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Submitted via www.regulations.gov

**Re: Opposing Proposed Rule on Procedures for Asylum and Withholding of Removal,
RIN 1125-AA93 or EOIR Docket No. 19-0010**

Dear Ms. Reid,

The Michigan Immigrant Rights Center (MIRC) submits this comment opposing the above-referenced rules proposed by the Department of Justice (“DOJ”) amending the Executive Office for Immigration Review (“EOIR”) regulations governing asylum and withholding of removal. MIRC urges the DOJ to withdraw the proposed rules¹ in their entirety. The proposed rules severely undermine established principles of international and domestic law intended to protect people seeking safety and refuge in the United States. The DOJ’s proposed changes accomplish the opposite objective as they further dismantle recognized due process protections for asylum seekers, violate entrusted procedural safeguards, and undermine confidence in immigration judges’ (“IJ”) capacity to administer impartial justice from within the institutional framework of the EOIR.

The proposed rules impose unreasonable and unjustified administrative and financial hurdles on applicants. The result will be a reduction in the number of asylum grants on technical grounds, without regard for either the facts presented by applicants or any meaningful legal standard drawn from statute. The government justifies these changes based on its inaccurate and misleading assessment that a substantial number of asylum claims are without merit (a conclusion that is not warranted for the clients our agency represents). Yet the proposed measures “solve” the ostensible problem of frivolous claims by creating arbitrary grounds for denying all claims, independent of their merits.

The proposed rules will also further erode the system of impartial adjudication that governs asylum decisions in the United States. The DOJ seeks to deny applicants the opportunity to collect reliable evidence in support of their claims, proposes to add a prosecutorial function to judges’ role as impartial adjudicators, and would preclude equal consideration of credible evidence presented by asylum seekers.

The agency offers as justification for these rule changes an interest in ameliorating its overburdened docket.² However, on the grounds of efficiency the proposed rules are

¹ 85 Fed. Reg. 59692 (Sept. 23, 2020)

² *Id.* at 59698

counterproductive. The new administrative hurdles are likely to be effective in denying fair hearings to many applicants. Moreover, these rules will also funnel many proceedings through alternate procedural and administrative channels, such as the filing of additional motions and/or appeals. Ultimately, the creation of arbitrary and difficult to meet deadlines and application procedures will add to the backlog of cases in immigration court based on the ostensible prioritization of asylum claims over other relief pending before EOIR. The further erosion of due process, judicial independence, and impartiality in asylum review within EOIR are also likely to flood the appellate courts, and to once again drive up levels of remand. Indeed, lessons drawn from the last major attempt to create “efficiency” in EOIR by abandoning norms of fairness and due process, in 2003, suggest that these rules will contribute to a repeat of the caseload crisis the federal courts experienced after 2007. Efficiency measures that sidestep fairness turn out not to be efficient at all.³

By denying applicants a fair consideration on arbitrary, technical grounds and by abandoning even a pretense of impartial adjudication, the proposed rules sidestep the asylum protections established by Congress. They are “manifestly contrary to the statute.”⁴ Because their implementation will consign many meritorious asylum applicants to persecution or death, the rules also frustrate the treaty commitments of the United States not to return people, within or at its borders, who need protection. Because they abandon even a pretense of fair and impartial justice, the rules constitute further evidence of the risks of locating the immigration review system within a highly politicized law enforcement agency. And because the rules empower EOIR to easily, arbitrarily, and capriciously erode asylum protections, it should not exercise its rulemaking power this way. MIRC urges DOJ to withdraw these proposed rules in their entirety.

MIRC is a legal resource center for Michigan’s immigrant communities, employing nearly twenty attorneys and accredited representatives to represent individuals before EOIR and the United States Citizenship and Immigration Services (“USCIS”). We advise over 2,000 new clients per year, including hundreds with cases before EOIR and an increasing number of individuals in detention. Some of these cases are brief advice and service; others include full representation for detained respondents. Our attorneys have decades of collective experience representing non-citizens in removal proceedings on the detained and non-detained docket, in petitions for relief in the Immigration Courts, in appeals and motions to the Board of Immigration Appeals (“BIA”), and in petitions for review in the U.S. Court of Appeals for the Sixth Circuit.

Because these regulations cover so many topics, we are not able to comment on every proposed change. The fact that we have not discussed a particular proposed regulatory change in no way indicates our acquiescence or agreement with it; rather, it simply indicates that we, as a busy nonprofit legal service organization providing free representation to thousands of Michigan non-citizens each year, did not have the time to fully response, especially within the short 30-day comment period, to every proposed change.

³ Robert M. Cannon, *A Reevaluation of the Relationship of the Administrative Procedure Act to Asylum Hearings: The Ramifications of the American Baptist Churches’ Settlement Comment*, 5 ADMIN. L.J. 713–748 (1991). Stephen H Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE LAW JOURNAL 1635–1721 (2010).

⁴ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

I. MIRC objects to EOIR’s 30-day comment period to respond to their comment for this Notice of Proposed Rulemaking (NPRM).

The DOJ has given the public a mere thirty (30) days to submit comments, without providing any explanation for this deviation from the customary sixty-day comment period. The change is difficult to understand, given the generally slow pace of the immigration court system and considerably slower pace dictated by the current public health crisis. Even presuming that these rule changes were necessary (which we do not concede), they are not particularly time-sensitive. It is hard to see justification for cutting short the process of review and comment, especially given the significant risk that these changes will wrongly consign our immigration system’s most vulnerable participants to persecution or death in their home countries. Stakeholders should be given adequate time to comment on dramatic revisions to asylum procedures that will reduce access to life-saving asylum protections in the name of efficiency.

The shortened comment period is all the more egregious given that the U.S. remains in the midst of the COVID-19 pandemic. All MIRC staff continue to work from home to the greatest extent possible, often while caring for children and/or for sick family members. None of the MIRC staff members (and we suspect, attorneys across the country) are able to work at their pre-pandemic capacity. Many of our clients are facing even greater difficulties, as they experience layoffs, lost income, evictions, food insecurity, and of course, infection with COVID-19. As low-income immigrants and, in many cases, as people of color, our clients have felt the disparities of COVID-19 and have suffered disproportionately from infections and complications. The work of providing our clients with effective representation has therefore become exponentially harder. We also must expend additional energy to keep up with EOIR’s and the Department of Homeland Security’s (“DHS”) daily operational changes during the pandemic.

Thirty days to comment on such a transformative proposal, under these conditions, is not a fair opportunity. Although we object to DOJ’s unreasonable thirty-day timeframe, we submit this comment nonetheless, because we feel compelled to object to the proposed regulations.

II. MIRC opposes the proposed provision 8 CFR § 1208.4 imposing a fifteen-day filing deadline for asylum applications because it is arbitrary and capricious.

MIRC vehemently opposes the fifteen-day asylum application filing deadline⁵, which appears to exist solely to foreclose asylum claims on technical grounds and serves no legitimate purpose. DOJ proposes to require respondents in asylum-only proceedings pursuant to 8 CFR § 1208.2(c)(1) to file their asylum applications within fifteen days of their first hearing. At first glance, this rule appears to only affect a limited subset of asylum seekers enumerated under 8 CFR § 1208.2(c)(1): visa waiver program entrants, alien crewmembers, stowaways, and other similarly narrow classes. However, DOJ’s intentions are clear when this proposed rule is read in conjunction with other proposed rules issued by this administration. In the DOJ’s June 15th, 2020 proposed rule, respondents subjected to expedited removal who pass their credible fear interviews will be placed in asylum- and withholding-only proceedings under 8 CFR § 1208.2(c)(1).⁶ Additionally, the DHS is aiming to expand the number of individuals subjected to expedited removal to include all

⁵ 85 Fed. Reg. 59692, at 59699

⁶ Procedures for Asylum and Withholding of Removal, 85 Fed. Reg. 36264 (June 15, 2020)

individuals in the interior of the United States who have been physically present for less than two years.⁷ If implemented, these three proposed rules will converge to create an almost automated deportation machine. Under this new regime, an unprecedented number of noncitizens will be subjected to expedited removal. Those who are placed in expedited removal proceedings and pass their credible fear interviews will be placed in asylum-only proceedings. They will then only get fifteen days to submit their asylum applications after their first hearing. Applicants who fail to meet this absurd deadline will have their asylum claims permanently waived, and they will be subject to deportation.

This proposed provision is clearly arbitrary and capricious because it will literally be impossible for a fifteen-day deadline to be met for the vast majority of applicants, especially those in detention. Fifteen days after an initial hearing is not sufficient time for an asylum applicant to find and retain counsel, let alone file a complicated Form I-589, Application for Asylum and Withholding of Removal, in English, with appropriate documentation translated. This onerous (read: impossible) deadline all but ensures that virtually all individuals in asylum-only proceedings will be filing their asylum applications pro-se. Further, even if the applicant were able to secure counsel, as practitioners, it would be near impossible to meet this deadline. We have helped hundreds of clients apply for asylum and in all but the most exigent circumstances have we been able to prepare a skeletal, let alone robust filing, in a fortnight or less.

Additionally, it is unclear how meeting this deadline would be possible in conjunction with other proposed rules, such as the new asylum fee that will need to be processed through DHS⁸, and the requirement within this instant proposed rule that a fee receipt accompany an initial asylum application.⁹ Fee receipts from DHS often take over fifteen days to be processed and returned by mail. On top of these routine delays, given the substantial delays in delivery of U.S. mail at this time, it is all but assured that even if a fee were timely-paid and a receipt mailed, it would not arrive within this fifteen-day window. It is not clear how an applicant could, within fifteen days of their first hearing, complete their asylum application, mail in a copy and a fee to U.S. Citizenship and Immigration Services (“USCIS), receive the receipt by mail, and then file it with the immigration court.

Even if an applicant is able to proceed pro se or secure counsel, pay the filing fee, receive the receipt, and submit the completed I-589, Application for Asylum and Withholding of Removal with all fields appropriately marked (including nones and N/As pursuant to the “blank space” policy)¹⁰ to EOIR within fifteen days, there is a substantial likelihood that relief will be denied based on other aspects of this and previous proposed rulemaking. Specifically, we are referring to the Immigration Judge’s (“IJ) authority to pretermite an asylum application on its face, and requiring particular social groups to be articulated on the record. As practitioners, we regularly supplement filings with a brief, along with additional exhibits and evidence prior to a hearing.

⁷ Notice Designating Aliens for Expedited Removal, 84 Fed. Reg. 35409 (July 23, 2019)

⁸ This regulation is currently stayed as a result of litigation in *Immigrant Legal Resource Center et al. v Wolf*, Case 4:20-cv-05883 (N.D. Cal. Sep. 29, 2020)’s ORDER GRANTING PLAINTIFFS’ MOTION FOR PRELIMINARY INJUNCTION AND REQUEST FOR STAY OF EFFECTIVE DATE OF RULE AND DENYING REQUEST FOR ADMINISTRATIVE STAY

⁹ 85 Fed. Reg. 59692, at 59699

¹⁰ See FN 13, *infra*

Coupling the fifteen-day deadline with an IJ's ability to pretermite a paper claim all but ensures only one outcome: denial.

Further, this rule is arbitrary and capricious because Congress has already established an asylum application filing deadline of one year from entry. Clearly, Congress views one year as a reasonable period of time for an individual to enter the United States and file for asylum.¹¹ United States asylum law, as adopted in 1980 by Congress, does not and should not contemplate a fifteen-day timeframe from the date of a noncitizen's first hearing to compile the documents necessary for a robust asylum application, including, but not limited to, a declaration, application form, and a detailed account of country conditions that often requires extensive research. Additionally, Congress has already spoken regarding deadlines in 8 CFR § 1208.4, and this proposed rule clearly contradicts the statutory language. If Congress wished to implement a fifteen-day deadline for asylum applications, like the DOJ is proposing now, Congress would have done so. And while Congress still can, DOJ, as an administrative agency, cannot unilaterally change the substantive requirements for asylum through notice and comment rulemaking. DOJ cannot upend well-established asylum law by rendering the purpose and effect of our asylum statute virtually non-existent via baseless and unreasonable time restrictions on asylum applications.

DOJ's proposed rule will most certainly, and perhaps intentionally, disproportionately affect asylum seekers arriving at our Southern border who often traverse a life-threatening desert environment in search of safety and refuge. DOJ's apparent assumption that asylum seekers—who have likely traveled thousands of miles to apply for legal protection to which Congress has said they are entitled—can produce or articulate the necessary and relevant evidence to craft a successful asylum claim in fifteen days is specious. This proposed provision, taken in totality with the other pieces of the puzzle crafted by this administration, is clearly intended to create a lightning-fast deportation process for asylum seekers from the Southern border. This political motivation undermines the statutory scheme established by Congress and as such, this proposed provision is arbitrary and capricious. The proposed rules must be withdrawn.

III. MIRC objects to the proposed 8 CFR § 1208.3(c)(3) that will lead to unnecessary rejections of asylum applications and require rejected applications to be re-filed in 30 days

MIRC strongly opposes this proposed provision, which predicates access to asylum protections on the ability of applicants to jump through procedural hoops. Based on this rule, a claimant's access to protection from egregious and life-threatening persecution can be foreclosed solely due to the failure of a mail carrier. This is an unacceptable result considering the consequences for applicants in asylum proceedings can be devastating. This rule will undoubtedly affect pro se applicants the most, leading to even more disparate outcomes for unrepresented asylum seekers. In asylum proceedings, where applicants are seeking preservation of their most fundamental human rights, substance must prevail over form.

The proposed rule adds failure to adhere to form instructions as a new regulatory basis for the court to reject an asylum application.¹² MIRC is hard-pressed to view this proposed change as unrelated

¹¹ 8 U.S.C. § 1158(a)(2)(B); 8 CFR 1208.4(a)(2)(i)

¹² 85 Fed. Reg. 59692, at 59699

to the recent rise in Form I-589 rejections based on the USCIS “blank space” policy. USCIS alleges that these rejections are due to applicants not following the Form I-589 instructions, which require applicants to answer every question on the form.¹³ However, MIRC’s attorneys have seen USCIS apply this policy inconsistently and erroneously, which is a predictable outcome when line-level, contract workers are tasked with implementing a hypertechnical and illogical policy.

For example, a MIRC attorney received a rejection for failing to write “N/A” on blank lines under Part A.III, Question 5 regarding family members:

5. Provide the following information about your parents and siblings (brothers and sisters). Check the box if the person is deceased.
 (NOTE: Use Form I-589 Supplement B, or additional sheets of paper, if necessary.)

Relationship	Full Name	City/Town and Country of Birth	Current Location
Mother	[REDACTED]	[REDACTED]	<input type="checkbox"/> Deceased [REDACTED]
Father	[REDACTED]	[REDACTED]	<input checked="" type="checkbox"/> Deceased
Sibling	[REDACTED]	[REDACTED]	<input type="checkbox"/> Deceased [REDACTED]
Sibling	[REDACTED]	[REDACTED]	<input type="checkbox"/> Deceased [REDACTED]
Sibling	X	X	<input type="checkbox"/> Deceased X
Sibling	X	X	<input type="checkbox"/> Deceased X

However, this was an erroneous rejection. The I-589 form instructions clearly state to answer all the questions asked and to only write “N/A” in response to questions that are not applicable or unknown to the applicant. In the above circumstance, the question was applicable to the applicant and was answered.

MIRC’s attorneys have received and reviewed similarly erroneous or inconsistent rejections. These rejections appear to serve no substantive purpose as, if there is confusion regarding minutiae on the Form, it can be resolved during the asylum hearing during which Form I-589 is reviewed and updated. With this proposed provision requiring strict adherence to Form instructions, DOJ is setting up the immigration court to sow a similar level of inconsistency and chaos in the processing of asylum applications for the failure of applicants to provide completely uninformative information to inapplicable blank spaces.

The increase in erroneous, inconsistent, and/or unnecessary rejections portended by this proposed rule aside, the procedural changes for processing rejections proposed by this new rule are absurd. The new rule eliminates time limits for rejections by EOIR and DHS, and instead shifts the burden of the 30-day deadline onto applicants seeking life-saving asylum protections.¹⁴ The court and USCIS can take as long as they desire to reject an application, with no predictability for the applicant as to when a rejected application may be returned, but the applicant must refile within 30 days of the rejection date. Such an unnecessarily harsh and arbitrary rule is simply an effort to abrogate access to asylum and nothing more. The consequence to the court under the current rules in failing to timely reject an incomplete application is simply that the court must accept the asylum

¹³ See USCIS Ombudsman Alert: Recent Updates to USCIS Form Instructions, January 23rd, 2020, available at: <https://www.dhs.gov/blog/2020/01/23/ombudsman-alert-recent-updates-uscis-form-instructions>.

¹⁴ 85 Fed. Reg. 59692, at 59699

application as-is and solicit missing information during the hearing. The consequence to an applicant in failing to timely refile a rejected application under the proposed rule would be to waive their asylum claim, completely foreclosing their opportunity to seek life-saving protection.

The proposed 30-day refiling timeline is not in good faith both in its impracticality and redundancy. The proposed rule requires applicants to re-file within 30 days of the rejection date, not the date that the applicant received the rejected application in the mail. Additionally, those who do not live in close proximity to the immigration court will have to re-file by mail, and of course it must be *received* by the court within 30 days in order to be timely. Thus, based on the realities of mail service, applicants will have much less than 30 days to amend and refile their applications. As described above, delays in the delivery of U.S. first class mail are quite common during the pandemic. Moreover, there have been circumstances where MIRC attorneys have filed, using first class, certified mailing, submissions for EOIR in August 2020, which were not received by EOIR. In one instance, our submission was delivered to an attorney's private legal office four blocks away from EOIR! Fortunately, that attorney contacted us and then hand-delivered the filing, in person, to EOIR on our behalf. Thus, even properly addressing and using certified delivery does not guarantee that a submission will arrive at the correct location.

This 30-day resubmission requirement will be particularly burdensome for applicants who do not speak English and cannot simply read the rejection notice or quickly fix the errors. Such applicants will either have to locate an interpreter or make an appointment with counsel. For applicants who are pro se and cannot read the notice, it will be very difficult for them to become aware of the 30-day deadline, and understand that they have very little time to amend their application and refile. Refiling an asylum application is not an easy task, particularly for applicants with several derivatives - the original has to be amended, the appropriate number of copies made, passport photos may have to be retaken - and considering the number of copies that may be included, it can be costly to mail an asylum application, particularly if seeking expedited services as a result of the limited time frame provided. Considering EOIR and USCIS can reject these filings at their leisure, this rule does not appear to promote efficiency and instead is a method of foreclosing asylum access to under-resourced and pro se applicants. It may only be considered "efficient" if the meaning of "efficient" were the pretermission/foreclosure of relief altogether such that there are fewer master calendar and individual hearings.

Additionally, the proposed rule is redundant. While the Department claims that this rule would be instituted for the purpose of "efficiency" so that applicants do not unduly delay re-filing their applications, applicants already must meet the filing deadline set by the immigration judge. As the DOJ points out in its discussion of this proposed provision, "immigration judges have the authority to set filing deadlines and manage their dockets consistent with applicable law" as per 8 CFR § 1003.10(b). Considering immigration judges already set filing deadlines for the court as appropriate to the circumstances of each case, it is not clear why a 30-day refiling deadline is necessary. In fact, an administrative 30-day refiling deadline for rejected applications takes away from the immigration judge's ability to manage their own docket, as an individual could have their case denied for failing to meet the refiling deadline and not the immigration judge's.

Lastly, the Department appears to argue that this proposed provision is not overly punitive by pointing out that applicants who miss the IJ's filing deadline will have their applications deemed

waived pursuant to 8 CFR § 1003.31.¹⁵ These arguments blatantly ignore the reality that IJs can and do set filing deadlines to provide applicants with considerably more than 30 days to prepare their applications, often after taking into consideration the circumstances of the case and conferring with the applicant or counsel. Further, the IJ is empowered to accept late filings on a “good cause” standard, while the proposed rule only provides for a higher “exceptional circumstances” standard to excuse an untimely re-file.¹⁶

There is no evidence that this proposed rule is addressing a significant inefficiency in the system - that delayed refiling of rejected applications is routinely prolonging asylum proceedings, despite the existence of filing deadlines set by the IJ. In fact, there is no indication that this new rule would shorten the pendency of any particular proceeding, as the court apparently can take as long as it wants to reject the application. Accordingly, this provision seems to be proposed solely to provide EOIR with another tool to foreclose asylum claims based on procedure and not the substance of the claim. For these reasons, we request that the proposed rules be withdrawn.

IV. MIRC objects to the proposed revisions in 8 CFR § 1208.12 that (1) permit IJs to submit and consider evidence on the record and (2) propose to designate U.S. Government-issued reports as more credible than NGO and private reports.

MIRC opposes an expansion of 8 CFR § 1208.12 permitting an immigration judge to submit and consider their own evidence for the record. The proposed rule “allow[s] an immigration judge to submit evidence into the record and consider that evidence, so long as the judge has provided a copy to both parties, which will give the parties an opportunity to respond to or address the information appropriately.” DOJ suggests that its support for this proposal stems from statutory authority granting IJs relatively unfettered discretion in managing the disposition of cases,¹⁷ as well as decisions from federal circuit courts of appeal discussing the role of administrative law judges.

A. Implementing traditionally inquisitorial techniques into a system that is fundamentally and in practice adversarial is a threat to fair and neutral case adjudication and weaponizes immigration courts against noncitizens in removal proceedings.

EOIR’s “primary mission,” per its website, “is to adjudicate immigration cases by fairly, expeditiously, and uniformly interpreting and administering the Nation’s immigration laws.”¹⁸ Indeed, the separation of the judicial function from the investigatory and prosecutorial function in immigration adjudication was the major reason for keeping EOIR within the DOJ when Congress transferred the other branches of the Immigration and Naturalization Service to DHS. The move was widely regarded as a significant step in resolving long standing concerns over the lack of judicial independence within DOJ.¹⁹ Those concerns have not been wholly resolved. Immigration

¹⁵ 85 Fed. Reg. 59692, at 59694

¹⁶ *Id.*

¹⁷ Ironically, contrary to the statutory language in 8 CFR § 1003.10(b), DOJ had no issue stripping immigration judges of their discretion and authority to manage their cases in its last proposed rule, which sought to end administrative closure and *sua sponte* reopening of EOIR cases.

¹⁸ U.S. Dept. of Justice, About The Office: EOIR Mission (2018), <http://www.justice.gov/eoir/about-office>

¹⁹ Dory Mitros Durham, *The Once and Future Judge: The Rise and Fall (and Rise) of Independence in U.S. Immigration Courts Note*, 81 NOTRE DAME L. REV. 655–692 (2005).

proceedings are essentially adversarial. On one side, there is a vulnerable noncitizen in removal proceedings, often with no legal representation or mastery of the English language. On the opposite side, an Immigration and Customs Enforcement (“ICE”) attorney serves as prosecutor, making the government’s case for removal. Unlike Article III courts, immigration courts are presided over by employees of a law enforcement agency within the executive branch. IJs report to the Attorney General of the United States. While this presents ongoing challenges, EOIR’s mission statement, at least on paper, recognizes the importance of fairness and uniformity.

Yet, not only does this proposed rule further contribute to the dissolution of EOIR’s pledge to fairness and uniformity, but also exposes DOJ’s blatant disregard of the reality of proceedings in immigration court. Given EOIR’s commitment to neutrality and fairness, the proposed rule’s approach to the admission of evidence in immigration proceedings is rather puzzling and reckless. DOJ cannot, without further hampering procedural and judicial integrity in immigration courts, fairly implement piecemeal procedural rules that lean immigration courts toward a more inquisitorial form of adjudication, when immigration courts remain so fundamentally adversarial. Simply put, allowing an IJ to admit and consider evidence on the record fundamentally alters the fairness and neutrality of this setting. If the IJ is introducing their own evidence, the parties are at a disadvantage/unable to challenge the inclusion. It is unlikely that an IJ, after introducing their own evidence, would sustain an objection as to the evidence’s relevance, weight, or inclusion altogether by one of the litigants. Moreover, such an approach all but eliminates avenues of advocacy for unrepresented noncitizens in removal proceedings by allowing an IJ to enforce their own bias(es) as to the relevant evidence in any given case.

Immigration proceedings are adversarial at their core, and they require a neutral arbiter to assure fairness and due process. The proposed rule, which is unnervingly vague and brief, does nothing to ensure that IJs will admit evidence neutrally and not in accordance with the executive branch’s policy objectives, or that IJs will not utilize the rule to essentially strip noncitizens of the ability to advocate for themselves. It provides no guidelines as to when it may be in/appropriate for an IJ to admit and consider his or her own evidence. It provides no explanation narrowing the types of evidence an IJ may submit. And, in conjunction with DOJ’s proposal to treat government-issued reports as more credible than NGO and private reports, it provides no protection against the continuing entrenchment of an immigration system riddled with inequity and bias in favor of the government (or against the government, for that matter if we are talking about fairness).

IJs have personal and political biases that sway their decision making, which, given the realities of this difficult work, are often at odds with the interests of the person the government is seeking to remove. Nonetheless, DOJ claims that this proposal “will better enable immigration judges to ensure full consideration of all relevant evidence and full development of the record for cases involving a pro se respondent.”²⁰ DOJ is blindly optimistic to suggest that allowing IJs to submit their own evidence on the record will cure the inconsistencies and defects that plague immigration courts across the country. Unless a robust due process framework were to develop around the introduction of this evidence such that this evidence could be meaningfully challenged--and the proposed rule has no such guidelines--any suggestion that this provides “full consideration” is a laughable farce.

²⁰ 85 Fed. Reg. 59692, at 59695

In reality, this proposal would equip IJs to continue to widen the divergent gap in the dispositions of their cases. For example, between the fiscal years of 2014 and 2019, two IJs denied *one hundred percent* of the asylum claims on their dockets, while another IJ denied only 2.6%.²¹ According to statistics provided by Syracuse University’s Transactional Records Access Clearinghouse (TRAC), this drastic disparity in asylum adjudications is the norm rather than the exception. The minority of judges, approximately only seven percent, average relatively equal grants and denials of asylum claims. Currently, the majority of IJs deny far more asylum claims than they grant, including 194 out of approximately 460 IJs between the fiscal years of 2014 and 2019 that denied **80% or more** of asylum cases—many of these judges reaching denial percentages in the mid to high 90s. Additionally, according to the EOIR Adjudication Statistics, in fiscal year 2019 only 12 out of 100 people were granted asylum.²² That includes only 3 out of 100 from Honduras,²³ 5 out of 100 from Guatemala,²⁴ and 8 out of 100 from El Salvador.²⁵ With these numbers, the proposed rule will only amplify these disparities, often to the detriment of the noncitizen, by allowing an IJ’s bias to shape the record and unilaterally determine the relevant evidence in a case.

IJs can also be biased in their evaluation of evidence. The Ninth Circuit recognized this prevailing problem in a case where the IJ prejudged the credibility of the noncitizen before hearing her testimony, and even refused to hear expert testimony.²⁶ The Ninth Circuit was particularly disturbed by the extent to which the IJ’s prejudice and bias derailed the possibility of a fair proceeding, ultimately holding that the IJ violated the noncitizen’s due process rights. Rather than allowing the noncitizen a “reasonable opportunity to present evidence,” the IJ “was skewed by prejudgment, personal speculation, bias, and conjecture.”²⁷ Even more recently, on October 14, 2020, the Fourth Circuit reversed the BIA and IJ’s denial of relief for an asylum applicant because the IJ deliberately refused to “consider important evidence” that bolstered the applicant’s asylum application, and “reach[ed] conclusions that [were] inconsistent with the evidence and contrary to law.”²⁸ Notably, the Fourth and Ninth Circuits are not alone—at least the Second, Third, Seventh, and Eighth Circuits have also criticized improper conduct by IJs of allowing bias and personal opinions to permeate the evidentiary record and unjustly determine the outcome of the proceedings.²⁹

²¹ TRACImmigration, Judge-by-Judge Asylum Decisions in Immigration Courts FY 2014-2019, <https://trac.syr.edu/immigration/reports/judge2019/denialrates.html>.

²² Exec. Office for Immigration Review, Credible Fear and Asylum Process: Fiscal Year (FY) 2019, <https://www.justice.gov/eoir/file/1217001/download>.

²³ Exec. Office for Immigration Review, Credible Fear and Asylum Process - Honduras: Fiscal Year (FY) 2019, <https://www.justice.gov/eoir/page/file/1218206/download>.

²⁴ Exec. Office for Immigration Review, Credible Fear and Asylum Process - Guatemala: Fiscal Year (FY) 2019, <https://www.justice.gov/eoir/page/file/1218201/download>.

²⁵ Exec. Office for Immigration Review, Credible Fear and Asylum Process - El Salvador: Fiscal Year (FY) 2019, <https://www.justice.gov/eoir/page/file/1218196/download>.

²⁶ *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049 (9th Cir. 2005).

²⁷ *Id.* at 1050, 1054.

²⁸ *Hernandez-Cartagena v. Barr*, No. 19-1823, 2020 WL 6053322 (4th Cir. 2020).

²⁹ See, e.g., *Ali v. Mukasey*, 529 F.3d 478 (2nd Cir. 2008) (holding that the IJs improper comments reflected an “impermissible reliable on preconceived assumptions about homosexuality and homosexuals, as well as a disrespect for the petitioner”); *Wang v. Atty Gen. of U.S.*, 423 F.3d 260 (3rd Cir. 2005) (stating that a “disturbing pattern of IJ misconduct has emerged” of IJs adjudicating cases on the basis of their own biases and political and religious beliefs); *Zuh v. Mukasey*, 547 F.3d 504 (4th Cir. 2008) (reversing the IJs decision and holding in part that the court would not defer to “adverse credibility findings based on speculation, conjecture, or an otherwise unsupported personal opinion”); *Florioiu v. Gonzales*, 481 F.3d 970 (7th Cir. 2007) (holding that the IJ “manifested clear bias”

Yet, most immigration cases do not have the privilege of landing in a federal courts of appeal for review. With the possibility of introducing and considering their own evidence, the IJ becomes a third advocate in the case in which they are deciding, leaving noncitizens in removal proceedings even more vulnerable to unchecked admissions of potentially prejudicial evidence and with little realistic opportunity to challenge the record. The rule suggests that an IJ may admit and consider evidence upon giving the parties “an opportunity to respond to or address the information appropriately,” but this proposition fails to address two key issues.³⁰ First, how may a party challenge an IJ’s evidence without compromising judicial deference? With two opposing sides before the judge, it is critical that the judge be as impartial and fair as possible, even though the statistics and reality do not indicate that fairness and impartiality are commonplace. Instead, DOJ’s proposal effectively creates an adversarial relationship between the parties and the judge. Second, what avenue of review does a party have to challenge an IJ’s admission of evidence on the record? The proposed rule provides no guidance as to what immigration judges are to do if a party opposes that judge’s admission of evidence on the record. These logistical gaps suggest that the IJ—despite objections—can charge forward in admitting evidence with impunity. Taking judicial notice is common, appropriate, and fair; this rulemaking is uncommon, inappropriate, and unfair. For these reasons, this rulemaking must be withdrawn in its entirety.

B. Allowing an IJ to submit and consider evidence does not comport with the essential functions of immigration courts and provides a procedural avenue for IJs to skew the resolution of a case towards their personal political or religious leanings.

The DOJ’s apparent contention that IJs are on the same playing field as administrative law judges (ALJ) with regard to the procedures and consequences that define everyday practice is fundamentally flawed. The first distinction rests in each agency’s source of authority—ALJs derive their power from Article I of the Constitution and are governed by the Administrative Procedures Act (APA), whereas EOIR is a purely administrative channel for the executive and is governed procedurally by the Immigration and Nationality Act (INA).³¹ Unlike IJs, ALJs have judicial independence under the APA, and the APA provides ALJs with autonomy and separation from the agency for which they are resolving disputes.³²

The second, and perhaps key distinction, is the nature and potential consequences of the cases that each type of judge decides. Noncitizens in removal proceedings often have a lot more to lose than, for example, a claimant seeking benefits before an ALJ for the Social Security Administration. Noncitizens in removal proceedings have at stake their fundamental human rights and sometimes even their lives, while ICE and EOIR are stacked with resources, legal expertise, and the ability to enforce political agendas. Additionally, traditionally inquisitorial modes of adjudication, which may function well in low stakes administrative law settings, do not mesh well with a system that in many ways mimics criminal proceedings. Immigration proceedings have grown to have strikingly similar procedures and effects as a criminal trial—the ideal example of adversarial

against the noncitizen, which violated his due process); *Tun v. Gonzales*, 485 F.3d 1014 (8th Cir. 2007) (holding that IJs biased commentary suggested that the IJ did not act as a neutral arbiter and thus violated due process).

³⁰ 85 Fed. Reg. 59692, at 59699, 59700

³¹ See generally, 5 U.S.C. § 500 et seq.; 8 U.S.C. § 1101 et seq.

³² 5 U.S.C. §§ 556, 557

adjudication. Our criminal system would be uprooted if judges could submit and consider their own evidence, and then on top of that be expected to make a neutral and fair decision. Nonetheless this method of adjudication is what DOJ is naively proposing will work in our immigration courts. DOJ fails to recognize the reality that, in practice, this proposal is broad enough to allow an IJ to orchestrate and manipulate the entirety of the proceedings, with bias seeping—unimpeded—into the record, and with no realistic avenue for judicial review or for a party to place an objection. Further and given that a substantial number of non-citizens are deported, without counsel or meaningful access to counsel, in immigration courts housed in rural detention centers with minimal oversight from the public at large, the likelihood that an IJ abuses their power is demonstrably real (and frightening).

As a final note, DOJ seems to overlook the practical concerns of time constraints and already overloaded dockets. DOJ acknowledges that IJs have enough on their plate, and that immigration courts are in need of solutions for more efficient case resolution. Searching for evidence, consulting with the parties about any evidence, and figuring out how to deal with a party's objection to evidence will take up exorbitant amounts of time and resources. DOJ fails to address this undeniable consequence of its proposed rule. For these reasons, the rules must be withdrawn.

C. A pound of feathers weighs the same as a pound of bricks; U.S. government-issue reports, by the mere provenance, must not be given more evidentiary weight solely based on their connection to the Department of State or similar agency/department.

MIRC questions the necessity of the clarification that agency sources should be given precedence over other credible sources in asylum hearings.³³ According to statute, the burden of proof for demonstrating a well-founded fear of persecution as a result of membership in a protected group falls on the asylum applicant.³⁴ Pursuant to BIA decisions, applicants regularly rely on a variety of sources relating to “country conditions” in order to document their claims.³⁵ These may be used to elucidate the particular instances of social conflict and persecution that put the asylum seeker at risk or to document generalized patterns that lend credibility to the particular claim. Government attorneys, in the role of prosecutor, may present contradictory country conditions evidence to contest asylum claims. In adjudicating disputes between asylum seekers and the government, immigration judges may consider reports generated by United States government agencies and other “credible sources,” including foreign governments, international organizations, the news media, and academic scholarship. Reliance on a full range of available evidence is in the interest of fair adjudication, as global human rights matters are also so extensive and varied as to be beyond the ability of any single entity, government agency or private organization, to document comprehensively.

The proposed rule change would undermine fairness in the system by introducing an unequal standard. The new guidance would ask judges to consider reports produced by the relevant agencies to be credible, *a priori*, while limiting other sources only to those that can be confirmed to be “credible and probative.” This attempt to create a hierarchy of sources reproduces some features of a previous failed era of asylum adjudication, which granted a near monopoly to the

³³ 85 Fed. Reg. 59692, at 59695

³⁴ 8 U.S.C. § 1158(b)(1)(B)(i)

³⁵ *Matter of S-M-J*, 21 I&N Dec. 722, 724 (BIA 1997); *Matter of Dass*, 20 I&N Dec. 120, 125 (BIA 1989).

Department of State (“DOS”) to determine the credibility of asylum claims. From 1980 through the early 2000s, every asylum application was forwarded to the Bureau of Human Rights and Humanitarian Affairs (“BHRHA,” later the Bureau of Democracy, Human Rights and Labor) for a recommendation. For more than a decade, applicants had no ability to argue against the BHRHA guidance, and adjudicators, with no country conditions expertise of their, almost always followed BHRHA recommendations. This led to a massively ineffective asylum system, and eventually to a class-action suit and settlement in *American Baptist Churches v. Thornburgh*. The ABC settlement granted the right to *de novo* review to 150,000 asylum applicants with a broader consideration of available sources on country conditions.³⁶ As part of the settlement, DOS officials had to include the following text in their guidance: “[t] his letter is advisory only. It is only one of several sources of information relevant to the applicant's claim. You *may also rely on material provided by other credible nongovernmental sources and international organizations*. [emphasis added]”³⁷

There are several reasons to be concerned about an effort to once again limit the influence of country conditions evidence from credible sources outside the government. First, given the sheer scale of global human rights issues, DOS and other agencies will never be able to provide guidance that is comprehensive enough to adjudicate all of the asylum claims that may come before EOIR. Not every violation of human rights question, not every regional dispute, not every instance of state violence, not every particular social group that is at risk can be named in a report generated by DOS or other US government agency. By warning IJs against reliance on credible non-governmental sources, the new rule risks narrowing asylum claims only to that fraction of global human rights violations that have already been written into agency reports. The proposed rule instructs judges to weigh agency reports more highly than other credible sources, and warns particularly against claims supported *only* with evidence drawn from non-governmental sources (citing the Fourth Circuit to suggest that “eligibility based solely on pronouncements of private organizations or the news media” as particularly problematic).³⁸ Thus, the absence of particular mention in agency sources is construed to cast doubt on the credibility of an asylum claim, even when there is clear documentation from other credible sources. The result can hardly be considered fair or effective adjudication.

The idea that government reports should be viewed alongside, and balanced by, other credible sources has been relatively uncontroversial over three decades since the ABC settlement. Indeed, as USCIS has relied less on the DOS, it has created a research unit to “provide credible and objective information on human rights and country conditions in order that applicants’ claims may be adjudicated in a timely manner.” This unit maintains a collection that “consists of material generated by governmental and nongovernmental agencies, international organizations, human rights advocacy groups, academia, and general news media.” Asylum officers are instructed to rely on this diversity of sources and may introduce into the record evidence drawn from this collection, even if asylum applicants have not presented it. (Note, this is appropriate to asylum officers’ role as adjudicators in a non-adversarial context).³⁹ Similarly, EOIR, in seeking to provide an

³⁶ Robert M. Cannon, *A Reevaluation of the Relationship of the Administrative Procedure Act to Asylum Hearings: The Ramifications of the American Baptist Churches’ Settlement Comment*, 5 ADMIN. L.J. 713–748 (1991).

³⁷ *American Baptist Churches v. Thornburgh*, 760 F. Supp. 29 (N.D. Cal. 1991).

³⁸ *M.A. v. U.S. INS*, 899 F.2d 304, 313 (4th Cir. 1990) cited in 85 Fed. Reg. 59692 (Sept. 23, 2020).

³⁹ USCIS, *Asylum Division Affirmative Asylum Procedures Manual*, 2016.

“accurate, up to date, balanced, and impartial compilation of country condition materials” has created a website that includes material from “private organizations” such as Amnesty International, Freedom House, Human Rights Watch, InSight Crime, and English-language media.⁴⁰ The Second Circuit has furthermore urged adjudicators not to place undue weight on agency reports, which cannot be expected to be comprehensive.⁴¹

A second concern with the proposed rule is the presumption that agency reports (whether or not they are comprehensive) are free of error and bias. In fact, agency reports are produced within the scope of United States foreign policy and therefore do not always present a balanced or accurate view of country conditions. The Ninth Circuit has noted that “A frank, but official, discussion of the political shortcomings of a friendly nation is not always compatible with the high duty to maintain advantageous diplomatic relations with nations throughout the world.”⁴² Reports generated in the context of international relations are therefore not appropriate as the sole grounds for asylum determinations. This was tragically revealed during the most brutal years of the Guatemalan civil war when the Department of State not only failed to recognize widespread human rights abuses, but actively sought to refute reports from Amnesty International, the Guatemalan Human Rights Commission, and other international organizations. Embassy officials accused those groups of participating in Communist misinformation campaigns. At that time, as discussed above, the Department of State had a virtual monopoly over country conditions within asylum cases. As a result, only 1.8% of asylum seekers from Guatemala received grants of asylum between 1983-1990.⁴³ By the end of the 1990s, it became clear that DOS had been gravely mistaken in its reporting, at times willfully so. The Commission for Historical Clarification (a truth commission convened under the auspices of the Catholic Church) and an avalanche of scholarly research have meticulously documented the military’s responsibility for widespread sexual violence and genocide.⁴⁴ Absolute deference to agency reports, it became clear, had been a grave flaw in the adjudication system. The result was not only unjust, it was also deeply inefficient as the ABC settlement provided access to *de novo review* for more than 150,000 applicants.

These are not simply the mistakes of a past era. Agency reports on human rights and country conditions continue to be guided by politics. A statistical analysis comparing DOS Human Rights Reports over a two year span found that the reports were, on average, 14% shorter in 2017 than in 2016, and marked by a “systematic decrease in the frequency of terms associated with women, reproduction, racism, sexual violence and abuse, LGBTI rights, and refugees.”⁴⁵ Likewise, the 2019 Human Rights Report on Saudi Arabia noted that “government agents” were responsible for the murder of journalist Jamal Khashoggi, but stopped short of attributing the crime to Crown

⁴⁰ <https://www.justice.gov/eoir/country-conditions-research>

⁴¹ *Diallo v US Department of Justice, BIA*, 548 F.3d 232,237 (2nd Cir. 2008).

⁴² *Kasravi v. INS*, 400 F.2d 675, 677 n.1 (9th Cir. 1968).

⁴³ Robert M. Cannon, *A Reevaluation of the Relationship of the Administrative Procedure Act to Asylum Hearings: The Ramifications of the American Baptist Churches’ Settlement Comment*, 5 ADMINISTRATIVE LAW JOURNAL 713–748 (1991).

⁴⁴ COMMISSION FOR HISTORICAL CLARIFICATION, *Report of the Commission for Historical Clarification* (1999), <https://www.usip.org/publications/1997/02/truth-commission-guatemala> (last visited Oct 3, 2019).

⁴⁵ Rebecca Cordell et al., *How Does the Trump Administration Think about Human Rights? Evidence from the State Department Country Reports*, POLITICAL VIOLENCE AT A GLANCE , <https://politicalviolenceataglance.org/2018/06/01/how-does-the-trump-administration-think-about-human-rights-evidence-from-the-state-department-country-reports/> (last visited Oct 12, 2020).

Prince Mohammed bin Salman.⁴⁶ It is difficult to see any justice in a rule that would push immigration judges to lend more credence to these reports than to those produced by the United Nations High Commission for Human Rights, or international news sources.

A final concern with weighing agency reports has to do with the influence that political considerations around immigration policy can have in shaping agency statements and publications about country conditions. In some instances, a desire to exclude or remove certain immigrants—rather than foreign policy concerns—has been the driving force in determining what to include in documents that are, ostensibly, the purview of the foreign service. Declassified internal emails show that, in 2018, White House officials who favored ending Temporary Protected Status for more than half a million people, pressured officials in the Department of State and Department of Homeland Security to alter recommendations on country conditions in El Salvador, Sudan, Haiti, and Honduras. The published findings supported the termination of TPS, but contradicted the professional recommendations of Embassy staff in those countries.⁴⁷

Government agency reports, in short, cannot be presumed to be all-knowing, without error, and free from ulterior considerations. There is therefore no justifiable reason to shield the conclusions presented in agency reports from the scrutiny of consideration, on equal footing, alongside other credible sources. Thus, the Seventh Circuit has warned against absolute deference to agency reports⁴⁸ especially since their authors are unknown and cannot be cross-examined.⁴⁹ The Second Circuit has ruled that that agency reports do not automatically discredit contrary evidence presented by applicants and are not binding on judges⁵⁰ The Fourth Circuit expressly notes the *equivalence* of agency and private sources: “If it is reasonable to suspect the State Department has a tendency to soft-pedal human rights violations, it may be just as reasonable to suspect that Amnesty International exaggerates them so they will not go without notice.”⁵¹

There may, however, be unjustifiable reasons for the attempt to create an unequal playing field in evaluating country conditions. Impartial consideration of a full range of evidence sometimes leads adjudicators to find in favor of asylum seekers who would not be successful if only government sources were considered. To most observers, it will be difficult to see how this is a problem in need of fixing. The possibility of a finding against the prosecution is a fundamental element of any fair system of adjudication, and the government has ample opportunity to make its case.⁵² The administration proposes to abandon impartiality. The administration seeks to return to an earlier, disastrous, system of deference to agency reports in evaluating country conditions. The sole,

⁴⁶ Tracy Wilkinson, *Annual U.S. human rights report condemns Khashoggi killing but avoids assigning blame*, LOS ANGELES TIMES, March 13, 2019, <https://www.latimes.com/nation/la-na-pol-trump-administration-human-rights-khashoggi-20190313-story.html> (last visited Oct 16, 2020).

⁴⁷ Jonathan Blitzer, *The Battle Inside the Trump Administration Over T.P.S.*, THE NEW YORKER, 2018, <https://www.newyorker.com/news/daily-comment/the-battle-inside-the-trump-administration-over-tps> (last visited Oct 16, 2020).

⁴⁸ *Galina v. INS*, 213 F.3d 955, 959 (7th Cir. 1998).

⁴⁹ *Niam v. Ashcroft*, 354 F.3d 652, 659 (7th Cir. 2004).

⁵⁰ *Chen v. INS*, 359 F.3d 121, 130 (2d Cir. 2004).

⁵¹ *Ghonahasa v. INS*, 181 F.3d 583 (4th Cir. 1999).

⁵² Furthermore, there have been circumstances in our removal cases where the ICE trial attorney has failed to provide State Department- or other U.S. government-generated reports. This rulemaking attempts to ensure that the Department of Justice serves as a backstop for ICE when ICE fails to zealously advocate for removal. Such an approach cannot be sustained.

implicit, and apparent goal is to deny relief to applicants who would otherwise receive grants of asylum under a full, impartial evaluation of country conditions. Such a move would not only send many meritorious applicants into peril, but would further undermine faith in the Immigration Courts as independent and effective administrators of justice. For these reasons, this rule must be withdrawn.

V. MIRC opposes 8 CFR § 1208.7 deletion and/or removing the reference to INA § 208(d)(5)(A)(iii), 8 U.S.C. § 1158(d)(5)(A)(iii) to mandate EOIR to adjudicate asylum applications within 180 days absent exceptional circumstances.

The Department asserts that there is confusing language in 8 CFR § 1208.7, which regulates employment authorization document (EAD) eligibility for asylum applicants. Specifically, it takes issue regarding the time period for EAD adjudications, which EOIR does not adjudicate, and the time period for adjudicating asylum applications relevant to EOIR.

The Michigan Immigrant Rights Center (MIRC) comments specifically on the changes related to the proposed time period for adjudicating asylum applications. The Department argues that INA § 208(d)(5)(A)(iii), 8 U.S.C. § 1158(d)(5)(A)(iii), which governs asylum adjudication procedures, is undermined by the current text of 8 CFR § 1208.7(a)(2). Specifically, it argues that INA § 208(d)(5)(A)(iii), 8 U.S.C. § 1158(d)(5)(A)(iii) indicates that asylum applications should be adjudicated within 180 days absent “exceptional circumstances.” And that references to those provisions in 8 CFR § 1208.7(a)(2) could be interpreted to allow either party to delay adjudication without showing exceptional circumstances.

8 CFR § 1208.7(a)(2) states that asylum applications must be adjudicated pursuant to INA § 208(d)(5)(A)(iii), 8 U.S.C. § 1158(d)(5)(A)(iii), and that “any delay requested or caused by the applicant shall not be counted as part of these time periods, including delays caused by failure without good cause to follow the requirements for fingerprint processing.” Thus, people in removal proceedings sometimes request continuances subject to the “good cause” standard. CFR § 1003.29: *Matter of L-A-R-B-*, 27 I&N Dec. 405 (A.G. 2018). The Department argues that this delays the adjudication of asylum applications past the 180 day deadline, and that an immigration judge may only grant a continuance if the respondent satisfies both good cause and shows “exceptional circumstances.”

It is simply impractical to require the immigration judge to adjudicate an asylum application within 180 days absent exceptional circumstances when so many other types of applications are already pending, and no solution to reduce that case load has been proposed. The implementation of this rule would result in significant delays in every other type of case before the immigration judge such as adjustment of status, cancellation of removal, etc. In our experience, these types of cases are already scheduled out three years out in advance, and if this rule were implemented, it would require the court to reset these hearings even further. Thus, essentially, if the rule were implemented and followed, all forms of relief would take a backseat to asylum. That is not appropriate, fair, equitable, or efficient.

The Department’s proposal prejudices the very people the Department of Homeland Security seeks to remove. In our experience, many respondents are unrepresented and non-English speaking.

Even after an applicant submits an application for asylum, it takes time to gather the additional evidence to help support their claim in preparation for an individual hearing. Any lack of evidence that is caused by the speed at which judges are forced to process the application for asylum can be fatal to an applicant's case - it works against applicants. The inevitable result is that an immigration judge will be forced to deny continuances, absent exceptional circumstances, and that decision alone can materially affect the outcomes of respondent's cases fast tracking deportation.

The Department's proposal ignores the fundamental realities of Immigration Courts. The Department even acknowledges that as of August 14, 2020, EOIR has over 560,000 applications for asylum and withholding of removal pending. It then uses the backlog as a justification for the need to implement this rule. The problem is a systemic, structural one - the immigration court system is housed within the Department of Justice. It is further compounded by the backlog that has surpassed 1 million cases.⁵³ Requiring immigration judges to adjudicate asylum applications within 180 days absent exceptional circumstances is not addressing the root cause of the problem. Instead, the backlog is being used as a pretext to interfere with immigration judge's authority and to implement a harmful rule.

A. MIRC opposes the Departments proposal to add a definition of exceptional circumstances in the context of asylum adjudications that is similar to the one currently in INA § 240(e)(1), 8 U.S.C. § 1229a(e)(1).

The Department concedes that "exceptional circumstances" is not defined for the purposes of asylum procedures and thus proposes to add one that is similar to the one currently in INA § 240(E)(1), 8 U.S.C. § 1229 a(e)(1), governing removal proceedings. That provision defines exceptional circumstances as: "refers to exceptional circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien."

The Department fails to provide a definition of "exceptional circumstances" and the idea of what one may look like - battery or extreme cruelty to respondent, child, parent; serious illness to respondent; or death of respondent spouse, child, or parent - creates a high burden on applicants to meet. These situations rise to a level that are so exceptional that, in effect, anything less than that will demand immigration judges deny continuances. Asylum procedures are complex and require time, effort, research, and evidence in preparation for an individual hearing. Defining what constitutes an exceptional circumstance for the purpose of a continuance makes it convenient and easy for the Department to weaponize it and use it against the respondent by forcing the immigration judge to deny a continuance. For these reasons, we demand that this rule be withdrawn.

B. MIRC opposes promulgating a regulation in 8 CFR § 1003.10 (b) as part of the listing of immigration judge powers and duties; and MIRC opposes amending 8 CFR § 1003.31(c), which outlines the immigration judge's authority to set and extend time limits for filings of applications and related documents.

⁵³ TRAC Immigration, *Immigration Court Backlog Tool* (Aug. 2020)
https://trac.syr.edu/phptools/immigration/court_backlog/

To further direct immigration judges to adjudicate asylum applications within 180 days of filing absent exceptional circumstances, the Department proposes to implement INA § 208 (d)(5)(A)(iii), 8 U.S.C. § 1158 (d)(5)(A)(iii), and to direct immigration judges to adjudicate asylum applications within 180 days of filing absent exceptional circumstances. It does so by proposing to amend 8 CFR § 1003.10(b) as part of the listing of immigration judge powers and duties; and amend 8 CFR § 1003.31(c) which outlines the immigration judge’s authority to set and extend time limits for filings of applications and related documents.

These proposed amendments make certain that the immigration judge does not set deadlines for filing supporting documents that extend the 180-day deadline absent exceptional circumstances. Imposing a definition for what qualifies as an exceptional circumstance for the purpose of a continuance in asylum proceedings coupled with these amendments severely restricts the judge’s ability to continue a case. The administrative burden of an immigration judge’s docket should not be resolved by shortening the adjudication process. It strips the immigration judge from any discretion to continue proceedings for any reason in their discretion meets an exceptional circumstance. This proposed change rushes both asylum seekers and immigration judges and fails to provide a reasonable opportunity for asylum seekers to present their claim—key to due process and the United States obligation under U.S. and international law. The result of this proposed change is that it will be applied completely unfairly resulting in denials of continuances and resulting in unequal outcomes. Although the impact to the Department will be virtually nonexistent, our clients and other respondents will be prejudiced against and the outcome materially impacted.

Furthermore, there is already an 180-day timeline to adjudicate asylum applications in statute at INA § 208 (d)(5)(A)(iii), 8 U.S.C. § 1158 (d)(5)(A)(iii) that is not being followed. Amending the regulatory text to define “extraordinary circumstances” and control how immigration judges can structure their dockets will have the opposite effect of adjudicating asylum applications more efficiently. It will reduce the already-limited docket management tools that IJs use to expedite their current caseload. For these reasons, the proposal must be withdrawn.

C. MIRC opposes modifications to 8 CFR § 1003.29, Continuances; and § 1240.6, Postponement and adjournment of hearing.

The Department proposes modifications to 8 CFR § 1003.29, which governs continuances. Currently, this regulation provides that “the Immigration Judge may grant a motion for continuance for good cause shown.” 8 CFR § 1240.6, which governs postponement and adjournment of hearings states, “the immigration judge may grant a reasonable adjournment either at his or her own instance or, for good cause shown, upon application by the respondent or the Service.” The Department proposes to add the following text to both provisions:

provided that nothing in this section shall authorize a continuance that causes the adjudication of an asylum application to exceed 180 days in the absence of exceptional circumstances, consistent with section 208(d)(5)(A)(iii) of the Act and § 1003.10(b).⁵⁴

⁵⁴ 85 Fed. Reg. 59692 at 59699, 59700

Again, as stated above, this attempt to rein in on the timeline to adjudicate asylum applications will backfire as these cases are already being set out two or three years into the future. It will be all but impossible, absent the hiring of 2,000-plus new immigration judges, to clear the backlog of claims and meet this 180-day illusory deadline that is already not being followed in statute, let alone regulation. Furthermore, in cases in which our staff attorneys have requested an expedited asylum hearing, it is often not scheduled within six months, and sometimes set for two to three years out.

This proposed change is yet another attempt to curb legal immigration. It is not a genuine proposal to make immigration courts more “efficient”. Instead, it fast tracks asylum seekers’ deportations. It is at odds with both legislative intent of Congress and international obligations. For these reasons, we demand that it be withdrawn altogether.

VI. Conclusion

In summation, this proposed rulemaking has little to do with court efficiency from the perspective of full, fair, and impartial adjudication of asylum claims. Rather, it is a subterfuge of the law to deny and deport as many asylum applicants as possible by implementing procedural obstacles, impossible deadlines, and partiality/bias on behalf of immigration judges. We, as practitioners who have helped thousands of non-citizens with their immigration cases, see the practical effects of this rulemaking—rejection, dismissal, and denial of asylum claims—dressed up as a means of making the immigration courts more efficient. While courts certainly become more efficient when there are no litigants proceeding to trial (which is the goal here), that objective cannot become reality as it would undermine the very purpose of what the asylum process is supposed to protect and ensure: fair and impartial adjudication of claims for people fleeing persecution. Adopting this rulemaking takes us in the opposite direction of that vision. For these reasons, we urge the Department to withdraw this rule in its entirety.

Respectfully submitted,



Ruby Robinson
Managing Attorney