HARVARD IMMIGRATION AND REFUGEE CLINICAL PROGRAM

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Via Federal e-Rulemaking Portal

RE: Notice of Proposed Rulemaking: *Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure;* RIN 1125-AA96, EOIR Docket No. 19-0022, A.G. Order No. 4800-2020

To Whom It May Concern:

The Harvard Immigration & Refugee Clinical Program ("HIRC") and the HLS Immigration Project ("HIP") submit this comment on the proposed rulemaking published August 26, 2020 by the Executive Office for Immigration Review ("EOIR") of the U.S. Department of Justice ("DOJ") (collectively, the "Agencies"), entitled "Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure" (the "Proposed Rules"), and recommend that the Proposed Rules be withdrawn in full for reasons including but not limited to those outlined below.

I. Statement of Interest

HIRC is one of the oldest clinical programs in the country that focuses on the advancement of immigrants' rights while teaching students critical lawyering skills. HIRC includes two distinct clinics: (1) the Immigration & Refugee Advocacy Clinic, which represents clients seeking humanitarian protections in a range of different fora, including administrative tribunals and federal appellate courts and (2) the Crimmigration Clinic, which focuses on the growing intersection of criminal law and immigration law. HIRC faculty and staff also teach a range of courses concerning immigration policy, refugees and trauma, the intersection of immigration law and labor law, and the intersection of criminal law and immigration law. HIRC faculty and staff regularly publish scholarship concerning asylum adjudication, due process protections in removal proceedings, working with traumatized refugees, crimmigration, and immigration detention.

HIRC has worked with thousands of immigrants and refugees since its founding in 1984. Its advocacy includes representation of individual applicants for asylum and related relief and the development of theories and policy relating to asylum law, crimmigration, and immigrants' rights. HIRC has an interest in the proper application and development of U.S. asylum law to

ensure that the claims of individuals seeking asylum and related relief receive fair and proper consideration under standards consistent with U.S. law and treaty obligations.

HIP is a student-practice organization under the supervision of HIRC, which provides law students with the opportunity to gain practical, hands-on legal experience. HIP represents clients seeking release from detention in Massachusetts, promotes policy reform, and provides representation to refugees and asylees who are seeking family reunification and legal residency.

HIRC and HIP regard the Proposed Rules as arbitrary and capricious and contrary to law. If implemented, the Proposed Rules would violate the INA's guarantee that immigrants will have a "reasonable opportunity" to meaningfully contest removal proceedings, and undermine immigrants' Fifth Amendment right to due process and fundamental fairness in removal proceedings. Reflecting the somewhat specialized nature of our casework, HIRC and HIP write in particular to draw attention to the ways the Proposed Rules would violate the rights of refugees.

II. By Limiting the Availability of Review, the Proposed Rules Abdicate the Agencies' Legal Duty to Protect Refugees

Both agency precedent[1] and binding international authority[2] require that refugees should be given the "benefit of the doubt" in the course of evaluating their protection claims. The Proposed Rules fly in the face of this core principle. They greatly limit the scope of issues adjudicators are empowered to review, even where a refugee lacks counsel,[3] eliminate administrative closure,[4] and provide Department of Homeland Security ("DHS") with unlimited, indefinite motions to reopen.[5] In so doing, the Proposed Rules "run counter to the [DOJ]'s responsibility to ensure that refugee protection is provided where the circumstances warrant it, [and] [thwart . . . . the cooperative approach [to adjudication] emphasized" by agency precedent and approved by circuit courts.[6]

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[1] *See Matter of S-M-J-*, 21 I. & N. Dec. 722, 725 (B.I.A. 1997) (quoting UNHCR handbook); *see also I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 438–39 (1987) (internal punctuation omitted) ("In interpreting the Protocol's definition of 'refugee' we are further guided by the analysis set forth in the Office of the United Nations High Commissioner for Refugees Handbook."). UNHCR provides interpretative guidance regarding states parties' treaty obligations on which federal courts have consistently relied. *See, e.g.*, *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1060-61 (9th Cir. 2017) (*en banc*); *De Pena-Paniagua v. Barr*, 957 F.3d 88, 97 n. 3 (1st. Cir 2020); *Diaz Reynoso v. Barr*, 968 F.3d 1070, 1081–87 (9th Cir. 2020).

[2] *See* UN High Commissioner for Refugees (UNHCR), *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection* (Feb. 2019) 44–45, https://www.unhcr.org/enus/publications/legal/5ddfcdc47/handbook-procedures-criteria-determining-refugee-status-under-1951- convention.html; *see Cardoza-Fonseca*, 480 U.S. at 438.

[3] *See* "Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure," 85 Fed. Reg. 52491, 52495–96 (Aug. 26, 2020)

[4] *See id.* at 52504.

[5] *See id.* at 52506.

[6] *See Cantarero-Lagos v. Barr*, 924 F.3d 145, 154 (5th Cir. 2019) (Dennis, J., Concurring in the judgment) (discussing *Matter of S-M-J-*, 21 I. & N. Dec. 722, 23–24 (B.I.A. 1997)).

The Supreme Court has made clear that "the Fifth Amendment entitles [immigrants] to due process of law in deportation proceedings."[7] Accordingly, immigration proceedings must conform with due process standards of fundamental fairness. Circuit courts[8] and the Board of Immigration Appeals[9] ("Board") have repeatedly reversed immigration courts where removal proceedings lacked fundamental fairness. This is appropriate as deportation can mean the difference between life and death for many immigrants, especially refugees. Reflecting this overall principle, the INA separately requires that immigrants in removal proceedings be given "a reasonable opportunity to examine the evidence against [them, and] to present evidence on [their] own behalf."[10] Furthermore, the Board counsels that immigration judges must take "a cooperative approach,"[11] in asylum proceedings and "take an active role in helping the respondent develop [their] legal theory from the facts"[12] in light of the unique difficulties refugees often face in marshalling evidence that proves their claims.[13]

As the Fifth Circuit Court of Appeals has recognized, "someone who faces persecution on account of a protected ground is no less deserving of asylum's protections because of her inability to exactly delineate a convoluted legal concept."[14] The agencies have previously (in

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[7] *Reno v. Flores*, 507 U.S. 292, 306, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993).

[8] *Rosales v. Bureau of Immigr. & Customs Enforcement*, 426 F.3d 733, 736 (5th Cir. 2005) ("[D]ue process requires that deportation hearings be fundamentally fair...."); *Dakane v. U.S. Attorney General*, 399 F.3d 1269, 1273 (11th Cir. 2005) ("It is well established in this Circuit that an alien in civil deportation proceedings ... has the constitutional right under the Fifth Amendment Due Process Clause ... to a fundamentally fair hearing."); *Al Khouri v. Ashcroft*, 362 F.3d 461, 465 (8th Cir. 2004) ("The Fifth Amendment's due process clause mandates that removal hearings be fundamentally fair."); *Trench v. INS*, 783 F.2d 181, 182–83 (10th Cir.1986) ("This court has recognized that the Fifth Amendment guarantees aliens subject to deportation the right to a fundamentally fair deportation proceeding."); *Djadjou v. Holder*, 662 F.3d 265, 277 (4th Cir. 2011) (finding due process violation where use of evidence was "fundamentally unfair" to petitioner); *Fei Yan Zhu v. Attorney General* U.S., 744 F.3d 268, 273 (3d Cir. 2014) (explaining that admissibility of evidence in immigration proceedings must be "fundamentally fair so as not to deprive the alien of due process.").

[9] *Matter of Exilus*, 18 I. & N. Dec. 276, 278 (BIA 1982) ("The constitutional requirements of due process are satisfied in an administrative hearing if the proceeding is found to be fair.").

[10] 8 U.S.C. § 1229a(b)(4)(B).

[11] *See Matter of S-M-J-*,21 I.&N. Dec. 722, 723-24 (BIA 1997); *see also Cantarero-Lagos v. Barr*, 924 F.3d 145, 154 (5th Cir. 2019) (Dennis, J., Concurring in the judgment) (same). *See* Sabrineh Ardalan, *Refugee Eligibility: Challenging Stereotypes and Reviving the 'Benefit of the Doubt*,' Rethinking Refuge (July 2020), https://www.rethinkingrefuge.org/articles/rethinking-refugee-eligibility-challengingstereotypes-and-reviving-the-ben.

[12] *Cantarero-Lagos v. Barr*, 924 F.3d 145, 151 (5th Cir. 2019); *see S-M-J-*, 21 I.&N. Dec. at 723–24 (recognizing the responsibility of the immigration judge to ensure that refugee protection is provided when warranted, and specifying that a "cooperative approach" between the immigration judge and the applicant is therefore necessary in immigration court); *see also Matter of Y-L-*, 24 I.&N. Dec. 151, 161 (BIA 2007) (admonishing the immigration judge for failing to notify an asylum applicant of her concerns with the application and providing the applicant with an opportunity to respond); *Toure v. Att'y Gen. of U.S.*, 443 F.3d 310, 325 (3d Cir. 2006) ("an [immigration judge] has a duty to develop an applicant's testimony, especially regarding an issue that she may find dispositive"); *Agyeman v. I.N.S.*, 296 F.3d 871, 877 (9th Cir. 2002) ("[T]he IJ must adequately explain the hearing procedures to the alien, including what he must prove to establish his basis for relief."); UNHCR, Note on Burden and Standard of Proof in Refugee Claims (Dec. 16, 1998) ("the adjudicator shares the duty to ascertain and evaluate all the relevant facts. This is achieved, to a large extent, by the adjudicator […] guiding the applicant in providing the relevant information.").

[13] United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status (1979, reissued. 2011); *see also* n. 1, *supra* (documenting the interpretive value of UNHCR guidance).

[14] *See Cantarero-Lagos*, 924 F.3d at 154 (Dennis, J., Concurring in the judgment).

some circumstances) established safeguards designed to reinforce U.S. obligations to protect refugees. As just one example, the Board has remanded cases for consideration of particular social groups that were not "exactly delineated" by immigrants representing themselves in immigration court *pro se.*[15]

But the Proposed Rules, by limiting both the Board's remand authority[16] and immigration judges' scope of review upon remand,[17] would circumscribe the agency's ability to realize refugee rights even where the facts, properly considered, establish that the immigrant qualifies for relief. The Proposed Rules would, *inter alia*, eliminate the ability of the Board to remand a case *sua sponte* when the immigration judge ("IJ") failed to adequately develop the record even when the case presents a clear avenue for relief. This has particularly troubling implications for *pro se* individuals. Immigrants without representation may not understand that they have the ability to seek remand in this case, and the Board would lack authority to remand the case for further fact-finding.

Furthermore, the remand prohibition cannot be reconciled with the Attorney General's decision in *Matter of A-C-A-A-*, 28 I.&N. Dec. 84 (A.G. 2020), published a mere day before comments on the Proposed Rules were due. *A-C-A-A-* suggests that the Board must conduct a searching review of all elements of asylum eligibility, including where DHS waived or otherwise no longer contests an element.[18] Yet a different Attorney General decision and proposed asylum regulations both suggest IJs should limit the issues they consider, stating that where an IJ concludes "an alien's asylum application is fatally flawed in one respect—for example, for failure to show membership in a proposed social group . . . . an immigration judge or the Board need not examine the remaining elements of the asylum claim."[19] Here, the Proposed Rules affirm that the Board remains nearly entirely unable to engage in fact-finding.[20] Synthesizing all of the above: immigration judges are encouraged to reach as few elements of asylum eligibility as possible. But where an immigration judge errs in ruling an element insufficient, and that error is appealed to the Board, the Board would neither be able to remand the claim for further fact-finding and analysis, nor take new evidence and engage in the fact-finding needed to resolve the outstanding elements of asylum eligibility.

Taken together, these rules and decisions are nothing short of a regulatory trap for refugees, especially those proceeding *pro se*. The foreseeable, yet unconscionable effect of the Proposed Rules will be to tie hands of adjudicators from developing the administrative records of, and subsequently granting relief to, protection-eligible immigrants. The Proposed Rules thus

[15] Decisions on file with author.
[16] *See* "Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure," 85 Fed. Reg 52495–96 (Aug. 26, 2020).
[17] *See id.*
[18] *See* 28 I.&N. Dec. at 91.
[19] *See* "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review," 85 Fed. Reg. 36264, 36277 (June 15, 2020) *citing Matter of A–B–*, 27 I.&N. Dec. 316, 340 (A.G. 2018).
[20] *See* 85 Fed. Reg. at 52496.

contradict the protection imperatives the U.S. adopted by acceding to 1967 Protocol, and passing the Refugee Act of 1980.

III. The Proposed Rules Unduly Prejudice Immigrants' Abilities to Vindicate their Rights

The Proposed Rules' elimination of administrative closure is arbitrary and capricious and will only serve to foreclose relief to eligible immigrants. Parroting *Matter of Castro-Tum*, which has been reversed by the U.S. Courts of Appeals for the Seventh and Fourth Circuits,[21] the Proposed Rules would foreclose even joint motions for administrative closure absent an explicit statutory or regulatory provision providing for it.[22] As the Fourth Circuit explained in *Zuniga Romero v. Barr*, "administrative closure has been a procedural mechanism employed by IJs and the BIA since the late 1980s and consistently reaffirmed—even if its precise contours have changed—through the BIA's precedential decisions . . . Accordingly, numerous petitioners have relied on this long-established procedural mechanism to proceed through the immigration process."[23] HIRC attorneys have sought and received administrative closure in removal proceedings for immigrants who USCIS subsequently found eligible for many different forms of collateral relief, including Adjustment of Status, Special Immigrant Juvenile Status, and DACA. Yet USCIS's elongated application processing times, and EOIR's limited jurisdiction to consider many types of immigrant benefits, could in essence force IJ's to enter removal orders against such relief-eligible immigrants.

Finally, under the Proposed Rules, DHS would be specifically exempted from time and number bars on motions to reopen before the BIA, while immigrants would be bound by these strict limitations.[24] The Proposed Rules also allow the BIA to remand a case at any time based on derogatory evidence the government presents, while preventing immigrants from remanding their case on the basis of new and favorable evidence.[25] Contrary to principles of fairness, the proposed change will worsen procedural disparities between the parties that appear before it.

IV. Conclusion

Ultimately the Proposed Rules serve to provide less process and less assurance of fairness for immigrants in proceedings. We urge the Agencies to abandon this proposal and instead

[21] *See Yeison Meza Morales v. Barr*. _F.3d_, 2020 WL 526986 (7th Cir. 2020) ("administrative closure is . . . plainly within an immigration judge's authority to take "any action" that is "appropriate and necessary for the disposition of . . . cases under 8 C.F.R. § 1003.10); *Zuniga Romero v. Barr*, 937 F.3d 282 (4th Cir. 2019) (concluding the same).

[22] See "Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure," 85 Fed. Reg. 52491, 52504 (Aug. 26, 2020).

[23] *See* 937 F.3d at 296.

[24] *See* "Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure," 85 Fed. Reg. 52491 52506 (Aug. 26, 2020).

[25] *See id*.

promote reforms to the immigration adjudication system that are consistent with the INA, due process, and international protection imperatives. HIRC and HIP also object to the Proposed Rules' thirty-day timeframe for public comments. Thirty days is an insufficient period of time for the public to have a meaningful opportunity to comment on the Proposed Rules, particularly in light of the myriad other regulatory changes to immigration proceedings proposed in recent months.[26] Each of these proposed regulations represents an effort by the current administration to erode due process and fairness in immigration proceedings.[27]

The Agencies have not identified any reason for departing from the more typical comment period of sixty days, or providing for a longer period, as necessary. The above-described, complex interaction between the Proposed Rules and the Attorney General's decision in *Matter of A-C-A-A-*, published just one day before comments on the Proposed Rules were due, emphasizes the insufficiency of the comment period provided for the Proposed Rules.

Under the cover of the pandemic, DOJ and DHS have sought to rewrite immigration laws and eliminate protection for those seeking refuge in the United States. Taken together, and separately, the Proposed Rules and the other regulations proposed this year represent an assault on the rights of asylum seekers and immigrants in general.

[26] Yet another highly complicated rulemaking that, based on draft text, will greatly impair the rights of asylum seekers, was recently published. *See generally* "Procedures for Asylum and Withholding of Removal," EOIR Docket No. 19-0010; A.G. Order No. 4843-2020, *available at* https://www.federalregister.gov/documents/2020/09/23/2020-21027/procedures-for-asylum-and-withholding-of-removal.

[27] *See generally* Harvard Immigration & Refugee Clinical Program Comment, "Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons into United States from Designated Foreign Countries or Places for Public Health Purposes," *available at* http://harvardimmigrationclinic.org/files/2020/04/4.23.20-HIRC-CDC-Comment-Final.pdf; Harvard Immigration & Refugee Clinical Program & Harvard Immigration Project Comment, Notice of Proposed Rulemaking, "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review," 85 Fed. Reg. 36264 (June 15, 2020) *available at* http://harvardimmigrationclinic.org/files/2020/08/HIRC-Asylum-Rule-Comment-FINAL.pdf ; Harvard Immigration & Refugee Clinical Program & Harvard Immigration Project Comment, Notice of Proposed Rulemaking, Security Bars and Processing; RIN 1615-AC57/ Docket No. USCIS 2020-0013 *available at* http://harvardimmigrationclinic.org/files/2020/09/HIRC-Comment-Nonrefoulement-to-Submit.pdf; Harvard Immigration & Refugee Clinical Program Comment, "United States Citizenship and Immigration Services, Docket ID USCIS-2020-0016, "Collection of Information," *available at* http://harvardimmigrationclinic.org/files/2020/09/Final-HIRC-Comment-re_Collection-of-Information.pdf.

We appreciate the opportunity to provide comments on the Proposed Rules. If you have questions, please contact us by phone at 617-384-8165 or by email at hirc@law.harvard.edu.

Sincerely,

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