Comments Submitted by American Gateways RE: Notice of Proposed Rulemaking (NPRM) by the Executive Office for Immigration Review, Department of Justice: Professional Conduct for Practitioners—Rules and Procedures, and Representation and Appearances; RIN 1125-AA83 / EOIR Docket No. 18-0301 / A.G. Order No. 4841-2020 (published in the Federal Register on September 30, 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 staff also work inside four detention centers in Central Texas—T. Don Hutto Residential Center ("Hutto"), South Texas Detention Complex, Karnes County Residential Center, and Limestone County Detention Center. Each year, American Gateways administers legal orientation programs to thousands of immigrants in Texas detention facilities and assists hundreds of detained asylum seekers through its staff attorneys and network of *pro bono* attorneys. American Gateways is one of eighteen non-profit legal services providers who offer services to detained immigrants through the Legal Orientation Program (LOP), which is administered by Vera Institute of Justice and funded by the Executive Office for Immigration Review (EOIR).[1] The LOP, which serves more than 50,000 detained immigrants annually, including more than 30,000 in Texas, involves four components of service: (1) group orientations and information sessions; (2) individual orientations and information sessions; (3) *pro se* and self-help workshops; and (4) outreach and referrals to *pro bono* attorneys.[2] Through its work inside Texas's vast network of detention centers, American Gateways has become intimately familiar with the deleterious impact of detention on immigrants' ability to access basic legal information, counsel, and evidence, all of which are essential to ensure full due process protections for *pro se* respondents in removal proceedings.

American Gateways opposes the notice of proposed rulemaking regarding Professional Conduct for Practitioners—Rules and Procedures, and Representation and Appearances (the "Proposed Rule"), published by the Department of Justice (DOJ, or the "Department") on September 30, 2020, and requests that the Department promptly rescind the Proposed Rule. As an LOP provider, American Gateways is particularly concerned with the profound impact the Proposed Rule would

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[1] American Gateways offers LOP services at Hutto, the South Texas Detention Center, and Karnes County Residential Center. Its work at Limestone County Detention Center is not funded through the LOP.

[2] *See* Bettina Rodriguez Schlegel, *Legal Orientation Program*, Vera Inst. of Justice, https://www.vera.org/projects/legal-orientation-program/learn-more (last visited Oct. 29, 2020) (discussing LOP service components); Vanessa Romo, *Justice Department Will Pause a Legal Advice Program for Detained Immigrants*, NPR (Apr. 12, 2018), https://www.npr.org/sections/thetwo-way/2018/04/12/601642556/justice-department-will-pause-a-legal-advice-program-for-detained-immigrants (reporting that LOP serves more than 50,000 immigrants annually); Human Rights First, *Ailing Justice: Texas—Soaring Immigration Detention, Shrinking Due Process* 4, 27 (June 2018), https://www.humanrightsfirst.org/sites/default/files/Ailing_Justice_Texas.pdf (reporting that LOP serves 30,000 detainees in Texas annually).

have on the efficacy of its LOP services. Although American Gateways has never been permitted to offer legal advice (which would constitute representation) in connection with the LOP, the guidance it provides through group educational sessions requires that its staff be able to explain complex legal arguments, as well as changes to the statutes and regulations that govern immigration court proceedings. The proposed restrictions on the exercise of legal judgment and legal research would negatively impact the scope of services that American Gateways, as well as other LOP providers, can offer through individual orientations, self-help workshops, and *pro bono* referrals.[3] Group orientations are useful but, by themselves, are not sufficient to overcome the many obstacles that impair detained immigrants' exercise of basic due process rights. It is through individual orientations that American Gateways is able to both (1) screen individual cases for referral to *pro bono* attorneys or to American Gateways staff under funding other than LOP and (2) identify individuals who would benefit from additional *pro se* assistance, such as completing applications for relief, gathering documents, or filing DOJ-approved motions. Similarly, *pro se* workshops are a necessary complement to group orientation sessions given that detained immigrants otherwise have no or very limited access to basic legal education.

American Gateways describes below how some of the proposed changes would impact our organization and the *pro se* individuals we assist, 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 frustrate access to basic legal education and erode the due process rights of individuals 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 immigrants, 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. 61640, 61649, 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.

[3] The Immigration Court Helpdesk (ICH) is also funded by Congress and administered by EOIR. Because American Gateways is an LOP provider, its comments herein are focused on the LOP. However, several of the comments are equally applicable to similar programs, such as ICH.

American Gateways objects to the shortened 30-day comment period. As discussed herein, the Proposed Rule contains several substantial changes to regulations governing the provision of legal education and *pro se* assistance to immigrants in removal proceedings. For example, the Proposed Rule would allow practitioners to assist *pro se* individuals with drafting, writing, or filing documents with EOIR only if the nature of the assistance is disclosed on an amended Notice of Entry of Appearance as Attorney or Representative Before the Board of Immigration Appeals (Form EOIR-27) or Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court (Form EOIR-28 and, together with Form EOIR 27, the "NOEA forms"). At the same time, the Proposed Rule would expand the definition of "practice" so that almost any act undertaken by an attorney would trigger the requirement to file an NOEA form, thereby unduly constricting the ability of LOP providers like American Gateways to make meaningful legal education available to detained immigrants. The Proposed Rule would also impose disciplinary sanctions for a single failure to file an NOEA form in connection with limited representation and restrict practitioners' access to records of proceedings. The public should be afforded adequate time to thoughtfully consider and respond to the complex revisions proposed by the Department. The Department has offered no justification for shortening the comment period, which is particularly unreasonable in light of disruptions resulting from the ongoing COVID-19 public health crisis. The lack of any explanation for shortening the comment period signals that the Department has improperly prejudged the issues and intends to implement the Proposed Rule without having provided interested persons with a *meaningful* opportunity to participate. At the same time, the shortened comment period suggests that the Department desires not to improve the efficiency or quality of rules and procedures governing the representation of aliens in immigration proceedings, but to push through its divisive political agenda in disregard of public comments. American Gateways therefore respectfully requests that, if the Proposed Rule is not withdrawn, the comment period be extended for at least an additional 30 days.

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

The rapid pace at which the current administration has proposed several different and overlapping rules that would drastically alter—and largely upend—procedural and substantive regulations governing immigration court proceedings (especially those relating to asylum and withholding of removal) makes it virtually impossible for the public to comprehend the interplay among the myriad proposed rules. As a result, the public has been denied its right to adequately comment on the impact of the changes in this Proposed Rule. The joint NPRM issued by the DOJ and Department of Homeland Security (DHS) on June 15, 2020, titled "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review," proposed the most sweeping changes to asylum eligibility since the 1996 Illegal Immigration Reform and Immigrant Responsibility Act.[4] At present, it is unclear how the agencies may amend that proposal based on the 88,933 public comments that were submitted[5] and, therefore, impossible to adequately comment on this Proposed Rule. On August 26, 2020 the DOJ issued another NPRM, titled "Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative

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

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

Closure," that would dramatically alter the due process rights of asylum seekers and others in removal proceedings, including in proceedings before the Board of Immigration Appeals (BIA, or the "Board"),[6] and the Department has not yet responded to the 1,287 comments it received.[7] Then, on September 23, 2020, the DOJ issued yet another NPRM, titled "Procedures for Asylum and Withholding of Removal," which would impose arbitrary deadlines for filing and adjudicating applications for asylum and withholding of removal, as well as arbitrary standards for assessing whether an application is deemed complete.[8] In response to that NPRM, the Department received an additional 2,039 public comments to which it has not yet responded.[9]

As noted above, the APA requires that agencies give the public a *meaningful* opportunity to comment on proposed regulatory changes. The Department's increasingly frequent practice of staggered rulemaking hinders meaningful and comprehensive public comments and is, therefore, procedurally improper. *See, e.g. Casa de Md., Inc. v. Wolf*, __ F.3d __, No. 8:20-cv-02118-PX, 2020 WL 5500165, at *26 (D. Md. Sept. 11, 2020) (concluding that plaintiffs are likely to succeed in their argument that agency's failure to meaningfully address the interaction of staggered rules regarding Employment Authorization Documents violated the APA); *N.C. Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 770 (4th Cir. 2012) (finding that agency's staggered rulemaking violated notice-and-comment procedures and precluded consideration of important issues). For this reason alone, American Gateways urges the Department to rescind the Proposed Rule and refrain from issuing any additional notices of proposed rulemaking regarding immigration proceedings before EOIR until its overlapping proposals have been rescinded or finalized.

Throughout these comments, American Gateways highlights how some of the staggered proposals issued by the DOJ and DHS would, when taken together, pose an increased threat to basic due process rights or otherwise impede immigrants' access to legal education, which is critical for *pro se* respondents facing removal. However, in the shortened 30-day comment period, American Gateways cannot fully analyze the impact of the entire series of complex and interrelated proposals. By submitting these comments, American Gateways does not waive its procedural objections to either the shortened comment period or the DOJ's and DHS's staggered rulemaking practices.

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

Executive Orders 12866 and 13563 require agencies to assess all costs and benefits of regulatory changes, including both quantifiable and qualitative factors, and choose the regulatory alternative that maximizes net benefits.[10] The Department acknowledges that the Office of Information and

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

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

[8] Procedures for Asylum and Withholding of Removal, 85 Fed. Reg. 59692 (proposed Sept. 23, 2020).

[9] *See* EOIR, *Procedures for Asylum and Withholding of Removal*, Regulations.gov, https://beta.regulations.gov/document/EOIR-2020-0005-0001 (last visited Oct. 27, 2020).

[10] *See* Exec. Order No. 12866 § 1(b)(6), 58 Fed. Reg. 51735, 51736 (Oct. 4, 1993) ("Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to

Regulatory Affairs of the Office of Management and Budget has determined that the Proposed Rule is a "significant regulatory action" within the meaning of Executive Order 12866, and also certifies that the Proposed Rule has been drafted in accordance with Executive Orders 12866 and 13563. 85 Fed. Reg. 61640, 61649-50. Yet, the Proposed Rule contains no real assessment of costs, benefits, and regulatory alternatives. Instead, the Department claims that the Proposed Rule "imposes *no new costs* on either the Government or on practitioners or aliens." *Id.* at 61650 (emphasis added). Similarly, the Department asserts that the Proposed Rule "adds no new requirements to most immigration court filings or for practitioner behavior," without any in-depth examination of the potential effects of the Proposed Rule. *Id.* The Department cannot discharge its obligation to fully assess costs and benefits of the proposed regulatory changes by simply dismissing as insubstantial the very real harms that would flow from the Proposed Rule, especially for detained and *pro se* immigrants.[11] Moreover, the Department's bald assertion that its proposed changes will have virtually *no* impact on practitioners or respondents is absurd—particularly when those changes would inevitably constrict LOP services and erect barriers to the effective provision of *pro se* assistance. Under the Department's Proposed Rule, *pro se* respondents, who already struggle with preparing forms and motions, would have even less access to meaningful assistance from organizations like American Gateways. The Department also fails to acknowledge that the Proposed Rule would pull back documented benefits, including time and cost savings, that have resulted from the implementation of LOP-type programs.[12]

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quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs."); Exec. Order No. 13563, 76 Fed. Reg. 3821, 3821 (Jan. 21, 2011) (supplementing and reaffirming the mandate in Executive Order 12866 that agencies "must take into account benefits and costs, both quantitative and qualitative" when implementing regulations).

[11] The Department claims that the Proposed Rule is exempt from Executive Order 13771 because its expected costs "are likely to be de minimis." 85 Fed. Reg. 61640, 61650. As discussed herein, the Department has simply ignored a host of substantial costs that would result from the Proposed Rule. Therefore, there is no valid basis for the Department's claimed exemption from Executive Order 13771.

[12] *See* Nina Siulc et al., Vera Inst. of Justice, *Legal Orientation Program Evaluation and Performance and Outcome Measurement Report, Phase II* 7-8 (May 2008), https://www.vera.org/downloads/Publications/legal-orientation-program-evaluation-and-performance-and-outcome-measurement-report-phase-ii/legacy_downloads/LOP_evalution_updated_5-20-08.pdf. This report, which evaluates LOP services as of September 2007, highlights several benefits of the LOP including: (1) participants moving through the courts faster; (2) participants receiving fewer *in absentia* removal orders; (3) more effective preparation of detained respondents to proceed *pro se*; (4) improved detention conditions; and (5) increased immigration court efficiency. For example, the report found that

> [d]etained LOP participants have immigration court case processing times that are an average of 13 days shorter than cases for detained persons who did not participate in the program. This suggests that the LOP may have important resource-saving benefits for the immigration courts and immigration detention system. The faster detained cases are completed, the sooner detained persons are eligible to be released from custody or removed from the United States. This can free available bed space at detention facilities and, at least in theory, substantially reduce costs for the federal government.

Id. at iv. Additionally, immigration judges at LOP sites reported

> that respondents who have attended the LOP appear in immigration court better prepared, are more likely to be able to identify the relief for which they are statutorily eligible, to not pursue relief for which they are ineligible, and to have a better understanding of the immigration court process, thus helping to improve court efficiencies.

Id. at v.

Agencies may "propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs." Exec. Order No. 12866 § 1(b)(6) (1993). Rather than engage in a cost-benefit analysis, as the law requires, the Department cursorily concludes that the Proposed Rule would not result in any costs because practitioners are already well-versed in submitting NOEA forms and immigration court personnel and judges are already well-versed with reviewing those forms. *See* 85 Fed. Reg. 61640, 61650. Executive Orders cannot be so easily circumvented by improperly discounting obvious costs. Indeed, the Departments' unfounded (and unsupported) assumption that its proposal will have *no* costs to practitioners or respondents is so patently erroneous that the Proposed Rule should be rescinded on that basis alone.

D. The Proposed Rule threatens due process protections for detained immigrants.

The Proposed Rule would severely limit access to basic legal education and *pro se* assistance for detained asylum seekers and other immigrants in removal proceedings. "Although there is no Sixth Amendment right to counsel in an immigration hearing, Congress has recognized it among the rights stemming from the Fifth Amendment guarantee of due process that adhere[s] to individuals that are the subject of removal proceedings." *Tawadrus v. Ashcroft*, 364 F.3d 1099, 1103 (9th Cir. 2004). "Th[is] right to counsel is a particularly important procedural safeguard because of the grave consequences of removal . . . [which] 'visits a great hardship on the individual and deprives

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EOIR's 2012 cost savings analysis submitted to the Committee on Appropriations similarly found that "detained aliens' participation in the LOP significantly reduced the length of the immigration court proceedings," which resulted in a cost savings to U.S. Immigration and Customs Enforcement (ICE) of approximately $19.9 million. According to the analysis, after deducting the cost of providing LOP services to participants, the program resulted in net savings to the government of $17.8 million. *See* Dep't of Justice, *Cost Savings Analysis—The EOIR Legal Orientation Program* (updated Apr. 4, 2012), https://www.justice.gov/sites/default/files/eoir/legacy/2013/03/14/LOP_Cost_Savings_Analysis_4-04-12.pdf.

Although a subsequent analysis of the LOP conducted by EOIR in 2018 and an addendum thereto reached the conclusion that LOP participants had longer stays in detention than non-LOP participants, resulting in additional costs to the government, those conclusions stand in stark contrast to earlier findings, as well as the results of a 2018 study conducted by the Vera Institute of Justice ("Vera"). *See* EOIR, *Legal Orientation Program Cohort Analysis* (Sept. 5, 2018), https://www.justice.gov/eoir/file/1091801/download; EOIR, *Addendum to Cohort Analysis, Phase I: Detention Length with DHS Data* (Jan. 29, 2019), https://www.justice.gov/eoir/file/1125596/download. As Vera noted, the 2018 EOIR cohort analysis "failed to consider pending cases in assessing a potential relationship between LOP and case time, thus grossly distorting any possible LOP effect by ignoring the time pending cases have been open to date." *See* Letter from Nina Siulc to Steven Lang, *LOP Case Time Analysis for Performance Indicators* 2 (Sept. 14, 2018), *available at* https://www.tahirih.org/wp-content/uploads/2018/10/2018-51777-Doc-02-21-pgs.pdf. The 2018 EOIR analysis also "compared cases solely [based] on whether they involved LOP or not without considering the many other factors beyond LOP that may influence how a case behaves, including . . . where the case begins and what immigration charges are involved." *Id.* EOIR's failure to compare LOP cases with similarly situated non-LOP cases undermined the statistical validity of EOIR results. *Id.* Additionally, Vera's LOP case time analysis for FY 2013 through FY 2017 (the same time period analyzed by EOIR) yielded results in line with earlier LOP analyses. *See* Vera Inst. of Justice, *LOP Case Time Analysis, Fiscal Years 2013-2017* (Sept. 14, 2018), *available at* https://www.tahirih.org/wp-content/uploads/2018/10/2018-51777-Doc-02-21-pgs.pdf. Specifically, Vera found that: (1) LOP participants receive fewer *in absentia* removal orders; (2) LOP cases have a greater chance of completing sooner than non-LOP cases; and (3) it takes three times as long for non-LOP cohort cases to reach 50 percent completion that LOP cohort cases (421 days for non-LOP cases versus 140 days for LOP cases). *Id.* at 16. Furthermore, Vera noted that "case time efficiencies" are just one benefit of the LOP, which also aims to protect due process rights and enhance respondents' understanding of the immigration court process. *Id.* at 18. In fact, EOIR's Phase II LOP cohort analysis found that LOP participants apply for asylum more frequently and are more likely than non-LOP participants to submit an application during the pendency of their cases, and have longer merits hearings. *See* EOIR, *LOP Cohort Analysis: Phase II* 9-10 (Jan. 29, 2019), https://www.justice.gov/eoir/file/1125621/download.

him of the right to stay and live and work in this land of freedom.' " *Leslie v. Atty. Gen. of U.S.*, 611 F.3d 171, 181 (3d Cir. 2010) (quoting *Bridges v. Wixon*, 326 U.S. 135, 154 (1945)).[13] However, there is no universal right to representation in immigration court proceedings, and the immigration system is facing a crisis of underrepresentation. As a result, *pro se* assistance has become a vital due process protection, especially for detained immigrants. The Department does not even mention detention in the Proposed Rule, much less evaluate the impact of the Proposed Rule in light of the government's ill-conceived and inhumane mass detention project.[14]

Legal representation rates among non-citizens in removal proceedings are low. As of 2016, only 37% of individuals appearing before immigration courts secured legal representation.[15] Immigrants in detention were the least likely to obtain representation—only 14% had legal counsel.[16] Access to counsel is often outcome-determinative. Represented detainees are ten-and-a-half times more likely than their *pro se* counterparts to win their cases.[17] The disparities are similarly high for asylum seekers (both detained and non-detained). In Fiscal Year (FY) 2020, the overall asylum denial rate rose for the eighth straight year to 71.6%.[18] The denial rate for

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[13] The constitutional right to counsel is codified in the Immigration and Nationality Act (INA). *See* 8 U.S.C. § 1362 ("In any removal proceedings before an immigration judge . . . the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel . . . as he shall choose.").

[14] As a DHS Special Advisor on Immigration and ICE Detention and Removal explained: "With only a few exceptions, the facilities that ICE uses to detain aliens were built, and operate, as jails and prisons to confine pre-trial and sentenced felons. ICE relies primarily on correctional incarceration standards [that] . . . impose more restrictions and carry more costs than are necessary. . . ." Dora Schriro, DHS, *Immigration Detention Overview and Recommendations* 16-17 (Oct. 6, 2009), https://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf. Moreover, as the use of immigration detention has expanded, the government has allocated substantial discretionary authority to the private sector, infusing enforcement with a profit-seeking element while simultaneously distancing itself from the sociopolitical and legal risks engendered by its mass detention project. *See, e.g.*, *Barrientos v. CoreCivic, Inc.*, No. 4:18-CV-70 (CDL), 2018 WL 4481956 (M.D. Ga. Aug. 17, 2018) (detailing CoreCivic's practices of forcing detainees to work for negligible wages and punishing those who refuse to work), *aff'd*, 951 F.3d 1269 (11th Cir. 2020); ACLU, *Shutting Down the Profiteers: Why and How the Department of Homeland Security Should Stop Using Private Prisons* 12-15 (Sept. 2016), https://www.aclu.org/sites/default/files/field_document/white_paper_09-30-16_released_for_web-v1-opt.pdf (detailing horrific record of abuse and misconduct in private detention facilities). At least seventy-five percent of detention facilities are now operated by for-profit prison corporations that are subject to scant federal oversight. *See* Hauwa Ahmed, *How Private Prisons are Profiting Under the Trump Administration*, Ctr. for Am. Progress (Aug. 30, 2019), https://www.americanprogress.org/issues/democracy/reports/2019/08/30/473966/private-prisons-profiting-trump-administration/; *see also* DHS, Homeland Security Advisory Council, Report of the Subcommittee on Privatized Immigration Detention Facilities, at App. C (Dec. 1, 2016), https://www.dhs.gov/sites/default/files/publications/DHS%20HSAC%20PIDF%20Final%20Report.pdf (documenting that, as of year-end 2016, 73% of detention facilities were operated by private contractors).

[15] Ingrid Eagly & Steven Shafer, Am. Immigration Council, *Access to Counsel in Immigration Court* 5 (Sept. 2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf.

[16] *Id.* Since 2000, representation rates for detained individuals have ranged between roughly 10% and 30%. According to some estimates, the rates leveled off between 2015 and 2017 at about 30%. *See* TRAC Immigration, *Who Is Represented in Immigration Court?* (Oct. 16, 2017), https://trac.syr.edu/immigration/reports/485/.

[17] Eagly, *supra* note 15, at 19.

[18] TRAC Immigration, *Asylum Denial Rates Continue to Climb* (Oct. 28, 2020), https://trac.syr.edu/immigration/reports/630/ (asylum was granted in just 26.3% of cases; in an additional 2.1% of cases, some other form of relief (e.g., statutory withholding of removal or withholding of removal under CAT) was granted when asylum itself was denied); *see also* TRAC Immigration, *Record Number of Asylum Cases in FY 2019* (Jan. 8, 2020), https://trac.syr.edu/immigration/reports/588/ (reporting asylum denial rate of 69% in FY 2019).

unrepresented asylum seekers was a staggering 82.3% (versus 68.9% for represented asylum seekers).[19] During the first quarter of FY 2020, less than 27% of asylum requests were granted in immigration court—a 36.6% decline from FY 2016.[20] The asylum grant rate for Central American migrants has declined even more steeply to 13.3%—a 50% decline from FY 2016.[21] For those caged in detention facilities, where myriad barriers frustrate efforts to access counsel and basic legal information, circumstances are even more dire. Because non-citizens appearing before immigration courts have no right to government-appointed counsel, *pro se* respondents must often confront the complex process of drafting filings, filling out forms, and presenting arguments to a judge with little to no legal, technical, or linguistic guidance. As a result, thousands of detained immigrations without legal representation rely on legal services organizations like American Gateways for *pro se* assistance.

Pro se respondents face significant challenges in appearing before immigration courts without counsel. Most individuals in removal proceedings do not speak English and have little, if any, familiarity with U.S. immigration law, which courts have described as "a maze of hyper-technical statutes and regulations that engender waste, delay, and confusion," including among immigration lawyers. *Drax v. Reno*, 338 F.3d 98, 99 (2d Cir. 2003). Applications for relief must be submitted in English, or they will be deemed abandoned and the respondent ordered removed. Without the assistance of counsel, few individuals—many of whom are torture or trauma survivors who suffer from post-traumatic stress disorder or other mental health ailments—can successfully complete required legal forms, much less complete them within the required time constraints.

Moreover, detention exacerbates the challenges immigrants (especially those seeking asylum and other forms of humanitarian protection) already face, including challenges accessing basic legal information about court proceedings and available forms of relief. By way of example: Limited, inadequate, or no access to law libraries and legal materials in detention centers obstructs immigrants' access to legal assistance;[22] time in the law library is restricted, and most resources are outdated, incomplete, or available only in English;[23] phone calls, if permitted, require notice

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[19] TRAC Immigration, *Asylum Denial Rates Continue to Climb*, *supra* note 18. Between FY 2019 and FY 2020, the percentage of unrepresented asylum seekers increased from 15.6% to 20%. *Id.* This decrease in representation is one of several factors that have contributed to the increase in denial rates.

[20] Human Rights First, *Fact Sheet* 2 (June 2020), https://www.humanrightsfirst.org/sites/default/files/AdministrationDismantlingUSAsylumSystem.pdf. USCIS has not released data for the first quarter of FY2020. As of FY 2019, the asylum grant rate for affirmative asylum claims adjudicated before USCIS was 30.7%—a decline of 28.8% since FY 2016. *Id.*

[21] *Id.* at 1; *see also* TRAC Immigration, *Asylum Denial Rates Continue to Climb*, *supra* note 18 (reporting that denial rates for asylum seekers from Honduras, Guatemala, and El Salvador in FY 2020 were 87.3%, 85.8%, and 85%, respectively).

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

[23] Office of Inspector Gen., DHS, OIG-07-01, *Treatment of Immigration Detainees Housed at Immigration and Customs Enforcement Facilities* 16-17 (Dec. 2006), https://www.oig.dhs.gov/assets/Mgmt/OIG_07-01_Dec06.pdf.

to the detention facility and are limited in duration;[24] telephones, if operational, are typically located in public areas.[25] Such restrictions frustrate efforts to access basic legal information to which detainees are constitutionally entitled. Moreover, detained individuals are far less likely to secure legal counsel than those not in detention. This disparity significantly impacts an individual's case, as those with representation are more likely to apply for protection in the first place and successfully obtain the relief sought.

As previously noted, American Gateways staff work inside four Central Texas detention centers. With limited resources, it is impossible for American Gateways to represent the thousands of detainees held in these facilities. Hence, American Gateways staff often provides *pro se* assistance to detained immigrants, including asylum seekers.[26] Three of those facilities American Gateways serves through the LOP—the South Texas Detention Complex, The Karnes County Residential Center and the T. Don Hutto Residential Center. American Gateways provides Know Your Rights information and *pro se* assistance to the individuals detained at the Limestone County Detention Center. When providing *pro se* assistance, American Gateways does not give legal advice, but instead educates individuals about the law, the immigration court process, and specific forms of relief so that they can identify relief available to them and complete applications and filings on their own. The vast majority of individuals that American Gateways serves *pro se* are non-English speakers and many of them are illiterate or have minimal education. Most have also experienced high levels of psychological distress that not only impede their quality of life but also inhibit their capacity to effectively present their claims. As a result, they often cannot complete legal forms without assistance. The Proposed Rule, which seeks to redefine and sharply limit the scope of *pro se* assistance LOP providers such as American Gateways can offer to detained asylum seekers by expanding the definition of "practice" to include any acts that involve the exercise of "legal judgment," would largely foreclose most of the already scant legal education and *pro se* assistance available to detainees.

American Gateways has itself encountered countless obstacles to accessing, communicating with, providing education and *pro se* assistance to, and representing the detained immigrants it serves. As noted below, these barriers are not anomalous features of rogue facilities but have been widely documented throughout the immigration detention system. The following impediments to accessing basic legal information and counsel[27]—and attendant due process concerns—are relevant to and, therefore, must be considered in connection with the Department's perverse and underhanded proposal to further limit detainees' access to legal education and services:

- **Remote Location of Detention Facilities:** The physical geography of the immigration detention system is antithetical to the constitutional right to counsel. A map of the nation's "deportation railway" reveals that ICE has strategically erected detention centers in rural areas, far from major cities where most legal aid organizations, attorneys, and interpreters

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24 *Id.* at 23-24.

25 *Id.*

26 The T. Don Hutto Residential Center where American Gateways provides LOP services houses largely asylum-seeking women. In 2014, the all-female Hutto facility detained more asylum seekers (4,142) than did facilities in 48 states combined. Human Rights First, *Lifeline on Lockdown: Increased U.S. Detention of Asylum Seekers* 12 (July 2016), http://www.humanrightsfirst.org/sites/default/files/Lifeline-on-Lockdown_0.pdf.

27 Barriers to accessing counsel are numerous and multifaceted; those identified herein are merely exemplary.

operate. An analysis of seventy detention facilities revealed that approximately 30% of immigrant detainees are held at facilities more than 100 miles (with a median distance of 56 miles) from the nearest government-listed legal aid provider.[28] For immigrants detained in isolated locations, obtaining counsel is exceedingly difficult, if not impossible. Rates of representation in some remote facilities are so low that the mere fact of detention may itself violate the right to counsel. By way of example, in 2017, the National Immigrant Justice Center identified only 21 attorneys in Texas and New Mexico willing to take removal defense cases out of New Mexico's Cibola County Detention Center (a private prison resurrected as a detention center after the DOJ terminated CoreCivic's federal prison contract on account of human rights violations).[29] Even working at maximum capacity, these 21 attorneys could serve only 42 detainees—a mere 6% of the prison's April 2017 population and less than 4% of the population at capacity.[30]

- **Inadequate Access to Counsel:** When individual cases are taken on for representation, countless obstacles frustrate attorney-client communications and visitation in detention centers. In fact, the very architecture of detention facilities—designed to imprison hundreds or thousands of detainees in structures with only a handful of attorney visitation rooms—reveals that these barriers were built into the blueprints. For example, the Houston Contract Detention Facility has three attorney visitation rooms for up to 1,000 detainees.[31] The IAH Secure Adult Detention Facility has two non-contact attorney visitation rooms for up to more than a 1,000 detainees.[32] At Hutto, attorneys experience recurrent problems accessing their clients. Out-of-state attorneys without bar cards have reported being denied access to the facility for failure to prove their identity as an attorney. Others have reported being turned away by CoreCivic and ICE due to alleged "dress code" violations. Attorneys have reported waiting up to six hours to visit a single client at the South Texas Detention Complex. Staff blame long wait times on a variety of issues, including that clients cannot be moved while in "count," that no specific staff persons are assigned to bring clients to the visitation area, or that a visit was not called in due to a shift change. Regardless of the alleged cause of the long wait times, the result is devastating—attorneys must sit in the waiting area for hours without phone or internet access and without any guarantee of seeing a client. These obstacles have only morphed and multiplied as a result of the COVID-19 pandemic.

- **Inadequate Access to Interpreters:** Detention facilities frequently lack working phone lines to conference in interpreters,[33] or they otherwise limit telephone access in attorney-

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

[29] Nat'l Immigrant Justice Ctr., *What Kind of Miracle…"—The Systematic Violation of Immigrants' Right to Counsel at the Cibola County Correctional Center* 4-5 (Nov. 29, 2017), https://immigrantjustice.org/research-items/report-what-kind-miracle-systematic-violation-immigrants-right-counsel-cibola-county.

[30] *Id.* at 3.

[31] Human Rights First, *Ailing Justice*, *supra* note 2, at 26.

[32] *Id.*

[33] *See* Ashley Cleek, *The Government Says Border Patrol Agents in the Southwest Speak Spanish—But Many Migrants Speak Indigenous Languages*, The World (July 3, 2018), https://www.pri.org/stories/2018-07-

client visitation rooms. Telephone access in the Hutto visitation space, for example, is limited to non-profits, which means that if an attorney requires an interpreter, that interpreter must obtain security clearance from CoreCivic and ICE and accompany the attorney to the facility for client visits. This policy renders it incredibly difficult for attorneys to communicate with non-English speaking clients. In many instances, it would be impossible for attorneys to (1) locate a competent interpreter, (2) navigate inconsistent and ever-changing policies regarding the use of interpreters, and (3) assist clients with preparing applications for relief or other filings before the relevant deadlines. These barriers for attorneys make representation much more difficult, and *pro se* representation exponentially more challenging.

- **Frequent Transfer of Detainees:** The frequent transfer of detainees among ICE facilities also impedes access to basic legal information and access to counsel. Between October 1998 and April 2010, 40% of detainees were transferred at least once; 46% of those transferred were moved at least twice, and 3,400 detainees were transferred 10 times or more.[34] The average distance of each transfer was 369 miles.[35] The number of detainees experiencing transfer has also steadily risen over time from 23% in 1999 to 52% in 2009.[36] In FY 2015, there were 374,059 recorded transfers,[37] and 60% of detained adults experienced at least one interfacility transfer.[38] Of those adults who were transferred, roughly 86% experienced at least one intercity transfer, 37% experienced at least one interstate transfer, and 29% experienced at least one transfer across different federal judicial circuits.[39] Under the current administration, ICE has also initiated the mass transfer of detainees, including asylum seekers, to federal prisons.[40] Because transfers hinder access to securing legal representation and access to basic legal information, and also separate detained immigrants from the evidence needed to support their claims, the Department must take transfer practices into account when assessing the fairness and legality of a Proposed Rule that would prevent programs such as the LOP from operating and providing critical and irreplaceable legal education and *pro bono* referrals to detainees.

Lastly, the burdens the Proposed Rule would impose on legal representatives and detained *pro se* respondents must be evaluated in the context of the current public health crisis. The global COVID-

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03/government-says-border-patrol-agents-southwest-speaks-spanish-many-migrants-speak (explaining that speaker phones needed to call interpreters are frequently in use or broken).

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

[35] *Id.* at 13.

[36] *Id.* at 17.

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

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

[39] *Id.*

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

19 pandemic, which has disrupted lives around the world, has had a particularly acute impact on detained immigrants. Aside from the health risks of detention, more restrictive visitation policies (or policies prohibiting visitation altogether) have made it even more challenging for detainees to access basic legal services and information and, if represented, communicate with their counsel.[41] Many legal services providers like American Gateways have had to fundamentally alter their service delivery models to provide remote legal education and assistance. This has not only required increased resources and training on the part of thinly resourced organizations, but also has curtailed both the quantity and quality of available legal services inside detention centers. Out of necessity, American Gateways has quickly adapted to the new environment. Nonetheless, the public health crisis undoubtedly continues to complicate the delivery of services. The Department's proposed implementation of rule changes that would inhibit detainees' access to quality legal education and *pro se* assistance while setting legal representatives—and LOP providers in particular—up for punitive action in the midst of a global pandemic is both legally and morally reprehensible.

E. The Proposed Rule fails to adequately consider the weight of public comments supporting limited in-court representation as a method of increasing access to counsel.

The purpose of public comments is to allow the government to solicit feedback from interested members of the public and use that feedback to develop procedures supported by data, information, and authority. The Proposed Rule fails to adequately consider, and seemingly disregards, the weight of the 30 public comments the Department received in response to its Advance Notice of Proposed Rulemaking ("ANPRM") published on March 27, 2019.

The ANPRM specifically solicited feedback regarding whether the Department should permit limited representation. As the Department itself acknowledges, the vast majority of the comments it received (26 of 30 comments) supported limited representation in removal proceedings as a means to increase access to counsel. *See* 85 Fed. Reg. 61640, 61641-45. Nevertheless, the Department has not only decided against expanding in-court limited representation (in direct contravention of the majority of comments it received), but has put forth a proposal that was not advocated for by a single commenter—a proposal that would function to *limit* rather than expand access to legal education and assistance by individuals in removal proceedings while eroding critical due process protections.[42] Moreover, the Department offers no rational explanation for its

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

[42] Although the National Association of Immigration Judges (NAIJ) submitted comments opposing in-court limited representation in removal proceedings, the NAIJ did not advocate for the promulgation of a regulation that would restrict *pro se* assistance. *See* NAIJ, Comment Letter on ANPRM regarding Professional Conduct for Practitioners, Scope of Representation and Appearances (hereinafter "ANPRM regarding Professional Conduct"),

proposal. The Department's failure to consider the crisis in underrepresentation in the nation's immigration courts and propose changes that could help increase access to basic legal education, *pro se* legal assistance, and counsel renders the proposal arbitrary and capricious in violation of the APA.

American Gateways agrees with the legal service providers who responded to the ANPRM and echoes their comments here. Expanding in-court limited representation beyond bond and custody proceedings, while providing adequate safeguards, would encourage more practitioners to agree to represent individuals, which would, in turn, result in more just outcomes for respondents and a more efficient immigration court system. As many of the comments noted, there is a dire shortage of representation among immigrants in removal proceedings, which has only been exacerbated by mass detention. Immigrants are frequently shuttled among detention centers and forced by circumstances beyond their control to proceed with various parts of their cases in different locations. "Unbundling" legal representation would increase the likelihood of immigrants securing legal representation for at least part of their case.[43] Moreover, with limited representation, applications for relief are typically presented more clearly and comprehensively, making it easier for immigration judges to adjudicate applications. Rather than take the time draft a proposed rule, informed by input from legal service providers and other practitioners, that would actually benefit respondents and the overall operation of the immigration court system, the Department has instead proposed a convoluted set of regulations that are obviously designed to limit the ability of non-profit legal service agencies and LOP providers to offer necessary education and information to *pro se* respondents who struggle to navigate the complexities of the immigration court system without representation. Although the Department claims its proposal is designed to curtail "bad actors" and protect immigrants, nothing in the Proposed Rule would stop so-called "bad actors" from sidestepping the new requirements. Similarly, the Proposed Rule does not contain any real or meaningful protections for vulnerable, detained immigrants. Instead, the Proposed Rule would punish "good actors" and harm immigrants. Because the Department's only stated justifications for its proposal are incredible, American Gateways respectfully requests that the Department return to the drawing board. And if the Department elects to draft a new proposal regarding rules and procedures for representation and appearances, it should give due consideration to the previously submitted comments regarding limited-scope representation.

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available at https://beta.regulations.gov/comment/EOIR-2019-0001-0024. In fact, the NAIJ has been a staunch proponent on the LOP and similar programs. *See infra* at p. 14.

[43] "Unbundling" legal services has long been supported by the American Bar Association (ABA). *See, e.g.*, Am. Bar Ass'n Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 07-446, Undisclosed Legal Assistance to Pro Se Litigants (May 5, 2007), https://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/ls_del_aba_07_446_2007.pdf. As explained in a 2014 white paper prepared by the ABA Standing Committee on the Delivery of Legal Services, Model Rule 1.2(c), which permits lawyers to "limit the scope of representation *if the limitation is reasonable under the circumstances and the client gives informed consent*," was intended to "provide a framework within which lawyers could expand access to legal services by providing limited but nonetheless valuable legal services to low or moderate-income persons who otherwise would be unable to obtain counsel." *See* Am. Bar Ass'n Standing Comm. on Delivery of Legal Services, An Analysis of Rules that Enable Lawyers to Serve Self-Represented Litigants 4-5 (Aug. 2014), https://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/ls_del_unbundling_white_paper_2014.authcheckdam.pdf. Most states have rules either mirroring or similar to ABA Model Rule 1.2(c). EOIR's decision not to expand in-court limited representation is therefore out of line with the general trend toward permitting "unbundled" legal services as a way to increase access to representation.

F. The Proposed Rule must be assessed against the backdrop of the administration's prior efforts to limit the provision of basic legal education and services to immigrants.

The LOP was established by Congress in 2003 to educate detained individuals in removal proceedings about the immigration court, its processes, and forms of available relief so that they can make more informed decisions. By alleviating some of the inherent challenges immigrant detainees face in removal proceedings, the LOP enables detainees to navigate the immigration court system more quickly and efficiently and obtain more just outcomes. Moreover, the fact that the LOP has yielded substantial benefits for both respondents and the government has already been established. Despite the proven effectiveness of the LOP, which has received steady bipartisan support from Congress, the current administration has nonetheless sought to dismantle it on more than one occasion. For purposes of contextualizing its objections to this Proposed Rule, American Gateways briefly describes just a few of the administration's efforts to systematically dismantle the LOP:

- In April 2018, the DOJ (under the direction of former Attorney General Jeff Sessions) instructed EOIR to temporarily suspend the LOP.[44] The suspension was broadly condemned as a move intended to undermine access to legal counsel, erode due process protections in immigration courts, and harm asylum seekers.[45] Immigration judges were not consulted about the decision to halt the program, and the president of the NAIJ explained in testimony before the Senate Judiciary Committee that "[t]he overwhelming majority of the judges that are presiding over cases in those detention facilities have told us that LOP has been a very effective tool in making sure the cases are handled in a fair manner and that there is due process for the immigrant."[46] The decision to halt the program also caused the NAIJ to question the administration's "stated goal of wanting to bring greater efficiencies to the court and the management of the docket."[47] Although the DOJ's suspension of LOP was reversed due to congressional backlash,[48] the program has remained under review by the Department.

- In August 2019, the Department published an interim final rule reorganizing EOIR.[49] Among other changes, the rule eliminated the Office of Legal Access Programs (OLAP)

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[44] *See* Joseph McKeown, *Justice Department to Halt Legal-Education Program for Immigrants in Detention*, Wash. Post (Apr. 10, 2018), https://www.washingtonpost.com/local/immigration/justice-dept-to-halt-legal-advice-program-for-immigrants-in-detention/2018/04/10/40b668aa-3cfc-11e8-974f-aacd97698cef_story.html.

[45] *See, e.g.*, Human Rights First, *Halt of Critical Program is Another Attack on Due Process, Access to Counsel in Immigration Courts* (Apr. 11, 2018), https://www.humanrightsfirst.org/press-release/halt-critical-program-another-attack-due-process-access-counsel-immigration-courts.

[46] Massoud Hayoun, *Immigration Judges are Bewildered by the DOJ's Decision to Slash Legal Guidance for Detainees* (Apr. 18, 2018), https://psmag.com/social-justice/immigration-judges-are-bewildered-by-the-dojs-decision-to-slash-legal-guidance-for-detainees.

[47] *Id.*

[48] *See* Dep't of Justice, *Opening Statement of Attorney General Jefferson Sessions Before the Senate Appropriations Subcommittee on Commerce, Justice, Science, and Related Agencies* (Apr. 25, 2018), https://www.justice.gov/opa/speech/opening-statement-attorney-general-jeff-sessions-senate-appropriations-subcommittee; *see also* Joshua Breisblatt, *Justice Department Will Not Halt Legal Orientation Program for Detained Immigrants, Reversing Course for Now*, Immigration Impact (Apr. 25, 2018), https://immigrationimpact.com/2018/04/25/justice-department-legal-orientation-program-not-halt/#.X5nn24hKiUk.

[49] Organization of the Executive Office for Immigration Review, 85 Fed. Reg. 44537 (Aug. 26, 2019).

in name, albeit not its functions, and moved OLAP from the Office of the EOIR Director to the Office of Policy, a move that has been condemned for minimizing the importance of legal access programs to the mission of EOIR.[50]

- The president's FY 2021 budget request for the DOJ does not contain any funding for the LOP, which is currently funded at $18 million annually.[51]

The Department has also sought to more broadly stifle legal assistance for *pro se* respondents. For example, on April 25, 2017, EOIR sent a cease and desist letter to Northwest Immigrant Rights Project (NWIRP), ordering it to stop providing limited-scope legal assistance to *pro se* respondents without entering an NOEA form. As NWIRP described in its Complaint for Declaratory and Injunctive Relief:

> EOIR now insists on a Hobson's choice: either NWIRP must commit to full legal representation of every immigrant in removal proceedings it presently assists (which is plainly impossible), or NWIRP must refrain from providing them *any* form of legal assistance—not even a brief consultation. EOIR's cease-and-desist order to NWIRP will deprive thousands of immigrants—including asylum seekers and unaccompanied children—of the chance to consult with a NWIRP lawyers to evaluate their potential claims for legal residence. EOIR's interpretation will also deprive otherwise unrepresented immigrants of legal advice they need to understand United States law, and assistance with navigating the immigration court system.
>
> EOIR's new edict purports to control not just the appearance of attorneys in removal proceedings but their communications with clients (and even potential clients) and other limited assistance provided outside of an active EOIR proceeding.

Complaint, *Nw. Immigrant Rights Project v. Sessions*, Case No. 2:17-cv-00716 RAJ, 2017 WL 1953159 (W.D. Wash. May 8, 2017). The district court agreed with NWIRP. In a written order granting preliminary injunctive relief, the court explained as follows:

> The dichotomy between the Government's recognition of the importance of legal representation and acknowledgment that the Regulation will result in decreased services lays bare an uncomfortable reality. The effect of the Regulation as interpreted by the Government will be the inevitable chipping away at attorneys'

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[50] *See, e.g.*, Donald Kerwin, *Strengthening the U.S. Immigration System through Legal Orientation, Screening and Representation: Recommendations for a New Administration*, Center for Migration Studies (Aug. 26, 2020) https://cmsny.org/publications/strengthening-the-us-immigration-system-through-legal-orientation-screening-and-representation-recommendations-for-a-new-administration/.

[51] National Immigration Forum, *The President's Budget Request for the Department of Justice (DOJ): Fiscal Year (FY) 2021* (Mar. 2, 2020), https://immigrationforum.org/article/the-presidents-budget-request-for-the-department-of-justice-doj-fiscal-year-fy-2021/.

> fundamental rights. Under the circumstances of this case, EOIR is blindly seeking to impose its rules and regulations and spin precedent in a manner inconsistent with fairness.

Nw. Immigrant Rights Project v. Sessions, No. C17-716 RAJ, 2017 WL 3189032, at *4 (W.D. Wash. July 27, 2017). The Proposed Rule is but a renewed effort to interfere with *pro se* assistance to unrepresented immigrants.

The Department's ongoing attempts to limit—and eliminate—the LOP (and similar programs), coupled with its broader attacks on the provision of *pro se* assistance to unrepresented immigrants, cast significant doubt on the Department's stated purpose of "protect[ing] respondents from the unique and significant negative impact *notarios* and other bad actors have on them and their cases in immigration proceedings generally." 85 Fed. Reg. 61640, 61648. In fact, the purpose of the Proposed Rule is quite clear—to limit respondents' access to legal education and counsel while further eroding due process of law in immigration court proceedings. As evidenced by the congressional response to the Department's earlier attempt to terminate the LOP, the Proposed Rule is plainly contrary to congressional intent and should be withdrawn.

II. SPECIFIC COMMENTS

The Proposed Rule would allow practitioners to assist *pro se* individuals with "drafting, writing, or filing applications, motions, forms, petitions, briefs, and other documents with EOIR" as long as the practitioners disclose the nature of such assistance on amended NOEA forms. 85 Fed. Reg. 61640, 61645. Further, the Proposed Rule would not permit such continued assistance—whether practice or preparation—absent additional disclosure following the same procedure. *Id.* In other words, each separate instance of *pro se* assistance would require a new NOEA form. At the same time, the Proposed Rule would forbid EOIR funds to be used for such assistance. *Id.* American Gateways staunchly objects to these proposed changes, which would negatively impact legal services providers and *pro se* litigants, as well as the immigration court system, while yielding no discernible benefits. American Gateways is particularly concerned with the disproportionate harms to organizations who administer EOIR-funded legal orientation programs and the thousands of detained immigrants they serve each year.

A. The Department's proposal to amend the definitions of "practice" and "preparation" would impair the ability of organizations to provide meaningful legal orientation services to *pro se* individuals in removal proceedings.

The Department proposes to amend the definitions of "practice" and "preparation" throughout the relevant regulations to delineate between "practice" (as broadened to include any acts that "involve the provision of legal advice or exercise of legal judgment") and "preparation" (as limited to "acts that consist of purely non-legal assistance"). *See id.* at 61646. Representative examples of "practice" under the Proposed Rule would "include legal research, the exercise of legal judgment regarding specific facts of a case, the provision of legal advice as to the appropriate action to take, drafting a document to effectuate the advice, or appearing on behalf of an individual or petitioner in person or through a filing." *Id.* Preparation, on the other hand, would be limited to "completing forms or applications without the provision of legal advice or the exercise of legal judgment—for example, by serving purely as a transcriber or translator" or assisting individuals with filling in

"such basic, factual information as their name, address, place of birth, etc." *Id.* at 61645-46. These amended definitions would prove disastrous for the LOP, largely eviscerating providers' ability to offer educational and orientation services to *pro se* respondents.

Under the current regulations "practice" is more narrowly defined to mean "the act or acts of any person appearing in any case, either in person or through the preparation or filing of any brief or other document, paper, application, or petition on behalf of another person or client before or with DHS, or any immigration judge, or the Board." 8 C.F.R. § 1001.1(i). Stated otherwise, "practice" is limited to acts that involve a practitioner appearing in a case on behalf of another person. The LOP was structured to comply with this definition. The proposed definition of "practice," on the other hand, is so broad as to render almost any form of legal education an act of representation that would trigger the obligation to file an NOEA form. This requirement would put LOP providers like American Gateways in an impossible situation—LOP providers would not be able to file an NOEA form for their LOP work, nor, as recipients of government funds, would the same organizations be able to provide other limited-scope work at LOP sites under an NOEA. In other words, LOP providers would have to struggle mightily (under threat of sanctions) to provide any meaningful legal services at all.

As a LOP provider, American Gateways is prohibited from offering legal advice, which would amount to representation, but it routinely exercises legal judgment in the provision of LOP services. As discussed in the introduction, the LOP involves four service components: (1) group orientations and information sessions; (2) individual orientations and information sessions; (3) *pro se* and self-help workshops; and (4) referrals and outreach to *pro bono* attorneys. In order to provide appropriate education, American Gateways must also be able to help individuals assess their cases—an activity that LOP providers could be prohibited from engaging in under the Proposed Rule because it inevitably involves some exercise of legal judgment, however slight that may be. For example, under the Proposed Rule, if a practitioner were to ask follow-up questions during a group or individual orientation or information session in order to better understand the applicable facts and circumstances of an individual's situation, such act could be construed as "practice." This is especially true if a practitioner were, for instance, to explain to an asylum seeker the next steps in the immigration court process or explain her rights and obligations based on recent changes in the law. *Pro se* workshops would also be negatively impacted. A substantial number of the detained immigrants served by American Gateways are seeking humanitarian protection in the United States, including asylum, statutory withholding of removal, and removal under the Convention Against Torture (CAT). The Department and DHS have proposed rolling out a new version of the Form I-589 application for asylum and withholding of removal that would require applicants to engage in legal analysis and make legal judgments.[52] If a practitioner providing LOP services is prohibited from exercising any legal judgment in the course of assisting applicants with completing the Form I-589 (unless the practitioner files a NOEA form, which the LOP prohibits), American Gateways would be precluded from providing any assistance with completing the application. The Proposed Rule thereby contravenes the intent and diminishes the value of the

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

LOP, which Congress created for the specific purpose of helping detained immigrants navigate the immigration court system.

The Proposed Rule also provides that "legal research" could fall within the ambit of the amended definition of "practice," but it fails to define "legal research." If the Department declines to rescind the Proposed Rule, it must address this ambiguity, which could discourage practitioners' from sharing even general research about changes in asylum law or referring a *pro se* respondent to *pro bono* counsel—both of which are key components of the LOP's continued success.

The Proposed Rule's overly narrow definition of "preparation" is similarly nonsensical. Under the Proposed Rule, "preparation" would be limited to "acts that consist of purely non-legal assistance." 85 Fed. Reg. 61640, 61645. This means that practitioners could help individuals fill in basic biographical information but would be precluded from engaging in any activities that "involve the provision of legal advice or application of legal knowledge or judgment." *Id.* at 61646. This constitutes a departure from the current regulations, which provide that "preparation" does not constitute "practice" unless a practitioner (1) studies the facts of the case, (2) gives legal advice, *and* (3) performs other activities, such as the preparation of forms or a brief for the Immigration Court. *See* 8 C.F.R. § 1001.1(k) (defining "preparation" that amounts to "practice" as the "study of the facts of a case and the applicable laws, coupled with the giving of advice and auxiliary activities"). Consistent with existing guidelines, American Gateways is able to offer individual orientation and information sessions at which its staff provides information to participants as part of individualized assessments even though they do not give legal advice. For example, staff attorneys do not advise LOP participants to apply for certain types of relief but, in compliance with regulations, they do provide individualized guidance as to what the law requires if an individual wishes to apply for a certain type of relief. Such individualized educational services are the centerpiece of the LOP, as they provide *pro se* respondents with the information and tools needed to effectively present their cases without representation. The proposed definition of "preparation" could foreclose these activities, eroding critical protections that programs like the LOP afford to indigent immigrants.

B. The Department's proposal to require all practitioners who engage in limited non-representative practice or preparation to file an NOEA form would similarly disrupt LOP services while also discouraging *pro bono* representation.

The Proposed Rule sets forth amendments to the current NOEA forms. Specifically, the amended forms would contain three sections: (1) a section "limited to situations in which a practitioner has provided assistance in the form of non-representative practice, but does not wish to take on actual representation in the EOIR proceeding"; (2) a section "limited to the rare situation in which a practitioner has engaged in preparation"; and (3) a section "relating to representation similar to the current practice with the existing EOIR Forms 27 and 28." 85 Fed. Reg. 61640, 61646.

Under the Proposed Rule, a practitioner assisting with "preparation" would be required to submit an amended NOEA form to EOIR, which would accompany any form, application, or filing that was the subject of the assistance. The practitioner would have to disclose her name, contact information, state bar number or EOIR identification number, the general nature of work performed, and fees charged, as well as complete an attestation certifying that she explained, and the individual understands, the "preparatory nature" of the assistance she provided. *Id.* at 61647.

Filling out the preparer sections of USCIS or EOIR forms (*e.g.*, I-589, I-485, EOIR-40, EOIR-42A, EOIR-42B, or Form I-881) would not be a permissible substitute for filing an NOEA form. *Id.* at 61646. Requiring LOP providers like American Gateways to enter a notice of limited appearance for every person consulted as part of the program's individual orientations, information sessions, and workshops gives rise to a substantial risk that EOIR would ultimately determine that such services constitute "representation" and, accordingly, withhold government funding for the programs.

The Proposed Rule also has the potential of requiring LOP providers who offer assistance with completing applications, including the translation of forms and applications, to file an amended NOEA by completing the form's "non-representative practice" or "preparation" sections. As the Department notes, "it expects practitioners to engage only *rarely* in acts of preparation, because of the inherent likelihood that a practitioner will exercise legal judgment or provide legal advice while performing otherwise ministerial tasks such as serving as a scribe in filling out a form." *Id.* at 61645 n.8 (emphasis added). Hence, there would be a strong presumption that all practitioners engage in "practice" rather than mere "preparation." As discussed above, it is common for LOP providers to assist *pro se* individuals, many of whom lack the requisite literacy or English-language competency, with the "preparation" of forms. By equating preparation with representation except in "rare" cases, the Proposed Rule threatens the continued viability of the LOP.

American Gateways is also concerned about the impact of the Proposed Rule on its ability to recruit volunteer attorneys and non-attorneys to assist with *pro se* and self-help workshops in a non-LOP context. Take, for example, a volunteer attorney who leads a *pro se* workshop in partnership with American Gateways at Limestone County Detention Center or provides guidance to a *pro se* individual in the completion of a form. Under current regulations, that practitioner does not have to enter appearances for each participant that the practitioner assists. Imposing such a requirement, as the Department proposes, would not only be unduly burdensome for the volunteer practitioner but would leave the practitioner vulnerable to the risk of disciplinary sanctions for failure to enter appearances for each assisted participant. *See infra* Section II.D. That practitioner is likely to simply seek out a different *pro bono* opportunity. Furthermore, it is common practice for legal services organizations to hold clinics to assist *pro se* applicants with completing certain forms (*e.g.*, Form I-589). Under the Proposed Rule, that activity would arguably constitute "practice" such that volunteer attorneys would be required to file a limited appearance in the case. Given the complexity of immigration law, this requirement is likely to deter *pro bono* attorneys (especially non-immigration practitioners) from providing these types of services. Moreover, many non-immigration practitioners do not have EOIR identification numbers. The Department states both (1) that an attorney who does not have an EOIR identification number would not have to register with EOIR in order to submit an NOEA form and engage in non-representative practice, *see* 85 Fed. Reg. 61640, 61645 n.9, and (2) that "[a]ttorneys and fully accredited representatives must register with EOIR's electronic registry" and be assigned an EOIR ID number in connection with cases involving non-representative practice or preparation, *id.* at 61647 n.12. This lack of clarity surrounding EOIR registration requirements would further discourage participation. Moreover, if a non-attorney volunteer (*e.g.*, a law school graduate) were to assist with preparing an application under the supervision of an attorney, it would then fall on the attorney to submit an NOEA form. American Gateways serves thousands of detained immigrants its each year. It is wholly unreasonable to expect or require its staff attorneys who work in detention centers to file hundreds of limited-scope NOEA forms disclosing each individual instance of *pro se* preparation assistance.

Legal services providers like American Gateways may simply opt not to host such clinics because it would become overly onerous to do so.

Notably, other rules of professional conduct governing the legal profession do *not* mandate the disclosure of *pro se* assistance. There "is no prohibition in the [ABA] Model Rules of Professional Conduct against undisclosed assistance to pro se litigants."[53] Instead, the Model Rules permit lawyers "to provide legal assistance to litigants appearing before tribunals 'pro se' and help them prepare written submissions without disclosing or ensuring the disclosure of the nature or extent of such assistance."[54] As the ABA Standing Committee on Ethics and Professional Responsibility has explained, "the fact that a litigant submitting papers to a tribunal on a pro se basis has received legal assistance behind the scenes is not material to the merits of the litigation. Litigants ordinarily have the right to proceed without representation and may do so without revealing that they have received legal assistance in the absence of a law or rule requiring disclosure."[55] The EOIR has not provided any sensible explanation for imposing heightened disclosure requirements for similar *pro se* assistance in cases before the EOIR.

The Proposed Rule amounts to little more than a bare attempt to reduce LOP providers to mere scribes who are forbidden from providing any meaningful legal education to detainees and discourage other practitioners from providing *pro se* assistance. Due to the remote location of detention facilities and shortage of immigration attorneys, not to mention the current COVID-19 pandemic, restricting the scope of LOP services would result in many detained immigrants being left with virtually *no* access to basic legal information. The Department's underhanded and misguided proposal to dismantle the LOP under the guise of *allowing* practitioners to assist *pro se* respondents with preparing applications and court filings, subject to required disclosures, should be withdrawn.

C. Constraining and silencing LOP providers would impair the efficient operation of immigration courts and impose unnecessary costs on the government.

Depriving immigrants of access to information about the legal process creates inefficiencies in the immigration court system. The Department fails to appreciate that the burden of ensuring that immigrants adequately understand the removal process falls on immigration judges. As the Eighth Circuit has explained,

> [c]onsidering the 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.

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53 Am. Bar Ass'n Standing Committee on Ethics & Prof'l Responsibility, *Undisclosed Legal Assistance to Pro Se Litigants*, Formal Opinion 07-446 4 (May 5, 2007).

54 *Id.* at 1.

55 *Id.* at 2.

Ramirez v. Sessions, 902 F.3d 764, 771 (8th Cir. 2018) (internal 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.") (internal citations and quotation marks omitted); *Mohamed v. Att'y Gen. U.S.*, 705 F. App'x 108, 114 (3d Cir. 2017) ("The importance of that full examination is all the more apparent when considering the difficulties faced by a *pro se* applicant with little or no reading skills who was forced to seek help from his fellow detainees in a facility where he had already been assaulted, collect evidence and seek testimony while detained, and present his case via videoconference."); *Yang v. McElroy*, 277 F.3d 158, 162 (2d Cir. 2002) (per curiam) ("[T]he IJ whose decision the Board reviews, unlike an Article III judge, is not merely the fact finder and adjudicator but also has an obligation to establish the record.") (citation omitted); EOIR, U.S. Dep't of Justice, Immigration Court Practice Manual, § 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").[56] Recently imposed quotas on immigration judges have already heightened tensions between fairness and procedural efficiency.[57] The inevitable outcomes of the Department's instant proposal would include inadequately prepared forms, motions, and evidentiary submissions that would only further diminish efficiency and increase the existing backlog in the immigration court system.[58]

As discussed herein, the effectiveness of the LOP has been well-documented.[59] Immigration judges have lauded the program for enhancing the fairness and efficiency of court proceedings. *See supra* p. 14. Congress has overwhelmingly supported the LOP and similar programs, and it vehemently pushed back against the Department's attempt to suspend the LOP in 2018. *See id*. More than 100 members of the House of Representatives condemned the planned suspension as

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

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

[57] *See, e.g.*, Lorelei Laird, *Justice Department Imposes Quotas on Immigration Judges, Provoking Independence Concerns*, ABA J. (Apr. 2, 2018, 6:31 P.M.), http://www.abajournal.com/news/article/justice_department_imposes_quotas_on_immigration_judges_provoking_independe; *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) (criticizing performance quotas for "putting judges in the position of violating a judicial ethics canon" and "pitting their personal interest against due process considerations").

[58] The immigration court case backlog currently stands at 1,246,164 cases, including more than 560,000 asylum cases. *See* TRAC Immigration, *Immigration Court Backlog Tool* (data through Sept. 2020), https://trac.syr.edu/phptools/immigration/court_backlog/; 85 Fed. Reg. 59692, 59696 (identifying number of pending asylum cases).

[59] *See* Siulc, *Legal Orientation Program*, *supra* note 12.

an action that ran "counter to the very clear direction of Congress" and went on to describe the LOP thusly:

> The LOP Program provides individuals in detention with in-person briefings on immigration court procedures, as well as basic legal information and resources. Studies have shown that these programs save our immigration courts time and money. Recent efforts at the Department with regard to U.S. immigration courts raise serious concerns about the Department's commitment to fairness, due process, and constitutional requirements.[60]

Even the Department itself has acknowledged the substantial cost-savings to the government that have resulted from the LOP.[61]

These findings regarding the benefits of the LOP are generally consistent with other credible sources documenting the benefits of *pro se* assistance and legal education programs. The Office of the Chief Immigration Judge has recognized the positive contributions of such programs, "encouraging judges and courts 'to support legal orientations and group rights presentations' which can greatly assist local pro bono efforts to disseminate critical legal information, prepare respondents for master calendar hearings, screen respondents for eligibility for relief, and identify cases for referral to pro bono counsel…."[62] The ABA has long sanctioned and encouraged the unbundling of legal services. ABA Model Rule 1.2(c) allows lawyers to limit the scope of representation so long as the limitation is reasonable under the circumstances and the client gives informed consent.[63] In 2013, the ABA passed a resolution encouraging attorneys to consider limiting the scope of representation *so as to increase access to legal services*.[64] And in a 2016 report, the American Immigration Lawyers Association (AILA) Task Force on the Future of Immigration Law Practice explained how self-lawyering programs "have not only helped alleviate some of the *pro se* issues that the courts are seeing, but have also promoted more *pro bono* work among attorneys."[65]

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[60] U.S. Congress, Letter to Attorney General Jefferson Sessions (Apr. 19, 2018), https://quigley.house.gov/sites/quigley.house.gov/files/LOPICHLetter.pdf.

[61] *See* Dep't of Justice, *Cost Savings Analysis*, *supra* note 12. Although the Department has since taken a different position, that position relies on studies lacking in statistical validity. *See* Vera Inst. of Justice, *supra* note 12.

[62] David L. Neal, Chief Immigration Judge, Memorandum for All Immigration Judges, et al. re: *Operating Policies and Procedures Memorandum 08-01: Guidelines for Facilitating Pro Bono Legal Services*, at 4 (Mar. 10, 2008), https://www.justice.gov/sites/default/files/eoir/legacy/2008/04/24/08-01.pdf.

[63] Model Rule of Prof'l Conduct R. 1.2(c).

[64] Am. Bar Ass'n, Resolution No. 108 (adopted Feb. 11, 2013), https://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/ls_del_unbundling_resolution_108.pdf.

[65] AILA, Doc. No. 16051200, *The Future of Immigration Law Practice: A Comprehensive Report*, at 1-11 (Oct. 17, 2016), https://www.aila.org/practice/ppc-reports/the-future-of-immigration-law-practice.

A report commissioned by the United Kingdom Legal Services Board similarly "found that access to justice would be enhanced if consumers of legal services are empowered to handle more of their own legal affairs." *Id.* at 1-11 (citing Legal Services Consumer Panel, Legal Services Board of England and Wales, *2020 Legal Services: How Regulators Should Prepare for the Future* (Nov. 2014), http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/2020consumerchallen

The Department's utter silence regarding the LOP in the Proposed Rule would seem peculiar if the Department's less benign intentions were not so apparent. Before pressing forward with the Proposed Rule, the Department must assess the impact of its proposal on LOP providers and offer a legitimate justification for implementing a costly and inefficient regulatory scheme that is contrary to Congressional intent and out-of-step with the recommendations of immigration judges and practitioners, as well as generally applicable standards and practices within the legal profession. If the Department refuses to do so, the Proposed Rule would run afoul of the APA, which requires that agencies "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)).

D. The proposed disciplinary sanctions are unnecessary and inappropriate.

Under the Proposed Rule, a practitioner who engages in practice or preparation and fails to disclose that on an NOEA form "would be subject to disciplinary sanction in the public interest." 85 Fed. Reg. 61640, 61649. The current rule requires that a practitioner engage in a "pattern or practice of failing to submit an NOEA form before disciplinary action may be taken." 8 C.F.R. § 1003.102(t). The amended regulations, on the other hand, would permit disciplinary sanctions upon a first offense. *See* 85 Fed. Reg. 61640, 61652 (proposed 8 C.F.R. § 1003.102(t)). This would likely result in the punishment of innocent practitioners who are simply unaware of the NOEA filing requirement or who mistakenly believe they are not required to file an NOEA form because the nature of the assistance they provided did not amount to practice or preparation. Harsher disciplinary sanctions would deter *pro bono* attorneys in particular from providing legal assistance to immigrants, thereby compounding the underrepresentation crisis in immigration courts nationwide.

The Department contends that the current regulations requiring a "pattern or practice" of offenses relating to NOEA forms are justified because the definitions of "practice" and "preparation" in C.F.R. § 1003.102(t) are "confusing." 85 Fed. Reg. 61640, 61649. The Department further asserts that (1) this more forgiving standard is "no longer necessary" because the Proposed Rule contains purportedly "clearer definitions of 'practice' and 'preparation'" and (2) allowing practitioners to engage in non-representative practice outside of court heightens the importance of the disclosure requirements such that "the damage from just one instance of failing to file the appropriate form is accordingly greater." *Id.* Both of the Department's justifications are ill-founded. First, the newly proposed definitions of "practice" and "preparation" not only lack clarity but are counterintuitive, as they are largely inconsistent with other rules of professional conduct governing attorneys. Nearly all jurisdictions permit lawyers to limit the scope of their representation, and they do *not* require the disclosure of *pro se* assistance. *See supra* p. 20. Second, attorneys are already subject

ge.pdf). Furthermore, *pro se* assistance has become an increasingly common element of practice before other executive agencies. For example, the United States Patent and Trademark Office (USPTO) operates a Pro Se Assistance Program that includes walk-in assistance at USPTO's headquarters in Alexandria, Virginia, pro se-specific educational resources on patents and electronic filing, dedicated customer service and assistance, and increased examiner-applicant interaction. *See* Dennis Crouch, *Answering the Call — Pro Se Assistance at the USPTO*, Patentlyo (Apr. 20, 2017), https://patentlyo.com/patent/2017/04/answering-assistance-uspto.html ("The program has helped identify the most common problems encountered by these applicants, so that the USPTO can simplify the process if possible, or establish best practices to assist *pro se* applicants.").

to rules of professional responsibility that address mandatory disclosures to clients or potential clients regarding the scope of representation, and the Department fails to explain how enhanced disclosure requirements would improve existing safeguards.

To make matters worse, the Department does not explain what it means by "disciplinary sanction" so the precise consequences of failing to file an NOEA form are unclear. Nor does the Department explain how it would consistently enforce the rule. Where a practitioner (or *notario*) assists a *pro se* respondent with preparing an application or motion and the respondent later files that document with the immigration court without an accompanying NOEA form, it is entirely unclear how EOIR would go about establishing the identity of the unknown practitioner or preparer, especially if the respondent himself does not know the identity of the person who assisted him with the filing. At best, EOIR could enforce the rule unevenly, which counsels against its implementation.

The Proposed Rule also provides that a practitioner would be subject to disciplinary sanctions if he "repeatedly drafts notices, motions, briefs, or claims that are later filed with DHS or EOIR that reflect little or no attention to the specific factual or legal issues applicable to a client's case, but rather rely on boilerplate language indicative of a substantial failure to competently and diligently represent the client." 85 Fed. Reg. 61640, 61652-53. This particular revision is apparently intended to address *pro se* legal assistance that involves the drafting of motions and applications, which falls short of full representation. Yet, the revision seemingly blurs the line between non-representative "practice" or "preparation" and full "representation," opening the door to disciplinary sanctions on the grounds that "boilerplate language" is "indicative of a substantial failure to competently and diligently *represent* the client." *Id.* at 61653 (emphasis added). But what about a practitioner or preparer who provides only limited-scope *pro se* assistance? The very point of *pro se* assistance is to provide limited assistance that falls short of representation. Either the Department has improperly targeted the use of template filings in an attempt to curtail *pro se* assistance, or it did not intend for this provision to encompass template filings, in which case the provision should be redrafted for clarity.

Given that the overriding (yet unstated) purpose of the Proposed Rule is to inhibit meaningful *pro se* assistance to unrepresented immigrants in removal proceedings, EOIR would most likely seek to enforce this arguably ambiguous provision against non-profit legal services providers. Consider the potential effects of this proposed change on American Gateways. In connection with its LOP services, American Gateways utilizes EOIR-approved templates, such as motions for change of venue, bond applications, and motions to accept late filings. It also uses these same templates for *pro se* individuals not under LOP (including detainees it serves at Limestone County Detention Center, which is not an LOP site). If American Gateways were not able to use these templates, which contain "boilerplate" language, without the possibility of facing sanctions, then it would not be able to provide any real assistance to individuals.

The Proposed Rule's prohibition on filings that rely on "boilerplate language" is senseless given the widespread use of templates in court systems throughout the country and, more specifically, their use in connection with *pro se* legal clinics. Indeed, "[a]ny program to assist the self-represented litigant must begin with the provision of court forms," and nearly every state court

system provides template forms to *pro se* litigants.[66] Similarly, United States District Courts have fifteen publicly available forms for use by *pro se* litigants.[67] And federal judges surveyed by the Federal Judicial Center responded that forms were among "measures they have found most effective in helping pro se litigants."[68] Certainly the Department itself can recognize the value in using such forms to assist both individuals and adjudicators since the Department itself publishes several EOIR-approved templates.[69] A practitioner who elects to assist a *pro se* litigant with filling in the blanks on an approved template has arguably exercised "legal judgment" that amounts to "practice" under the Proposed Rule. At the very least, the Department must clarify proposed 8 C.F.R. § 1003.102(u) so that a practitioner's use of EOIR-approved forms cannot, under any circumstances, give rise to sanctions.

Lastly, American Gateways would be remiss not to mention that 8 C.F.R. § 1003.102(u) would apply only to practitioners who represent immigrants, not DHS attorneys who represent the government. DHS attorneys routinely draft and file motions and briefs that not only contain "boilerplate language" but "reflect little or no attention to the specific factual or legal issues" applicable to a given case. *See* 85 Fed. Reg. 61640, 61652-53 (proposed 8 C.F.R. § 1003.102(u)). The Department's proposed double-standard for counsel is patently unfair.

E. Limiting access to records of proceedings would impose unnecessary burdens on practitioners with no demonstrable benefits.

Although the Proposed Rule would "allow practitioners to assist pro se individuals with drafting, writing, or filing applications, motions, forms, petitions, briefs, and other documents with EOIR," 85 Fed. Reg. 61640, 61645, it "would not expand access to records of proceedings beyond the current law." *Id.* at 61649. Accordingly, limited practitioners would be treated as third parties with respect to access to records of proceedings, meaning they would be required to submit Freedom of Information Act (FOIA) requests to obtain case files, or obtain such records from respondents themselves. *Id.* (asserting that "[e]xisting mechanisms, such as [FOIA], are sufficient for third parties to obtain access to such records"). The Department asserts that records of proceedings are available via FOIA requests and "readily available for review by the alien and the alien's attorney or representative of record." *Id.* The Department further asserts that because every document in a case is served on the respondent "an individual who wishes to assist an alien in immigration proceedings may quickly and easily obtain information or documents about a case directly from the alien." *Id.* The Department contends that this system sufficiently balances competing concerns

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[66] Ctr. on Court Access to Justice for All, *Access Brief: Forms and Document Assembly*, https://ncsc.contentdm.oclc.org/digital/collection/accessfair/id/264/rec/9 (last visited Oct. 28, 2020).

[67] *Civil Pro Se Forms*, U.S. Courts, https://www.uscourts.gov/forms/civil-pro-se-forms (last visited Oct. 27, 2020).

[68] Fed. Judicial Ctr., *Assistance to Pro Se Litigants in U.S. District Courts: A Report on Surveys of Clerks of Court and Chief Judges*, Federal Judicial Center viii (2011) https://www.fjc.gov/sites/default/files/2012/ProSeUSDC.pdf.

[69] *See Forms*, DOJ, https://www.justice.gov/forms (last visited Oct. 27, 2020).

of confidentiality and access but fails to acknowledge the heavy burden that this places upon respondents and practitioners, and the injustice it creates.

First, the Proposed Rule presumes that immigrants receive and maintain a complete "case file" without providing a basis for this proposition.[70] This statement neglects the fact that many immigrants may be in detention, which impedes their ability to properly maintain a case file.[71] It also offers no alternative (outside of a FOIA request, as discussed below) in the event that an immigrant has not obtained or maintained her case file. Further, it relies upon the assumption that all pieces of the record of proceeding will be served upon the immigrant. *See* 85 Fed. Reg. 61640, 61649. The Immigration Court Practice Manual describes the "Record of Proceedings" as "vary[ing] from case to case," but typically containing "the Notice to Appear (Form I-862), hearing notice(s), the attorney's Notice of Appearance (Form EOIR-28), Alien's Change of Address Form(s) (Form EOIR-33/IC), application(s) for relief, exhibits, motion(s), brief(s), hearing tapes (if any), and all written orders and decisions of the Immigration Judge."[72] The Proposed Rule, for example, does not address how an immigrant or a limited representative is to obtain "hearing tapes," copies of which are not automatically served upon immigrants (or their representatives).

Second, the Department states that current "mechanisms, such as [FOIA], are sufficient for third parties to obtain access to such records." 85 Fed. Reg. 61640, 61649. However, FOIA requests, which may take weeks or months to arrive, and are not sufficient for a respondent's representative, no matter how limited such representation may be. Federal agencies are required to respond to FOIA requests within 20 business days informing the requester of its determination regarding whether to comply the request (such deadline may be extended in "unusual circumstances"), and if applicable, then make the requested documents "promptly available." 5 U.S.C. §§ 552(a)(6)(A)(i), (B)(i), (C)(i). According to the Department's website, "[i]n some circumstances [its agencies, such as EOIR] will be able to respond to the request within the standard time limit established by the FOIA, which is twenty working days or approximately one month. In other instances there might be a longer period of time before the request can be handled."[73] In other words, EOIR is neither obligated to produce records within 20 business days and, by its own admission, does not uniformly do so in all instances. While such a delay may be acceptable to a

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[70] The Proposed Rule states as follows:

> Moreover, except in rare cases involving classified information or the issuance of a protective order or in cases involving in absentia hearings, every immigration court order and every document considered by an immigration judge in adjudicating a respondent's case is served on the respondent. Thus, an individual who wishes to assist an alien in immigration proceedings may quickly and easily obtain information or documents about a case directly from the alien.

85 Fed. Reg. 61640, 61649.

[71] *See e.g.,* Eunice Cho, et al., ACLU Research Report, *Justice-Free Zones: U.S. Immigration Detention Under the Trump Administration* 14, 29, 48 (Apr. 2020), https://www.hrw.org/sites/default/files/supporting_resources/justice_free_zones_immigrant_detention.pdf (noting that immigration detention facilities detained "an average of over 50,000 people in FY 2019, at one point detaining as many as 56,000 people" and also providing that access to legal materials and law libraries within immigration detention facilities is lacking).

[72] *See* EOIR, DOJ, Immigration Court Practice Manual § 4.10(c) (July 2, 2020), https://www.justice.gov/eoir/page/file/1258536/download.

[73] Dep't of Justice, *Make a FOIA Request to DOJ*, https://www.justice.gov/oip/make-foia-request-doj#:~:text=In%20some%20circumstances%20the%20component%20will%20be%20able,time%20needed%20before%20the%20request%20can%20be%20handled (accessed Oct. 26, 2020).

third party studying the system, it serves as an impediment to justice when a legal representative must wait—and potentially be denied the request in the process—to review a case file.

By way of example, in May 2020, a *pro bono* attorney requested access to the record of proceedings in a case in which he had entered a Form EOIR-28 so that he could review a Form I-589 application for asylum filed *pro se* by his client while she was detained. The client is of limited literacy and did not have a file-stamped copy of the Form I-589 in her possession. The immigration court to which the case had been transferred declined the attorney's request to coordinate a time to access the record, stating that it had not yet received the record from the transferee court despite the transferee court indicating that the record had already been transferred. In July 2020, the transferee court indicated that it still had not received the case record. The attorney, therefore, resorted to submitting a FOIA request to EOIR on July 2, 2020. EOIR promptly acknowledged receipt of the request, noting that EOIR was "extending the time period to respond by an additional 10 working days" because the request involved "unusual circumstances." The acknowledgement further "advised that due to necessary operational changes as a result of the national emergency concerning the novel coronavirus disease (COVID-19) outbreak, there may be some delay in the processing of [the] request." The full record of proceedings was not produced by EOIR until October 7, 2020 and was not received by the attorney until October 16, 2020—*106 days after the request was submitted*. Although American Gateways certainly appreciates that COVID-19 has impacted the operation of businesses and government agencies nationwide, that simply underscores why mechanisms like FOIA are *not* sufficient avenues for representatives to timely obtain a respondent's record of proceedings.

Third, the Department improperly equates restricting access to the record of proceedings with protecting sensitive information. But if confidentiality were really the primary concern, there are several alternative ways that the Department could ensure that case files are protected. As noted by multiple filers in the advance comments, the Department could require that respondents consent to a limited practitioner's access to the record of proceedings by checking a box on a notice of appearance or otherwise providing a signed consent.[74] While protecting sensitive information should be a concern of the Department, this Proposed Rule would not further that goal. Instead the Department disingenuously seeks to impede practitioners' access to necessary case information under the guise of protecting respondents.

Fourth, the Department's proposal to limit access to the record of proceedings is particularly objectionable in light of its recent proposal to speed up filing deadlines for the Form I-589 and

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[74] *See* AILA, Comment Letter on ANPRM regarding Professional Conduct, at 4 (Apr. 26, 2019), *available at* https://beta.regulations.gov/comment/EOIR-2019-0001-0020 ("The process should be the same as with all cases (see 8 CFR §1292.4(b)), except that in limited scope cases clients would consent to this access by selecting the appropriate box on a new version of Form EOIR-27 or 28."); *see also* Florence Immigrant & Refugee Rights Project, Comment Letter on ANPRM regarding Professional Conduct, at 10 (Apr. 26, 2019), *available at* https://beta.regulations.gov/comment/EOIR-2019-0001-0033 ("A signed consent from the noncitizen, and/or a notice of appearance by counsel if the noncitizen is represented in proceedings, should be sufficient for the noncitizen and/or his or her counsel to have access to the file."); *see also* Human Rights First, Comment Letter on ANPRM regarding Professional Conduct, at 4 (Apr. 26, 2019), *available at* https://beta.regulations.gov/comment/EOIR-2019-0001-0021 ("Attorneys engaging in any level of legal assistance to a noncitizen, including in providing case analysis or assessing whether to engage an individual as a client, should be permitted access to immigration court files with the written consent of the noncitizen.").

codify into regulation inflexible case adjudication timelines.[75] Pursuant to the Department's most recent NPRM regarding procedures for asylum and withholding of removal, asylum seekers who are funneled into asylum-and-withholding proceedings would have a mere 15 days after their initial master calendar hearing to file the Form I-589, and immigration judges would be required to adjudicate nearly all cases within 180 days.[76] And in connection with an earlier joint NRPM, the Department and DHS introduced several proposed changes to the existing Form I-589 that would require applicants to have in-depth knowledge of the asylum laws and regulations.[77] American Gateways submitted comments addressing those proposed changes and, therefore, will not repeat all of its objections here. However, American Gateways submits that any proposal to limit legal representatives' access to the record of proceedings must be assessed alongside all other pending rule changes that would increase the need for attorneys to readily access a respondent's record for purposes of providing limited-scope legal assistance or even analyzing a case in order to assess whether to enter into an engagement with a client or refer the client to a *pro bono* attorney. The Department has failed to do so here.

Lastly, it has long been the case that "[p]arties to an Immigration Court proceeding, and their legal representatives, may inspect the official record of proceedings by prior arrangement with Immigration Court staff" without filing a FOIA request.[78] Immigration Courts are therefore accustomed to "tak[ing] special precautions to ensure the confidentiality of cases involving aliens in exclusion proceedings, asylum applicants, battered alien spouses and children, classified information, and information subject to a protective order."[79] The Department provides no valid rationale for departing from this established procedure by restricting access to the record of proceedings only when a practitioner provides limited-scope representation. As stated by the Florence Immigrant & Refugee Rights Project,[80] in its comments to the Department's ANPRM:

> Whether or not EOIR changes the rules regarding limited representation, there is no reason to restrict access to a noncitizen's file based on the scope of representation. A practitioner engaging in any level of representation, no matter how limited, or, indeed even in providing case analysis, will generally need access to the noncitizen's court record. A signed consent from the noncitizen, and/or a notice of appearance by counsel if the

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75 *See* 85 Fed. Reg. 59692, 59693-94 (proposed Sept. 23, 2020).

76 *See* 85 Fed. Reg. 59692, 59693-94, 59699-700.

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

78 Immigration Court Practice Manual § 12.2(a)(i)(A), at 156 (last updated July 2, 2020); *see also id.* § 1.6(c)(i), at 11.

79 *Id.* at ch. 1.6(c)(v), at 12.

80 The Department has improperly disregarded the multiple comments it received on this topic in response to its ANPRM. *See, e.g.*, RAICES, Comment Letter on ANPRM regarding Professional Conduct, 84 Fed. Reg. 59, at 3 (Apr. 26, 2019), *available* at https://beta.regulations.gov/comment/EOIR-2019-0001-0029 ("Attorneys who are making limited appearances should have access to the same record of proceedings that attorneys who are making full appearances have access. There is no privacy or ethical reasons to limit the access to records."); Human Rights First, Comment Letter, *supra* note 74, at 4 ("Attorneys engaging in any level of legal assistance to a noncitizen, including in providing case analysis or assessing whether to engage an individual as a client, should be permitted access to immigration court files with the written consent of the noncitizen.").

> noncitizen is represented in proceedings, should be sufficient for the noncitizen and/or his or her counsel to have access to the file.[81]

American Gateways agrees. For the foregoing reasons, among others, American Gateways objects to the Department's proposal to prevent limited-scope practitioners from accessing records of proceedings without submitting a FOIA request. There is no reason why such representatives should not be permitted to readily access a client's court records.

F. The Proposed Rule would neither deter fraud nor level the playing field, as the Department contends.

The Department's primary justification for the Proposed Rule is that undisclosed legal assistance, or "ghostwriting," both facilitates fraud and gives *pro se* litigants who receive such assistance an unfair advantage in immigration court proceedings. Neither of these concerns justifies the tremendous costs of implementing the Proposed Rule.

American Gateways agrees that there are some "bad actors" who take advantage of detained and other *pro se* immigrants, but the Proposed Rule is not tailored to deter such individuals who could easily circumvent the rule by either (1) disclosing that any assistance they provided was mere "preparation" while giving what amounts to bad legal advice, or (2) simply not filing an NOEA form at all. Imposing disciplinary sanctions for the single failure to file an NOEA form is unlikely to have any deterrent effect on *notarios* who are not even authorized to practice law. And, as the Department acknowledges, all attorneys are already subject to EOIR's Rules of Professional Conduct and state bar rules. *See* 85 Fed. Reg. 61640, 61648. Furthermore, the Department tacitly admits that the alleged deterrent effects of the Proposed Rule are, at best, speculative. *See id.* ("DOJ believes that the proposed requirements *may reduce* the ability of *notarios* and other bad actors to operate in immigration proceedings through ghostwriting.") (first emphasis added; second emphasis in original). And its assertion that "[r]espondents and petitioners, through the proposed rule and education efforts, would know to avoid the assistance of practitioners or other bad actors who are unwilling to identify themselves on documents with which they assist" is specious. Individuals of limited literacy and/or English proficiency, who are often desperate for legal assistance, are not likely to examine or even understand the purpose or contents of an NOEA form. By limiting the ability of legal services organizations and LOP providers to effectively provide education and guidance to *pro se* individuals in an incredibly complex area of the law, the Proposed Rule would harm, not help, immigrants. Moreover, programs that give immigrants some access to an experienced immigration lawyer help immigrants "avoid the fees and the bad advice often rendered by nonlawyer *'notarios'* who prey upon vulnerable litigants."[82] If the already limited access to basic legal education and services is cut off, detained immigrants in particular would be even more—not less—vulnerable to fraud.

The Department's related claim that *pro se* litigants who receive undisclosed legal assistance "would be granted greater latitude as a matter of judicial discretion in hearings and trials," thereby

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[81] *See* Florence Immigrant & Refugee Rights Project, Public Comments, *supra* note 75, at 10.

[82] Proposed Brief of Immigrant Legal Rights Organizations as Amici Curiae, at 5, *Nw. Immigrant Rights Project, et al. v. Sessions, et al.*, Case. No. 2:17-cv-00716 RAJ (W.D. Wash. May 12, 2017), ECF No. 15-1.

disadvantaging the opposing party (*i.e.*, the government), is unsupportable. Providing *pro se* respondents with orientation and education assistance without disclosure does not somehow give those respondents an unfair advantage. If a respondent walks away from a LOP session with a basic understanding of the immigration court system and her claims, this will benefit not only the individual respondent, but the immigration court system. If the Department were truly concerned about selective assistance providing an unfair benefit to *pro se* respondents, then a more appropriate rule would seek to expand federal funding of programs providing such assistance so that all *pro se* respondents could have a basic understanding of the immigration court system and their particular claims prior to representing themselves before EOIR.

III. CONCLUSION

For all of the reasons set forth herein, American Gateways urges the Department to withdraw the Proposed Rule in its entirety. American Gateways generally supports the "unbundling" of legal services, including the provision of limited-scope legal education, assistance, and representation for indigent immigrants who have no recognized right to counsel. But the Department's arbitrary and excessively burdensome proposal would do little, if anything, to support the expansion of limited-scope legal assistance. To the contrary, the Proposed Rule would make it exceedingly difficult for LOP providers like American Gateways to provide vital legal education to detained immigrants, interfere with the ability of non-profit legal services organizations to provide *pro se* assistance, and discourage attorneys from providing *pro bono* representation. Given the severe shortage of competent representation and the extraordinary backlog of cases in immigration courts, the Department's imprudent proposal not only threatens fundamental due process rights but contravenes "right, justice, and plain common-sense." *Nw. Immigrant Rights Project*, 2017 WL 3189032, at *4. The Proposed Rule should therefore be withdrawn.