Comments Submitted by American Gateways RE: Notice of Proposed Rulemaking (NPRM) by the Executive Office for Immigration Review, Department of Justice: Good Cause for a Continuance in Immigration Proceedings; RIN 1125-AB03 / EOIR Docket No. 19-0410 / Dir. Order No. 02-2021 (published in the Federal Register on November 27, 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, South Texas Detention Complex, Karnes County Residential Center, and Limestone County Detention Center. Each year, American Gateways administers the legal orientation program 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 opposes the notice of proposed rulemaking regarding Good Cause for a Continuance in Immigration Proceedings (the "Proposed Rule"), published by the Department of Justice (DOJ, or the "Department") on November 27, 2020, and requests that the Department promptly rescind the Proposed Rule. American Gateways describes below how some of the proposed changes would impact American Gateways and the 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 erode the due process rights of asylum seekers or individuals in immigration proceedings, or otherwise impede—in any way—the ability of individuals who have suffered persecution to access humanitarian protection in the United States.[1] At the same time, American Gateways expresses heightened concern regarding the disproportionate harms that would befall certain immigrants, especially *pro se* and detained immigrants, as well as other vulnerable individuals seeking humanitarian protection in the United States, if the Proposed Rule is not withdrawn. The Department proposes to implement an arbitrary and capricious definition of "good cause" that would severely curtail immigration judges' discretion to manage their cases in a fair manner and essentially eliminate continuances as a tool for noncitizens to obtain counsel, or to pursue lawful status. Rather than "effectuate[] the intent and purpose of the representation-related provisions of the [Immigration and Nationality] Act,"[2] the Proposed Rule would only result in lower rates of representation, poorly prepared filings, due process violations, higher denial rates, and the more rapid deportation of refugees and immigrants who have fled persecution in their countries, or who have legitimate claims to presence in the United States.

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

[2] 85 Fed. Reg. 75925, 75936 n.15.

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.[3] 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."[4] The Department has given no reason for allowing only 30 days for the public to submit comments to these proposed rules rather than the customary 60-day comment period.

American Gateways objects to the shortened 30-day comment period. As discussed below, the proposed regulations would radically limit the circumstances in which an immigration judge may grant a continuance, with the result that many noncitizens who qualify for, and are pursuing, immigration protection will be ordered removed before they are able to have their claim considered. The Proposed Rule would not only place the heavy burden of demonstrating a need for a continuance on the requesting party—it would also explicitly prohibit findings of "good cause" in numerous instances where immigration judges formerly had broad discretion to make such findings. The public should be given adequate time to consider these dramatic revisions to existing law in order to provide thoughtful and well-researched comments.

The shortened comment period presents particular challenges given that the United States continues to be in the midst of an unprecedented pandemic, forcing many members of the public to work from home and balance work activities with familial obligations, including childcare. Moreover, the shortened comment period is even more unreasonable given that it spans multiple holidays. EOIR announced the rule over a holiday weekend (the Friday following Thanksgiving) and the comment period ends on the Monday after Christmas. The comment period also includes the entirety of Hanukkah, a major religious holiday that begins on December 10, 2020 and ends on December 18, 2020, and the first three days of Kwanzaa, which begins on December 26, 2020. EOIR thus imposed a comment period that spans multiple major holidays when many stakeholders will not be working.

EOIR issued this Proposed Rule, with its sweeping new restrictions on immigration judges' authority to grant continuances, on the same day that it issued another proposed rule that would make sweeping and restrictive changes to the standards governing motions to reopen,[5] on the heels of a number of other proposed immigration regulations with equally short comment periods,[6] and

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[3] *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. . . .").

[4] Exec. Order No. 12866, 58 Fed. Reg. 51735, 51740 (Oct. 4, 1993); *see also* Exec. Order No. 13563, Improving Regulation and Regulatory Review § 2(b) (Jan. 18, 2011) (providing that the public comment period "should generally be at least 60 days").

[5] EOIR NPRM, Motions to Reopen and Reconsider; Effect of Departure; Stay of Removal, 85 Fed. Reg. 75942 (proposed Nov. 27, 2020).

[6] *See, e.g.*, Department of Homeland Security (DHS) NPRM, Employment Authorization for Certain Classes of Aliens with Final Orders of Removal, 85 Fed. Reg. 74196 (proposed Nov. 19, 2020); DHS NPRM, Collection and Use of Biometrics by U.S. Citizenship and Immigration Services, 85 Fed. Reg. 56338 (proposed Sept. 11, 2020);

during the same time period both the Department of Homeland Security (DHS) and DOJ have promulgated numerous final rules that impose radical, harsh changes to immigration proceedings.[7] 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 fairness of rules and procedures governing individuals 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.

Below are just a few examples of the several proposed and/or final rules that relate to the Department's instant proposal to alter the regulations regarding continuances:

- On June 15, 2020, the DOJ and DHS issued a joint NPRM titled "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review," which proposed the most sweeping changes to asylum eligibility since the 1996 Illegal Immigration Reform and Immigrant Responsibility Act.[8] The final rule, which largely disregarded 88,933 public comments, was published fourteen days *after* the NPRM for this Proposed Rule was issued.[9]

- On August 26, 2020, the DOJ issued an NPRM, titled "Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure," that proposed

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

[7] *See, e.g.*, DOJ & DHS, Procedures for Asylum and Bars to Asylum Eligibility, 85 Fed. Reg. 67202 (final rule published Oct. 21, 2020); DOJ & DHS, Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 80274 (final rule published Dec. 11, 2020); EOIR, Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 81588 (final rule published Dec. 16, 2020).

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

[9] *See* DOJ & DHS, Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 80274 (final rule published Dec. 11, 2020);

dramatic alterations impacting 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").[10] The Department published the final rule on December 16, 2020, nearly three weeks after the NPRM for this Proposed Rule was issued.[11]

- 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.[12] The Department published the final rule on December 16, 2020.[13]

- On November 27, 2020—the same day this NPRM was published, the DOJ issued another NPRM, titled "Motions to Reopen and Reconsider; Effect of Departure; Stay of Removal," which proposes sweeping changes to EOIR regulations governing the filing and adjudication of motions to reopen and reconsider, changes that would greatly restrict the judicial discretion and authority of immigration judges.[14]

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.[15] 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 counsel, which is critical for 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.

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

[11] EOIR, Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 81588 (final rule published Dec. 16, 2020).

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

[13] Procedures for Asylum and Withholding of Removal, 85 Fed. Reg. 81698 (final rule published Dec. 16, 2020).

[14] EOIR NPRM, Motions to Reopen and Reconsider; Effect of Departure; Stay of Removal, 85 Fed. Reg. 75942 (proposed Nov. 27, 2020).

[15] *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).

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.[16] The Department certifies that the Proposed Rule has been drafted in accordance with Executive Order 13563.[17] Yet, the Proposed Rule contains no real assessment of costs, benefits, and regulatory alternatives. Instead, the Department claims that the "expected costs of this proposed rule are likely to be *de minimis*."[18] Similarly, the Department asserts that the Proposed Rule "does not change the nature or scope of the role of an immigration judge during immigration proceedings," without any in-depth examination of the potential effects of the Proposed Rule.[19] 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. The Department's claim that the costs are likely to be "de minimis" is simply a result of the fact that it has ignored a host of substantial costs that would result from the Proposed Rule.[20] Rather than fulfill its obligation to track and measure these costs, the Department argues that the continuances that are the subject of the Proposed Rule are "inherently fact-specific," and thus that the Department "cannot quantify precisely the expected decrease" in their number.[21] Moreover, the Department's bald assertion that its proposed changes will "provide some benefit to attorneys [] who would not need to commit to representation for several years if the hearing process worked more efficiently" is absurd—particularly when those changes would inevitably constrict the provision of *quality* legal services and erect barriers to the effective facilitation of *timely* legal assistance. Under the Department's Proposed Rule, individuals in immigration proceedings, who already struggle with preparing forms and motions, would have even less access to meaningful assistance from legal services organizations like American Gateways, and even less time to seek such assistance.

The Proposed Rule is also fundamentally flawed because the Department falsely asserts that the Proposed Rule will not have a significant economic impact on a substantial number of small entities and thus fails to conduct the regulatory flexibility analysis required by Executive Order 12866.[22] The Department fails to recognize that the Proposed Rule would directly regulate thousands of small entities, including American Gateways, by imposing draconian limitations on continuance requests, many of which target representatives directly.[23] The proposed rule would require significant extra work by small entities like ours in preparing continuance requests,

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16 *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 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).

17 85 Fed. Reg. 75925, 75939.

18 *Id*. at 75939 (emphasis added).

19 *Id*.

20 *Id*.

21 *Id*.

22 85 Fed. Reg. 75925, 75939. A "small entity" is statutorily defined as a "small business," "small organization," or "small governmental jurisdiction." 5 U.S.C. § 601(6).

23 *See* proposed 8 CFR § 1003.29(b)(4).

pursuing relief in immigration court while awaiting relief before USCIS, and pursuing complex and resource-intensive remedies including appeals, ICE stays, and motions to reopen for clients whose continuance requests will be denied as a result of the Proposed Rule.

Agencies may "propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs."[24] 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 substantial costs because immigration judges are "already trained to consider all relevant legal issues in assessing a request for a continuance," and, "[i]f anything, the proposed rule would make adjudicating motions for a continuance easier and more efficient."[25] The Department does not consider that the ease and efficiency it invokes will only come at the expense of immigration judges' authority, independence, and discretion, and of protecting basic due process rights. Executive Orders cannot be so easily circumvented by improperly discounting obvious costs. Indeed, the Department's unfounded (and unsupported) assumption that its proposal will have de minimis costs to practitioners or respondents that are outweighed by benefits is so patently erroneous that the Proposed Rule should be rescinded on that basis alone.

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

Under the APA, 5 U.S.C. §§ 551-559, courts are authorized to "hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . . ."[26] As drafted, the Proposed Rule contravenes or is otherwise inconsistent with several provisions of the governing statute, infringes upon due process rights, is not the product of reasoned decision-making, and is otherwise arbitrary and capricious. If implemented in its current form, the Proposed Rule would be subject to judicial invalidation on multiple grounds.

For example, several provisions of the Proposed Rule are contrary to constitutional rights because they infringe upon the due process rights of asylum seekers. The arbitrary 30-day restriction on continuances for securing representation, as well as the requirement that an alien demonstrate diligence in seeking representation to secure that limited continuance, for instance, would substantially interfere with asylum seekers' right to counsel and to a full and fair hearing on their claims for relief. In these comments, American Gateways highlights some of the constitutional violations that would flow from the Proposed Rule. Additionally, the Proposed Rule, as well as the separate provisions thereof, is arbitrary and capricious. The arbitrary-and-capricious standard requires that an agency "examine the relevant data and articulate a satisfactory explanation for its action, including a 'rational connection between the facts and the choice made.'"[27] When reviewing an agency's proffered explanation, courts "must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'"[28] Further, courts require that an agency provide the "essential facts upon which the

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[24] Exec. Order No. 12866 § 1(b)(6) (1993).
[25] *See* 85 Fed. Reg. 75925, 75939.
[26] 5 U.S.C. § 706(2)(A)-(C).
[27] *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. U.S.*, 371 U.S. 156, 168 (1962)).
[28] *Id.* (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974)).

administrative decision was based,"[29] and explain the justification for its determinations with actual evidence beyond a "conclusory statement."[30] In general, an agency decision is arbitrary and capricious

> if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[31]

In other words, agency actions are subject to invalidation where an agency fails to adequately explain its decision, fails to consider relevant factors, including the policy effects of its decisions, fails to adequately explain illogical actions, or reaches a conclusion that contradicts the underlying record. What counts as "relevant" is context specific, but the U.S. Supreme Court has previously instructed that agency decision-making on immigration matters "must use an approach that is tied to the purposes of the immigration laws or the appropriate operation of the immigration system."[32]

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

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

Since inception, the nation's immigration court system has been afflicted by structural problems—namely the failure to separate adjudicative and enforcement functions—that impede fair and impartial adjudications. In addition to hindering judicial independence, the fact that immigration courts are housed within the executive branch makes them prone to political interference. Both immigration judges and members of the BIA are expressly subordinate to the Attorney General who controls their appointment and, through the EOIR Director, oversees case management, including case assignments, and evaluates their performance.[33] Additionally, immigration judges and Board members are "subject to removal by the Attorney General, and may be transferred from and to assignments as necessary to fulfill the Department's mission."[34] This vast authority enjoyed

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29 *United States v. Dierckman*, 201 F.3d 915, 926 (7th Cir. 2000) (quoting *Bagdonas v. Dep't of Treasury*, 93 F.3d 422, 426 (7th Cir. 1996)).

30 *Allied-Signal, Inc. v. Nuclear Reg. Comm'n*, 988 F.2d 146, 152 (D.C. Cir. 1993).

31 *Id*.

32 *Judulang v. Holder*, 565 U.S. 42, 132 S. Ct. 476, 478 (2011).

33 *See* 8 C.F.R. § 1003.0(b)(1)(ii), (iv), (v).

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

by the Attorney General substantially impedes the fair administration of the nation's immigration laws.

Although government acquiescence to pervasive bias and politicized influences in the immigration court system is long-standing, the current administration's efforts to dismantle the already-crippled court system and transform it into a "weapon of deportation" are unprecedented.[35] For purposes of contextualizing its objections to this Proposed Rule—which would further strip immigration judges of the ability to manage their dockets in the interest of justice—American Gateways briefly describes just a few of the administration's most obvious strikes in its multi-pronged assault on the independence of the court system:

- In April 2018, the DOJ rolled out quotas for immigration judges in an "EOIR Performance Plan" memorandum. In order to receive a "satisfactory" rating, judges are required to complete at least 700 cases a year and have fewer than 15% of their decisions overturned on appeal.[36] These onerous numeric quotas that are designed to promote speedy deportations, not fair adjudications, place judges in an untenable position—they must rush through cases to keep their own jobs.[37] As the National Association of Immigration Judges (NAIJ) has explained, performance quotas not only "put[] judges in the position of violating a judicial ethics canon" but "pit[] their personal interest against due process considerations."[38]

- In May 2018, former Attorney General Jeff Sessions held in *Matter of Castro-Tum*—a case he certified to himself for decision—that immigration judges "lack the general authority to administratively close cases" because no regulation expressly grants them such authority.[39] The decision also called for cases that had previously been administratively closed to be put back on the docket upon the motion of either party, an immigration judge, or the Board.[40][41] A move allegedly designed to reduce a growing case backlog and enhance docket efficiency has instead exacerbated the case backlog and decreased efficiency, as administrative closure had long been a valuable tool utilized by immigration judges to

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

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

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

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

[39] 27 I&N Dec. 271, 282-83, 293 (AG 2018).

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

[41] *Id.* at 292-93.

manage their dockets.[42] Simultaneously, *Matter of Castro-Tum* has undermined due process by restricting the ability of immigrants to pursue other forms of relief while in removal proceedings. The Fourth and Seventh Circuits have since overturned *Matter of Castro-Tum*, concluding that immigration judges have an inherent authority to control their dockets.[43] Although limited to their respective Circuits, the *Romero* and *Meza Morales* decisions highlight the abusive nature of the administration's attempts to undercut judicial independence. Nonetheless, the Department recently codified *Matter of Castro-Tum*, thereby stripping immigration judges nationwide, as well as members of the BIA, of the authority to administratively close cases.[44]

- After having tied the hands of immigration judges with respect to administrative closures, the DOJ orchestrated another direct strike on judicial independence in July 2018. For several years, Immigration Judge (IJ) Steven Morley had overseen the immigration case of Reynaldo Castro-Tum.[45] After issuing his ruling in *Matter of Castro-Tum*, Sessions gave IJ Morley fourteen days to issue a new notice of hearing to Castro-Tum, whose whereabouts were unknown.[46] An immigration attorney appeared in court, volunteered to represent Castro-Tum, and requested a brief continuance so that he could attempt to locate Castro-Tum.[47] IJ Morley granted the continuance.[48] Without any explanation and no indication of a legitimate basis for doing so, the DOJ responded by simply taking the case away from IJ Morley.[49] At Castro-Tum's next hearing on July 26, 2018, Assistant Chief Immigration Judge Deepali Nadkarni, who had been reassigned to handle the single preliminary hearing in the Castro-Tum case, ordered Castro-Tum removed *in absentia*.[50] The message was clear—immigration judges must quickly get on board with the administration's agenda or risk having their cases reassigned. This direct attack on judicial independence and due process was widely condemned, including by a group of retired immigration judges and former members of the BIA, who described the maneuver as an "unacceptable" instance of "interference with judicial independence."[51] Politically driven case assignments of this sort are also unlawful, as regulations prohibit the EOIR Director from "direct[ing] the result of an adjudication."[52]

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42 *See id*.

43 *Romero v. Barr*, 937 F.3d 282 (4th Cir. 2019); *Meza Morales v. Barr*, No. 19-1999, 2020 WL 5268986, at *8-9 (7th Cir. June 26, 2020).

44 *See* 85 Fed. Reg. 81588.

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

46 *Id*.

47 *Id*.

48 *Id*.

49 *Id*.

50 *Id*.

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

52 8 C.F.R. § 1003.0(c).

- In an apparent effort to speed up decisions and increase removals, former Attorney General Sessions issued yet another decision limiting immigration judges' discretionary authority in August 2018. *Matter of L-A-B-R-* sets forth certain factors that an immigration judge must take into consideration when ruling on a request for a continuance in order "to await the resolution of a collateral matter."[53] Although the good cause standard for continuances requires the application of a multi-factor balancing test,[54] judges must now give more weight to two specific factors: (1) the likelihood that the "collateral" relief will be granted, and (2) whether the relief will materially affect the outcome of the proceedings.[55] Combined with the performance evaluation metrics, this decision inappropriately incentivizes immigration judges to grant fewer continuances, thereby restricting an important mechanism for providing respondents with much-needed time to retain counsel and gather evidence.[56]

- In September 2018, former Attorney General Sessions held in *Matter of S-O-G- & F-D-B-*—cases he certified to himself for decision—that immigration judges have no inherent authority to terminate or dismiss removal proceedings.[57] Instead, judges may only dismiss or terminate proceedings when the regulations expressly permit, or if the charges of removability against a respondent have not been sustained.[58] This ruling further inhibits the ability of judges to manage their dockets in a manner that permits respondents to pursue other forms of immigration relief.

- In August 2019, the DOJ moved to decertify the union of immigration judges, an organization whose members have, at times, openly criticized the administration's efforts to conscript immigration judges to carry out its law enforcement agenda.[59] On July 31, 2020, the Federal Labor Relations Authority dismissed the DOJ's petition on the grounds that "IJs are not management officials within the meaning of the [Federal Service Labor-Management Relations statute]."[60]

- In 2017, EOIR implemented a policy requiring immigration judges to obtain government approval before they speak about immigration-related issues, marking a departure from prior policy pursuant to which immigration judges were free to speak on such issues in their personal capacities.[61] Then, in January 2020, EOIR tightened these restrictions,

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53 27 I&N Dec. 405, 413 (AG 2018).

54 *See* 8 C.F.R. § 1003.29.

55 *Matter of L-A-B-R-*, 27 I&N Dec. at 413.

56 Innovation Law Lab & S. Poverty Law Ctr., *supra* note 35, at 25 (describing a "'noticeable increase' in respondents accepting voluntary departure and removal orders due to a lack of continuances to find representation and prepare their cases" after *Matter of L-A-B-R-* was decided (quoting Atlanta focus group)).

57 27 I&N Dec. 462, 462 (2018).

58 *Id*.

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

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

61 *Immigration Judges Challenge Justice Department Speech Policy*, Knight First Amendment Inst. at Columbia Univ. (July 1, 2020), https://knightcolumbia.org/content/immigration-judges-challenge-justice-department-

forbidding judges from publicly discussing immigration law or policy at all.[62] This series of increasingly harsh directives has effectively silenced immigration judges from participating in any public discussion concerning the operation of courts over which they preside—including the impact of COVID-19 on immigration courts—or risk being disciplined or fired.[63] On July 1, 2020, the NAIJ filed suit against the government, challenging the policy on the grounds that it constitutes an unconstitutional prior restraint on immigration judges' ability to write and speak publicly about immigration issues in their personal capacities.[64]

- On July 2, 2020, the DOJ announced the appointment of ICE's chief immigration prosecutor, Tracy Short, as the new Chief Immigration Judge—an appointment that has been described as the "nail in the coffin of judicial neutrality."[65] During his tenure as ICE's chief prosecutor, Short penned a memo instructing ICE attorneys to exclude no one from immigration enforcement, to challenge grants of immigration benefits, and not to consider petitions for prosecutorial discretion.[66] A DOJ employee explained that Short's "hiring is further confirmation that the Executive Office for Immigration Review [EOIR] leadership wishes EOIR to be a tool for enforcement agencies, focused on removal orders and nothing else."[67] Another DOJ employee described Short's appointment as "one step closer to the death knell for impartiality at the Immigration Court and more persuasive evidence that our code of American justice and fairness is not being followed at the Department of Justice."[68]

Similarly, the administration has made several attempts to conscript the BIA for enforcement purposes, stacking the Board with anti-immigrant hardliners and enhancing the power of the

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speech-policy; Cristian Farias, *The Trump Administration is Gagging America's Immigration Judges*, The Atlantic (Feb. 28, 2020), https://www.theatlantic.com/ideas/archive/2020/02/immigration-judges-first-amendment/607195/.

62 *Id*.

63 *Id*.

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

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

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

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

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

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

67 *See* Aleaziz, *supra* note 65.

68 *See id*.

attorney general and other political appointees, thereby disrupting critical checks and balances in the court system. Below are but a few of the administration's more notable efforts to consolidate power in political appointees who support its anti-immigration agenda and to fast-track deportations by manipulating the appellate process:

- In March 2019, the Department altered its hiring procedures to facilitate the appointment to the BIA of six former immigration judges with high denial rates (all in excess of 80%)—William Cassidy, Stuart Couch, Deborah Goodwin, Stephanie Gorman, Keith Hunsucker, and Earle Wilson.[69] A July 18, 2019 memo from EOIR Director James McHenry recommending four of the judges stated that applicants who are immigration judges would be immediately appointed to the Board on a permanent basis instead of having to complete a two-year probationary period.[70] And, although public complaints had been filed against at least three of the judges, McHenry's recommendation memo made no mention of those grievances or the fact that Couch and Wilson had the third and fourth highest number of board-remanded cases in 2017.[71] (In fact, Couch's remand rate of 28.4% (50 out of 176 cases[72]) was almost double the 15% remand threshold that immigration judges must stay below in order to obtain a "satisfactory" performance review.) All six judges were swiftly sworn in as BIA members on August 23, 2019. The opacity and arbitrariness of BIA hiring procedures have long been criticized, but the current administration's politicized hiring is unrivaled.[73] Former BIA-head Paul Schmidt openly condemned the administration for

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

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

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

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

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

having "weaponized the [hiring] process" and having "exploited" existing "weaknesses" in the system for its own ends.[74] Additionally, several U.S. Senators pressed Attorney General William Barr for information related to the politicization of the courts, stating in a letter:

> While immigration courts reside within the executive branch, they should not be merely a tool to achieve desired policy outcomes. The administration's recent decisions to subvert normal hiring process to promote partisan judges, and to increase political influence over individual immigration cases, has undermined public confidence in our immigration courts. These actions create the impression that cases are being decided based on political considerations rather than the relevant facts and law. The appearance of bias alone is corrosive to the public trust. [75]

The Senators further admonished that "[t]he administration's gross mismanagement of these courts further prevents them from providing basic due process."[76]

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

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improperly—and illegally—block the hiring of immigration judges and members of the Board of Immigration Appeals." *See Democrats Ask Sessions About Whistleblower Allegations that DOJ is Blocking Immigration Judges Based on Prohibited Political Considerations*, U.S. House of Representatives: Don Beyer (Apr. 17, 2018), https://beyer.house.gov/news/documentsingle.aspx?DocumentID=825.

[74] Misra, *supra* note 70.

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

[76] *Id*. at 1.

- In April 2020, the Attorney General added three additional members to the BIA—Phillip Montante Jr., Kevin W. Riley, and Aaron R. Petty.[77] Former immigration judges, Montante and Riley boast high denial rates—96.3% and 88.1%, respectively.[78] A former DOJ employee, Petty most recently served as counsel in the Department's Office of Immigration Litigation.[79]

- On May 29, 2020, the Attorney General appointed Associate Deputy Attorney General David H. Wetmore as BIA chairman.[80] Wetmore, who joined the DOJ in 2009 and served as a Trial Attorney in the Department's Office of Immigration Litigation's Appellate Section until 2018, also served a detail as immigration advisor to the White House Domestic Policy Council from 2017 to 2018 (during which time the administration implemented the Muslim country travel ban and zero-tolerance family separation policy).[81]

- On June 8, 2020, the Department reassigned nine BIA career members (all of whom were appointed prior to the current administration) to new roles.[82] The retaliatory reassignment, which followed the members' rejection of an April 17, 2020 buy-out offer from the Department, is part and parcel of the ongoing efforts to restructure the BIA with new hires who are more likely to deny relief to immigrants.

- In August 2020, the Department topped off the current BIA membership with three more former immigration judges—Michael P. Baird, Sunita B. Mahtabfar, and Sirce E. Owen.[83] During their time on the bench, Mahtabfar and Baird each had denial rates in excess of 90%.[84] This latest round of appointments confirms that the administration's expansion of

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

[78] *See* TRAC Immigration, *supra* note 69.

[79] U.S. Dep't of Justice, *supra* note 77.

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

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

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

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

[84] Baird's and Mahtabfar's denial rates were 91.4% and 98.7%, respectively. *See* TRAC Immigration, *supra* note 69. A former ICE prosecutor, Sirce Owen served as a "management judge" in the infamous Atlanta Immigration Court before being appointed to the BIA. *See* Monyak, *supra* note 83. Owen also served as acting deputy director of EOIR from June 2019 to January 2020. *Id*.

the BIA to 23 members in April 2020 (in the midst of a global public health crisis)[85] was done to facilitate the appointment of board members with a documented anti-immigrant bias.

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

Notably, during Attorney General Session's twenty-one-month term, he certified as many cases to himself (at least seven) as did the attorneys general in the entire twelve-year period of the presidencies of Clinton (three) or Obama (four).[86] These cases include *Matter of Castro-Tum*, *Matter of L-A-B-R-*, and *Matter of S-O-G- & F-D-B-* (which are discussed above), as well as the following:

- In March 2018, former Attorney General Sessions issued *Matter of E-F-H-L*, vacating a BIA decision from four years earlier that held an asylum applicant is ordinarily entitled to a full evidentiary hearing.[87] The ruling provided no guidance on when an applicant should be entitled to an evidentiary hearing. Additionally, Sessions' decision to certify a seemingly unremarkable case to himself in the first instance was itself peculiar, prompting criticism that Sessions intended to send a message to immigration judges that the Attorney General is monitoring every action they take.[88]

- In June 2018, in *Matter of A-B-*, 27 I&N Dec. 316 (AG 2018), former Attorney General Sessions overturned a prior BIA decision, *Matter of A-R-C-G-*,[89] which held that domestic violence survivors could in some cases qualify for asylum based on membership in a particular social group. In his decision, Sessions held that "[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum" and that "[t]he mere fact that a country may have problems effectively policing certain crimes—such as domestic violence or gang violence—or that certain populations are more likely to be victims of crime, cannot itself establish an asylum claim."[90] The decision was challenged by a group of twelve asylum applicants who had been denied an opportunity to apply for asylum under *Matter of A-B-* despite presenting credible accounts of sexual abuse, kidnappings, and beatings in their home countries during

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

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

87 27 I&N Dec. 226 (AG 2018).

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

89 26 I&N Dec. 388 (BIA 2014).

90 *Id*. at 320.

interviews with asylum officers. The district court granted summary judgment in favor of plaintiffs and issued an injunction preventing the application of *Matter of A-B-* in future cases and ordering the return of asylum seekers who had been illegally removed.[91] The appellate court affirmed in part, holding that the standard presented in *Matter of A-B-* was arbitrary and capricious.[92]

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

- In *Matter of M-S-*,[93] Attorney General Barr overturned a 2005 BIA decision, *Matter of X-K-*.[94] The decision divested immigration judges of jurisdiction to grant bond to arriving aliens, thereby expanding the mandatory detention of asylum seekers. Upon request by the DHS, Barr delayed the effective date of his decision by 90 days so that DHS could undertake "operational planning" for the "sizable population of aliens" who were no longer eligible for bond.[95]

- In July 2019, Attorney General Barr overturned another BIA decision in *Matter of L-E-A-*, 27 I&N Dec. 581 (AG 2019). The decision reversed a holding that membership in a family that was targeted with violence could constitute a particular social group for an asylum claim, holding instead that "an alien's family-based group will not constitute a particular social group unless it has been shown to be socially distinct in the eyes of its society, not just those of its alleged persecutor."[96] Even though the holding of *Matter of L-E-A-* is itself narrow, the decision is peppered with sweeping dicta about categories of asylum claims that generally will not prevail, thereby urging adjudicators to improperly forego a careful case-by-case analysis regarding respondents' membership in a particular social group (and silently warning adjudicators that exercising their reasoned discretion to grant family-based asylum claims may increase their remand rate).[97] Additionally, Barr reiterated to the Board "that a cursory analysis of a question that was either uncontested, or not dispositive to the outcome" does not "undermine the Board requirement that asylum applicants" establish each element of their claim.[98] In sum, neither judicial nor prosecutorial discretion is welcome in immigration courts.

- In *Matter of Thomas* and *Matter of Thompson*,[99] Attorney General Barr overturned BIA decisions from 2016 (*Matter of Estrada*),[100] 2005 (*Matter of Cota-Vargas*),[101] and 2001

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91 *Grace v. Whitaker*, 344 F. Supp. 3d 96, 146 (D.D.C. 2018).
92 *Grace v. Barr*, 965 F.3d 883, 900 (D.C. Cir. 2020).
93 27 I&N Dec. 509 (AG 2019).
94 23 I&N Dec. 731 (BIA 2005).
95 27 I&N Dec. at 519 & n.8.
96 *Id.* at 582.
97 *See, e.g., id.* at 595 ("[U]nless an immediate family carries greater societal import, it is unlikely that a proposed family-based group will be 'distinct' in the way required by the [Immigration and Nationality Act (INA)] for purposes of asylum."); *id.* at 589 ("[I]n the ordinary case, a nuclear family will not, without more, constitute a 'particular social group' because most nuclear families are not inherently socially distinct.").
98 *Id.* at 589, 596.
99 27 I&N Dec. 674 (AG 2019).
100 26 I&N Dec. 749 (BIA 2016).
101 23 I&N Dec. 849 (BIA 2005).

(*Matter of Song*).[102] The decision imposes new limitations on the effect that vacaturs of conviction or reductions in sentencing have on immigration decisions. In particular, the decision held that "[s]uch an alteration will have legal effect for immigration purposes when based on a procedural or substantive defect in the underlying criminal proceeding, but not when the change was based on reasons unrelated to the merits, such as the alien's rehabilitation or an interest in avoiding an immigration consequence."[103]

- In *Matter of R-A-F-*,[104] Attorney General Barr overturned an unpublished BIA decision that affirmed the immigration court's finding that a man in his seventies who suffers from Parkinson's disease, dementia, Major Depressive Disorder, traumatic brain injury, post-traumatic stress disorder (PTSD), and chronic kidney disease[105] would be subject to torture if returned to his home country. With respect to asylum claims specifically, Barr instructed that the BIA must examine *de novo* an immigration judge's "application of law to fact."[106] As former Immigration Judge and commentator Jeffrey Chase pointed out, the BIA had issued another decision concerning the "specific intent" requirement for claims seeking protection under the Convention Against Torture (CAT) just 16 months earlier, thus indicating that the "real motive behind [*Matter of R-A-F-*] was not to give guidance, but rather to serve warning."[107] As Chase further explained:

> While published precedential decisions have always received broad attention, individual BIA appellate judges have felt safe affording relief in sympathetic cases in unpublished decisions where the outcome is generally known only to the parties involved. . . . [Yet,] the A.G. . . . chose to unceremoniously refer [*Matter of R-A-F-*] to himself and then slam the BIA's decision. The legacy of such action will be fully felt the next time a single judge at the BIA has the opportunity to affirm a similarly sympathetic grant of relief, but will instead choose not to do so out of fear and self-preservation.[108]

- Even more recently, in September 2020, Attorney General Barr—leveraging his and former Attorney General Sessions' prior decisions in *Matter of A-B-*, *Matter of L-E-A-*, and *Matter of R-A-F*—vacated and remanded a Board decision affirming a humanitarian grant of asylum to a Salvadoran refugee who had suffered familial violence at the hands of her parents.[109] Despite sanctioning and encouraging the AWO practice (which permits the Board to cursorily affirm immigration judge decisions with no explanation at all), Barr specifically criticized the Board for "deferring to the immigration judge's credibility finding and concluding, in a one-sentence discussion of the merits of the respondent's

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102 23 I&N Dec. 173 (BIA 2001).

103 27 I&N Dec. at 675.

104 27 I&N Dec. 778 (AG 2020).

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

106 *Id.* at 779.

107 *Id.*

108 *Id.*

109 *Matter of A-C-A-A-*, 28 I&N Dec. 84 (AG 2020).

> asylum claim, that it could 'discern no clear error in the Immigration Judge's determination that the respondent established persecution on account of her membership in a particular social group.' "[110] Barr then directed the Board, upon remand, to rigorously scrutinize whether respondent had carried her burden of proving past persecution and, if so, whether she merited a grant of humanitarian asylum.[111] As evidenced by the summary prefacing the decision, the Attorney General intends to continue rewriting well-established asylum law to reflect the current administration's anti-immigrant animus (particularly against women, people of color, and other vulnerable groups) while also policing and punishing the Board, as well as immigration judges, for granting asylum.[112]

The overreach in the decisions the attorneys general have certified to themselves for decision (in many instances to overturn well-established precedent), is compounded by actions that limit the ability of interested parties to provide relevant input during the certification process. These actions include providing insufficient notice that a case is under review, refusing to provide relevant materials and information, and failing to provide a clear statement of the issue(s) under review.[113]

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110 *Id*. at 87 (quoting BIA Op. at 2).

111 *Id*. at 93-96.

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

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

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

The foregoing chronology of the administration's vicious attack on the immigration court system—and more specifically the discretion of immigration judges to make individualized determinations on a case-by-case basis to ensure due process—is merely illustrative of the issues that warrant attention and careful assessment in connection with the Department's Proposed Rule.[114] For example, the Department's proposal to limit the ability of immigration judges to grant continuances that would extend the case adjudication deadline beyond 180 days must be assessed in connection with recent judicial decisions that have stripped immigration judges of other critical docket management tools, including administrative closure and termination. Similarly, the 180-day case adjudication timeline must be considered against the backdrop of the onerous case quotas that have been imposed on immigration judges. American Gateways submits that, when considered in tandem with the administration's broader pattern of conduct, the purpose of the Proposed Rule becomes quite clear—to further erode judicial independence as well as due process of law in immigration court proceedings.

F. The Proposed Rule threatens due process protections for detained immigrants who already face severe difficulties accessing legal representation and legal resources.

The Proposed Rule would severely limit access to legal aid and legal resources 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 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)).[115] 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 bono* representation and *pro se* assistance have become vital tools for protecting due process rights, 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.[116]

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

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

[116] 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

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.[117] Immigrants in detention were the least likely to obtain representation—only 14% had legal counsel.[118] 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.[119] 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%.[120] The denial rate for unrepresented asylum seekers was a staggering 82.3% (versus 68.9% for represented asylum seekers).[121] 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.[122] The asylum grant rate for Central American migrants has declined even more steeply to 13.3%—a 50% decline from FY 2016.[123] 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

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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).

[117] 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.

[118] *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/.

[119] Eagly, *supra* note 117, at 19.

[120] 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).

[121] TRAC Immigration, *Asylum Denial Rates Continue to Climb*, *supra* note 120. 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.

[122] 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.*

[123] *Id.* at 1; *see also* TRAC Immigration, *Asylum Denial Rates Continue to Climb*, *supra* note 120 (reporting that denial rates for asylum seekers from Honduras, Guatemala, and El Salvador in FY 2020 were 87.3%, 85.8%, and 85%, respectively).

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* legal 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.[124] 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;[125] time in the law library is restricted, and most resources are outdated, incomplete, or available only in English;[126] phone calls, if permitted, require notice to the detention facility and are limited in duration;[127] telephones, if operational, are typically located in public areas.[128] 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 to successfully obtain the relief sought.

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.[129] American Gateways has itself encountered numerous

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124 *Drax v. Reno*, 338 F.3d 98, 99 (2d Cir. 2003).

125 *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").

126 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.

127 *Id.* at 23-24.

128 *Id.*

129 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.

obstacles to providing legal assistance, whether in the form of legal representation or of legal education or *pro se* assistance. These obstacles make it extremely difficult for American Gateways staff to access, communicate with, provide education and *pro se* assistance to, and represent 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[130]—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 critical continuances, especially those that afford a reasonable time to secure legal assistance or representation:

- **Remote Location of Detention Facilities:** The physical geography of the immigration detention system is antithetical to the constitutional right to counsel. A map of the nation's "deportation railway" reveals that ICE has strategically erected detention centers in rural areas, far from major cities where most legal aid organizations, attorneys, and interpreters operate. An analysis of seventy detention facilities revealed that approximately 30% of immigrant detainees are held at facilities more than 100 miles (with a median distance of 56 miles) from the nearest government-listed legal aid provider.[131] 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).[132] 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.[133]

- **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.[134] The IAH Secure Adult Detention Facility has two non-contact attorney visitation rooms for up to more than a 1,000 detainees.[135] At the T. Don Hutto facility, attorneys experience recurrent

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

131 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/.

132 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.

133 *Id.* at 3.

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

135 *Id.*

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 multiplied as a result of the COVID-19 pandemic.

- **Inadequate Access to Interpreters:** Detention facilities frequently lack working phone lines to conference in interpreters,[136] or they otherwise limit telephone access in attorney-client visitation rooms. Telephone access in the Hutto visitation space, for example, is limited to non-profits, which means that if an attorney requires an interpreter, that interpreter must obtain security clearance from CoreCivic and ICE and accompany the attorney to the facility for client visits. This policy renders it incredibly difficult for attorneys to communicate with non-English speaking clients. In many instances, it would be impossible for attorneys to (1) locate a competent interpreter, (2) navigate inconsistent and ever-changing policies regarding the use of interpreters, and (3) 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.[137] The average distance of each transfer was 369 miles.[138] The number of detainees experiencing transfer has also steadily risen over time from 23% in 1999 to 52% in 2009.[139] In FY 2015, there were 374,059 recorded transfers,[140] and 60% of detained adults experienced at least one interfacility transfer.[141] Of those adults who were transferred,

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136 *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/2018-07-03/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).

137 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.

138 *Id*. at 13.

139 *Id*. at 17.

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

141 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.

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.[142] Under the current administration, ICE has also initiated the mass transfer of detainees, including asylum seekers, to federal prisons.[143] 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 seeking continuances must be evaluated in the context of the current public health crisis. The global COVID-19 pandemic, which has disrupted lives around the world, has had a particularly acute impact on detained 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.[144] 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 in the midst of a global pandemic is both legally and morally reprehensible.

II. SPECIFIC COMMENTS

The Proposed Rule would strip important due process rights from noncitizens in proceedings before the immigration court and curtail immigration judges' discretion to manage their cases in an individualized and fair manner. The importance of fairness in immigration court proceedings cannot be overstated. For many noncitizens, having a fair day in court can mean the difference between living safely in the United States and being returned to a country where they may be persecuted, tortured, or killed. Deportation can also lead to permanent family separation. The U.S. government should ensure that, before it imposes such weighty consequences through ordering a

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142 *Id*.

143 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.

144 *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").

person's removal, every noncitizen is afforded a meaningful opportunity to secure counsel and to seek protection from removal in a process that is fair. Because the Proposed Rule would sharply limit the ability of noncitizens to exercise their right to counsel and a meaningful opportunity to seek immigration protection, American Gateways urges the Department to withdraw the rule in its entirety.

A. The Proposed Rule's list of situations that would not demonstrate good cause for a continuance, its presumptions against continuances, and its limitations on continuances for reasons related to seeking representation are facially unreasonable and would result in widespread due process violations.

The Department seeks to amend 8 CFR § 1003.29(b) to provide a list of scenarios that would not suffice to establish good cause for a continuance, to create presumptions against continuances for individuals applying for or awaiting immigrant or nonimmigrant visas, and to limit continuances for individuals seeking relief over which DHS has initial jurisdiction. The Proposed Rule would also set arbitrary and draconian limitations on continuances that relate to a respondent's representation. These proposed additions would impose unnecessary and undue burdens on many respondents, as well as immigration practitioners. The Department suggests that this proposal—if adopted—would facilitate efficiency in an otherwise overburdened system. It will not. Immigration judges already impose specific deadlines and appropriately manage their dockets according to the individual circumstances of each case. Instead, the proposed revision would prejudice respondents and deprive immigration judges of the authority to fairly manage removal proceedings. As drafted, the proposal raises serious due process concerns, particularly given the current backlog of immigration court cases. Yet, the Department omits any mention, much less meaningful assessment, of the true scope of its proposal, which would impact tens of thousands of respondents, including asylum seekers and other vulnerable persons seeking humanitarian protection.

For the reasons discussed below, American Gateways opposes the proposed definition of "good cause" for a continuance that would explicitly heighten the standard of proof required of respondents, expose vulnerable populations to an increased likelihood of facing removal orders, restrict continuances in a manner contrary to the INA, and limit continuances relating to a respondent's representation. Furthermore, American Gateways submits that the Proposed Rule must be rescinded because the Department fails to examine the impact of the proposal in light of other proposed regulatory changes and fails to engage in a full and balanced assessment of the relevant issues, including fundamental constitutional rights, as the law requires.[145]

1. The Proposed Rule's list of scenarios that would not demonstrate good cause for a continuance threatens basic due process protections.

"It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."[146] Indeed, for over a century, the Supreme Court has repeatedly affirmed that the

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

[146] *Demore v. Kim*, 538 U.S. 510, 523 (2003) (quoting *Flores*, 507 U.S. at 306).

"Due Process Clause applies to *all* 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."[147] As early as 1896, the Court held that due process rights applied to an individual detained for unauthorized entry into the United States.[148] Less than a decade later, the Court reaffirmed that immigrants in removal proceedings are guaranteed due process rights, including the right "to be heard upon the questions involving [the] right to be and remain in the United States."[149]

It is similarly well settled that due process requires (1) notice and (2) an opportunity to be heard.[150] In the immigration context, due process requires that "[a]n alien who faces deportation is entitled to a *full and fair* hearing of his claims."[151] The civil rather than criminal nature of removal proceedings does not diminish this due process right:

> Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty . . . cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.[152]

Procedural due process rights have also animated statutory rights that apply to immigration proceedings. Section 240 of the INA delineates the contours of a fair hearing and enumerates the rights that apply to persons in removal proceedings. The INA provides that an "immigration judge *shall* administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses."[153] Moreover, "the alien *shall* have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine the witnesses presented by the Government."[154] The INA's implementing regulations also require a hearing. The BIA has acknowledged that "[a]t a minimum, . . . the regulations require that an applicant for asylum and withholding take the stand, be placed under oath, and be questioned as to whether the information in the written application is complete and correct."[155] The BIA continued:

> We would not anticipate that the examination would stop at this point unless the parties stipulate that the applicant's testimony

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147 *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (emphasis added).

148 *See Wing v. United States*, 163 U.S. 228, 238 (1896).

149 *Yamataya*, 189 U.S. at 101; *see also Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (Fifth Amendment protects all persons "from deprivation of life, liberty, or property without due process of law"); *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (same).

150 *See, e.g., Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) (" 'The fundamental requisite of due process of law is the opportunity to be heard. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.") (citations omitted).

151 *Agyeman v. INS*, 296 F.3d 871, 877 (9th Cir. 2002) (emphasis added) (citation omitted).

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

153 8 U.S.C. § 1229a(b)(1) (emphasis added).

154 *Id.* § 1229a(b)(4)(B) (emphasis added).

155 *Matter of Fefe*, 20 I&N Dec. 116, 118 (BIA 1989).

> would be entirely consistent with the written materials and that the oral statement would be believably presented.
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> In the ordinary course, however, we consider the full examination of an applicant to be an essential aspect of the asylum adjudication process for reasons related to fairness to the parties and to the integrity of the asylum process itself. . . . [T]here are cases where an alien establishes eligibility for asylum by means of his oral testimony when such eligibility would not have been established by the documents alone.[156]

The foregoing due process rights are intended to protect against practices and policies that violate precepts of fundamental fairness. The Department proposes that good cause for a continuance not be shown (1) where the continuance would not materially affect the outcome of removal proceedings, (2) where the respondent has not demonstrated by clear and convincing evidence a likelihood of obtaining relief on a collateral matter, (3) where the continuance is to seek parole, deferred action, or the exercise of prosecutorial discretion by DHS, and (4) where the continuance would cause an immigration court to exceed a statutory or regulatory adjudication deadline.[157] The Department's proposal is patently *unfair* as applied to individuals seeking protection from persecution, especially considering the complex web of statutory requirements any such individual must navigate, often without being able to secure counsel for a significant period of time. And, when considered in connection with other proposed changes, it is abundantly clear that these restrictions are intended to strip applicants of their right to present their claims and would result in the waiver or cursory denial of meritorious claims for relief. The Department's current proposal to prevent continuances in a wide array of circumstances would both decrease the likelihood that an individual can access counsel to assist with the preparation of their case and increase the likelihood that the individual's application would be deemed legally deficient and summarily denied by the immigration judge without her having any opportunity to be heard. This indefensible attempt to facilitate the deprivation of basic due process rights and fuel the improper expansion of the administration's invidious enforcement agenda by imposing unreasonable and arbitrary restrictions on continuances should be withdrawn.

More specifically, the Department's proposal that good cause for a continuance will not be shown when the continuance would not materially affect the outcome of removal proceedings appears to apply to *any* continuance, including one to find counsel, or to contest the charges in the Notice to Appear (NTA). This requirement—essentially requiring a prejudice showing before allowing a continuance to seek counsel or contest the government's charges—would violate a respondent's statutory and constitutional due process rights.[158] In other words, a respondent would be unable to

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156 *Id*.

157 Proposed 8 CFR § 1003.29(b)(2); 85 Fed. Reg. 75925, 75940.

158 *See* INA § § 240(b)(4)(A) (guaranteeing respondents the "privilege of being represented, at no expense to the Government, by counsel of the alien's choosing"); 240(b)(4)(B) (giving respondents the right to "a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government"); *see also, e.g.*, *Castaneda-Delgado v. INS*, 525 F.2d 1295, 1302 (7th Cir. 1975) (concluding that denial of right to counsel was inherently prejudicial and rendered immigration proceedings "tainted from their roots" and "refus[ing] to indulge in 'nice calculations as to the amount of prejudice flowing from the denial'" (internal citation omitted)).

pursue a continuance to seek counsel without also being able to show that the continuance would materially change the outcome of the removal proceedings in some manner. This draconian prerequisite will make it exceedingly difficult, if not impossible, for many *pro se* respondents to retain representation.

The Department also proposes that good cause for a continuance will not be shown based on a collateral matter, when the alien has not demonstrated by clear and convincing evidence a likelihood of obtaining relief on that collateral matter. This requirement imposes an even higher standard than that present in existing case law.[159] Furthermore, the "clear and convincing" evidence standard would apply to *pro se* and represented respondents alike, and would create an unfairly high burden on the respondent and her counsel, if any, to collect evidence and build a case within the further restricted time frames for a proceeding anticipated by the Proposed Rule. The "clear and convincing evidence" standard would also decrease efficiency because it would require the immigration judge to conduct a mini-merits review of a matter that another entity is concurrently conducting a full merits review on.

The Department additionally proposes that good cause would not be demonstrated in the case of a continuance in order to seek parole, deferred action, or the exercise of prosecutorial discretion by DHS. This change to 8 CFR § 1003.29(b)(2)(ii) would allow an immigration judge to enter removal orders against respondents pursuing, *inter alia*, DACA, Deferred Enforced Departure, humanitarian deferred action, parole in place, and prosecutorial discretion with DHS. This population in particular is in need of continuances, given that the current administration has eliminated other available tools, such as administrative closure, through *Matter of Castro-Tum* and final regulations, and discretionary termination in the absence of DHS joinder, through *Matter of S-O-G- & F-D-B-*.[160]

2. The Proposed Rule's presumption against continuances for individuals applying for visas and its restrictions on continuances for individuals seeking relief over which DHS has initial jurisdiction are contrary to the INA, congressional intent, and basic due process rights.

Under the INA, several categories of non-citizens have a right to apply for relief with DHS. For example, unaccompanied children filing asylum applications with USCIS have a right to have their

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[159] *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018) (tightening the requirements for certain types of continuances).

[160] *See, e.g.*, *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018) (removing immigration judge general administrative closure authority); *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018) (tightening the requirements for certain types of continuances); *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018) (ruling that immigration judges do not have discretionary termination authority); EOIR, Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 81588 (final rule published Dec. 16, 2020) (largely eradicating administrative closure and motions to remand, among many other things); EOIR NPRM, Motions to Reopen and Reconsider; Effect of Departure; Stay of Removal, 85 Fed. Reg. 75942 (proposed Nov. 27, 2020); Memorandum from James R. McHenry, EOIR Dir., PM 21-05, Enhanced Case Flow Processing in Removal Proceedings (Nov. 30, 2020), https://www.justice.gov/eoir/page/file/1341121/download; Memorandum from James R. McHenry, EOIR Dir., PM 19-13, Use of Status Dockets (Aug. 16, 2019), https://www.justice.gov/eoir/page/file/1196336/download; Priscilla Alvarez, *Justice Department Places New Pressure on Immigrants Facing Deportation*, CNN, Nov. 24, 2020, https://www.cnn.com/2020/11/24/politics/immigration-justice-department/index.html.

application first considered by an asylum officer.[161] Likewise, conditional permanent residents filing Form I-751 with a waiver of the joint filing requirement for a petition to remove conditions also have the right to first pursue their relief with DHS.[162] Individuals applying for Temporary Protected Status (TPS) with USCIS who are in removal proceedings at the time a country is designated for TPS also have that same right.[163]

Under the Proposed Rule, an immigration judge could deny a continuance to a person who falls within one of the above categories if the immigration judge decides that the person has not shown *prima facie* eligibility for the benefit, if the person has any other relief pending before the immigration judge, or if pleadings have not yet been taken. This is despite the fact that individuals in these categories have a statutory or regulatory right to first pursue their relief with DHS. The Department's proposal is therefore contrary to the INA.

Furthermore, denying a continuance to individuals who have a pending application with USCIS will result in several unnecessary burdens and inefficiencies. Take, for example, a client with a I-751 petition pending before USCIS. Forcing such an applicant to go forward with filing an asylum application in immigration court, despite the fact that USCIS approval of the I-751 petition would obviate the need for adjudication of the asylum application by the immigration court, would place unnecessary burdens on respondents, practitioners, and the immigration court system itself, which is already facing a tremendous case backlog.

Likewise, the Proposed Rule would create a presumption against continuances for many respondents pursuing visa petitions and eventual adjustment of status.[164] This proposed presumption is cruel, unnecessary, and contrary to congressional intent. It will also give rise to countless inefficiencies in the immigration court system, such as the need to file appeals of removal orders and then subsequent motions to reopen when the priority date for a respondent becomes current. Individuals who would be ineligible for continuances and would face immediate removal orders under this proposed regulation include youth seeking Special Immigrant Juvenile Status who are subject to the visa backlog (currently those from El Salvador, Honduras, Guatemala, and Mexico). Even if they already have an approved petition, these youth would be unable to obtain a continuance based on their pending visa petition unless they have a priority date within six months of the date listed in the current month's Visa Bulletin filing date chart. Violence Against Women Act (VAWA) self-petitioners whose petition is subject to a preference category would also be affected by this change, as would other individuals who are beneficiaries of family-based preference petitions or employment-based petitions, even if they already have an approved self-petition or petition, unless they have a priority date within six months of the date listed in the current month's Visa Bulletin filing date chart. Immediate relatives and others with immediately-available visas whose adjustment application is under the jurisdiction of USCIS, rather than the

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161 *See* INA § 208(b)(3)(C) ("An asylum officer . . . shall have initial jurisdiction over any asylum application filed by an unaccompanied alien child . . . .").

162 *See Matter of Stowers*, 22 I&N Dec. 605, 614 (1999) (concluding that immigration judge erred in using a theory of "constructive denial" to assume jurisdiction over an unadjudicated waiver application, since the INA and the regulations "expressly contemplate an initial adjudication of the waiver application before the regional service center director").

163 *See* 8 CFR § 1244.7(d) (providing that noncitizens in "pending deportation or exclusion proceeding . . . at the time a foreign state is designated" must be given the opportunity to apply for TPS with USCIS).

164 Proposed 8 CFR § 1003.29(b)(3)(i), (ii), 85 Fed. Reg. 75925, 75940.

immigration court (e.g., those charged as "arriving aliens"), would also be ineligible for continuances under the Proposed Rule, as would individuals who are beneficiaries of a relative petition based on a U.S. citizen or lawful permanent resident spouse where the marriage occurred during removal proceedings, unless the respondent demonstrates in the continuance motion by "clear and convincing evidence" that the marriage was entered into in good faith.

The Proposed Rule would also create a presumption against continuances for the purpose of applying for nonimmigrant visas.[165] Individuals who would be ineligible for continuances and would face immediate removal orders under this proposed regulation include individuals seeking U nonimmigrant status, including those who have received a *prima facie* determination from USCIS or who have already received deferred action (unless they can show that they will receive the actual U visa within six months of the continuance request). Individuals seeking T nonimmigrant status would also be ineligible for continuances under this change, including those who have already received a bona fide determination regarding their status (unless they can show that they will receive final approval of the T visa and actually receive the T visa within six months of the continuance request). These labyrinthian requirements would make consular processing especially difficult or impossible in certain instances, such as in the case of T nonimmigrant visas: to be eligible for T nonimmigrant status, the applicant must be "physically present in the United States." INA § 101(a)(15)(T)(i)(II); 8 CFR §§ 214.11(b)(2), 214.11(g)(2) (an individual who is removed from the United States after the trafficking act is generally "deemed not to be present in the United States"). A T applicant must show that he or she would suffer "extreme hardship involving unusual and severe harm" if removed. INA § 101(a)(15)(T)(i)(IV); 8 CFR § 214.11(b)(4). A T applicant denied a continuance and thus subject to a removal order, if removed, would find it impossible under these standards to receive his or her T visa.

There are several circumstances under which individuals, including asylum seekers, would be ineligible for continuances and face immediate removal without being provided a reasonable opportunity to seek relief to which they are otherwise entitled. Consider the following cases of American Gateways' clients:

- Ms. RV is an asylum seeker from Mexico. Ms. RV's mental competency was called into question by the Immigration Judge, as well as by DHS. Due to these questions regarding Ms. RV's competency, as well as her ability to understand the nature of the removal proceedings in which she has been placed, American Gateways was asked to assist with representation in her asylum case. The Immigration Judge granted a continuance for a mental health evaluation. During the pendency of her asylum case, Ms. RV was the victim of an aggravated sexual assault. Based on her reporting of the crime and cooperation with the District Attorney's office, Ms. RV was able to file an application for a U visa. The Immigration Judge granted a subsequent continuance in Ms. RV's case to allow for the adjudication of the U visa by USCIS. The bases of the continuances granted by the Immigration Judge would have fallen within the list of scenarios that would not suffice to establish "good cause" under this Proposed Rule. Given that that the current processing time for U nonimmigrant visas is more than 4.5 *years*, asylum seekers in removal

[165] Proposed 8 CFR § 1003.29(b)(3)(iii), (iv), 85 Fed. Reg. 75925, 75940.

proceedings would be virtually foreclosed from seeking U nonimmigrant visas even if they meet the relevant eligibility requirements.

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

- ETO is a 14-year-old boy from El Salvador. He left El Salvador to come to the U.S. to live with his maternal aunt as he had no one to care for him in El Salvador. His mother is deceased, and his father abused and abandoned him. Upon arrival in the U.S., ETO was placed in removal proceedings. He was released to the custody of his aunt and was able to apply for Special Immigrant Juvenile Status. His SIJS petition was approved, but a visa is not yet available to him and will not be for some years. He has been able to request continuances from the immigration judge based on his approved petition. Under these new rules, he would not be able to do so and risks removal to El Salvador, where he faces homelessness and danger as a minor child.

3. The Proposed Rule's limitations on continuances that relate to a respondent's representation would violate basic due process principles and the statutory right to counsel.

The Department further proposes to place harsh and arbitrary limitations on continuances to allow a *pro se* respondent to find counsel.[166] Flouting longstanding precedent, due process principles, and the statutory right to counsel, the Proposed Rule would largely obliterate continuances to secure representation—not only would it permit immigration judges to deny even a single continuance to seek counsel, but it would drastically limit immigration judges' authority to grant a continuance to find counsel to a very narrow set of circumstances, and even then would only permit a single continuance of a maximum of 30 days. Specifically, the Proposed Rule would allow an immigration judge to deny even a single, short continuance to secure counsel so long as at least 10 days have elapsed between the date DHS served the Notice to Appear and the date of the first hearing. Even where an immigration judge wants to provide a *pro se* respondent a continuance to find counsel, the proposed regulation would permit the immigration judge to grant a maximum of one continuance of not more than 30 days, and only if (1) fewer than 30 days have passed between the NTA service date and the date of the first hearing, and (2) the respondent shows diligence in seeking representation since the date the NTA was served.[167] This means immigration judges would have virtually no ability to consider individual circumstances as is required by due process.

[166] Proposed 8 CFR § 1003.29(b)(4)(i), (ii); 85 Fed. Reg. 75925, 75941.

[167] Proposed 8 CFR § 1003.29(b)(4)(ii); 85 Fed. Reg. 75925, 75941.

The Department asserts that "aliens in removal proceedings generally have ample time to seek representation if they exercise diligence."[168] As discussed herein, *pro se* respondents—and detained respondents in particular—face myriad barriers to accessing counsel, and those barriers have become even more difficult to overcome in light of the global COVID-19 pandemic.[169] American Gateways works with several *pro se* respondents who are unable to find representation despite exercising reasonable diligence, especially at the early stages of proceedings. Based on its own experience working with detained immigrants, American Gateways staunchly opposes any proposal that would further restrict access to counsel based on the false premise that counsel is available to those who diligently pursue representation.

The Department also seeks, through the Proposed Rule, to vastly limit continuances based on a representative's workload or obligations in other cases.[170] The Proposed Rule's limitations on continuances on this basis would vastly decrease flexibility for respondents' counsel and their ability to meet the needs of their clients appropriately. The Department argues that "professional responsibility obligations require that representatives do not take on [] more cases than they can handle."[171] This fails to consider that by further limiting continuances that would provide more time for a representative to fulfill his or her professional obligations, the Proposed Rule will cause attorneys to become wary of taking on additional cases, knowing they will not be granted sufficient time to provide quality representation to each and every client. This will only succeed in limiting the pool of available legal representatives while restricting the amount of time each person has to seek representation.

This proposed limitation on continuances based on representatives' workloads or obligations would also result in minimum flexibility for respondents' counsel in an environment where the EOIR is making repeated docket management changes and where DHS counsel is not held to the same standard. The Proposed Rule offers no justification as to why the rule should apply only to representatives and not to DHS attorneys, who are known to regularly arrive in court without A files and to seek (and be granted) multiple continuances for this reason. Presumably, if DHS filed fewer NTAs, DHS attorneys would come to court with the correct file for the case and not need to seek a continuance.

The Department proposes additionally to nearly eradicate continuances for a respondent or legal representative's preparation of their case.[172] This change would conflict with respondents' statutory right to present evidence and examine the government's evidence, and would conflict with their right to due process in removal procedures. Allowing a maximum of one preparation continuance, not to exceed 14 days, prior to pleading to the NTA, is a harsh restriction in cases where a representative may need to gather evidence, develop rapport with a child client so that the client will disclose facts relevant to relief, allow a client to pursue mental health treatment, or secure an expert witness. If an individual wishes to challenge the NTA, 14 days is essentially a meaningless amount of time to investigate the validity of the NTA allegations and charge. This rule would also presumably eliminate continuances to prepare applications for relief, or for any

168 85 Fed. Reg. 75925, 75936.
169 *See supra* Section I.F.
170 Proposed 8 CFR § 1003.29(b)(4)(iii); 85 Fed. Reg. 75925, 75941.
171 Proposed 8 CFR § 1003.29(b)(4)(iii); 85 Fed. Reg. 75925, 75936
172 Proposed 8 CFR § 1003.29(b)(4)(iv); 85 Fed. Reg. 75925, 75941.

other preparatory purpose such as to review newly-filed DHS evidence. Again, this rule does not apply to DHS attorneys.

The Proposed Rule would further eradicate continuances for representative scheduling conflicts, unreasonably removing an immigration judge's discretion to consider the individual circumstances under which a scheduling conflict may warrant a continuance.[173] This change would prohibit a continuance even where a representative overlooked or mis-noted a pre-existing court date and thus inadvertently failed to notify the court of the pre-existing court date at the time the immigration judge scheduled the hearing in open court; where the representative receives a hearing notice in the mail, the hearing conflicts with a pre-existing court date, and the representative does not file a motion for a continuance with the immigration court within 14 days of the issuance of the immigration court hearing notice; and where an obligation in another court arises after the immigration court date is scheduled and cannot be rescheduled, unless the representative was appointed by the court in that matter.[174] Representatives are often required to appear at later-scheduled hearings in another court and are not able to move the date of those hearings. Removing the flexibility of an immigration judge to decide, in his or her discretion, whether circumstances warrant a continuance would only serve to exacerbate inefficiencies and injustices in the immigration court system, while also resulting in due process violations.

Finally, the Proposed Rule, would permit a continuance where a representative fails to appear at a hearing for only a maximum of fourteen days.[175] This rule would impose a uniform obligation upon all cases, regardless of the reasons the representative may have failed to appear—a health emergency (which is more likely given the COVID-19 pandemic), or a car accident, for example. If the representative is unsuccessful in her attempts to contact the court about the emergency on the day of the hearing, this could be disastrous for the client and a 14-day continuance is unlikely to consistently be sufficient to resolve the circumstances that led to the failure to appear or to provide the client with the chance to appropriately address the issue.

B. Imposing drastic limitations on immigration judges' ability to continue a case on their own motion or to continue merits hearings would improperly deprive immigration judges of their authority to set deadlines and manage their dockets.

"In deciding the individual cases before them . . . immigration judges shall exercise their independent judgment and discretion and may take any action consistent with their authorities under the [INA] and regulations that is appropriate and necessary for the disposition of such cases." 8 C.F.R. § 1003.10(b). The Department's proposed revision would strip immigration judges of their "broad discretion to conduct and control immigration proceedings."[176] As the Department acknowledges, an immigration judge "may grant a motion for continuance for good cause shown." That language "was initially added to the regulations in 1987 to codify existing practices and to 'restate[] in simpler terms the discretionary authority of Immigration Judges to grant continuances for good cause shown found in 8 CFR 242.13.'"[177] There is good reason that current regulations

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173 Proposed 8 CFR § 1003.29(b)(4)(v); 85 Fed. Reg. 75925, 75941.

174 85 Fed. Reg. 75925, 75937.

175 Proposed 8 CFR § 1003.29(b)(4)(v); 85 Fed. Reg. 75925, 75941.

176 *Matter of Interiano-Rosa*, 25 I&N Dec. 264, 265 (BIA 2010).

177 85 Fed. Reg. 75925, 75926 (citing Aliens and Nationality; Rules of Procedure for Proceedings Before Immigration Judges, 52 FR 2931, 2934 (Jan. 29, 1987)).

afford immigration judges the discretion to grant continuances, to set deadlines, and to manage their dockets. Immigration judges are in the best position to determine case-appropriate deadlines and grant or deny continuances that balance often competing concerns of efficiency and due process. For example, a short continuance may be reasonable for a respondent who is already represented by counsel at his first Master Calendar Hearing. That same continuance would be patently unreasonable for an unrepresented respondent who speaks an indigenous language and for whom the government cannot even locate an interpreter.

The Proposed Rule would remove immigration judges' discretion to continue cases *sua sponte* where they determine that a continuance is warranted, unless the situation falls within one of fourteen specific categories.[178] While the last category is a catch-all, it imposes an extremely high threshold, much more burdensome than "good cause." Instead, it allows for an immigration judge to continue a case *sua sponte* where "[u]nforeseen exceptional or extraordinary circumstances beyond the control of the alien, the alien's representative, government counsel, or the immigration judge require a continuance."[179] The purpose of *sua sponte* power is that there are many unforeseen circumstances that happen, and immigration judges must have the power to manage their dockets and address these issues as they arise. Under this rule, immigration judges would be limited and forced to proceed even where it is unfair or inefficient to do so.

The Proposed Rule would also curtail immigration judges' authority to continue merits hearings except in strictly limited circumstances.[180] Indeed, the change would prohibit immigration judges from continuing a merits hearing unless there is a representative scheduling conflict that meets the Proposed Rule's strict requirements for continuances on that basis, the noncitizen's counsel fails to appear at the hearing, or the merits hearing falls within one of the fourteen circumstances under which the Proposed Rule would permit immigration judges to *sua sponte* grant continuances. The rule would allow a maximum continuance of a merits hearing for 30 days, without taking into account whether the issue causing the need for the continuance can be resolved in that time period, or whether there are any open merits hearing slots on the court's docket within the 30-day time frame.

By instituting these changes to immigration judges' authority to continue cases *sua sponte* or to continue merits hearings, the Department is recommending that immigration judges' longstanding discretion over these matters be revoked. The Proposed Rule offers no real justification for this change, which appears designed solely to render the process more difficult for respondents and interfere with the ability of immigration judges to conduct fair proceedings. As discussed above, such intentional interference with judicial independence is improper, undermines the integrity of the immigration court system, facilitates due process violations, and fuels inefficient case management.[181]

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178 Proposed 8 CFR § 1003.29(b)(5); 85 Fed. Reg. 75925, 75941.
179 Proposed 8 CFR § 1003.29(b)(5); 85 Fed. Reg. 75925, 75941.
180 Proposed 8 CFR § 1003.29(b)(5); 85 Fed. Reg. 75925, 75941.
181 *See supra* Section I.E.

C. The Department's proposed limitation on an immigration judge's authority to grant a continuance to asylum seekers if it results in the application adjudication exceeding 180 days prioritizes speed over fairness and erodes judicial independence.

On December 16, 2020, EOIR published a final rule that implements the proposed change to 8 C.F.R. § 1003.29(a).[182] American Gateways hereby incorporates its comments submitted in opposition to that change,[183] and notes that the change to 8 C.F.R. § 1003.29(a) will be subject to judicial invalidation on multiple grounds. Most notably, the modification eradicates an immigration judge's authority to grant a continuance to an asylum seeker where such continuance would result in the adjudication of the application exceeding a 180-day timeline. As detailed in the comments American Gateways submitted in opposition to the December 16, 2020 change, this mandatory adjudication timeline is unreasonable, unachievable, and unlawful.

Aside from repeatedly invoking the more than two-decades-old provision in the INA providing that asylum cases should be adjudicated within 180 days absent exceptional circumstances—a provision that has never before been enforced by regulation—the Department offers no further justification for imposing a strict adjudication timeline and no explanation as to how such a rule could possibly be implemented without causing pervasive due process violations and ultimately contributing to the collapse of the immigration court system. Although the Department has already elected to move forward with implementation, the regulatory change is unlikely to withstand legal challenge. Hence, American Gateways preserves its objections to the proposed limitation on continuances that would result in the adjudication of an asylum application exceeding 180 days.

III. CONCLUSION

For all of the reasons set forth herein, American Gateways urges the Department to withdraw the Proposed Rule in its entirety. Continuances are essential to protect respondents' statutory right to counsel and to ensure that they have a meaningful opportunity to seek immigration relief during removal proceedings as required by due process. The Proposed Rule would essentially do away with continuances to obtain counsel and would eradicate continuances in many circumstances where they are currently the only tool still available for noncitizens facing removal proceedings to pursue certain immigration relief. The Proposed Rule would disproportionately harm, and lead to the swift removal of, some of the most vulnerable respondents in immigration court proceedings, despite their eligibility for and likelihood of obtaining lawful status if the immigration court would only give them the time to pursue it. 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."[184] The Proposed Rule should therefore be withdrawn.

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[182] Procedures for Asylum and Withholding of Removal, 85 Fed. Reg. 81698, 81750.

[183] Comments regarding Procedures for Asylum and Withholding of Removal, 85 Fed. Reg. 81698, *available at* https://www.regulations.gov/document?D=EOIR-2020-0005-1665.

[184] *Nw. Immigrant Rights Project v. Sessions*, No. C17-716 RAJ, 2017 WL 3189032, at *4 (W.D. Wash. July 27, 2017).