HARVARD IMMIGRATION AND REFUGEE CLINICAL PROGRAM

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Via Federal e-Rulemaking Portal

RE: Notice of Proposed Rulemaking: Good Cause for a Continuance in Immigration Proceedings, EOIR-2020-0009-0001

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 "Good Cause for a Continuance in Immigration Proceedings" (the "Proposed Rules"), and recommends that the Proposed Rules be withdrawn in full.

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.

HIRC writes to oppose the Proposed Rules and recommend that they be withdrawn in full, for reasons including the following. 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, when U.S. Covid-19 cases were spiking across the country.

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;

- *Motions To Reopen and Reconsider; Effect of Departure; Stay of Removal*, 85 Fed. Reg. 75942 (Nov. 27, 2020), purporting to overrule agency precedent *Matter of Arabelly* and encouraging immigration judges to discretionarily-deny applications where immigrants may otherwise qualify for relief, published with only a 30-day comment period;

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

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

- *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").

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

[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).
[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).

the statutory removal adjudication scheme and international protection imperatives that Congress established for the United States.

The Proposed Rule Would Violate Constitutional and Statutory Due Process, as well as U.S. *Non-Refoulement* Obligations

The Proposed Rules greatly undermine immigration judges' authority to grant an immigrant in removal proceedings a continuance to obtain a lawyer if 30 days have passed since service of a Notice to Appear (NTA).[10] In so doing, the Proposed Rules violate due process and U.S. *non-refoulement* obligations.

It is uncontroversial that the Fifth Amendment's Due Process Clause protects an immigrant's right to counsel at her own expense in removal proceedings. *See, e.g.*, *Gjeci v. Gonzales*, 451 F.3d 416 (7th Cir. 2006); *Biwot v. Gonzales*, 403 F.3d 1094 (9th Cir. 2005); *Rios-Berrios v. INS*, 776 F.2d 859 (9th Cir. 1985). 8 U.S.C. § 1229a similarly provides that immigrants "shall have a *reasonable* opportunity to examine evidence against [her], to present evidence on [her] own behalf, and to cross-examine witnesses presented by the Government." *Id.* § 1129a(b)(4)(B) (emphasis added). Federal circuit judges have characterized immigration law as "second only to the Internal Revenue Code in complexity."[11] To give meaning to the Constitution and statute's requirements of due process, an immigrant must be afforded—*at the very minimum*—a reasonable opportunity to secure counsel. This is all the more so true given the severe trauma many asylum seekers must contend with in coming forward with their claims,[12] and the minimal familiarity immigrants will likely have with the U.S. legal system, or in some cases, legal systems in general.

Furthermore, Congress, in passing the "Foreign Affairs Reform and Restructuring Act of 1998 (FARRA) implement[ed] Article 3 of the" International Convention Against Torture. *Nasrallah v. Barr*, 140 S. Ct. 1683 (2020). Similarly, Congress bound the United States to the protection imperatives guaranteed by the 1951 Refugee Convention when it acceded to the 1967 Protocol Relating to the Status of Refugees. In *INS v. Cardoza-Fonseca*, the Supreme Court recognized that Congress enacted the Refugee Act of 1980 "to bring United State refugee law into conformance with the 1967 Protocol" and therefore the Refugee Convention. 480 U.S. 421, 436–37 (1987). Article 3 of CAT and Article 33 of the Refugee Convention **prohibit** the U.S. from returning a noncitizen to frontiers of a country where she "likely would be tortured," see *Nasrallah*, 140 S. Ct. at 1690, or where her "life or freedom would be threatened" on account of a Refugee Convention ground. *See INS v. Stevic*, 467 U.S. 407 (1984).

[10] *See* 85 Fed. Reg. at 75936.
[11] *Baltazar-Alcazar v. INS*, 386 F.3d 940, 948 (9th Cir. 2004); *see also* Hon. Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3, 8 (2008) (discussing the U.S.'s "complicated maze of immigration laws").
[12] *See* Stephen Paskey, Telling Refugee Stories: Trauma, Credibility and the Adversarial Adjudication of Claims for Asylum, 56 SANTA CLARA L. REV. 457, 487-88 (2016).

To ensure compliance with these non-refoulement guarantees, both the CAT and Refugee Convention require a minimum level of process for immigrants pursuing protection claims. Article 3 of the CAT provides that "the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."[13] Under binding domestic precedent and regulations "*all* evidence relevant to the possibility of torture *shall* be considered" when evaluating whether an immigrant qualifies for CAT relief. *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002) (en banc) (emphasis added); 8 C.F.R. § 208.16(c)(3) (same). Likewise, the UNHCR Handbook emphasizes an adjudicator evaluating a refugee's protection claim should "ensure that applicant presents his case a*s fully as possible and with all available evidence.*"[14]

Thus, by allowing, and indeed requiring, immigration judges to railroad refugees and other immigrants through removal proceedings by denying continuances that would allow immigrants to access to counsel (and adequately present their claims), the Proposed Rules would encourage the U.S. to functionally violate these treaties.

Concerns that the Proposed Rules will facilitate illegal refoulement are far from theoretical. As multiple studies conducted by Professor Ingrid Eagly & Steven Shafer document, legal representation strongly correlates to the ability of immigrants, including refugees and torture victims, to access immigration protections for which they qualify.[15]

Accordingly, HIRC recommends that this rule be vacated in full, and that the agencies focus their efforts on expanding, rather than undercutting, access to counsel for immigrants in removal proceedings.

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.

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[13] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 3, opened for signature Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), *available at* https://www.ohchr.org/en/professionalinterest/pages/cat.aspx.

[14] United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status ¶ 205 (1979, Rev. 2019) (emphasis added); *see also Cardoza Fonseca*, 480 U.S. at 438–39 ("[W]e are guided by the . . . [UNHCR] Handbook.").

[15] *See, e.g.*, Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court* (Sept. 2016) 2–3 (documenting the vastly disparate outcomes between counseled and uncounseled immigrants, and documenting detained immigrants' difficulty accessing counsel); Ingrid Eagly & Steven Shafer, *Measuring* In Absentia *Removal in Immigration Court* 168 U. PA. L. REV. 817, 860 (Mar. 2020) ("Overall, only 15% of those ordered removed *in absentia* during our study period had and attorney. By contrast, 86% of those who avoided an *in absentia* order had counsel.").

Sincerely,

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