NATIONAL IMMIGRANT JUSTICE CENTER
A HEARTLAND ALLIANCE PROGRAM

December 28, 2020

Submitted via https://www.regulations.gov

Lauren Alder Reid, Assistant Director
Office of Policy
Executive Office for Immigration Review
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RE: RIN 1125-AB01; EOIR Docket No. 18-0503; Dir. Order No. 01-2021,
Public Comment Opposing Proposed Rules on Motions to Reopen and Reconsider; Effect of Departure; Stay of Removal

Dear Ms. Alder Reid:

The National Immigrant Justice Center (NIJC) submits this comment opposing the Department of Justice (DOJ or Department), Executive Office for Immigration Review (EOIR), Notice of Proposed Rulemaking (NPRM) on motions to reopen and reconsider, the effect of departure, and stays of removal. Motions to reopen and reconsider, stays of removal, and a reasonable interpretation of "departure" are critical protections for immigrants, including asylum seekers, and serve as safety valves when errors, oversights, and/or changes in circumstance threaten a permanent, unjust result. The NPRM recklessly and needlessly proposes adjustments to a system and that is not in need of repair in this way. It favors speedy removal without regard to due process, and in violation of existing law. It betrays the very purpose of the U.S. immigration system; which is to seek justice and protect families. It favors permanent deportation in nearly all cases; without regard to the human toll. In particular, the proposed changes would harm asylum seekers and risk returning those who seek protection in the United States to places where they face grave harm, including death.

Headquartered in Chicago, with offices in Indiana, Washington D.C., and San Diego, NIJC is a legal service provider and advocacy organization. Each year, NIJC provides legal services to more than 10,000 immigrants, refugees, and asylum seekers applying for lawful status or facing removal. NIJC has provided these services for more than 30 years. All NIJC clients live at or below 200% of the federal poverty line. NIJC provides legal services to many of them on a completely *pro bono* basis. As a DOJ-recognized organization, NIJC services are either *pro bono*

or provided at substantially reduced rates.[1] Each year, NIJC represents hundreds of asylum seekers, many of whom require motions to reopen, motions to reconsider, and stays of removal. NIJC opposes this proposed rule because it improperly raises burdens of proof while limiting access to counsel, imposes improper limitations on motions to reopen, and violates domestic and international obligations to asylum seekers.

NIJC also registers its objection to the premise and tone of the NPRM, which accuses noncitizens and their attorneys of "dilatory gamesmanship" and the filing of frivolous motions. Sweeping assertions of bad faith and a combative tone betray an underlying purpose of punishment rather than justice-seeking and suggest the EOIR's interpretation of the statute is infected by animus.

1. **The rushed nature of the proposed rule denies stakeholders a reasonable opportunity to comment, a requirement under the Administrative Procedures Act (APA).**

The APA requires the Department to provide notice of its proposed rules and the proposed legal bases for those rules.[2] Notice must afford interested parties "a reasonable and meaningful opportunity to participate in the rulemaking process."[5] The Department has issued the proposed rule on an expedited timeframe, with inadequate justification.

According to the Rulemaking Management Office, which provides access to and collects comments on proposed regulations, "[g]enerally, agencies will allow 60 days for public comment. Sometimes they provide much longer periods."[3] Here, the Department has allowed only 30 days for comments for a significant rule change to long-standing regulations. The Department provided no rationale for this shortened comment period, nor has there been any recent change in circumstances that would require a hasty implementation of the proposed rule and a shortened comment period. On the contrary, the comment period overlapped with the promulgation of various other final rules, including rules that will significantly alter motions before the immigration courts and Board of Immigration Appeals. As such, it is not possible to consider the full impact of these proposed changes in the time permitted. A full 60-day period would have allowed for a more comprehensive review and response by NIJC.

Due to this timeframe, NIJC was unable to conduct the thorough review and analysis the proposed rule merits. This proposed rule is just one of several proposed rules published during the past several months in which NIJC, and the many other stakeholders to this proposed rule, is an interested party. NIJC, and other similarly situated stakeholders, are put in the untenable position of attempting to carry on day-to-day advocacy for clients while also devoting sufficient time to responding to the many rushed proposed rules that directly threaten its clients. Overlay

[1] *See* 8 C.F.R. § 1292.11 (recognition requires proof that organization "provides immigration legal services primarily to low-income and indigent clients" within the United States, and, if the organization charges fees, has a written policy for accommodating clients unable to pay fees for immigration legal services).
[2] *See* 5 U.S.C. § 553.
[3] Regulatory Timeline, Regulations.gov, *available at* https://www.regulations.gov/docs/FactSheet_Regulatory_Timeline.pdf (last accessed Oct. 15, 2020).

this with the global pandemic, with over 18 million people in the United States having been infected with COVID-19, and more than 3000,000 people in the United States having died as a result of it.[4] With reported cases continuing to rise throughout most of the United States, the country is about to hit a "third wave" of COVID-19 infections.[5] NJIC's entire staff, like the staff of many other stakeholders, currently is required to work remotely, disrupting typical work practices and, notably, attorney-client communication.

The use of a truncated comment period to rush through major changes while the United States grapples with a historic crisis raises concerns regarding the Department's motivation to skirt appropriate scrutiny of the changes under the proposed rule.[6]

2. A departure should not be construed as volitional where the departing noncitizen leaves under duress, as a result of abuse, or because she or he is a minor and *Matter of Arrabally and Yerrabelly* should be preserved.

The proposed regulations suggest that one who makes a "volitional departure" from the United States will be precluded from pursuing a motion to reopen and other benefits. EOIR should clarify that a "volitional departure" does not apply to noncitizens who depart the United States due to abuse, coercion, or while under age. Such a protection exists elsewhere in the law. For example, the permanent bar located at INA §212(a)(9)(c) contains a waiver for petitioners under the Violence Against Women Act (VAWA) "if there is a connection between the…battering or subjection to extreme cruelty; and the…departure from the United States." INA §212(a)(9)(C)(iii). Such a safeguard should be built into these regulations. For example:

> *NIJC represents a survivor of domestic violence who experienced years of domestic violence by a partner in the United States. In the context of this abuse, she travelled to Mexico after a removal order had been entered against her. In Mexico, she was targeted for persecution by a drug cartel, against which she had testified. She ultimately fled back to the United States and sought protection in the form of withholding of removal and relief under the Convention Against Torture. Had regulations existed to allow her to reopen her case and apply for asylum, she could have pursued stronger and more durable protection from harm by her abuser and the Mexican cartels.*

Moreover, NIJC objects to the proposed rescission of *Matter of Arrabally and Yerrabelly*, which allows certain noncitizens to travel on advance parole without triggering departure penalties, and to subsequently be construed as having made a lawful entry for purposes including adjustment of status. This allows for family unity, where U.S. citizens and lawful permanent residents may petition for their loved ones and not endure months (or more) of needless separation, significant

[4] *See* Johns Hopkins University, Coronavirus Resource Center, World Map (last accessed on Dec. 22, 2020), https://coronavirus.jhu.edu/map.html.
[5] *See Alarming Data Show a Third Wave of COVID-19 Is About to Hit the U.S.*, TIME, *available at* https://time.com/5893916/covid-19-coronavirus-third-wave/ (last accessed Oct. 15, 2020).
[6] *See* Eric Lipton, *A Regulatory Push by Federal Agencies to Secure Trump's Legacy*, N.Y. TIMES (Oct. 16, 2020), *available at* https://www.nytimes.com/2020/10/16/us/politics/regulatory-rush-federal-agencies-trump.html (quoting Susan E. Dudley, top White House regulatory official during the George W. Bush administration: "Two main hallmarks of a good regulation is sound analysis to support the alternatives chosen and extensive public comment to get broader opinion. . . . It is a concern if you are bypassing both of those.").

expense and economic hardship, and the destabilizing impact of losing a family member indefinitely. NIJC represents clients who have already travelled on advance parole, relying on such travel to enable them to further regularize their status. EOIR should not terminate that option. For example:

> *NIJC represents a client from El Salvador who fled to the United States as a result of the Salvadoran civil war. She applied for asylum. The immigration judge denied her case and the Board of Immigration Appeals upheld the denial. Following the client's petition for review in the federal court of appeals, she became eligible for temporary protected status, which she maintains to this day. She is married to a lawful permanent resident and is mother to two U.S. citizen children. The family petition her adult son filed on her behalf has been approved. She has traveled on advance parole, and expects to ultimately be able to adjust status in the United States and remain in safety with her family.*

For these reasons, *Matter of Arrabally and Yerrabelly* should be preserved and the departure bar should be construed to not apply to anyone who departed the United States as a result of duress, coercion or abuse, or while a minor.

3. The proposed regulation changes the standards and raises the burden of proof regarding the evidence submitted by noncitizens.

Through proposed 8 C.F.R. § 1003.48(b), EOIR improperly reconfigures the legal requirements imposed upon noncitizens, including asylum seekers. A motion to reopen is an "'important safeguard' intended to 'ensure a proper and lawful disposition' of immigration proceedings."[7] The language in section 8 C.F.R. § 1003.48(b) of EOIR's proposed new regulations purports to do away with this this safeguard, however, by eliminating the rule accepted by a majority of circuits that facts stated in an affidavit should be accepted as true unless they are inherently unreliable.[8]

EOIR's proposed regulation states that factual assertions that are "contradicted … conclusory, uncorroborated, or unsupported by other evidence in the record" should not be accepted as true.[9] But this conflicts with current immigration law, regulations, and case law - which require "inferences … to be drawn in favor of the party whose entitlement to further proceedings is at stake."[10] Moreover, the proposed regulation obviates the purpose behind motions to reopen, which is "to ensure that the applicant has had her day in court to demonstrate the truth of facts alleged."[11] EOIR's proposed regulation also directly conflicts with INA § 208(b)(1)(B)(ii), which states that the "testimony of the applicant may be sufficient to sustain the applicant's burden *without corroboration*…." (emphasis added) The statute recognizes that in certain cases, clients are unable to obtain corroborating affidavits or evidence to support their cases. Sometimes, this is because clients are detained; other times, it is because it would be too dangerous for a family member back in the home country to attempt to obtain the requisite

[7] *Kucana v. Holder*, 558 U.S. 233, 242 (2010), (quoting *Dada v. Mukasey*, 554 U.S. 1, 18 (2008)).
[8] *See, e.g., Gebremichael v. I.N.S.*, 10 F.3d 28, 40 (1st Cir. 1993); *Fessehaye v. Gonzales*, 414 F.3d 746, 755 (7th Cir. 2005).
[9] Motions to Reopen and Reconsider; Effect of Departure; Stay of Removal, 85 Fed. Reg. 75947-48 (proposed Nov. 27, 2020) (to be codified at 8 C.F.R. § 1003.48(b)(2)(iii).).
[10] *I.N.S. v. Abudu*, 485 U.S. 94, 100-01 (1988).
[11] *Trujillo Diaz v. Sessions*, 880 F3d 244, 252-53 (6th Cir. 2018).

documentation or to mail it to the United States. Clients should not be forced to put their family members' lives in danger or be denied their day in court simply because they lack access to additional evidence.

EOIR's proposed regulation– which also seeks to bar statements that are "based principally on hearsay" – would also conflict with longstanding precedent and regulations permitting hearsay in deportation proceedings.[12] In immigration proceedings, it is often necessary for clients to submit affidavits containing hearsay statements. For example, when submitting a motion to reopen in order to present an asylum claim, a noncitizen will often include the threatening words of her persecutor in her affidavit, which is a prerequisite to her establishing her eligibility for relief.[13] EOIR's proposed regulation – which would bar a noncitizen from presenting this evidence - will ultimately prevent a noncitizen from being able to make the requisite showing.

Taken together, EOIR's proposed regulatory changes would make it virtually impossible for noncitizens – particularly asylum seekers – to present evidence sufficient to meet their burden of proof or to have their cases reopened. If enacted, these changes will greatly increase the likelihood that individuals with viable asylum claims will be returned to their home countries, where they may be harmed or killed. For this reason, NIJC strongly opposes EOIR's proposed changes to 8 C.F.R. § 1003.48(b), which seek to fundamentally change the way evidence is evaluated by adjudicators and will prevent many noncitizens deserving of relief from reopening their cases.

4. NIJC opposes the proposed regulatory codification of the "fugitive disentitlement."

NIJC strongly urges EOIR to eliminate the proposed regulatory codification of the "fugitive disentitlement" doctrine requiring that motions to reopen or reconsider include a statement concerning whether a noncitizen has complied with their duty to surrender and that failure to comply may result in a denial of the motion. The incorporation of this overbroad interpretation of the "fugitive disentitlement" into administrative proceedings is unduly severe, fundamentally unfair, and runs afoul of the United States' obligations under international law.

First, the Supreme Court and U.S. courts of appeal have held that the fugitive disentitlement doctrine is a severe sanction that should be invoked sparingly by judges.[14] The doctrine is an equitable tool that judges may use at their discretion to deter petitioners from absconding and to preserve the dignity and authority of the court.[15] However, when cautioning against frequent invocation of the doctrine, the Supreme Court noted that courts have "at [their] disposal an array

[12] *See Matter of Grijalva*, 19 I&N Dec. 713, 721-22 (BIA 1988); 8 C.F.R. § 1240.7(a).
[13] *See*, *e.g.*, *Abudu*, 485 U.S. at 104 (noting that a motion to reopen must establish that the moving party is *prima facie* eligible for some type of relief).
[14] *Degen v. United States*, 517 U.S. 820, 828 (1996); *Hasan v. Gonzales*, 484 F.3d 513, 516 (8th Cir. 2007) (describing the doctrine as "an extreme sanction"); *Gutierrez-Almazan v. Gonzales*, 453 F.3d 956, 957 (7th Cir. 2006) ("[t[he Supreme Court cautioned against frequent use of fugitive dismissal, stating that it is too blunt an instrument for deterring other petitioners from absconding and for preserving the court's authority and dignity.").
[15] *Gutierrez-Almazan*, 453 F.3d at 957.

of means to enforce its orders."[16] In fact the Court warned that overuse of the doctrine could undermine the very "dignitary purposes" it was created to protect.[17]

In spite of the long history of judicial restraint in the invocation of the "fugitive disentitlement" doctrine, the proposed regulations seek to apply this severe sanction to nearly all cases in which an individual has not complied with a notice to surrender. The proposed regulations contain no requirement that an adjudicator assess whether application of the doctrine is appropriate under the circumstances, whether the noncitizen's actions have made enforcement of adverse judgment impossible, or whether the adjudicator has other less severe means at its disposal to achieve compliance with court orders or sanction parties should the need arise. Instead, the proposed regulations seek to create a categorical application of this extreme sanction without any individualized analysis or consideration.

Additionally, the interpretation of the "fugitive disentitlement" doctrine put forth in the proposed regulations sweeps too broadly and encompasses noncitizens who have not surrendered for deportation but whose whereabouts are known by the Department of Homeland Security (DHS) and the court. There is disagreement among the federal courts of appeals as to who is a fugitive under the doctrine in the immigration context.[18] One of the guiding principles in the application of the "fugitive disentitlement" doctrine is that "for disentitlement to be appropriate, there must be some connection between a defendant's fugitive status and the appellate process."[19] The Ninth Circuit held that even when a noncitizen failed to surrender for removal, she was not a fugitive during the pendency of her appeal because her whereabouts were known by her counsel, DHS, and the court.[20] The Ninth Circuit's interpretation correctly balances the court's interest in its ability to enforce its judgments with the interest of members of the public in being able to pursue meritorious claims before adjudicatory bodies. The proposed expansion of the "fugitive disentitlement" doctrine sweeps too broadly by encompassing those who have not surrendered for removal, but nevertheless have made their whereabouts known to DHS and the court, are complying with adjudicatory procedures, and against whom the court can enforce its own judgements.

Furthermore, the proposed regulations improperly limit immigration judges' discretionary authority in the application of the "fugitive disentitlement" doctrine. The "fugitive disentitlement doctrine is not a categorical rule that courts are required to invoke, but rather an equitable doctrine that the court may apply at its discretion.[21] In spite of this, the proposed language creates a blanket rule that codifies a noncitizen's failure to surrender for removal as a severe negative factor mandating a denial of a motion to reopen or reconsider in contravention of the traditional discretionary nature of the doctrine. Federal courts have held that when determining whether to apply the doctrine, the court must weigh all relevant factors and "tak[e] into account

[16] *Degen*, 517 U.S. at 827.
[17] *Id.* at 828 ("It remains the case that the sanction of disentitlement is most sever and so could disserve the dignitary purposes for which it is invoked. The dignity of a court derives from the respect accorded its judgments. That respect is eroded, not enhanced, by too free a recourse to rules foreclosing consideration of claims on the merits.").
[18] *Bright v. Holder*, 649 F.3d 397, 400 (5th Cir. 2011) (stating that some courts have applied the fugitive disentitlement doctrine when a noncitizen fails to surrender for removal regardless of whether their whereabouts are known while other courts do not apply the doctrine if the noncitizen's address is known to DHS and the court).
[19] *Sun v. Mukasey*, 555 F.3d 802, 805 (9th Cir. 2009) (internal quotation marks omitted).
[2020] *Id*.
[21] *Bright*, 649 F.3d at 400.

the social and human considerations in an applicant's favor."[22] The proposed regulations eliminate this balancing test and do not account for the fact that noncitizens with meritorious claims to reopening (and ultimately relief from removal) may have a variety of legitimate reasons for failing to surrender for removal.

Moreover, the proposed regulation's obligation to surrender and its codification of the "fugitive disentitlement" doctrine is an exceptionally severe sanction for noncitizens with pending motions to reopen or reconsider who wish to pursue asylum, and essentially forecloses their ability to present protection-based claims. Under the proposed regulatory language, noncitizens must surrender for removal (and ultimately allow themselves to be removed from the United States) to be eligible to have their motions to reopen considered. While other provisions of the proposed regulations purport to allow the adjudication of motions to reopen regardless of the noncitizen's geographical location, when the motion to reopen is based on a noncitizen's eligibility for asylum, the surrender requirement presents a particularly egregious barrier to adjudication of their claims.

Not only must individuals with protection-based claims surrender themselves for removal to countries where they fear persecution and/or torture, but they must do so knowing that if they are removed from the United States, they will be ineligible for the relief they seek. A noncitizen is ineligible to apply for asylum if he or she is outside of the United States.[23] Yet under the proposed regulations, noncitizens pursuing motions to reopen based on their eligibility for asylum must surrender themselves in order to preserve their right to have their motion to reopens adjudicated, but by so doing submit to removal from the United States, which destroys their eligibility for protection.[24] The proposed regulations function as an unconscionable categorical bar against pursuing motions to reopen to seek protection from persecution or torture and so should be rescinded.

This functional foreclosure of motions to reopen to seek protection from persecution and/or torture runs afoul of the United States' international obligation of *non-refoulement*.[25] The United States acceded to the 1967 Protocol relating to the Status of Refugees ("Refugee Protocol") which largely incorporates the 1951 Convention Relating to the Status of Refugees ("Refugee Convention").[26] Article 33(1) enshrines the principle of *non-refoulement* stating: "[n]o

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[22] *Francisco-Rosendo v. Gonzales*, 454 F.3d 965, 967 (9th Cir. 2006) (citing *Arrozal v. I.N.S.*, 159 F.3d 429, 432-33 (9th Cir. 188) (overturning the BIA's denial of a motion to reopen based solely on the petitioner's failure to report for removal without considering that the life-threatening illness making her eligible for cancellation of removal also prevented her from travel).

[23] INA §208(a)(1) (requiring physical presence in the United States for Asylum eligibility).

[24] The draconian impact of this regulation is exacerbated by the proposed regulation 8 C.F.R. §1003.2(k) dramatically restricting the availability of discretionary stays of removal. Motions to Reopen and Reconsider; Effect of Departure; Stay of Removal, 85 Fed. Reg. at 75947—48.

[25] *Non-refoulement* is the cornerstone of international refugee law, a principal of customary international law, and possibly *jus cogens*, a norm of international law from which no state can derogate. *See* Jean Allain, *The jus cogens Nature of non-refoulement*, 13 INT'L J. OF REFUGEE L. 533 (2001); GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 218 (2007) ("[C]omments…have ranged from support for the idea that non-refoulement is a long-standing rule of customary international law and even a rule of *jus cogens*, to regret at reported instances of its non-observance of fundamental obligations…").

[26] Convention relating to the Status of Refugees, 189 U.N.T.S. 15000, *entered into force* April 22, 1954 [*hereinafter* "Refugee Convention"]; Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267, *entered into force* Oct. 4, 1967 [*hereinafter* "Refugee Protocol"]. *See also INS v. Stevic*, 467 U.S. 407, 416 (1984) ("The Protocol bound

Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[27] Article 3(1) of the Convention Against Torture contains a parallel provision stating "[n]o State Party shall expel, return ('refouler') or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture."[28] The proposed regulatory scheme, which aims to facilitate removal of noncitizens before their claims for protection can be adjudicated, runs afoul of the United States' obligation of *non-refoulement*, and consequently must be rescinded.

5. Limiting access to relief only to the form of relief raised in the motion to reopen runs afoul of the statute and ignores the reality that other relief may emerge for noncitizens.

The proposed regulation's limitation on the scope of reopened proceedings violates the statute and arbitrarily limits access to relief. The regulation seeks to narrow the removal proceedings in a reopened case and limit them only to the form of relief established in the motion to reopen. But the statute does not contemplate this; and for good reason. Removal proceedings do not occur in a vacuum and particularly when such proceedings span years, as they commonly do, laws and circumstances change in ways that result in eligibility for new forms of relief. NIJC primarily appears before the Chicago Immigration Court, where hearings are now being set into late 2023. While awaiting case resolution, new relief will arise in many matters, not because anyone is trying to abuse the system, but because individual circumstances change, particularly in the lives of vulnerable immigrants. For example:

> *NIJC represents a woman who fled to the United States following severe violence based on her sexual orientation. She applied for asylum with a notary public who held herself out as possessing authority and expertise in immigration matters. The notary received a hearing notice on behalf of the woman and failed to advise her of her court date. As a result, the woman was ordered removed in absentia. The woman found NIJC and NIJC filed a motion to reopen on her behalf, appending her asylum application and supporting documents to establish her eligibility for relief. Following the motion to reopen, NIJC's client married a United States citizen, who became abusive. The client is now eligible for both asylum and VAWA relief under. Limiting her to only asylum when she meets the statutory VAWA requirements frustrates the statute and is an unreasonable interpretation of the law.*

In the preamble to the proposed regulations, EOIR suggests noncitizens should not be able to "shoehorn their otherwise barred claims into reopened proceedings," but that language baselessly suggests immigrants are seeking to game the system. EOIR offers no evidence of that. In reality, acknowledging the mutable nature of proceedings and authorizing immigration judges to

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parties to comply with the substantive provisions of Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees…with respect to "refugees" as defined in article 1.2 of the Protocol.").

[27] Refugee Convention, *supra* note 25, art. 33(1).

[28] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc A/39/51 (1984), *entered into force* June 26, 1987 [*hereinafter* Torture Convention].

fully review all aspects of a case is the most just and efficient way to handle matters where multiple forms of relief arise. The proposed limited scope of reopened proceedings is also concerning since another rule promulgated by EOIR eliminates nearly all remands for new evidence, as well as *sua sponte* motions to reopen.

6. The proposed regulation imposes improper rigidity on the test for determining ineffective assistance of counsel.

At 8 C.F.R. § 1003.48(i)(2), the proposed regulation clarifies that ineffective assistance of counsel claims can be brought against attorneys, DOJ accredited representatives, as well as individuals a noncitizen reasonably but erroneously believes to be an attorney. NIJC welcomes this proposed addition, since it will help to protect many noncitizens who are harmed when they rely on individuals who provide them with legal assistance even though they lack the knowledge or qualifications to do so.

However, NIJC believes EOIR should eliminate the proposed language in 8 C.F.R. § 1003.48 (i)(5) since it creates additional unnecessary and onerous obstacles for noncitizens who wish to file motions to reopen based on ineffective assistance of counsel. Although noncitizens are not entitled to representation by counsel in immigration proceedings, they are entitled to due process protections, including the effective assistance of counsel, when counsel has been obtained.[29] Because many individuals in removal proceedings do not speak English and are unfamiliar with the laws and procedures in the United States, they are particularly in need of legal assistance and vulnerable to abuse; therefore, a mechanism through which they can seek relief when they are prejudiced by the deficient performance of counsel is critical.

EOIR's proposed changes essentially gut this due process safeguard by requiring strict adherence to the factors outlined in *Lozada*,[30] tacking on additional requirements, and raising the standard required to prove prejudice. These new requirements will not better protect noncitizens from ineffective assistance of counsel or augment the integrity of the immigration process and instead will merely diminish the ability of noncitizens to achieve a fair adjudication of their motions to reopen. We therefore ask that the proposed language in the regulation - which demands that stringent new requirements be met before a motion to reopen based on ineffective assistance of counsel can be filed – be stricken for the following reasons.

First, EOIR's new proposed requirements are unnecessary. Currently, noncitizens filing motions to reopen based on ineffective assistance of counsel must already comply with the *Lozada* requirements, which include (1) explaining the substance of the agreement with former counsel; (2) informing prior counsel of the allegations of ineffective assistance of counsel and giving them an opportunity to respond; and (3) filing a complaint with the appropriate disciplinary authority or explaining why one was not filed.[31] Many circuits do not require strict adherence to these requirements, but instead require only "substantial compliance."[32] Flexibility with these

[29] *Reno v. Flores*, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles defendants to due process of law in deportation proceedings."); *Alvarez-Espino v. Barr*, 959 F.3d 813, 817 (7th Cir. 2020) (noting that the denial of effective assistance of counsel in immigration proceedings may violate due process).
[30] *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988).
[31] *Id.* at 639.
[32] *Zheng v. US Dep't of Justice*, 409 F.3d 43, 47 (2d Cir. 2005); *Xu Yong Lu v. Ashcroft*, 259 F.3d 127, 134 (3d Cir. 2001); *Barry v. Gonzales*, 445 F.3d 741, 746 (4th Cir. 2006); *Habchy v. Gonzales*, 471 F.3d 858, 863-64 (8th Cir.

requirements still effectuates their goals, which include "discourag[ing] baseless allegations and meritless claims"[33] and "hold[ing] attorneys to appropriate standards of performance"[34] but also ensuring that individuals who truly have been prejudiced by ineffective assistance of counsel are afforded a fair opportunity to have their claims heard.

The new regulations proposed by the government, by contrast, require strict adherence to the *Lozada* requirements. In addition, they go even further by imposing additional requirements, which will be nearly impossible for many noncitizens to satisfy. One of these new requirements requires a noncitizen to file a complaint against former counsel unless he can show that prior counsel is dead.

Under EOIR's new proposed regulations, some of NIJC's clients would be unable to file motions to reopen based on ineffective assistance of counsel. For example:

> *NIJC's client entered the United States as an unaccompanied immigrant child and was released into the care of his uncle. His uncle arranged for him to meet with an attorney, who erroneously informed the client that he was ineligible for any immigration relief and so should not appear in court. Based on this advice, the client's uncle failed to transport him to court, and the client was ordered removed in absentia. The client could not file a complaint against prior counsel, because his uncle refused to provide him with the attorney's name. Thus, although the client was clearly prejudiced by the ineffective assistance of counsel, he would be ineligible to file a motion to reopen based on ineffective assistance of counsel under EOIR's new proposed rule.*

EOIR's proposed regulations at 8 C.F.R. § 1003.48(i)(4) also elevate the showing of prejudice that a noncitizen must meet for an ineffective assistance claim beyond the one utilized by many circuits. Currently, some circuits require only that counsel's error *may* have affected the outcome.[35] Others require a noncitizen to show that that there is a reasonable or a significant possibility that counsel's deficient performance affected the outcome. The new proposed regulations by contrast, require an applicant to prove that there is a reasonable probability – which they define as a "probability sufficient to undermine confidence in the outcome" - that absent the ineffective assistance of counsel; the outcome would have been different.[36] Proposing a heightened standard of prejudice is just one more overly broad attempt to foreclose relief to individuals filing motions to reopen based on ineffective assistance of counsel.

2006); *Castillo-Perez v. I.N.S.*, 212 F.3d 518, 526 (9th Cir. 2000) (noting that the *Lozada* requirements "need not be rigidly enforced where their purpose is fully served by other means" or it is obvious that ineffective assistance of counsel occurred).

[33] *Lo v. Ashcroft*, 341 F.3d 934, 937 (9th Cir. 2003).

[34] *Id.*

[35] *See Raphael v. Mukasey*, 533 F.3d 521, 533 (7th Cir. 2008) (finding the standard to be whether counsel's errors "actually had the potential for affecting the outcome of the proceedings").

[36] *Compare with Calderon-Rosario v. Attorney General*, 957 F.3d 378, 387 (3d Cir. 2020) (finding a "reasonable probability" means a "significant possibility" and holding that noncitizens are "not required … to show counsel's deficient performance did, in fact, affect the outcome of the case, or even that a different outcome was more likely than not").

7. Stays of removal are a necessary protection and obstacles to obtaining them short circuit due process and limit access to protection for asylum seekers.

NIJC opposes the inclusion of significant new requirements to obtaining a stay of removal and urges EOIR to completely eliminate the proposed language regarding stays of removal. Stays of removal are a crucial tool to protecting the due process rights of noncitizens and ensuring that the United States upholds its obligation under international law to *non-refoulement*.

The proposed regulation's requirement that a noncitizen first apply for a stay from DHS before he or she can file a motion for stay with EOIR places an unconscionable burden on noncitizens seeking relief. First, DHS charges a $155 application fee for requests for stays of removal. Requiring noncitizens to first seek a stay from DHS necessarily limits who can benefit from a stay of removal to individuals who can afford to pay the application fee. While $155 may not seem like an unduly burdensome cost, it unfairly discriminates against low income immigrants, particularly detainees, who often have no means to acquire the necessary money to pay application fees, and asylum seekers, who as of August 25, 2020 are not eligible to apply for work authorization until their asylum applications have been pending for 365 days.[37]

Furthermore, DHS very rarely grants requests for stays. Stays filed with DHS by NIJC are denied nearly 90% of the time. Under these circumstances, the requirement that noncitizens first apply to DHS for a stay of removal is an exercise in futility designed to create delays enabling DHS to remove noncitizens before they have an opportunity to file a motion for stay with the Immigration Court or the Board. The proposed regulatory language states that a noncitizen may not file a motion for stay with EOIR unless DHS denies their request for stay or does not respond to the request within five business days. This requirement provides DHS with advance notice of a noncitizen's intention to file a motion for stay with EOIR and thus gives DHS an opportunity to remove the noncitizen before he is able to ask the court for a stay, resulting in the circumvention of due process.

Additionally, the proposed regulations improperly delegate adjudicatory authority to DHS—a litigant—and give DHS unprecedented control over the decision of the Immigration Court or the Board. It is improper to restrict the Immigration Court's and the Board's authority to issue equitable remedies, such as stays of removal, and delegate that authority to DHS—a party to the litigation. A court's power to "hold an order in abeyance" is inherent and is an important tool allowing the courts to preserve the rights of those appearing before it while assessing the claims presented.[38]

The language of the proposed regulation not only states that DHS must have the first opportunity to adjudicate a request for stay before a noncitizen may be given an opportunity to present the request to the Immigration Court or the Board, but the proposed language also gives DHS unprecedented power to control EOIR's decision on a motion for stay. Under the proposed regulation, a discretionary stay cannot be granted unless the opposing party (DHS) (1) joins or affirmatively consents, or (2) does not respond within three business days.[39] Based on the proposed regulatory language, the adjudicator may not grant a stay request if DHS affirmatively opposes the motion for stay. The proposed regulation allows DHS unilaterally to quash a

[37] 8 C.F.R. §208.7(a)(ii).
[38] *Nken v. Holder*, 556 U.S. 418, 426 (2009).
[39] Motions to Reopen and Reconsider; Effect of Departure; Stay of Removal 85 Fed. Reg. at 75954.

noncitizen's ability to obtain a stay of removal simply by registering its opposition, without even providing an explanation. Providing one litigant—DHS—such unbridled power is fundamentally unfair and constitutes an improper delegation of adjudicatory authority.

Moreover, the proposed requirements for stays of removal function to foreclose legitimate claims for asylum and run afoul of the United States' obligation of *non-refoulement*. Because the proposed regulations give DHS the opportunity to remove noncitizens before they are able to request a stay from EOIR, and gives DHS the power to force the immigration judge or the Board to deny a motion for stay, the proposed regulations would ensure that noncitizens with pending motions to reopen will be denied stays of removal (unless DHS chooses to grant a stay of removal—a rare occurrence). If a noncitizen is seeking to reopen their case to present a non-frivolous asylum claim, their inability to receive a stay and their ultimate removal before adjudication of his motion to reopen will doom the asylum claim.[40] Not only is this a cruel restriction on a noncitizen's right to apply for asylum and a subversion of due process, but also is an egregious departure from the United States' obligation of *non-refoulement*.[41]

In addition, NIJC opposes the codification of the *Nken* factors for determining whether to grant an administrative stay of removal. EOIR should not adopt the *Nken* test for U.S. courts of appeal considering stay motions in conjunction with a petition for review, because the test assumes the agency has already reviewed and rejected the underlying claim on the merits. The *Nken* test is not appropriate when the underlying claim has not yet been reviewed by the agency.

Instead of the *Nken* factors, EOIR should grant an automatic stay when a noncitizen files a motion to reopen to seek protection-based relief from removal. First, the stakes in stay adjudications are especially high when they are tied to a motion to reopen based on a fear of persecution and/or torture in the noncitizen's country of origin. Such claims inherently carry the risk of irreparable harm if the noncitizen is removed prematurely.[42] If EOIR denies or fails to rule on a motion for stay filed by a noncitizen with a pending protection-based motion to reopen, the practical result is that the noncitizen will face the very harm he or she fears.[43] For example:

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[40] Asylum is not available to individuals who are outside the United States. INA §208(a)(1).The potential for foreclosure of non-frivolous asylum claims is exacerbated by the provision of the proposed regulations, 8 C.F.R. §1003.48(c) codifying the "fugitive disentitlement" doctrine and further foreclosing claims from noncitizens who do not surrender for removal out of fear of being returned to a country where they may face persecution and/or torture. Motions to Reopen and Reconsider; Effect of Departure; Stay of Removal, 85 Fed. Reg. at 75947-48.

[41] *Non-refoulement* is the cornerstone of international refugee law, a principal of customary international law, and possibly *jus cogens*, a norm of international law from which no state can derogate. *See* Allain, *supra* note 24, at 533 (2001); GUY S. GOODWIN-GILL & JANE MCADAM, *supra* note 24 ("[C]omments…have ranged from support for the idea that non-refoulement is a long-standing rule of customary international law and even a rule of *jus cogens*, to regret at reported instances of its non-observance of fundamental obligations…"); Refugee Convention, *supra* note 25, art. 33(1); Torture Convention, *supra* note 27, art 3(1). *See also Stevic*, 467 U.S. at 416) ("The Protocol bound parties to comply with the substantive provisions of Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees…with respect to "refuges" as defined in article 1.2 of the Protocol.").

[42] *See Leiva-Perez v. Holder*, 640 F.3d 962, 969 (9th Cir. 2011) (observing that for persecution and torture-based claims, the risk of physical harm must be part of the irreparable harm inquiry); *Khouzam v. Hogan*, 497 F.Supp. 2d 615, 626-27 (M.D. Pa. 2007) (granting stay of removal where habeas claims challenging recission of relief under the Convention Against Torture were "not frivolous" and there was a likelihood of torture."

[43] *See Devitri v. Cronen*, 289 F. Supp. 3d 287, 294 (D. Mass. 2018) (delay in the Board's adjudication of stay motions for asylum applicants leads to "Kafkaesque" result that "they will be removed back to the very country

NIJC represents a transgender woman from Jamaica who has a prior order of removal and was detained in June. NIJC's client fears persecution and torture if forced to return. In June 2020, NIJC filed a motion to reopen on her behalf based on her underlying claim for protection and a motion for stay of removal with the Board. While waiting for her motion to be adjudicated, the woman was informed by ICE officers twice that her removal was imminent. It took the Board twenty days grant her motion for stay, during which time she could have been removed and faced a severe risk of persecution or torture.

An automatic stay is necessary in these circumstances to avoid the high risk of irreparable harm.

Second, because noncitizens presenting motions to reopen in order to present asylum claims based on previously unavailable evidence, their claims necessarily have never been reviewed by any adjudicator.[44] Therefore, the motion for stay is not well-suited to the rushed review that occurs when adjudicating a motion on an emergency basis. Until EOIR can fully evaluate the underlying motion to reopen, an automatic stay is the only way to ensure that noncitizens are not wrongly removed.

Finally, in these circumstances, removal prior to adjudication of the motion to reopen deprives noncitizens of their ability to benefit from a positive decision on their motion and of their right to apply for asylum, since they are ineligible to apply for asylum once they are removed outside the boundaries of the United States. Because the consequence of an erroneous removal would prevent a noncitizen from presenting an asylum claim, and could result in physical harm or even the death of a noncitizen, an automatic stay is the only way to ensure that the noncitizen has a meaningful opportunity to be heard and to seek relief.[45]

In fact, the government has previously recognized the severity and irreparable nature of the harm that results from removal when that removal interferes with a noncitizen's ability to seek relief. Prior to the passage of IIRAIRA, automatic stays were granted upon appeal of an adverse decision from the Board, in recognition of the fact that irreparable harm resulted from removal before a decision on a petition for review because "the petition abated upon removal."[46] When a noncitizen presents a protection-based motion to reopen, an analogous situation is created wherein, failure to grant a stay and removal necessarily forecloses the underlying claim for protection. An automatic stay is necessary in these circumstances to avoid jeopardizing a noncitizen's ability to benefit from any decision granting reopening.

In the alternative, EOIR should adopt a balancing test that prioritizes preventing irreparable harm. EOIR cannot focus its adjudication of stay motions on the likelihood of success of the respondent's motion, as that would require the adjudicator to prematurely decide the entire merits of the case and would be contrary to the purpose of the stay process. Stays traditionally have resolved a two-pronged problem: "what to do when [(1)] there is insufficient time to

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where they fear persecution and torture while awaiting a decision on whether they should be subject to removal because of their fears of persecution and torture.").

[44] 8 U.S.C. §1129a(c)(7)(B), (C)(ii); 8 C.F.R. § 1003.2(c)(3)(ii); 8 C.F.R. § 1003.23(b)(4)(i).

[45] *See Desta v. Ashcroft*, 365 F.3d 741, 748 (9th Cir. 2004); *Madrigal v. Holder*, 572 F.3d 239, 245 (6th Cir. 2009) ("to allow the government to cut off Madrigal's statutory right to appeal an adverse decision,…,simply by removing her before a stay can be issued or a ruling on the merits can be obtained, strikes us as a perversion of the administrative process.").

[46] *Nken*, 556 U.S. at 435.

resolve the merits and [(2)] irreparable harm may result from delay."[47] Focusing on the likelihood of success is especially inappropriate where the exigencies of the removal process may necessitate initially filing a skeletal motion and later supplementing it.[48] Therefore, at a minimum, EOIR should heavily weigh the risk of irreparable harm when adjudicating a stay motion, especially where the motion to reopen presents never reviewed arguments and evidence.

8. The departure bar risks denying access to asylum by quickly funneling noncitizens towards removal despite legitimate claims for relief in the United States.

The proposed regulatory language around the departure bar demonstrates the Department's intention to use the rescission of the departure bar to quickly funnel noncitizens towards removal despite pending motions to reopen, and by so doing foreclose a noncitizen's ability to benefit from a positive decision on his or her motion.

The language of the NPRM unequivocally states that while a noncitizen may pursue a motion to reopen if they are outside of the United States, "whether the noncitizen is physically present in the United States may determine their *prima facie* eligibility for relief."[49] This provision will serve to foreclose the ability of noncitizens with protection-based motions to reopen from having access to the benefit of asylum. This is especially true in light of the department's proposed regulatory language of 8 C.F.R. §1003.48(e)(2) prohibiting an immigration judge or the Board from granting a motion to reopen if the movant has not demonstrated *prima facie* eligibility for the underlying relief sought. Because physical presence outside the United States destroys *prima facie* eligibility for relief on an asylum claim,[50] the proposed regulations effectively bar all asylum claims for those individuals who have been removed.

Moreover, the Department has explicitly disavowed any responsibility or intention to parole a previously removed noncitizen whose motion to reopen has been granted back into the United States to seek the underlying relief sought in their motion to reopen. EOIR states in the proposed regulation that "EOIR does not have the authority to order DHS to parole or admit an alien physically outside the United States into the United States following the grant of a motion to reopen or reconsider."[51]

The proposed regulation, in conjunction with the prohibition on granting motions to reopen unless the movant can demonstrate *prima facie* eligibility for the underlying relief sought, and the Department's disavowal of any intention to parole a noncitizen back into the United States after an immigration judge or the Board grants their motion to reopen, constitutes a deliberate foreclosure of protection-based claims to relief and a particularly pernicious attack on asylum.

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[47] *Id. at* 418, 432; *see also id.* ("The authority to grant stays has historically been justified by the perceived need to prevent irreparable injury to the parties or to the public pending review.") (quotation omitted).
[48] *See Yeghiazaryan v. Gonzales*, 439 F.3d 994, 1000 (9th Cir. 2006) (concluding that BIA erroneously denied a skeletal motion to reopen where counsel stated that additional evidence would be forthcoming within the 90-day statutory time period for filing a motion to reopen).
[49] Motions to Reopen and Reconsider; Effect of Departure; Stay of Removal, 85 Fed. Reg. at 75945.
[50] INA §208(a)(1).
[51] Motions to Reopen and Reconsider; Effect of Departure; Stay of Removal, 85 Fed. Reg. at 75945, n6.

CONCLUSION

NIJC opposes the NPRM for the reasons set forth above. The limited time allowed for comment – particularly during the COVID-19 pandemic, while other proposed regulations and new rules require attention, and as all stakeholders prepare for a transition in administrations – places commenters in an untenable position. It limits the ability to engage comprehensively with these proposed rules and to analyze the sundry ways they interact with other changes posited by the agencies. NIJC asserts that treating travel on advance parole and travel under duress, under age, or in the context of abuse as a departure improperly punishes noncitizens, including asylum seekers. Erecting obstacles to protecting noncitizens from the unauthorized practice of law is an improper and unreasonable interpretation of the statute. Measures intended to speed removal without allowing for a full review of the case – such as limiting evidence, foreclosing access to stays of removal, and weaponizing the fugitive disentitlement doctrine – are unreasonably punitive and violate due process. Limiting the scope of reopened proceedings violates the statute and denies noncitizens, including asylum seekers, access to relief for which they qualify. Taken together, these provisions do much to damage the integrity and efficiency of the immigration system and very little to improve it. The proposed regulations should be withdrawn.

Thank you for your kind attention to NIJC's comment on the NPRM. Please do not hesitate to contact Lisa Koop at lkoop@heartlandalliance.org or (312) 660-1321 for further information.

/s/
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