(iii)). Similarly, the Department does not define "material factor" or explain when such factor would be deemed "pertinent" enough to the issues under consideration to permit certification. *Id.* (proposed 8 C.F.R. § 1003.2(k)(1)(iv)). These broad and ambiguous standards would give too much latitude to immigration judges to certify cases to the Director, thereby creating avenues for immigration judges to seek review simply because they do not agree with a Board decision (or need to improve their remand rate to attain a satisfactory performance evaluation). If the Department implements a procedure allowing for immigration judges to certify cases to the Director for review—which implementation American Gateways strongly opposes—it should, at minimum, carefully delineate the very specific circumstances under which certification would be permitted. As drafted, the Proposed Rule is vulnerable to widespread misuse and abuse.

American Gateways further objects to the Department's misleading claim that its proposed "quality assurance" measures are similar to those of other administrative adjudicatory agencies. *See* 85 Fed. Reg. 52491, 52496. The only source the Department cites to support this claim is the Social Security Administration's (SSA) *Hearings, Appeals, and Litigation Law Manual*, which outlines the circumstances under which administrative law judges (ALJs) may seek clarification of remand orders from the SSA Appeals Council. *Id.* Unlike the Department's instant proposal, the procedure utilized by the SSA defines two limited circumstances in which an ALJ may seek clarification of a remand order: (1) when the ALJ "cannot carry out the directive(s) set forth in the remand order" and (2) when the "directive(s) in the remand order appears to have been rendered moot."[82] "ALJs may not seek clarification of [Appeals Council] remand orders under any other circumstances."[83] The SSA has also implemented an Appeals Council Feedback Initiative (ACFI) that permits ALJs to refer certain remand orders, including those that are "unclear," "demonstrate inconsistent application of policy," or contain "only insignificant errors that would not likely result in federal court remand," to the regional office for the purpose of facilitating discussion, identifying training needs, and formulating policy recommendations.[84] Importantly, referral to the ACFI "does not delay or impact the way an ALJ handles a case. Despite an ACFI referral, the ALJ will follow normal case procedures and act on the remand in a timely manner."[85] In other words, the ACFI process is mechanism for facilitating feedback, not challenging remand orders.

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[82] Soc. Sec. Admin., *Hearings, Appeals, and Litigation Law Manual* § I-2-1-85(A), https://www.ssa.gov/OP_Home/hallex/I-02/I-2-1-85.html.

[83] *Id.*

[84] *Id.* at § I-2-1-88(A)-(C), https://www.ssa.gov/OP_Home/hallex/I-02/I-2-1-88.html.

[85] *Id.* at § I-2-1-88 (B). When a case is referred through ACFI, a referral may be sent to the Office of the Chief Administrative Law Judge who may, in turn, elect to forward the referral to the Appeals counsel who will "evaluate the issues and take any necessary action to provide feedback to the appropriate individuals in the Office of Appellate Operations." *Id.* at § I-2-1-88 (C).

Hence, the SSA's procedure for seeking clarification of remand orders is quite *different* from that proposed by the Department. ALJs can seek clarification of remand orders in only two well-defined circumstances and, even then, clarification is sought *from* the Appeals Council that issued the remand order, not a political appointee that presides over the Appeals Council. Under the Proposed Rule, immigration judges could certify a remand order for almost any reason and the certification procedure would automatically *bypass* the appellate body that issued the remand order, permitting the Director to instead review the certification. The dissimilarity between the two procedures highlights that the Department's real goal is not "quality assurance" but enhanced political control.

E. Codifying *Matter of Castro-Tum* would further impede the efficient management of the immigration court system while undermining the rights of immigrants in removal proceedings.

The Proposed Rule would explicitly foreclose the BIA's and immigration judges' authority to administratively close cases. 85 Fed. Reg. 52491, 52503-04. Specifically, "[t]he Department proposes to amend § 8 CFR 1003.1(d)(1)(ii) and 1003.10(b) to make clear that those provisions—and similar provisions in 8 CFR part 1240—provide no freestanding authority for immigration judges or Board members to administratively close immigration cases absent an express regulatory or judicially approved settlement basis to do so." *Id.* The Department's proposal to codify *Matter of Castro-Tum* and expand its application to the BIA is not only arbitrary and capricious, but also violates Executive Orders 12866 and 13563, which 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.[86]

Administrative closure is an important docketing tool that immigration courts had, until recently, used to temporarily remove a case from their active docket or calendar. For more than three decades, administration closure allowed immigration judges to prioritize cases most in need of immediate resolution and deprioritize cases where there was not an urgent need for fast resolution. *See, e.g.*, *Penn-Am. Ins. Co. v. Mapp*, 521 F.3d 290, 295 (4th Cir. 2008) (explaining how district courts may administratively close cases, thereby removing them from the active docket, as a docket management tool).[87] In many instances, immigration judges used administrative closure to give respondents in removal proceedings an opportunity to pursue other forms of relief for which they were eligible. *See Romero v. Barr*, 937 F.3d 282, 287 (4th Cir. 2019) ("[A]dministrative closure is a procedural mechanism primarily employed for the convenience of the adjudicator (namely, IJs and the BIA) in order to allow cases to be removed from the active dockets of immigration courts, often so that individuals can pursue alternate immigration remedies. . . ."). In response to an invitation for briefing in *Matter of Castro-Tum*, the National Association of Immigration Judges (NAIJ) discussed the importance of administrative closure, specifically warning then-Attorney

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[86] Exec. Order No. 12866 (1993), https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf; Exec. Order No. 13563 (2011), https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review; 85 Fed. Reg. 52491, 52509 (explaining that the Department "has determined that this rule is a 'significant regulatory action'" under Executive Order 12866).

[87] *See also* Elizabeth Montano, *The Rise and Fall of Administrative Closure in Immigration Courts*, 129 Yale L. J. (Feb. 11, 2020), https://www.yalelawjournal.org/forum/the-rise-and-fall-of-administrative-closure-in-immigration-courts.

General Jeff Sessions that "[l]eaving [Immigration Judges] without this useful docket management tool will result in an enormous increase in our already massive backlog of cases, which will overwhelm the system and require [Immigration Judges] to spend a substantial amount of time and resources on cases that would be handled more efficiently if administratively closed."[88] Sessions flatly disregarded this cautionary advice from the very individuals who are primarily responsible for docket management, and their dire predictions have since come true.

In May 2018, Sessions ended the decades-long administrative closure practice in *Matter of Castro-Tum*—a case he certified to himself for decision. 27 I&N Dec. 271 (AG 2018). Specifically, Sessions held that immigration judges "lack a general authority to administratively close cases" because no regulation expressly grants them such authority. *Id.* at 282-83, 293. He also called for cases that had previously been administratively closed to be put back on the docket. *Id.* at 292-93. The consequences have been devastating.

A move allegedly designed to reduce a growing case backlog and maximize docket efficiency has instead had the opposite effect, worsening the case backlog and hindering the efficient management of the immigration court system. Both federal circuit courts and the BIA have acknowledged that administrative closure *facilitates* the "efficient[ ] management of [court] resources." *Romero*, 937 F.3d at 289 (quoting *Matter of Avetisyan*, 25 I&N Dec. 688, 695 (BIA 2012)) (first alteration in original). The Department's contrary claim that administrative closure impedes efficiency and contributed to the growth in the case backlog between 2012 and 2018 is specious. *See* 85 Fed. Reg. 52491, 52504 ("This marked decline in productivity, which is correlated with the increase in the use of administrative closure caused by *Matter of Avetisyan*, unquestionably exacerbated the growth in the pending caseload during that time period.") (emphasis added). Mere correlation between case completion statistics and the use of administrative closure does not establish any causal relationship between the two. Several factors impact case completion numbers, including the number of active immigration judges and whether they are made to work under undue pressures to churn out decisions, such as the onerous quotas imposed on immigration judges the very same year *Matter of Castro-Tum* was decided. The Department's claim is further undermined by an October 2017 EOIR memorandum in which the EOIR itself warned the DOJ that DHS's "potential activation of almost 350,000 low priority cases or cases that were not ready to be adjudicated could *balloon the backlog*."[89] The Department conveniently omits that EOIR's prediction was correct—the number of pending cases has continued to outpace the number of cases completed such that the overall backlog has actually *worsened* since *Matter of Castro-Tum* was decided.[90] The Department's self-serving selection and gross manipulation of data to arrive at its ultimate conclusion that administrative closure has "failed as a policy matter and is unsupported by the law," 85 Fed Reg. 52491, 52504, renders its

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[88] Email from A. Ashley Tabaddor, President, Nat'l Ass'n of Immigration Judges, to Hon. Jefferson B. Sessions, U.S. Att'y Gen. 5 (Jan. 30, 2018) (on file with the American Immigration Lawyers Association, Doc. No. 18051752) [hereinafter Letter from NAIJ].

[89] AILA, *supra* note 6, at 1 (emphasis added). EOIR's "Strategic Caseload Reduction Plan" advised the DOJ that "any burst of case initiation by a DHS component could seriously compromise EOIR's ability to address its caseload and greatly exacerbate the current state of the backlog." *Id.* (quoting *EOIR Strategic Caseload Reduction Plan*).

[90] Between the end of FY 2018 and August 2020, the number of pending cases *increased* nearly 35% (from 142,521 to 191,774). *See* TRAC Immigration, *Immigration Court Backlog Tool*, https://trac.syr.edu/phptools/immigration/court_backlog/.

ultimate recommendation that administrative closure be "clearly prohibited," *id.*, not only poor policymaking, but impermissible administrative rulemaking.

Notably, in 2019, the Fourth Circuit overturned *Matter of Castro-Tum*, concluding that immigration judges have an inherent authority to control their dockets. *See Romero*, 937 F.3d at 292, 297. The Seventh Circuit reached the same conclusion earlier this year. *Meza Morales v. Barr*, No. 19-1999, 2020 WL 5268986, at *8-9 (7th Cir. June 26, 2020). In both cases, the court highlighted that the governing regulations afford immigration judges and the BIA discretion to exercise their independent judgment and "take *any action* consistent with their authorities under the [INA] and regulations that is *appropriate and necessary* for the disposition of" the case. *Romero*, 937 F.3d at 288 (quoting 8 C.F.R. § 1003.10(b), 8 C.F.R. § 1003.1(d)(1)(ii)) (emphasis in original); *Meza Morales*, 2020 WL 5268986, at *8 (same); *see also* 8 C.F.R. § 1240.1(a) (providing that immigration judges shall have the authority in any removal proceeding to "[d]etermine removability," "make decisions, including orders of removal," "determine applications," "order withholding of removal," and "take any other action consistent with applicable law and regulations as may be appropriate").[91]

Codifying the elimination of administrative closure (and thereby abrogating *Romero* and *Meza Morales*) would continue to tie the hands of adjudicators—immigration judges and Board members alike—preventing them from prioritizing cases to achieve just and efficient results. Forcing adjudicators to treat all cases as equal priorities without any regard for the individual circumstances of each case will add cases to the already-substantial backlog and interfere with efficient docket management. Moreover, keeping this critical docket management tool out of the hands of adjudicators during an unprecedent global pandemic, which has brought most non-detained proceedings to a near-halt and made docket management all the more chaotic, defies logic.

American Gateways further objects to the Department's proposal to enshrine the *Castro-Tum* decision into regulation because administrative closure is an effective procedural tool for protecting the due process rights of respondents in pending removal proceedings. This is especially true in situations where respondents are pursuing relief that would render removal proceedings obsolete. *See, e.g.*, *Meza Morales*, 2020 WL 5268986, at *8 ("[C]ases must be disposed of fairly, and granting a noncitizen the opportunity to pursue relief to which she is entitled may be appropriate and necessary for a fair disposition."); *Vahora v. Holder*, 626 F.3d 907, 918 (7th Cir. 2010) (explaining that the decision to administratively close a case "can affect an individual's liberty and thus infringe upon areas that courts are often called upon to protect") (citation and quotations omitted). These situations include, but are not limited to: (1) administrative closure of a case of an unaccompanied minor when the minor's application for asylum is pending before USCIS; (2) administrative closure of a case of a minor applying for Special Immigrant Juvenile Status (SIJS) before a state court; (3) administrative closure of a case with a U visa application for which USCIS has found the alien is *prima facie* eligible; or (4)

[91] Citing *Romero*, the Department erroneously contends that "administrative closure continues to drive litigation and cause inconsistent application of immigration laws." 85 Fed. Reg. 52491, 52497. Yet, the Department does not point to any litigation challenging administrative closure. As *Romero* and *Meza Morales* make clear, the Attorney General's *Castro-Tum* decision, not administrative closure itself, has given rise to litigation.

administrative closure of a matter in which a visa petition for an immediate relative has been filed for which an alien appears *prima facie* eligible.[92]

Additionally, eliminating administrative closure has had the harshest impact on some of the most vulnerable individuals seeking humanitarian relief over which USCIS has exclusive jurisdiction. Children who are pursuing SIJS and crime victims pursuing U visas, to name just a few, may all face removal before USCIS adjudicates their applications for relief. This risk has been further heightened by COVID-19, which has caused USCIS to slow down the processing of almost all types of applications.[93]

Consider the following cases, which underscore the importance of administrative closure for particularly vulnerable immigrant groups:

- American Gateways client Ms. G.S. was placed in removal proceedings upon entry to the United States. She was released on her own recognizance and appeared at all of her immigration court hearings. During this time, she was attacked and sexually assaulted. She reported this crime to the police and assisted in the investigation against her attacker, who was eventually arrested and prosecuted. Ms. G.S. also assisted in the prosecution of the sexual assault. She filed a petition for U nonimmigrant status and was granted provisional U nonimmigrant status but given deferred action status because no visa was available at the time of the provisional grant. American Gateways requested that Ms. G.S.'s case be administratively closed until her U visa could be granted. DHS did not oppose the request, and the immigration judge granted administrative closure. Approximately 18 months later, when a U visa became available, Ms. G.S. requested that the proceedings against her be re-calendared and then sought termination based on the U visa grant.

- In 2014, American Gateways client Ms. V was granted deferred action status based on Deferred Action for Childhood Arrivals (DACA). She had graduated high school and was enrolled in college classes at a local community college. Because she had been granted deferred action under DACA, DHS agreed to administratively close Ms. V's removal proceedings. Pursuant to this agreement, the immigration judge granted administrative closure.

Under the Proposed Rule, individuals like Ms. G.S. and Ms. V. could be removed notwithstanding their clear eligibility for relief.

The Proposed Rule would also make it more difficult for immediate relatives of U.S. citizens (USCs) and legal permanent residents (LPRs) to obtain provisional waivers and legalize their immigration status. Noncitizens who are in removal proceedings cannot obtain a provisional waiver based on extreme hardship to a U.S. citizen or permanent resident spouse or parent unless

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92 *Id*. at 2.

93 *See* AILA, *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) (discussing how COVID-19 pandemic has increased USCIS processing times).

their removal proceedings are administratively closed or terminated.[94] By explicitly stripping judges and the BIA of the ability to administratively close cases, the Department has improperly used a backdoor to end provisional waiver eligibility for many noncitizens in removal proceedings.[95]

Take, for example, the case of American Gateways client Ms. X, who is currently in removal proceedings. With the assistance of prior counsel, Ms. X's case was administratively closed based on the grant of a USC spouse petition. Because Ms. X entered the United States without inspection, she must go back to her country to complete the consular process. However, going back to her country would trigger a 10-year bar on admissibility because she accrued more than one year of unlawful presence in the United States. Because her case was administratively closed, Ms. X can instead apply for a provisional waiver of that ground of inadmissibility while remaining in the U.S. If the provisional waiver is granted, consular processing in her home country will take mere days rather than months (or probably over a year with current wait times on the waiver and consular appointments). As noted above, without administrative closure, Ms. X would not have been eligible for the waiver. Thankfully, through another representative, she filed her provisional waiver application *two days* before the immigration judge re-calendared proceedings under *Matter of Castro-Tum* and, therefore, is eligible for the waiver. Her provisional waiver application remains pending.

Nowhere in the Proposed Rule or its preface does the Department acknowledge that administrative closure affords respondents in removal proceedings an opportunity to pursue other forms of relief for which they are eligible. Relatedly, it does not consider the severe harms (e.g., deportation) that would befall respondents if *Matter of Castro-Tum* is codified, much less that the risk of such harm only continues to escalate given the impacts of the ongoing COVID-19 pandemic on USCIS operations. Hence, even if the Department's purported efficiency goals had any validity—which they do not—the Department's assessment of the problem and proposed solution is wholly one-sided. As the court aptly stated in *Meza Morales*: "Immigration laws and regulations, like all laws and regulations, are the product of compromise over competing policy goals. Expeditiousness may be one such goal [underlying immigration law], but it is not the only goal." *Meza Morales*, 2020 WL 5268986, at *8. Here, the Department's failure to fully and fairly assess the costs and benefits of eliminating administrative closure violates basic tenets of agency rulemaking, which require consideration of all aspects of a given issue. The Department's warped analysis also violates the executive mandate that agencies assess all costs and benefits of regulatory changes.

Lastly, American Gateways submits that the Proposed Rule is an improper assertion of sovereignty designed to further consolidate power over immigration proceedings in the executive and expand political control within the immigration court system. The administration has already taken several

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[94] 8 C.F.R. § 212.7(e)(4)(iii); *see also* Ariel Brown, *I-601A Provisional Waiver: Process, Updates, and Pitfalls to Avoid*, Immigrant Legal Resource Center (June 2019), at 5-6, https://www.ilrc.org/sites/default/files/resources/i-601a_process._updates._and_pitfalls_to_avoid_june_2019.pdf (discussing how *Matter of Castro-Tum* has made it more difficult to pursue the provisional waiver process).

[95] Following *Matter of Castro-Tum*, the Attorney General issued *Matter of S-O-G- & F-D-B-*, which held that immigration judges "have no inherent authority to terminate or dismiss removal proceedings" and, therefore, can only terminate cases in the specific circumstances identified in the regulations or when DHS fails to sustain the charges of removability. 27 I&N Dec. 462, 463 (AG 2018). This additional obstacle has made it even more difficult for individuals in removal proceedings to apply for provisional waivers. *See* Brown, *supra* note 94, at 7.

steps to erode the judicial independence of immigration judges and the BIA. As discussed herein, *see supra* Section I.B, and summarized in a joint June 2019 report published by the Southern Poverty Law Center and Innovation Law Lab, the administration has transformed immigration courts into a "weapon of deterrence and deportation:"[96]

> The attorneys general have interfered with immigration judges' control of their courtrooms by reassigning case dockets to align with enforcement priorities and attacking crucial case management tools. In contravention of every known norm respecting impartiality, the attorneys general have pitted immigration judges against due process by threatening to punish—and even fire—judges for failing to meet enforcement-driven quotas.[97]

Although the Department couches the codification of *Matter of Castro-Tum* as a move designed to "eliminate any residual confusion regarding the scope of" the regulations governing administrative closure, 85 Fed. Reg. 52491, 52503, the Department's motivations are transparent. In the preface to the Proposed Rule, the Department reiterates that prosecutorial functions are vested solely with DHS and that the "authority to defer the adjudication of cases lies with EOIR leadership,"—namely, the Director, the Board Chairman, and the Chief Immigration Judge—"not with individual Board members or immigration judges themselves." *Id.* In other words, the nation's immigration courts belong to the Attorney General, who has full right and power over the court system and who will not tolerate interference from neutral immigration judges or Board members whose "powers" the Department describes as "sharply limited." 85 Fed. Reg. 52491, 52497 (citation omitted). As evidenced by the current line-up of EOIR leadership, the Attorney General can quite easily manipulate the court system to advance a political agenda that undermines the just administration of immigration laws. The Department now seeks to further gut the sparse vestiges of fairness, neutrality, and judicial independence. American Gateways urges the Department to rescind its administrative closure proposal.

F. The Proposed Rule would largely eliminate the BIA's and immigration judges' *sua sponte* authority to reopen or reconsider cases.

The Department proposes to withdraw the BIA's and immigration judges' authority to reopen a case or reconsider a decision, on its own motion, unless to "correct a ministerial mistake or typographical error . . . or to reissue the decision to correct a defect in service." 85 Fed. Reg. 52491, 52512 (proposed 8 C.F.R. § 1003.2(a)), 52513 (proposed 8 C.F.R. § 1003.23(b)(1)). The Department is concerned that the current *sua sponte* powers of the BIA and immigration judges are problematic because (1) aliens improperly invite the BIA or immigration judges to use their discretion to circumvent procedural rules; (2) the "exceptional situations" standard used to invoke such powers is insufficiently defined; and (3) no meaningful standards exist to review the BIA's or immigration judges' decisions.

Congress and the Attorney General have entrusted the BIA and immigration judges with the ability to intervene in cases where fundamental fairness and the interests of justice so warrant. *See Matter*

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96 Innovation Law Lab & S. Poverty Law Ctr., *supra* note 2, at 10.

97 *Id*. at 3.

of Roman, 19 I&N Dec. 855, 856-57 (BIA 1988) (permitting collateral attack on a prior proceeding where there was "a gross miscarriage of justice" in that proceeding); *see also Matter of Ng*, 17 I&N Dec. 63 (BIA 1979) (involving a grant of *nunc pro tunc* permission to reapply for admission after deportation); *Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976) (same); *Matter of Vrettakos*, 14 I&N Dec. 593 (BIA 1974) (same); *Matter of S-N-*, 6 I&N Dec. 73 (AG 1954) (same). The Department's proposed changes now seek to strip the BIA and immigration judges of that trust in favor of rendering them puppets to perpetuate the will of the Department. The Department's concerns can be ameliorated in other ways, without impeding the rights of immigrants to a fair and informed resolution. Its proposed changes should not be adopted.

1. The BIA and immigration judges are capable of rejecting improper "invitations."

The Department's chief complaint appears to be that "aliens often invite the BIA and immigration judges to reopen or reconsider a case *sua sponte* where the alien's motion for such an action was untimely or otherwise procedurally improper." 85 Fed. Reg. 52491, 52504. Those circumstances underscore the need for such discretion by the BIA and immigration judges. A respondent who has been sidelined by a missed deadline—while demonstrating exceptional circumstances requiring attention—presents precisely the type of case that requires the exercise of discretion.

The BIA is no stranger to denying motions that are untimely or frivolous. *See, e.g.*, *In re G-D-,* 22 I&N Dec. 1132, 1133-36 (BIA 1999) (denying motion to reconsider as untimely and declining to exercise discretion); *In re J-J-*, 21 I&N Dec. 976 (BIA 1997) (denying both motion to reconsider and motion to reopen as untimely). The delegation of authority to adjudicate motions to reopen, however, allows them to recognize exceptional circumstances requiring their attention. *See In re X-G-W-*, 22 I&N Dec. 71, 71 (BIA 1998), *superseded on other grounds by regulation* (case reopened "because of the significant changes to the asylum law enacted by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996"); *In re G-C-L-*, 23 I&N Dec. 359 (BIA 2002) (case reopened to permit respondent to apply for asylum based on coercive population control policies); *see also Mahmood v. Holder*, 570 F.3d 466, 467 (2d. Cir. 2009) (remanding case to BIA to consider whether to exercise its discretionary *sua sponte* authority to reopen case).

The Department hangs its argument on the notion that a *sua sponte* order "is one necessarily independent of any party's motion or request." 85 Fed. Reg. 52491, 52504. Given overburdened dockets, the suggestion that immigration judges and Board members should (or even could) independently recognize and apply to specific cases changes in a respondent's circumstances is unrealistic. The current rule authorizes the BIA and immigration judges to "reopen or reconsider any case in which he or she has made a decision" "upon his or her own motion at any time." 8 C.F.R. §§ 1003.2(a), 1003.23(b)(1); *see also Singh v. Holder*, 771 F.3d 647, 649 (9th Cir. 2014) (holding that unambiguous statutory language permitting the Board to reopen or reconsider on its own motion any case in which it has rendered a decision authorizes the Board to reopen proceedings of an individual who is under a final order of removal in order to pursue adjustment of status). The rule neither proscribes suggestions or invitations to exercise discretion, nor restricts the means by which the Board or immigration judges may determine when or how to make their own motion. Practically speaking, adjudicators would be foreclosed from exercising any discretionary power if they were not first made aware of the exceptional circumstances giving rise to such consideration.

The Department has identified no decisions in which the Board has strayed from its holding that "[w]hen Congress passes laws, and agencies promulgate rules as directed by those laws, these acts are meant to have real and substantial effect." *In re J-J-*, 21 I&N Dec. at 984 (denying both motion to reconsider and motion to reopen as untimely); *see also In re G-D-*, 22 I&N Dec. at 1133-36 (BIA 1999) (denying motion to reconsider as untimely and declining to exercise discretion). The attorney general's current delegation of authority to the BIA and immigration judges to use discretion to reopen or reconsider cases presenting exceptional situations should not be disturbed.

2. The governing standard is sufficiently defined.

As the Department admits, the BIA has repeatedly "made clear that [its *sua sponte*] authority 'is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship.'" 85 Fed. Reg. 52491, 52497, 52504 (quoting *Matter of J-J-*, 21 I&N Dec. at 984). Instead, "[t]he Board retains limited discretionary powers under the regulations to reopen or reconsider cases sua sponte in unique situations where it would serve the interest of justice." *Matter of X-G-W-*, 22 I&N Dec. at 73. This power is not one which the BIA or immigration judges wield indiscriminately. Instead, they use their powers to act in the interest of justice, to respond to exceptional circumstances, and to further the administration of immigration laws. *See In re Yewondwosen*, 21 I&N Dec. 1025, 1027 (1997) (noting that governing regulations permit the Board to reopen for such reasons as "good cause, fairness, or [ ] administrative economy"); *Matter of Farinas*, 12 I&N Dec. 467, 472 (BIA 1967) (finding that a prior deportation order "can and must" be examined upon a showing of a gross miscarriage of justice); *Matter of Malone*, 11 I&N Dec. 730, 731 (BIA 1966) (same); *Matter of S-N-*, 6 I&N Dec. 73 (AG 1954) ("[I]t is a basic concept of the Board's appellate jurisdiction that it must do complete justice for the alien in a given case. . . ."). The Board has utilized its affirmative *sua sponte* authority as one method of "serv[ing] the interest of justice" and has, itself, invited other similarly situated applicants to move for reopening. *See In re X-G-W-*, 22 I&N Dec. at 73.

3. The Department can establish standards for review.

The Department complains that the discretionary authority to reopen cases or reconsider decisions should be abolished because "eleven federal circuit courts agree that, as a general matter, no meaningful standards exist to evaluate the BIA's decision not to reopen or reconsider a case based on *sua sponte* authority." 85 Fed. Red. 52491, 52505 (collecting cases). In fact, those courts have declined to review the BIA's decisions because they lack jurisdiction to do so—not because there is no meaningful standard of review. *See Lenis v. U.S.*, 525 F.3d 1291, 1292 (11th Cir. 2008) ("Ten courts of appeals have held that they have no jurisdiction to hear an appeal of the BIA's denial of a motion to reopen based on its sua sponte authority.") (citing *Luis v. INS*, 196 F.3d 36, 40 (1st Cir. 1999)); *Ali v. Gonzales*, 448 F.3d 515, 518 (2d Cir. 2006) (per curiam); *Calle-Vujiles v. Ashcroft*, 320 F.3d 472, 474-75 (3d Cir. 2003); *Doh v. Gonzales*, 193 Fed. App'x 245, 246 (4th Cir. 2006) (per curiam) (unpublished); *Enriquez-Alvarado v. Ashcroft*, 371 F.3d 246, 248-50 (5th Cir. 2004); *Harchenko v. INS*, 379 F.3d 405, 410-11 (6th Cir. 2004); *Pilch v. Ashcroft*, 353 F.3d 585, 586 (7th Cir. 2003); *Tamenut v. Mukasey*, 521 F.3d 1000, 1005 (8th Cir. 2008) (en banc) (per curiam); *Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002); *Belay-Gebru v. INS*, 327 F.3d 998, 1000-01 (10th Cir. 2003)).

The Department's concern also is unfounded because the Attorney General may review all cases the Attorney General directs the Board to refer to him or are otherwise referred by the Board or DHS. *See* 8 C.F.R. §§ 1003.1(d)(1); (h); *see also Gonzales-Veliz v. Barr,* 938 F.3d 219, 229 (5th Cir. 2019) (*"*The [BIA] shall refer to the Attorney General for review of its decision all cases that . . . [t]he Attorney General directs the [BIA] to refer to him.") (citation and quotation marks omitted). Thus, even if the Courts of Appeals are without jurisdiction to review certain BIA decisions, the Attorney General has the power to do so. American Gateways in no way condones the Attorneys General's overuse and abuse of the self-certification power under the current administration. *See supra* Section I.B. Nonetheless, the Departments' suggestion that it must divest immigration judges and the BIA of *sua sponte* authority because the Department is otherwise powerless to check alleged abuses or inconsistencies in the exercise of such authority is wholly disingenuous.

Were the Department concerned that BIA decisions are not eligible for judicial review or lack a meaningful standard of review, the Department could seek the passage of legislation and regulations designed to correct those shortcomings. That the Department has made no such proposal reveals that the purpose of this proposed change is to minimize judicial discretion and further transform the BIA into a tool for implementing the Department's policy preferences.

4. The regulations do not provide other adequate avenues to alleviate hardships imposed by time and number limits on motions to reopen or reconsider cases.

The Department contends that *sua sponte* authority is unnecessary because "the time or numerical limitations that would otherwise prompt a request for *sua sponte* reopening do not apply to joint motions to reopen. 85 Fed. Reg. 52491, 52505 (citing 8 C.F.R. § 1003.2(c)(iii)). The Department makes no mention of the fact that a joint motion to reopen requires a favorable exercise of prosecutorial discretion on the part of DHS. The current administration has instructed DHS to uniformly utilize this powerful tool *against* respondents, which means joint motions to reopen that could lead to a favorable result for the respondent are, as a practical matter, not a viable procedural substitute for *sua sponte* authority. In other words, the Department's proposal would simply shift the power to reopen cases notwithstanding time and number limitations from the Board and immigration judges to DHS prosecutors charged with enforcing the administration's anti-immigrant policies.

Similarly, permitting a respondent to file a motion to reopen notwithstanding the time and number bars when an intervening change in law or fact renders him no longer removable does not "ameliorate any deleterious effects of the withdrawal of such authority for respondents," as the Department asserts. 85 Fed. Reg. 52491, 52506. Where a motion to reopen is based on an intervening change in law or fact affecting a respondent's eligibility for relief or protection from removal, as opposed to a ground of removability, the respondent would remain subject to time and number limits. *See id.* at n. 35. Moreover, *pro se* respondents may not understand the procedure for filing a motion to reopen and are unlikely to recognize when an intervening change in law or fact impacts their removability. Eviscerating the *sua sponte* authority of immigration judges and the BIA will have a disproportionately harsh impact on *pro se* respondents.

G. The proposed time and number limitations on motions to reopen would prejudice immigrants while unfairly rewarding the government.

The Proposed Rule specifically exempts the Department from time and number bars on motions to reopen before the BIA, while respondents would be bound by these strict limitations. *See* 85 Fed. Reg. 52491, 52512 (proposed 8 C.F.R. § 1003.2(c)(3)(v), (vii)). Specifically, time and number limitations on motions to reopen do not apply to the Department, but respondents may file only one motion to reopen—and that motion must be filed within 30 days of entry of the final order. "The primary mission of the Executive Office for Immigration Review (EOIR) is to adjudicate immigration cases by fairly, expeditiously, and uniformly interpreting and administering the Nation's immigration laws."[98] A set of rules applying different standards to the two parties that appear before it cannot be fair or uniform in its application. Moreover, if an immigrant later becomes eligible for relief (*e.g.*, through an approved immediate relative immigrant petition, derivative asylum status through a spouse or parent, or approved SIJS application, or because they suffered ineffective assistance or counsel or extraordinary circumstances warrant reopening), that immigrant would be foreclosed from reopening their removal orders (despite the government's unfettered right to move as often as it desires).

Moreover, time and number limitations are set in order to facilitate the finality of judgments. By allowing the government to move to reopen with no limitations whatsoever, no immigrant who appears in court could ever feel fully secure that the grant of relief they received will not be relitigated in the future. The proposed change in 8 C.F.R. § 1003.2(c)(3)(vii), taken in conjunction with the proposal to remove the BIA's authority to *sua sponte* reopen cases or reconsider decisions, would unjustly foreclose an immigrant's ability to obtain available forms of relief.

H. The BIA's authority to self-certify cases for review of exceptional circumstances should not be eliminated.

The Department's concerns about the BIA's right to self-certify cases are similar to those raised in connection with the BIA's authority to reopen a case or reconsider a decision. *See supra* Section II.F. The same reasoning thus applies with regard to the Department's argument regarding its perceived lack of standards for exercising its *sua sponte* powers. Additionally, the Department itself recognizes that the Board will self-certify only to consider exceptional circumstances. 85 Fed. Reg. 52491, 52506 (citing *Matter of Jean*, 23 I&N Dec. at 380 n.9).

The Department further contends that the Board improperly and inconsistently uses self-certification in order to circumvent jurisdictional hurdles. To be sure, the self-certification provision grants the Board authority to exercise jurisdiction in specific enumerated circumstances. *See* 8 C.F.R. § 1003.1(c) (including decisions involving removal, deportation, and asylum). Yet the opinions the Department relies upon to support its proposal are inapposite. In order to demonstrate the BIA's alleged inconsistent use of its self-certification authority, the Department suggests comparing cases in which the Board properly exercised jurisdiction with *Matter of Sano*, 19 I&N Dec. 299, 300 (BIA 1985)—a case in which the Board determined that, upon the death of the original petitioner, the beneficiary-spouse had no standing to pursue the deceased's appeal. In

[98] EOIR, *About the Office*, U.S. Dep't of Justice, https://www.justice.gov/eoir/about-office (last visited Sept. 24, 2020).

the that case, the BIA held that its previous, similar decisions on standing were inappropriate and, thus, the Board no longer would follow them. In *Matter of Sano*, the BIA also held that because it was not authorized by regulation to hear the beneficiary's appeal, the BIA also could not exercise jurisdiction. In contrast, the remaining cases cited by the Department—much like the cases discussed *supra* involving untimely motions—involved the BIA's discretion to exercise jurisdiction over specifically authorized cases that facially involved exceptional situations, which is precisely the purpose of self-certification. *See, e.g.*, *In re Carlos Daniel Jarquin-Burgos*, 2019 WL 5067262, at *1 & n.1 (BIA Aug. 5, 2019) (accepting untimely appeal from removal proceedings (*see* 8 C.F.R. § 1003.1(b)(3)) but finding no exceptional circumstances to overturn immigration judge's decision); *In re Daniel Tipantasig-Matzaquiza*, 2016 WL 4976725, at *1 (BIA July 22, 2016) (setting aside potential jurisdictional issues from removal proceedings (*see* 8 C.F.R. § 1003.1(b)(3)), but finding no exceptional circumstances to overturn immigration judge's decision); *In re Rafael Antonio Hanze Fuentes A.K.A. Anthony Hanze*, 2011 WL 7071021, at *1 & n.1 (BIA Dec. 29, 2011) (same). Much like the Department's arguments about the lack of standards for finding exceptional circumstances under 8 C.F.R. §§1003.2(a) and 1003.23(b), the Department's concerns about self-certification are unfounded and, thus, do not support its proposed regulatory change.

The Department also expresses concerns about the BIA's ability to self-certify without providing notice to the parties. First, this argument is merely the inverse of (and thus inconsistent with) the position the Department takes with respect to how the BIA exercises its discretion to reopen cases or reconsider decisions. *See supra* Section II.F.1. In those cases, the Department argues that the BIA must independently decide whether to reopen or reconsider. 85 Fed. Reg. 52491, 52504. No notice is required for the BIA to do so. In the Department's view, the BIA must simply decide on its own. The Department turns its logic upside down in connection with self-certification and bemoans the fact that the Board can independently decide to certify without notice to the parties. And, even if the Department did not take inconsistent positions, its complaint is not well-taken in light of its proposed "Quality Assurance Certification" procedure whereby immigration judges can seek review of BIA decisions by the Director without providing the parties any opportunity to be heard. *See supra* Section II.D. That proposal belies the Department's claim that it is concerned with the parties having an "opportunity to address whether self-certification by the Board is appropriate," 85 Fed. Reg. 52491, 52506, and suggests that its actual motivation is to further cabin the BIA's discretionary authority to exercise jurisdiction over cases that present "exceptional circumstances."

Finally, the Department's complaint that the BIA has somehow abused its certification authority in "unexceptional circumstances, such as to avoid finding appeals untimely, or simply to correct filing defects," 85 Fed. Reg. 52491, 52506, simply reflects that Department's dissatisfaction with the BIA making any discretionary decisions that favor respondents. *Pro se* respondents are most at risk of having their appeals dismissed not on the merits, but because they miss a deadline or their filing is defective. The Department's insistence on eliminating tools designed to ensure fair adjudication speaks loud and clear to its efforts to send a message that the BIA has limited independent authority and needs to keep in step with the Department's agenda. Its proposed rule changes should be rejected.

I. Implementing strict timelines for adjudication prioritizes speed at the expense of due process.

Certain provisions of the Proposed Rule purport to address "concerns about BIA productivity" and the "need to ensure that improved productivity at the immigration court level is not subverted by inefficient practices at the administrative appellate level" by instituting mandatory adjudication timelines. *See* 85 Fed. Reg. 52491, 52507. The proposed adjudication timelines, in fact, seek to codify those already implemented for certain cases pursuant to a widely criticized October 2019 EOIR policy memo.[99] Notably, the Department does not point to any increased efficiency or productivity since those new case management procedures were rolled out last year. Moreover, concerns with the timeliness of case processing are dwarfed by respondents' due process rights, which would be threatened by arbitrarily imposed deadlines. The Proposed Rule's mandatory adjudication timeframes would have the perverse result of eroding fundamental principles of fairness in our judicial system.

Under the Proposed Rule, initial screening for summary dismissal must be completed within 14 days of the filing of a Notice of Appeal, and a decision must be issued within 30 days. *See* 85 Fed. Reg. 52491, 52511 (proposed 8 C.F.R. § 1003.1(e)(1)). Given the number of cases pending before the BIA—91,042 at the end of the third quarter of 2020[100]—meeting this deadline would be impossible without a sharp increase in rubber-stamping denials. The arbitrary deadlines would also pressure the BIA staff conducting initial screenings to review cases quickly rather than accurately, inevitably resulting in erroneous dismissals. Further, the Department does not provide any explanation rationalizing these particular "case screening" deadlines. Because no rational explanation is provided, the purpose of imposing these stringent deadlines seems to be the inevitable result—more summary denials.

For cases not subject to summary dismissal, the Proposed Rule would impose other mandatory adjudication deadlines, including requiring a single Board Member to determine within 14 days of receipt of each case whether to issue a single-member or three-member decision. *See* 85 Fed. Reg. 52491, 52511-12 (proposed 8 C.F.R. § 1003.1(e)(8)). Since it is faster for a single member to affirm the decision of an immigration judge than it is for that member to refer a case for three-member review (which is required to overturn the decision of an immigration judge), the Proposed Rule's time constraints create an incentive for Board members to quickly decide and deny cases themselves rather than determine that the cases require three-member review.[101] Even under

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[99] The 2019 policy memo laying out "EOIR's expectations regarding the timely processing of appeals" imposed several similar deadlines, including that the BIA decide cases within 335 days after the notice of appeal is filed, and encouraged Board members to both "promptly dismiss[]" all "appeals subject to summary dismissal" and utilize "affirmances without opinion." EOIR, *Case Processing at the Board of Immigration Appeals*, at 2, 4-5 (Oct. 1, 2019), https://www.aila.org/infonet/policy-memo-on-case-processing-at-the-bia-. The guidance received much criticism on the basis that it risked undermining the quality of appellate decision-making and increasing legal error and due process violations. *See* Suzanne Monyak, *BIA Pressed to Speed Cases, Raising Due Process Concerns*, Law360 (Oct. 2, 2019), https://www.law360.com/articles/1205349/bia-pressed-to-speed-cases-raising-due-process-concerns.

[100] *See* EOIR, *supra* note 51.

[101] BIA staff attorneys are currently encouraged to produce 40 decisions per month that are signed by Board members without any regard for whether a case involves unique or challenging legal issues. In order to meet their quotas, staff attorneys resort to affirmances without opinion to simply keep their jobs. *See* Jeffrey S. Chase, *EOIR's Troubling New Regulations* (July 5, 2019), https://www.jeffreyschase.com/blog/2019/7/5/eoirs-troubling-new-regulations.

current BIA procedures, which contain no strict adjudication deadlines, American Gateways attorneys have received several abbreviated decisions that do little more than briefly summarize the immigration judge's flawed reasoning. Adding mandatory deadlines would only further incentive BIA members to focus on the quantity rather than quality of their decision-making.

American Gateways would be remiss if it did not note that the BIA's affirmance without opinion (AWO) practice—a practice that the proposed case timelines would both encourage and reward—has been uniformly condemned by judges, lawyers, and commentators because AWO decisions fail "to provide the parties or the court below with any hint as to the court's reasoning,"[102] reduce judicial accountability, and hinder meaningful federal circuit review of BIA decisions.[103] Given the Department's increasingly politicized hiring practices, boiler-plate decisions that contain no explanation of the underlying reasoning are particularly inappropriate. As Judge Posner wrote in discussing the "unbearable pressures" faced by immigration judges and a "sorely overworked Board of Immigration Appeals" more than a decade ago:

> Deference is earned; it is not a birthright. Repeated egregious failures of the Immigration Court and the Board to exercise care commensurate with the stakes in an asylum case can be understood, but not excused, as consequences of a crushing workload that the executive and legislative branches of the federal government have refused to alleviate.

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[102] William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Court of Appeals*, 78 Colum. L. Rev. 1167, 1174 (1978).

[103] The AWO practice has garnered criticism since its inception in the early 2000s. Early criticism focused on concerns with due process, including that the AWO procedure denies immigrants a meaningful and individualized determination on appeal, as well as a meaningful explanation for affirmance and a sufficient basis on which to appeal to the federal circuit courts. *See* John Ashcroft & Kris Kobach, *A More Perfect System: The 2002 Reforms of the Board of Immigration Appeals*, 58 DUKE L. J. 1991 (2009). Although several Circuit courts have determined that the AWO practice does not violate Fifth Amendment due process, multiple policy and procedural criticisms of the practice that persist. A primary criticism of the AWO process is that it is a "rubber stamp" on immigration court rulings. Critics argue that the absence of a requirement for a written opinion creates a system where it is doubtful whether adjudicators actually read parties' arguments and craft reasoned responses. *See* Philip G. Schrag, *The Summary Affirmance Proposal of the Board of Immigration Appeals*, 12 Geo. Immigr. L.J. 531, 534-36 (1998). Another criticism focuses on the pressure that AWO decisions put on the federal courts. One study shows that AWOs result in a surge of appeals to federal courts, thereby creating a new bottleneck of cases, only at a higher level of judicial review. *See, e.g.*, New York State Bar Association Commercial and Federal Litigation Section Report, *The Continuing Surge in Immigration Appeals in the Second Circuit: the Past, the Present and the Future* (Jan. 27, 2010), https://nysba.org/app/uploads/2020/02/ImmigrationAppealsinthe2dCircuitFinalReport1-29-10.pdf ("[N]ationwide federal circuit courts experienced an increase of 294% in immigration appeals from 2001 to 2002 with an additional increase of 35% in 2003 . . . . 29% of BIA cases within the Second Circuit were appealed in 2004, [and] this percentage increased to 41% (2005), 43% (2006), 38% (2007) and 42% (2008)"). Finally, there are serious concerns that the AWO practice "harbors a powerful potential to damage the rule of law, by elevating outcomes and personal preferences over adherence to standards, precedents, and legal principles." Shruti Rana, *"Streamlining" the Rule of Law: How the Department of Justice is Undermining Judicial Review of Agency Action*, 2009 U. Ill. L. Rev. 829, 836 (2009). A primary purpose of the Board is to correct the mistakes of other immigration officials, including immigration judges, in matters of law, procedure, or other applications of the law to facts. Written opinions serve as important guidance to the development of the law, as well as the practice of judges, the bar, and asylum seekers. *See* Schrag, *The Summary Affirmance Proposal*, at 534. Moreover, written opinions support the rule of law by making it easier for a losing party to accept the outcome of a case, particularly in situations where the appeal to the Board is the final stage of review and there are no further avenues for appeal to the federal courts. *Id.*

Kadia v. Gonzales, 501 F.3d 817, 820-21 (7th Cir. 2007). Since that time, the backlog of pending appeals has grown tremendously. Encouraging even quicker and more opaque decision-making from an overworked, under-resourced, and now highly politicized appellate body is not only arbitrary and capricious but will most certainly result in legally erroneous (or even worse, biased) decision-making. American Gateways therefore strongly opposes the imposition of any strict case completion deadlines and encourages the Department to explore ways to improve the timeliness of adjudication that would both preserve the independence of the judiciary and promote fair outcomes on appeal.

The Proposed Rule further provides that the BIA Chairman would be *required* to refer any case that remains pending more than 335 days after a notice of appeal is filed to the EOIR Director to render a decision himself or refer the case to the Attorney General for decision. *See* 85 Fed. Reg. 52491, 52512 (proposed 8 C.F.R. § 1003.1(e)(8)(v)). As noted above, as of the third quarter of FY 2020, there were 91,042 cases pending before the BIA. The BIA is comprised of 23 members, which means each member would have to complete over 3,958 cases just to clear the backlog on top of complying with the newly proposed 355-day deadline for appeals filed on or after the effective date of the rule. This is patently unreasonable and simply not feasible. In practice, this would mean that the Director (a political appointee, not a judge) would be able to personally decide potentially thousands of cases that not adjudicated before the 355-day deadline (or, alternatively refer them to the Attorney General for decision). This is a clear and objectionable example of the government dismantling the immigration court system by pressuring judges to complete cases faster and relying on politically appointed non-adjudicators to decide cases at the expense of fairness.

Lastly, the Department proposes to amend the circumstances in which the BIA Chairman may place a case on hold and thereby temporarily suspend mandatory adjudication deadlines. Currently, the Chairman my hold a case pending a decision by the U.S. Supreme Court or a U.S. Court of Appeals, in anticipation of a Board *en banc* decision, or in anticipation of an amendment to the regulations. 8 C.F.R. § 1003.1(e)(8)(iii). The Department seeks to eliminate Courts of Appeals decisions and regulatory actions as bases for holding a case because they do not "have a fixed deadline" and, therefore, are "poor bases to warrant an adjudicatory delay." 85 Fed. Reg. 52491, 52508 n.38, 52512 (proposed 8 C.F.R. § 1003.1(e)(8)(iii)). Given that the Chairman's existing authority to place cases on hold is permissive, further restricting the bases for such holds is unwarranted and irrational. The proposed change would simply eliminate the Chairman's discretion to appropriately hold cases when pending changes in the case law or regulations would benefit immigrants. The Department also seeks to make the Chairman's power to place cases on hold "subject to the concurrence by the Director," *id.*, a change that is quite clearly intended to enhance the Director's influence over appellate decision-making and ensure that cases are held only when doing so furthers the administration's political agenda, not when it further the fair administration of justice.

The mandatory adjudication timelines proposed by the Department, are, in fact, a back-door way of imposing mandatory case quotas on the BIA.[104] The troubling concerns with imposing quotas

[104] The October 2019 EOIR policy memo indicates that a Board member's failure to meet the assigned deadlines for the disposition of appeals will reflect negatively on his performance. *See* EOIR, *supra* note 99.

on judicial processes have been highlighted with respect to the quotas imposed on immigration judges, and those same concerns apply equally here. *See supra* Section I.B.

In sum, 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 the American Immigration Lawyers Association 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."[105] 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, 405 (7th Cir. 2015). Ultimately, the mandatory adjudication timeframes are arbitrary, impractical, and constitutionally suspect.

III. CONCLUSION

As discussed herein, the Proposed Rule, which is part of a broader pattern of conduct and policies that has harmed immigrants and undermined the integrity of the immigration court system, would unduly interfere with judicial independence and erode the due process rights of immigrants in removal proceedings. Among several other shortcomings, the Department fails to consider relevant factors, fails to support its claims with evidence or reason, fails to provide a satisfactory explanation for the changes it proposes, and fails to consider the several harms that would flow from the rule. American Gateways emphatically objects to and requests that the Department withdraw the Proposed Rule.

[105] AILA, *AILA Policy Brief: Imposing Numeric Quotas on Judges Threatens the Independence and Integrity of Courts* 2 (Oct. 13, 2017).