



September 24, 2020

Lauren Alder Reid  
Assistant Director  
Office of Policy  
Executive Office for Immigration Review,  
5107 Leesburg Pike, Suite 1800, Falls Church, VA 22041

Office of Information and Regulatory Affairs,  
Office of Management and Budget,  
Attention: Desk Officer, U.S. Citizenship and Immigration Services, DHS  
725 17th Street NW, Washington, DC 20503  
*Submitted via [www.regulations.gov](http://www.regulations.gov)*

**RE: Public comment opposing Proposed Rules on Administrative Closure, Appellate Procedures, and Decisional Finality in Immigration Proceedings, Federal Register No. 2020-18676, EOIR Docket No. 19-0022, A.G. Order No. 4800-2020, RIN 1125-AA96**

Dear Ms. Alder Reid:

The Michigan Immigrant Rights Center (MIRC), submits this comment opposing the above-referenced rules proposed by the Department of Justice (“DOJ”) and urging DOJ to withdraw them in their entirety. The proposed rules would codify, exacerbate, and entrench major problems that already afflict the Executive Office of Immigration Review (“EOIR”), namely, the lack of judicial independence, the tilt in favor of the government, and the prioritization of efficiency and quotas over human lives. Immigration Judge Dana Leigh Marks famously described the work of the Immigration Courts as “doing death penalty cases in a traffic court setting”<sup>1</sup>; these proposed rules would make that glib comment about EOIR, sadly, even more accurate. These proposals can hardly be described as ensuring due process for non-citizen respondents (“respondents”) in this highly adversarial setting. Rather, they severely restrict and limit the ability for respondents to have meaningful access to a fair hearing and a robust appellate review process. For respondents, the stakes could not be higher<sup>2</sup>— and yet DOJ proposes to strip away some of these most crucial mechanisms and protections for presenting their cases and preventing injustices. We thus urge DOJ to withdraw these proposed rules in their entirety.

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<sup>1</sup> Hon. Mark A. Drummond, “Death Penalty Cases in a Traffic Court Setting”: *Lessons from the Front Lines of Today’s Immigration Courts*, American Bar Association (Jan. 15, 2019), <https://www.americanbar.org/groups/litigation/publications/litigation-news/practice-points/death-penalty-cases-traffic-court-setting-lessons-front-lines-immigration-courts/>.

<sup>2</sup> See, e.g., *Deported to Danger: United States Deportation Policies Expose Salvadorans to Death and Abuse*, Human Rights Watch (Feb. 5, 2020), <https://www.hrw.org/report/2020/02/05/deported-danger/united-states-deportation-policies-expose-salvadorans-death-and> (documenting 138 reported killings of people deported back to El Salvador by the United States).

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 respondents 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 to the U.S. Court of Appeals for the Sixth Circuit.

The fairness of EOIR proceedings directly impacts our clients and our work. We already see that fairness trampled on too frequently. These proposed rules would curtail out of existence what little procedural fairness and flexibility remains.

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 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 respond, especially within the short 30-day comment period, to every proposed change.

**We object to the Department's 30 day comment period to respond to their comment for this Notice of Proposed Rulemaking (NPRM)**

If implemented, the proposed regulations would fundamentally upend the practice of immigration law before the Immigration Courts and the BIA. The changes discussed below would render the semblance of EOIR as a neutral arbiter of justice unrecognizable. The public—and particularly those who appear and practice before EOIR—should be given adequate time to consider these dramatic revisions to immigration procedure and to provide thoughtful, well-researched comments. But DOJ has given the public a mere 30 days to submit comments, without providing any explanation for this deviation from the customary 60-day comment period.

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 USCIS's daily operational changes during the pandemic.

Thirty days to comment on such a transformative proposal, under these conditions, is not a fair opportunity.

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Although we object to DOJ’s unreasonable 30-day timeframe, we submit this comment nonetheless, because we feel compelled to object to the proposed regulations.

**8 CFR §§ 1003.1(d)(ii),1003.10 – Forbidding administrative closure would thwart established principles of immigration procedure, diminish the role and the independence of Immigration Judges (“IJs”), and render DHS the ultimate decider of who gets removed**

The proposal to strip IJs and the BIA of all authority to administratively close cases flies in the face of normative judicial principles and allows DHS to plow ahead, unabated, with deportations despite even compelling circumstances to the contrary. We vehemently urge DOJ not to put this proposal into effect.

*i. The proposed rules distort the history of administrative closure at the expense of judicial power and independence*

The proposal seeks to justify the ending of administrative closure with a distorted and dishonest history of the practice. In Section H of the proposal’s “Background” section, the proposal essentially characterizes administrative closure as a recent invention by the BIA that contravenes regulation and precedent.<sup>3</sup> It cites the 1969 BIA case *Matter of Chamizo*—which held that “in deportation proceedings[,] an order be entered which will result in the proceedings being processed to a *final conclusion*”<sup>4</sup>—for the proposition that IJs have never been permitted to administratively close cases.<sup>5</sup> The proposal then focuses on the 2012 BIA case *Matter of Avetisyan*, which recognized 8 CFR §§ 1003.1(d)(1)(ii),1003.10(b) as a source (though not the sole source) of an IJ’s authority to administratively close cases.<sup>6</sup> The proposal characterizes *Avetisyan* as a brazen break from precedent, chastising the decision for relying “on language in 8 CFR 1003.1(d)(1)(ii) and 1003.10(b) to hold that Immigration Judges may unilaterally and indefinitely suspend immigration proceedings through the use of administrative closure even if one party objected.”<sup>7</sup> The gist of the “Background” is that there has never been any authority for IJs to administratively close cases, that the BIA in *Avetisyan* erroneously pointed to 8 CFR §§ 1003.1(d)(1)(ii),1003.10(b) as the sources of that authority, that the Attorney General corrected this error in *Matter of Castro-Tum*<sup>8</sup>, and that the proposed regulatory changes would settle the matter.

This characterization of the history of administrative closure is confusing and inaccurate. In reality, administrative closure is a case management tool that has been used by IJs and the BIA for decades. “The practice of administrative closure began in the 1980s based on a Department of Justice (DOJ) memorandum that listed administrative closure as an option available to Immigration Judges when

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<sup>3</sup> See Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 52491, 52496 (proposed Aug. 26, 2020) (to be codified at 8 C.F.R. 1003, 1240).

<sup>4</sup> *Matter of Chamizo*, 13 I&N Dec. 435, 437 (BIA 1969).

<sup>5</sup> 85 Fed. Reg. at 52496.

<sup>6</sup> *Matter of Avetisyan*, 25 I&N Dec. 688, 697 (BIA 2012).

<sup>7</sup> 85 Fed. Reg. at 52497.

<sup>8</sup> *Matter of Castro-Tum*, 27 I&N Dec. 271 (AG 2018).

a person failed to appear at a hearing.”<sup>9</sup> Since then, it has come to occupy an important role in immigration procedure. *Avetisyan* accurately described administrative closure as “a procedural tool created for the convenience of the Immigration Courts and the Board,” analogous to procedural mechanisms “utilized throughout the Federal court system, under a variety of names, as a tool for managing a court’s docket.”<sup>10</sup>

The power to administratively close cases was recognized and used long before *Avetisyan* pointed to 8 CFR §§ 1003.1(d)(1)(ii), 1003.10(b) as sources for the power. That previous recognition and implementation of administrative closure occurred because it is simply a means of standard judicial case management that anyone called a “judge” would normally be presumed to possess. Indeed, it made sense for *Avetisyan* to point specifically to 8 CFR §§ 1003.1(d)(1)(ii), 1003.10(b) as sources of authority because those regulations grant broad discretionary power to IJs and make clear that they should be viewed as having inherent control over their *own* dockets, just like other judges. The regulation, 8 CFR § 1003.10(b) states:

In deciding the individual cases before them . . . immigration judges *shall exercise their independent judgment and discretion* and may take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases.” (Emphasis added)

This is simply a recognition that IJs are, in fact, real judges. This regulation does not need to specifically name “administrative closure” in order to grant the power because administrative closure is a tool inherent to judicial case management, akin to dismissal without prejudice. In fact, much of an IJ’s daily judicial activities are not specifically described in Title 8 of the Act nor the CFR. These include ruling on the admission of evidence (as Immigration Courts are not subject to the Federal Rules of Evidence), permitting (or not) opening statements, requiring counsel to stand when addressing the Court, etc. Like administrative closure, these are critical ways in which an IJ, pursuant to 8 CFR § 1003.10(b), may “exercise their independent judgment and discretion ... that is appropriate and necessary for the disposition of such cases.”

In *Castro-Tum* and in these proposed rules, the Attorney General and DOJ go far beyond just overturning *Avetisyan*. They purport that the authority to administratively close cases has never existed, and that it cannot be found in IJs’ inherent power, nor in the regulations that vest them with such power. In essence, they are saying that IJs have never truly been judges in the full sense of the word. This assertion is unacceptable, for it diminishes the role and independence of IJs as well as casts EOIR as less of an independent, neutral court system and more of a bureaucratic adjudicator that can simply trample the principles of ensuring fair hearings and/or due process.

***ii. The proposal to eliminate administrative closure will allow DHS to make deportation decisions and will result in grave injustices***

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<sup>9</sup> Elizabeth Montano, *The Rise and Fall of Administrative Closure in Immigration Courts*, Yale L.J. Forum (2020), available at <https://www.yalelawjournal.org/forum/the-rise-and-fall-of-administrative-closure-in-immigration-courts>.

<sup>10</sup> *Avetisyan*, 25 I&N Dec. at 690, n. 2.

By eliminating IJs' power to administratively close cases, the proposed rules would make DHS the ultimate decider of whether respondents are deported as the balance of power substantially favors DHS anyway. EOIR was created to avoid this real (and perceived) imbalance of power between the government and respondents (and their counsel).. Administrative closure has served as a crucial procedural mechanism in cases where a respondent is currently deportable but is eligible for some form of relief in the future, such as gaining status through a family-based petition or relief outside the Immigration Court. In such situations, administrative closure has allowed respondents to receive a temporary reprieve from imminent deportation. Under the proposed rule, DHS would be able to cut off eligible respondents from obtaining future status by initiating proceedings in a manner where the Court would be powerless to independently and efficiently adjudicate the situation.

The story of a client that MIRC represented, N.R., illustrates the awful results that ending administrative closure would cause. N.R. was eligible for Special Rule Cancellation of Removal under INA 240A(b)(2) as the battered child of a permanent resident parent. Our office and the DHS trial attorney disagreed on some procedural matters regarding Special Rule Cancellation. In lieu of ruling from the bench and knowing that the decision would be appealed, the IJ, in Solomonian fashion, administratively closed the case so that the parties could resolve between themselves before returning to court. The parties mutually recognized that N.R. was also eligible for 245(i). Thus, they both knew that returning to court was necessary for recalending purposes anyway but given both of their own busy dockets, as well as the court's, this approach served all parties involved. The administrative closure permitted the respondent to collect the necessary evidence, some of which was over twenty-five years old. Moreover, the respondent had every incentive to recalendar so as to complete this nearly fifteen-year immigration journey for herself and her children. Without administrative closure, this path to status for N.R. would have been cut off.

Administrative closure is also required for respondents in removal proceedings to obtain provisional waivers. By ending administrative closure, the proposed rules would also in effect end these waivers, thus eliminating another crucial mechanism for eligible noncitizens to avoid deportation.

Administrative closure is, quite simply, an IJ's ability to prioritize some cases over others. It allows IJs to manage their own dockets logically, efficiently, and in a way that best serves their court. For this reason, administrative closure has served as an important procedural mechanism for decades. Stripping IJs of this docket-management tool does nothing to increase "efficiency"; to the contrary, removing this tool transfers the burden to DHS's Enforcement and Removal Office (ERO) to adjudicate a huge influx of stays of removal that will result in reopened proceedings and a return to Immigration Court all over again. Further, removing this tool will only incentivize DHS to maximize the attrition-through-enforcement model, knowing that IJs are nearly powerless to manage this influx of cases in a logical and efficient manner. . It also inflicts completely preventable harm on respondents, particularly those who are eligible for relief outside the Immigration Courts. Therefore, we vehemently urge DOJ to withdraw the proposed rules about administrative closure.

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**8 CFR § 1003.1(k) – Allowing IJs to undermine BIA members by requesting that the EOIR Director reverse and/or remand decisions would disrupt IJ judicial authority and contravene established review processes**

We strongly oppose the proposed “formal quality assurance process,” which the proposal suggests would help guarantee that the BIA’s remand decisions “provide appropriate and sufficient direction to the immigration judges.”<sup>11</sup> The proposal would grant IJs the authority to certify BIA decisions to the EOIR Director whenever the IJ believes the BIA committed a “specific error” as defined as a clerical or typographical error; a decision that goes against established law, statute, regulation, or binding precedent; an imprecise, muddled, logically inconsistent decision that fails to resolve the underlying reason for the appeal; or an oversight of a material fact by the BIA.<sup>12</sup> This proposal would essentially give IJs veto power over the BIA and vest the politically-appointed EOIR Director with broad powers over immigration law. Further, the proposal is borrowed from the Social Security Administration (SSA), which is an inappropriate model for the extremely high-stakes judicial proceedings that occur within EOIR.

*i. The suggested grounds by which IJs could ask for review of BIA remands are too broad and would essentially give IJs veto power over the BIA*

Despite the proposal’s assertion that this mechanism would serve as a quality check so that BIA decisions are “accurate and dispositive” and not “solely to express disagreements,” the proposed criteria inspire little confidence that the praxis will align with the theory. The proposal posits that IJs will be restricted to a “narrow set of criteria” to justify an alleged error. Yet the definitions are broad and empower IJs to certify cases based upon disagreements with the BIA. For example, IJs may request the Director review a BIA decision if the IJ believes the BIA neglected to consider a “material fact pertinent to the issue(s).” This provision allows the IJ to make the subjective determination of what constitutes a material fact, and then raise the issue with the Director. Used in this way, the “quality assurance process” could absolutely be used by IJs “solely to express disagreements” with the BIA and to seek a different answer from the politically-appointed EOIR Director.

*ii. The EOIR Director is not a “neutral” arbiter, and empowering the Director to overturn the BIA will further politicize and delegitimize the Immigration Courts*

Furthermore, the proposal’s choice of the EOIR Director as the possessor of this power to review BIA decisions is concerning. The proposal asserts that the EOIR Director offers the perspective of a “neutral” arbiter between the Board and the IJ.<sup>13</sup> But that assertion neglects to account for the politicized place that the EOIR Director occupies. All Directors are short-term political appointees by the Attorney General and serve at the pleasure of the Attorney General and the President. This dynamic would certainly affect how a Director will approach reviews of certification orders. Additionally, nothing within the EOIR Director’s job description explains why their position is more qualified than the Circuit Courts to review BIA decisions. The

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<sup>11</sup> 85 Fed. Reg. at 52496.

<sup>12</sup> *Id.* at 52502.

<sup>13</sup> 85 Fed. Reg. at 52502.

Director's role is to represent "the position and policies of EOIR to the Attorney General, Deputy Attorney General, Members of Congress, and other governmental bodies, the news media, the bar, and private groups interested in immigration matters." The proposed rules fail to offer any justification of what entitles the EOIR Director to review BIA decisions instead of Circuit Court judges.

Creating this certification mechanism will also disrupt and delay the established processes by which decisions are reviewed and their rulings, implemented. In no other adversarial court system does such a power exist. If DOJ decides to enact this proposed rule, the result undermines the Immigration Courts' resemblance to the structure of the actual court system. Under the guise of a "quality control" mechanism, this proposal would disrupt the chain of authority within the EOIR, namely, that IJs are subject to the BIA, and the BIA is subject to the Circuit Courts of Appeals. Imagine a U.S. District Court judge taking umbrage with a Circuit Court decision and being able to appeal directly to the Supreme Court. The equivalent situation is what would transpire if any IJ could certify BIA remands for review by the EOIR Director.

*iii. Borrowing this procedural mechanism from the Social Security Administration is inappropriate*

Nonetheless, to justify these changes as both needed and worthwhile, the proposal points to another adjudicatory agency, specifically the Social Security Administration (SSA). The SSA has enacted policies that permit its administrative law judges (ALJs) to seek higher-level review through its Office of Appellate Operations (OAO), which include the OAO Executive Director. Though the proposed rules borrow from the SSA the criteria for when IJs could seek review from the EOIR Director, such a need in the immigration setting is inane.

Although the EOIR and SSA are both administrative adjudicatory agencies with appellate level review in Falls Church, VA that is where the similarities end. The idea that EOIR should borrow this procedural mechanism from SSA is beyond deeply flawed. Whatever "quality" or "efficiency" such a procedural mechanism might have added to SSA proceedings is not only inappropriate and unnecessary, it is inapposite altogether for immigration purposes. The SSA process is, by its inherent design, non-adversarial. Only the claimant (along with their counsel) and the SSA are involved in this process. There is no adversarial party arguing the claimant is not disabled, credible, or otherwise ineligible for the relief sought.

Unlike the SSA disability determination process, EOIR is a self-labelled court system designed, initially, to foster a sense of an independent decisionmaker between the respondent seeking relief and the government's trial attorney opposing such relief. IJs are not children. They do not need a parent, in this analogy, the EOIR Director, to step in on their behalf. Logically, if an IJ is confused about a clerical or typographical error, one of the adversarial parties is too! It is that party's responsibility, in advocating for itself (if unrepresented) or its client to seek clarification through established processes, like filing a motion. Further, if the other parade of possible mistakes were to happen,<sup>14</sup> these too, would be of interest to the parties who have clear processes to achieve a resolution. It is not the IJ's role to step into this void.

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<sup>14</sup> *Id.* at 52502.

For these reasons, EOIR should not be borrowing bureaucratic conveniences from the SSA.

**8 CFR § 1003.2(a) and § 1003.23(b)(1) – Forbidding *sua sponte* reopening of cases would diminish the role and the independence of IJs and would divest them and respondents of a crucial tool used to avoid manifest unfairness**

We strongly object to the proposal to forbid *sua sponte* reopening of EOIR cases. The time and number limitations on motions to reopen already pose substantial obstacles to many respondents who would be eligible for some form of immigration relief but for a prior removal order. In many such cases, the ability of IJs and BIA members to exercise their *sua sponte* authority to reopen cases has allowed old removal orders to be vacated and has thus avoided extreme unfairness and injustice. By taking away this power, the proposed rules would subject nearly all case reopenings to the time and number limitations on motions to reopen. With few exceptions, respondents are limited to a single motion to reopen, filed within 90 days of the final removal order.<sup>15</sup> Without *sua sponte* reopening, many respondents who fall outside of these narrow statutory limitations would have no recourse to challenge their deportations, even in the most unjust circumstances.

For instance, a recent MIRC client, a seven-year-old girl named T.V.H., was subject to deportation based on an in-absentia removal order in “Migrant Protection Protocol” proceedings over which she had no control. She ended up in the custody of the Office of Refugee Resettlement in Michigan, but by that time, her timeframe for filing a motion to reopen or an appeal had long since passed. MIRC filed a motion asking the BIA to exercise its *sua sponte* authority to reopen her case. This would not be permitted under the proposed rule, and seven-year-old T.V.H. would be summarily deported alone back to Honduras based on an order issued at a hearing that she was not able to attend due to no fault of her own.

MIRC has also supported many individual class members in the class action *Hamama v. Adducci*, which challenged ICE’s plans to quickly deport more than 1,300 Iraqis around the country with old removal orders, including hundreds here in Michigan.<sup>16</sup> Many *Hamama* class members were eligible for a variety of immigration relief like a family-based petition, withholding of removal, or protection under the Convention Against Torture but were given no means of even applying for this relief due to the existence of old removal orders. The class action lawsuit gave class members the chance to request that IJs and/or the BIA exercise their *sua sponte* authority to reopen their cases, resulting in dozens of removal orders being vacated and many class members obtaining relief from deportation. Under the proposed rules, virtually every *Hamama* class member would have been deported back to Iraq, as these orders dated back decades.

The need to reopen cases frequently arises in extremely unfair situations like T.V.H.’s and the *Hamama* class members’. To curtail IJ and BIA power to reopen cases not only diminishes their role and independence, but also targets EOIR’s most desperate and vulnerable respondents,

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<sup>15</sup> See Practice Advisory, *The Basics of Motions to Reopen EOIR-Issued Removal Orders*, American Immigration Council (Feb. 7, 2018),

[https://www.americanimmigrationcouncil.org/sites/default/files/practice\\_advisory/the\\_basics\\_of\\_motions\\_to\\_reopen\\_eoir-issued\\_removal\\_orders\\_practice\\_advisory.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/the_basics_of_motions_to_reopen_eoir-issued_removal_orders_practice_advisory.pdf).

<sup>16</sup> See *Hamama v. Adducci*, ACLU, <https://www.aclu.org/cases/hamama-v-adducci>.

subjecting them to summary enforcement of old deportation orders without recourse. The proposal states:

Motions for reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. This is especially true in a deportation proceeding, where, as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States.<sup>17</sup>

The conceit of this proposal is appalling to us as daily practitioners of immigration law. As attorneys and accredited representatives, we are ethically bound by rules of professional conduct to not mislead the court nor to seek frivolous relief for our clients. We can be sanctioned and disbarred for doing so. Though, when there is a colorable argument to be made, where the law has changed or can be advanced, and where the evidence, facts, or circumstances are now present, it is our responsibility as advocates to zealously seek relief on behalf of our clients. And when these changes have occurred after the short window of time for filing a motion to reopen, our vehicle for representing our clients' best interests is by seeking *sua sponte* reopening. *Sua sponte* reopening authority is a critical safety valve that cannot be shutoff. Removing this authority on the false assumption that it is *only* used to delay deportations presents a misleading picture of the purpose of this authority.

In analogizing motions to reopen to petitions for rehearing or retrial based on new evidence in the criminal context, the proposal fails to consider the most common justifications for *granting* such petitions—namely, to avoid extreme injustice and wrongful convictions. This analogy demonstrates DOJ's failure to consider the respondents (and their family members) actually affected by its proposal to forbid *sua sponte* case reopenings. While the proposal would streamline EOIR proceedings and increase finality of removal orders, it does so at an extreme and untenable cost: the lives of the respondents. But clearly, DOJ has failed to consider that cost.

Law is not practiced in a vacuum; it changes. And when it does, *sua sponte* reopening authority permits respondents who were ordered deported to seek redress before EOIR. Accordingly, we demand that this proposal not be adopted.

### **8 CFR § 1003.3(c) – Expanding simultaneous briefing to non-detained cases would inhibit all parties' abilities to present full arguments and for IJs to competently decide cases**

We oppose the proposal to expand simultaneous briefing to non-detained cases.

In almost no other area of the law does simultaneous briefing exist. No court in this country has rules of civil procedure that do not permit one party to respond to the other's arguments. Expanding such a system to all of EOIR's docket is contrary to established principles of justice, notice, and a fair trial. Whatever benefits that simultaneous briefing may bring in terms of promoting administrative efficiency are outweighed by the detriments to the quality of representation and the fairness of proceedings.

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<sup>17</sup> 85 Fed. Reg. at 52493 (quoting *INS v. Doherty*, 502 U.S. 314, 323 (1992)).

The practical effect of this rule will be that both sides will be forced to brief every issue raised in the Notice of Appeal; this is uncommon in current practice, in which appellate briefs often focus on just a few of the issues raised in the Notice. Requiring briefing of all issues will waste time for EOIR, DHS, immigration lawyers, and respondents. Crucially, such a practice will erode the overall quality of representation. Briefs will become more boilerplate as attorneys are limited in their time and page lengths to provide in-depth analysis of the agreed upon and disputed factual and legal issues.

### **8 CFR § 1003.3(c) – Shortening the Appellate Brief Extension Period from 90 Days to 14 Days Would Inhibit All Parties’ Abilities to Present Arguments and Respondents’ Abilities to Secure Legal Representation**

We strongly object to the proposal to shorten the maximum allowable appellate brief extension period from 90 days to 14 days.

For represented respondents, shortening this period places a tremendous strain on the respondents and their attorneys. Even considering that current practice usually only permits extensions of 21 days, shortening this period by another week would have terrible consequences. With less time to write briefs, fewer appeals would get filed, and the quality of briefs would deteriorate. Currently, these consequences would be exacerbated by the ongoing COVID-19 pandemic, which as previously discussed has inhibited many people’s abilities to work at full capacity as they juggle childcare, sickness, and the added strain of working from home.

The shortness of a 14-day extension period seems all the more extreme when compared to other preparation periods in immigration law. Cases in the Circuit Courts of Appeal are often granted months to prepare (non-simultaneous) briefing and if oral arguments are requested, even more time to get ready for that. Before USCIS, written appeals are permitted 33 days, *without* a several-hundred-page trial transcript attached. That this proposal suggests that a mere 14-day extension should be sufficient to prepare an appeal is preposterous, especially at a time when the U.S. Postal Service is experiencing historic delays. Earlier this year, we did not learn about the contents of a BIA decision until two weeks after it was issued based on mail delays. And we only were able to get a copy from the ICE trial attorney.

One MIRC client, a teenager from Haiti named W.S., might be in a very different place right now if it were not for a 21-day briefing extension period. A MIRC attorney represented W.S. in a defensive asylum claim, and when asylum was denied, the attorney began working on the appeal. This attorney was pregnant, and she soon gave birth and began her maternity leave. W.S.’s case needed to quickly change hands to a different MIRC lawyer. Getting a 21-day briefing extension gave the second lawyer the time she needed to acquaint herself with the case, draft the brief, and file it. This extension allowed W.S. to keep fighting his case and avoid a final removal order. Today, W.S. is a green card holder. If we had only received a 14-day briefing extension, we really might not have been able to file W.S.’s appeal on time, and he could be back in Haiti with his life in grave danger.

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For these reasons, we object to this proposal shortening an already too short period of time to fully prepare briefing in the appellate context.

## **Conclusion**

As attorneys and accredited representatives who practice immigration law every day, we are uniquely exposed to the panoply of injustices and challenges we and our clients face in achieving a just outcome before EOIR. We work hard to zealously advocate for our clients despite the mounting challenges to due process, fairness, and a system of justice that maximizes administrative efficiency over human rights. These proposed rules turn an already unfair, prejudiced, limited-review “court” into an adjudicative machine with little to no due process. These proposals rest on the misguided belief that it is both permissible and advisable to model the adversarial Immigration Court system after a non-adversarial administrative agency like the Social Security Administration. Yet, it is neither permissible nor advisable to do so. Neither our constitutional law, nor international law, nor our own common humanity can permit such a sham of a review process in Immigration Court where lives are on the line every day. For these reasons, we demand that these proposals be withdrawn altogether.

Sincerely,



Ruby Robinson  
Managing Attorney

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