HARVARD IMMIGRATION AND REFUGEE CLINICAL PROGRAM

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Via Federal e-Rulemaking Portal

RE: Notice of Proposed Rulemaking: *Motions To Reopen and Reconsider; Effect of Departure; Stay of Removal,* EOIR Docket No. 18–0503; Dir. Order No. 01–2021 RIN 1125–AB01

To Whom It May Concern:

The Harvard Immigration & Refugee Clinical Program ("HIRC") submits this comment on the proposed rulemaking published November 27, 2020 by the Executive Office for Immigration Review ("EOIR") of the U.S. Department of Justice ("DOJ") (collectively, the "Agencies"), entitled "*Motions To Reopen and Reconsider; Effect of Departure; Stay of Removal*" (the "Proposed Rules"), and recommends that the Proposed Rules be withdrawn in full for reasons including but not limited to those outlined below.

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.

Through its Harvard Representation Initiative (HRI), HIRC also provides legal counsel and representation on immigration matters for members of the Harvard University community, including but not limited to Harvard community members with Deferred Action for Childhood Arrivals ("DACA") and Temporary Protected Status ("TPS").

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.

HIRC writes to oppose the Proposed Rules and recommend that they be withdrawn in full. As discussed below, HIRC's ability to evaluate this proposal was impeded by its publication alongside copious other immigration-related rulemakings with abbreviated 30-day comment periods during the late-winter holidays and during an unprecedented global pandemic, and when U.S. Covid-19 cases were spiking during the operative period.

The Public Was Not Given a Sufficient Period to Comment

"The purpose of the notice and comment requirement is to provide for meaningful public participation in the rule-making process." *Idaho Farm Bureau Federal v. Babbitt*, 58 F.3d 1392, 1404 (9th Cir. 1995). To that end, most rules "should include a comment period of not less than 60 days." Exec. Order 12866, 58 Fed. Reg. 51735 (Oct. 4, 1993). *See also* Exec. Order 13563, 76 Fed. Reg. 3821 (Jan. 21, 2011) (same).

The administration published myriad proposed and final rules undermining immigration protection and benefits in the run-up to the 2020 presidential election and during its "lame duck period," including during the Thanksgiving and winter holiday periods,[1] in separate, yet interrelated rulemakings. These included:

- *Procedures for Asylum and Bars to Asylum Eligibility*, 85 Fed. Reg. 67202 (Oct. 21, 2020), imposing a slew of new categorical bars on asylum applicants, published with only a 30-day comment period.[2] HIRC expended considerable resources as co-counsel bringing a lawsuit challenging the validity of this rule, which is currently subject to a preliminary injunction;[3]

- *Employment Authorization for Certain Classes of Aliens with Final Orders of Removal*, 85 Fed. Reg. 74196 (Nov. 19, 2020), eliminating work authorization for certain immigrants, published with only a 30-day comment period;

- *Good Cause for a Continuance in Immigration Proceedings*, 85 Fed. Reg. 75925 (Nov. 27, 2020), undercutting immigration judges' authority to manage their own dockets by granting continuance, and eliminating under most circumstances immigration judge authority to grant continuances for immigrants to secure counsel, published with a 30-day comment period that ended the same day as the instant Proposed Rules;

- *Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure*, 85 Fed. Reg. 81588 (Dec. 16, 2020), which would radically

[1] *See Pangea Legal Servs. v. DHS*, 20-CV-07721-SI, ECF 74 (N.D. Cal. Nov. 24, 2020), 32–34 (finding DOJ and DHS erred in their notice-and-comment procedures where "the comment period spanned the year-end holidays shortened the [30-day] period further still and undercut the purpose of the notice process to invite broad public comment").
[2] *See Procedures for Asylum and Bars to Asylum Eligibility*, 84 Fed. Reg. 69640 (Dec. 19, 2020) (notice of proposed rulemaking).
[3] *See Pangea Legal Servs. v. DHS*, 20-CV-07721-SI, ECF 74 (N.D. Cal. Nov. 24, 2020).

decrease the Board of Immigration Appeal's authority to consider issues or provide remedies upon appeal, and purports to eliminate "administrative closure" notwithstanding multiple contrary appellate court rulings. This rule also had a 30-day comment period;[4]

- *Procedure for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 80274 (Dec. 11, 2020), another unlawfully-promulgated, sweeping set of regulations with a 30-day comment period. This rule will, if implemented, transform the asylum process and seeks to prevent most applicants from establishing eligibility for asylum, withholding of removal, and protection under the Convention Against Torture ("CAT"). HIRC likewise expended considerable resources as co-counsel bringing a lawsuit challenging the validity of this rule;[5]

- *Procedures for Asylum and Withholding of Removal*, 85 Fed. Reg. 81698 (Dec. 16, 2020), which had a 30-day comment period that ended just two months prior to the published final rule,[6] and which, if allowed to stand, would dramatically reorder asylum procedures to the detriment of refugees and immigrants generally;

- *Security Bars and Processing*, 85 Fed. Reg. 841260 (Dec. 23, 2020), which had a 30-day comment period[7] and which, once again, would erect sweeping categorical bars to asylum, withholding of removal, and protection under CAT.

These recent rulemakings followed many other complicated and interrelated rulemakings in late 2019 and 2020 that minimized protection to immigrants and were published with shortened comment periods.[8]

Severed rulemaking of this sort is highly confusing and undermines public input, which in turn undermines public confidence. This divide-and-conquer strategy makes the agencies weaker for lack of quality public input, and violates the text and purpose of the Administrative Procedure Act ("APA").

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[4] *See Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure* 85 Fed. Reg. 52491 (Aug. 26, 2020) (notice of proposed rulemaking).

[5] *See Pangea Legal Servs.v. DHS*, 20-CV-09253-JD, ECF 1 (N.D. Cal. Dec. 21, 2020).

[6] *See Procedures for Asylum and Withholding of Removal* 85 Fed. Reg. 59692 (Sept. 23, 2020) (notice of proposed rulemaking).

[7] *See Security Bars and Processing*, 85 Fed. Reg. 41201 (July 9, 2020) (notice of proposed rulemaking).

[8] *See, e.g., Control of Communicable Diseases; Foreign Quarantine: Suspension of the Right to Introduce and Prohibition of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes*, 85 Fed. Reg. 56424 (Sept. 11, 2020) (Currently enjoined as illegal as applied to unaccompanied minors. *PJES v. Wolf*, _ F. Supp. 3d _, 2020 WL 6770508 (D.D.C. 2020)).

The current administration's policy preference for obstructing immigrants from accessing protections and benefits for which they legally qualify[9] is not a "reasoned basis" for departing from the standards Congress set forth in the APA. Indeed, as explained below, that aim violates the statutory removal adjudication scheme and international protection imperatives that Congress established for the United States.

The Proposed Rules Fail to Acknowledge, Let Alone Adequately Consider, their Impact Upon DACA and TPS Beneficiaries.

This year, the Supreme Court halted the Trump administration's effort to categorically eliminate DACA because the administration failed, *inter alia*, to adequately consider the "reliance interests" of DACA beneficiaries. *See Department of Homeland Security v. Regents of the University of California*, 140 S.Ct. 1891, 1913–51 (2020) (reversing DHS memo attempting to end DACA).

The Proposed Rules' misguided attempt to overturn *Matter of Arabally*, 21 I&N Dec. 771 (BIA 2012) and redefine "departure" for the purposes of INA § 212(a)(9)(B)(i)(II) [8 U.S.C. § 1182(a)(9)(B)(i)(II)] makes the same substantive error. Redefining "departure" to include departures authorized by grants of Advance Parole would have enormous consequences for TPS and DACA holders alike. Yet the Proposed Rules fail to even mention, let alone adequately consider, these effects.

Currently, both DACA and TPS beneficiaries may obtain permission to travel internationally through a grant of Advance Parole. By redefining "departure," the Proposed Rules would close that door for many immigrants, notwithstanding valid Advance Parole documents. Under the Proposed Rules, a "departure" would render any such immigrant who had accrued a year of "unlawful presence" inadmissible for ten years. Such immigrants will thus be functionally deprived of their grants of "Advance Parole" and will not be able to travel internationally, even to visit a dying relative or parents or children they had not seen for years.

By preventing immigrants from travelling on advanced parole, the Proposed Rule would also strip many of the ability to adjust to permanent resident status since adjustment of status requires an "inspected and admitted *or paroled*" entry into the United States, which many DACA beneficiaries may only achieve through travel pursuant Advance Parole. 8 U.S.C. § 1255(a). In so doing, the Proposed Rule could eliminate the ability of DACA recipients, among others, to obtain long-term immigration protection and resolve their removal proceedings—even where they have qualified for an immigrant visa and adjustment of status would otherwise be

[9] *See, e.g.*, Anita Kumar, POLITICO, *Behind Trump's Final Push to Limit Immigration*, https://www.politico.com/news/2020/11/30/trump-final-push-limit-immigration-438815 (Nov. 30, 2020) (discussing some recent administration efforts hostile to immigration in general).

straightforward. A natural and predictable consequence of this Proposed Rule will therefore be to exacerbate the immigration court backlog of around 1.3 million cases.[10]

Finally, the instant Proposed Rules were promulgated only by the Department of Justice and the Executive Office for Immigration Review. Yet still-binding guidance for USCIS, which adjudicates many applications for adjustment of status, adopts *Matter of Arabally*'s definition of "departure."[11] The lack of coordinated rulemaking by DHS and DOJ on such an important issue undercuts the reasonableness of this proposal.

The Proposed Rules Fail to Account for the United States' *Non-refoulement* Obligations

The Proposed Rules assert that EOIR judges retain unfettered discretionary authority to deny motions to reopen, even where an immigrant qualifies for relief on the face of their application, and even where the parties agree reopening is appropriate.[12] Federal courts, on the other hand, recognize that such discretion is limited and reverse the agency when it is abused.[13]

The Supreme Court has recognized that United States is obligated by statute and international convention alike not to deport a noncitizen where she would likely be tortured or where her life or freedom would be threatened on account of a protected ground set out in the Refugee Convention.[14] In such cases, the refoulement is prohibited. To account for all those who become eligible for asylum, withholding, and CAT protection "sur place" the statute provides a mechanism at 8 U.S.C. § 1229a(c)(7)(C)(i) allowing an immigrant "to file a motion to reopen at any time for the purpose of applying for asylum, withholding of removal, or protection under the Convention Against Torture so long as the motion is based on evidence of a substantial change in country conditions that was not previously available and could not have been presented at the prior hearing."[15]

That the Proposed Rules fail to acknowledge any legal constraint on adjudicators' allegedly unfettered discretion, and fail to even attempt to suggest safeguards that would conform to the

[10] *See Immigration Court Backlog Tool*, TRAC, https://trac.syr.edu/phptools/immigration/court_backlog/ (accessed Dec. 28, 2020).
[11] Secretary Jeh Johnson, *Directive to Provide Consistency Regarding Advance Parole*, (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_arrabally_0.pdf .
[12] *See* 85 Fed. Reg. 75949.
[13] *See, e.g.*, *Inestroza-Antonelli v. Barr*, 954 F.3d 813 (5th Cir. 2020) (reversing the Board where it abused its discretion in denying an asylum-applicant's otherwise-untimely motion to reopen based on changed country conditions in Guatemala).

[14] *See Nasrallah v. Barr*, 140 S. Ct. 1683, 1690 (2020) (Kavanaugh, J.), *INS v. Stevic*, 467 U.S. 407 (1984) (recognizing domestic *non-refoulement* obligation for refugees "more likely than not" to be persecuted because of a convention ground).

[15] *See Inestroza-Antonelli v. Barr*, 954 F.3d at 815–16.

United States' international and statutory *non-refoulement* obligations, is yet another reason to set aside this unreasoned rulemaking.

Accordingly, HIRC recommends that the Proposed Rules be vacated in full. 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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