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Submitted via https://www.regulations.gov/commenton/EOIR-2023-0001-0001

Raechel Horowitz
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RE: Comments in Support of Notice of Proposed Rulemaking entitled **Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure** (RIN: AB18; EOIR Docket No. 021–0410)

Dear Ms. Horowitz:

The National Immigrant Justice Center ("NIJC"), in collaboration with partner organizations listed below (collectively "we"), submits the following comment in support of the notice of proposed rulemaking put forth by the Department of Justice ("DOJ"), Executive Office for Immigration Review ("EOIR" or "the Department") entitled Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure ("NPRM" or "the Rule") on September 8, 2023.

Overall, we strongly support the content of this Rule and believe that it is urgently necessary to restore various substantive and due process protections that were eliminated or severely undermined in the December 2020 Rule, entitled Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 81588 (Dec. 16, 2020), which this NPRM refers to as the AA96 Final Rule.

I. Our Interest in the NPRM

The organizations submitting this comment are plaintiffs in cases challenging the AA96 Final Rule. NIJC, the Brooklyn Defender Services ("BDS"), the Florence Immigrant and Refugee Rights Project ("Florence Project"), and HIAS filed suit alongside the Catholic Legal Immigration Network ("CLINIC") in *CLINIC v. EOIR*, D.D.C. No. 1:21-cv-94, while Centro Legal and RAICES are among the plaintiffs in *Centro Legal de la Raza v. EOIR*, N.D. Cal. No. 21-cv-463. As parties to those cases, our organizations demonstrated that we would suffer irreparable harm if the AA96 Final Rule was implemented given its impact on our current and potential clients.

A. About NIJC

NIJC is dedicated to ensuring human rights protections and access to justice for immigrants, refugees, and asylum seekers. NIJC provides direct legal services to and advocates for these populations through policy reform, impact litigation, and public education. Since its founding more than three decades ago, NIJC uniquely blends individual client representation with advocacy for broad-based systemic change. Headquartered in Chicago, NIJC provides legal

services through our staff and pro bono network to more than 10,000 individuals each year, including more than 800 asylum seekers, many of whom have entered the United States by crossing the U.S.-Mexico border. These individuals have survived persecution and torture in their home countries and many dangers throughout their journey to seek safety in the United States.

NIJC's clients include indigent, Black, Brown, Indigenous, and LGBTQ asylum seekers who frequently have no avenue to seek safety but to approach the United States at the U.S.-Mexico border. We have served people forced to wait in Mexico to seek asylum in the United States under anti-asylum policies instituted by the Trump Administration. In addition to our own direct representation, NIJC provides pro se support to asylum seekers. Our experience working directly with clients and advising pro se applicants makes it clear that the vast majority of asylum seekers lack the linguistic and legal skills to navigate the U.S. asylum system alone. They often lack the financial resources to hire private counsel for purposes of pursuing asylum.

NIJC has also been involved in litigating these matters before the federal courts. For instance, in *Meza Morales v. Barr*, NIJC represented an applicant for a U visa who had been ordered removed. 973 F. 3d 656 (7th Cir. 2020). Then-Judge Coney Barrett, writing for the majority, rejected the analysis of former Attorney General Sessions in *Matter of Castro-Tum*, 27 I. & N. Dec. 271, 283 (Att'y Gen. 2018), finding administrative closure available under the regulations and sometimes necessary to ensure fair outcomes or to facilitate timely dispositions. Likewise, in *Zaragoza v. Garland*, NIJC represented a woman who faced loss of her permanent residency due to a guilty plea to leaving her child home without supervision. 52 F.4th 1006 (7th Cir. 2022). She had obtained a sentence modification prior to the decision in *Matter of Thomas and Thompson*, 27 I. & N. Dec. 674, 690 (Att'y Gen. 2019). The Seventh Circuit upheld the merits of *Thomas*, but found that it could not be applied retroactively. NIJC's involvement in these cases informs specific and detailed suggestions below.

B. About Brooklyn Defenders Services

BDS is a public defense office in Brooklyn, New York, that provides multi-disciplinary and client-centered criminal, family, and immigration defense, and civil legal services, along with social work and advocacy support. BDS represents low-income people in nearly 22,000 criminal, family, civil, and immigration proceedings each year. Since 2009, BDS has counseled, advised, or represented more than 16,000 clients in immigration matters, including deportation defense, affirmative applications, advisals, and immigration consequence consultations in Brooklyn's criminal court system.

About a quarter of BDS' criminal defense clients are foreign-born, roughly half of whom are not naturalized citizens and therefore are at risk of losing the opportunity to obtain lawful immigration status as a result of criminal or family defense cases. Our criminal immigration specialists provide support and expertise on thousands of such cases. In addition, BDS is one of three New York Immigrant Family Unity Project ("NYIFUP") providers and has represented more than 1,700 people in detained deportation proceedings since the inception of the program in 2013. BDS represents noncitizens in non-detained removal proceedings in New York's immigration courts, in petitions for review before the U.S. Circuit Court of Appeals for the Second and Third Circuits, and in writs of mandamus and habeas corpus in U.S. district courts.

C. About the Florence Project

The Florence Project is a 501(c)(3) non-profit organization that provides free legal and social services to the thousands of adults and children detained in immigration custody in Arizona on any given day. The Florence Project was founded in 1989 to provide free legal services to asylum seekers and other migrants in a remote immigration detention center in Florence, Arizona where people had no meaningful access to counsel. We have expanded significantly since that time and now provide free legal and social services to thousands of detained adults and unaccompanied children throughout Arizona. This includes providing services to thousands of people seeking asylum, withholding of removal, and Convention Against Torture protections each year, including hundreds of individuals who are going through the expedited removal credible fear or a reasonable fear screening process.

Additionally, in 2017, the Florence Project partnered with the Kino Border Initiative ("KBI"), a binational organization, to provide legal services to asylum seekers at the U.S.-Mexico border. Through that partnership, the Florence Project's Border Action Team now provides regular group and individual legal orientations and representation to asylum seekers in Heroica Nogales, Sonora, Mexico (hereafter referred to as Nogales, Sonora), just across the border from the Port of Entry into Nogales, Arizona. As the only 501(c)(3) non-profit organization in Arizona dedicated to providing free legal and social services to people in immigration detention, our vision is to ensure that every person facing removal proceedings has access to counsel, understands their rights under the law, and is treated fairly and humanely.

In 2022, the Florence Project provided legal case assistance, legal orientations, and legal educational packets to over 11,500 adults detained in Arizona. Our services include legal orientation services to detained pro se asylum seekers in Eloy and Florence to empower them to represent themselves in bond and removal proceedings. In 2022, our attorneys also represented 220 adults before the EOIR, including 117 people who were appointed counsel after an Immigration Judge found them incompetent to represent themselves pursuant to Franco-Gonzalez v. Holder. Our Border Action Team provided legal orientations, consultations, and other services to 13,731 people passing through KBI's humanitarian aid center in Nogales, Mexico. Finally, in 2022, our Social Service Team provided lifesaving social services to 552 people.

D. About HIAS

HIAS's mission is to support and protect refugees and asylum seekers when and where they need help most. HIAS is a Jewish humanitarian organization that works in the United States and 21 other countries, providing vital services to refugees and asylum seekers of all faiths so they can rebuild their lives. Alongside the Jewish community, HIAS also advocates for the rights of forcibly displaced people globally. Over our extensive history, HIAS has confronted—and overcome—formidable challenges facing refugees and asylum seekers. Today, HIAS is a leader with the expertise, partnerships, and values necessary to respond to the humanitarian situation along the U.S. southern border. HIAS operations reach along the migration route from Venezuela through South America and Central America, as well as Mexico.

HIAS provides legal services and support, including free legal representation for unaccompanied children, asylum seekers, survivors of domestic violence, and immigrants pursuing other forms of humanitarian or family-based relief. In addition, HIAS provides asylum seekers with knowledge of their rights and responsibilities, assist them in preparing asylum claims, and help them secure access to health, employment, and social services. This work is driven by HIAS's commitment to the fundamental rights and core needs of asylum seekers and other forcibly displaced people as they navigate complex legal systems and work to rebuild their lives in a new country.

E. About Centro Legal de la Raza

Founded in 1969, Centro Legal de la Raza is a civil rights legal services agency protecting and advancing the rights of low-income, immigrant, Black, and Latinx communities through bilingual legal representation, education, and advocacy. We are one of the largest providers of immigration court representation to asylum seekers in Northern and Central California. As a leading removal defense provider nationally, and one of California's largest providers of of free legal services to asylum seekers, the fiscal lead for the Alameda County Immigration and Legal Partnership (ACIELP), and a member of the Vera Institute of Justice SAFE Network, Centro Legal de la Raza is very concerned about political attacks rooted in discrimination and racial animus that threaten the sanctity of our human rights obligations and guiding principles. Centro Legal de la Raza is uniquely positioned to comment on the Departments' Proposed Rule regarding changes to appellate procedures and finality.

F. About RAICES

RAICES, formally known as the Refugee and Immigrant Center for Education and Legal Services, is a 501(c)3 not-for-profit organization that models a welcoming nation by fighting for the freedoms of immigrant, refugee, and asylum-seeking families. Founded in San Antonio in 1986, RAICES is now the largest immigration legal services provider in Texas, and pairs direct legal representation and social services case management with impact litigation and advocacy focused on expanding permanent protections for immigrants and changing the narrative around immigration in the U.S. In addition to San Antonio headquarters, RAICES maintains a presence in Austin, Corpus Christi, Dallas, Fort Worth, Houston, and Laredo—and makes immigration legal services accessible in rural communities throughout the state. Each year, the not-for-profit supports more than 700 parents and children through expansive refugee resettlement programming; provides legal rights presentations and screenings in a dozen-plus shelters and select emergency facilities for unaccompanied minors; and opens approximately 10,000 affirmative and removal defense direct representation cases, representing individuals in both detained and non-detained proceedings. In addition to advocating for access to universal representation, RAICES defends due process rights in immigration court proceedings, thus giving rise to the organization's interest in this matter.

II. Organizational Comments on Specific Sections of the Department's Rule

As stated prior, our organizations generally support the changes proposed in this Rule. In this comment we (A) note that briefing changes proposed in the NPRM are welcome, but propose discrete, additional changes; (B) support the restoration of administrative closure and respond to the Department's solicitation as to the specific factors to be considered; (C) provide specific

comments to improve the Department's proposal on termination and dismissals; (D) view the Department's proposed restoration of *sua sponte* reopening as critical; (E) support the NPRM's removal of fact-finding authority by the Board; (F) see the value of permitting the Board to grant respondents voluntary departure, but suggest additional safeguards; (G) support codifying the BIA's remand authority on the basis of new evidence; (H) support codifying the BIA's remand authority on the basis of errors of fact or law; (I) generally support BIA remands to permit respondents to obtain biometrics; (J) welcome removal of adjudication timelines that favor speed over fairness; (K) strongly support removal of the EOIR Director's authority to adjudicate individual cases; (L) agree with the Department's elimination of the AA96's ill-named "quality assurance" provision; and (M) support the Department's restored and streamlined process for forwarding records of proceedings.

A. Briefing Schedule Changes at the Board of Immigration Appeals

We welcome the change in the NPRM that reverts briefing schedules to the system that existed prior to Rule AA96. The changes created by AA96 would have substantially harmed the ability of noncitizens, particularly pro se or previously pro se litigants, to present their claims to the BIA. While we welcome this reversion to the status quo, we also urge the agency to consider some additional, modest changes.

First, we suggest that the Agency set the opening briefing schedule to 40 days instead of 21. This change would put briefing before the BIA on a timeline that is parallel to the default under the Federal Rules of Appellate Procedure and would afford a more meaningful timeline for noncitizens to draft and present their arguments. For most cases, there is a substantial delay between the filing of the briefs and the issuance of a decision by the Board. This time lag means that allowing the parties additional time to write their briefs will cause no harm to the Agency in terms of its adjudication timelines. To the contrary, it will increase the odds that litigants who were pro se before the immigration court are able to obtain counsel for an appeal, and it will allow all parties a more meaningful opportunity to provide quality briefing to the Board.

Second, while we welcome the reversion to staggered briefing in non-detained cases, we believe staggered briefing would also be beneficial in detained cases. Without staggered briefing, the parties are required to guess as to the arguments that opposing counsel might make and endeavor to respond affirmatively. Staggered briefing is particularly important, if the BIA retains its current stance of disfavoring reply briefs, as articulated in the BIA Practice Manual § 4.6(h). Under that section, a party wishing to file a reply brief must file a motion that "asserts surprise at the assertions of the other party" and respond to those assertions specifically in order to have a reply brief accepted. If the Department does not wish to allow for staggered briefing in the detained context due to the added expediency with which those cases are adjudicated, we propose in the alternative that the Department adds regulatory text expressly authorizing reply briefs as a matter of right within the relevant timeframe.

Third and finally, while we appreciate that the Rule retains the ability to seek and obtain more than one extension of the briefing timeline for a period of up to 90 days, we urge the Department to incorporate provisions into the regulation that ensure that this time can actually be offered in a meaningful way. Current practice precludes that in two ways. First, the BIA Practice Manual makes it clear that extensions are not automatic and that parties remain subject to the deadlines

absent the grant of an extension. *See* BIA Practice Manual §§ 4.7(c)(i)(A), (B). In our experience, however, extensions are often granted only on the eve of the filing deadline. This practice precludes respondents from the ability to avail themselves of the extension in a meaningful way, and forces organizations to rush and meet the original filing deadline despite needing the extension. Second, the BIA grants extensions of 21 days only, regardless of the time sought, and permits second extensions "only in rare circumstances." *Id.* Because of these sub-regulatory policies, the regulatory 90-day timeline is not actually available to litigants before the BIA. To account for these issues, the undersigned recommend additional regulatory text that makes it clear that second extensions may be entertained for good cause, particularly when they are sought by pro se or previously pro se litigants. The undersigned also recommend utilizing the new ECAS system to streamline the granting of first-time extension requests, as is the practice in numerous Federal Courts of Appeals.

We seek these additional changes because our view is that more time promotes fairness in the system and does not contribute to the delays in adjudication timelines. As the Department itself acknowledges, "[t]he noncitizen is entitled to certain rights under the Act, including the right to have legal representation before the Board (at no expense to the government)." 88 Fed. Reg. at 62,254. While this proposed rule eliminates some of the most egregious timing issues, the briefing schedule that has been in place for many years now has likewise adversely "impact[ed] a noncitizen's ability to adequately prepare their case for appeal or secure legal representation to do so" *Id.* at 62,254. The requested changes are modest, would have minimal impact on operations or adjudication timelines, and would substantially enhance fairness of the appellate process before the BIA.

B. Administrative Closure Authority

We support the Department's proposed restoration of administrative closure broadly in alignment with *Matter of Avetisyan*, 25 I&N 164 (BIA 2010), as well as the Department's representation that this policy will serve EOIR's dual interest in speed and fairness. 88 Fed. Reg. at 62,257. In our organizations' experience, administrative closure is a crucial tool at immigration judges' disposal for the efficient administration of removal proceedings in a variety of matters, especially in cases where respondents face bifurcated proceedings where they pursue relief before U.S. Citizenship and Immigration Services ("USCIS") that is pivotal to the outcome of their removal cases.

Our organizations regularly represent individuals seeking collateral relief before USCIS or other courts/agencies, including children and youth pursuing Special Immigrant Juvenile Status ("SIJS"); unaccompanied children pursuing asylum before USCIS's Asylum Office; individuals awaiting final judgment on a pending charge in state court or seeking post-conviction relief on a charge directly pertinent to their placement in removal proceedings or their inadmissibility or deportability charges; crime or domestic violence survivors pursuing U visas or relief under the Violence Against Women Act ("VAWA"); relatives of U.S. and lawful permanent residents seeking status via I-130 family petitions and/or provisional unlawful presence waivers; and nationals who qualify for Temporary Protected Status ("TPS"). In many cases, and as outlined in the NPRM, Congress required these individuals to proceed before USCIS first, precluding them from seeking relief before the immigration judge ("IJ") in the first instance. When these individuals are subject to removal proceedings, they fall under the jurisdiction of two or more

agencies—EOIR, USCIS, and/or a state court. USCIS's work complements the work of IJs, who can use administrative closure to prioritize cases where relief is under EOIR's purview while others proceed before USCIS. Similarly, cases that require proceedings in state court, such as children or youth pursuing SIJS juvenile court orders or individuals seeking post-conviction relief, are frequently directly pertinent to the outcome of respondents' removal proceedings. Nevertheless, AA96 sought to strip IJs of this crucial docket management tool and ignore the longstanding benefit judges gain from permitting respondents to obtain a decision from USCIS that is often outcome-determinative for their removal proceedings. 88 Fed. Reg. at 62,258.

We witnessed *Matter of Castro-Tum* exert undue pressure on IJs to disregard pending applications before the Department's sister adjudicating agency, USCIS, and order our clients removed. Applicants do not control which agency presides over their relief, or the speed with which such agency can adjudicate their applications for relief. Failing to administratively close their proceedings effectively rushes them towards removal for reasons they cannot control—namely the U.S. government's decision to have some applications for relief decided by USCIS, while others are within the jurisdiction of immigration judges. We appreciate the Departments' recognition that *Castro-Tum* effectively deprived respondents' right to fair proceedings and disparately impacts vulnerable members of U.S. families and communities.

For example, our organizations have seen IJs force crime survivors who are eligible for U visas to proceed and receive removal orders under the premise that they could seek such relief outside the United States. Such decisions blatantly upend respondents' access to evidence, witnesses, and counsel and risk upending investigations and prosecutions in the United States necessary for their application for U visas. In other cases, such as children with SIJS eligibility, premature deportations can mean that children are thoroughly unable to seek relief, which requires physical presence in the United States, a judicial finding by a juvenile court in the United States, and continuous jurisdiction by the U.S. juvenile court through USCIS adjudication of the SIJS petition *and* adjustment of status. 8 U.S.C. § 1101(J); 8 C.F.R. § 204.11(c)(5); 8 C.F.R. § 205.1(a)(3)(iv)(C). In both examples, presence in the United States is a matter of fundamental fairness for U visa and SIJS eligible individuals. As such, we support clear and unequivocal restoration of immigration judges' authority to order administrative closure.

We additionally support the Department's proposed changes of "necessary or appropriate" and "disposition or alternative resolution" to the regulatory authority of IJs to grant administrative closure, as well as the non-exclusive approach to the types of situations that may warrant the use of this docket management tool. 8 C.F.R. §§ 1003.1(d)(1)(ii) (proposed), 1003.10(b) (proposed). Immigration relief is an ever-changing landscape for parties and adjudicators. These proposed changes acknowledge this daily reality and afford IJs the flexibility to administratively close on a case-by-case basis.

That said, we do not see a justification for importing *Matter of Hashmi*'s "unusual, clearly identified, and supported reasons" where there is no opposition to administrative closure from the parties. *Matter of Hashmi*, 24 I&N Dec. 785, 791 (BIA 2009); *see* 88 Fed. Reg. at 62,259. Despite the Department's assertion that this standard would result in the denial of motions only in rare circumstances, we believe this provision would empower IJs to improperly keep respondents at risk of imminent removal and would provide some adjudicators who are averse to

the Attorney General's overruling of *Castro-Tum* an avenue to justify denial of administrative closure over both parties' will. A simpler rule with an unequivocal "shall" in cases of joint or unopposed motions would avert this scenario.

Where only one party seeks administrative closure, it is important for IJs to duly weigh any opposition asserted by the other. Administrative closure is frequently, as the Department notes, a tool for prosecutorial discretion that warrants close attention. However, we would urge the Department to clarify that DHS's desire to administratively close a case is no more dispositive than a respondent's desire to do so. We find *Matter of G-N-C-*, 22 I&N Dec. 281, 284-85 (BIA 1998) instructive: "neither an Immigration Judge nor the Board may abdicate the responsibility to exercise independent judgment and discretion in a case by permitting a party's opposition to act as an absolute bar to administrative closure of that case when circumstances otherwise warrant such action." Much as one party's unilateral opposition should not be dispositive, neither should one party's unilateral support for administrative closure.

The Department's proposal to apply the threshold of a "persuasive reason" put forth by the respondent in opposition to administrative closure would sensibly protect their right to remain before the IJ if they so desire. 88 Fed. Reg. at 62,261 (citing *Matter of W-Y-U-*, 27 I&N Dec. 17, 20 n.5 (BIA 2017)). For example, this could protect unaccompanied children awaiting an imminent decision from USCIS's Asylum Office from having to move to recalendar their cases and potentially wait for years before they can present their claim before the IJ, in the case of USCIS referral. While DHS may find that administrative closure would save resources in the short term, the respondent in this case would provide a persuasive reason to keep the case on the IJ's active docket so as to move swiftly towards resolution of any asylum, withholding, or relief under the Convention Against Torture ("CAT") for all parties involved.

Additionally, we note that the non-exclusive list of seven factors the Department proposes to consider could be simplified or amended in the following ways:

- "Any requirement that a case be administratively closed for a petition, application, or other action to be filed with, or granted by, DHS": We note and appreciate the Department's reminder that pursuing collateral relief before USCIS is not a prerequisite for administrative closure. 88 Fed. Reg. at 62,260. Furthermore, administrative closure may be warranted in cases where a respondent is pursuing collateral relief before an agency other than USCIS—such as vacating a criminal conviction in state court pertinent to inadmissibility or deportability charges, or pursuing a juvenile court order pertinent to SIJS eligibility. However, respondents, adjudicators, and DHS may omit these scenarios from consideration given the specificity of this new factor. Importantly, this newly proposed factor also correlates USCIS petitions with the "requirement" of administrative closure in order for those petitions to proceed. That raises the bar for respondents to obtain these administrative closures and injects more uncertainty in their process. We would propose instead that the agency consider "the relevance of a petition, application, or other action outside of the Department to a respondent's claim for relief or defense against removal."
- Likelihood of success: In our organization's experience, this factor, when applied, often results in respondents having to present their claims twice in full: once to the IJ merely so they can then present it again to USCIS or the presiding court. This factor therefore

undercuts much of the efficiency that administrative closure is intended to provide. Since much of immigration relief involves discretion, this factor can also invite IJs to make decisions against administrative closure that ultimately preclude discretionary review by USCIS, under whose jurisdiction the petition or application resides. Administrative closure should afford that individual the opportunity to present their full claim, including any pertinent waiver, to the appropriate court or agency—such as USCIS for adjudication. However, it is neither efficient nor fair for IJs, who might have little experience with the type of relief at issue, to test their claim in lieu of the agency where the respondent is seeking collateral relief. We would thus propose to amend likelihood of success to "likelihood of eligibility" to clarify that the scope of this review should be whether the applicant meets prima facie requirements—an objective metric already required of IJs under *Hashmi*—without supplanting the authority of the court or agency presiding over the collateral claim.

- Anticipated duration: For many respondents, especially pro se ones, this is an especially challenging factor. Respondents rarely control the timeline of their collateral relief. Few courts or agencies, including USCIS, are reliable predictors of the duration of their collateral claim. As a result, we recommend omitting this factor.
- Responsibility of either party, if any, in contributing to any current or anticipated delay: Our organizations have seen this *Avetisyan* requirement used adversely against respondents who are frequently accused of lack of diligence. However, delayed collateral proceedings rarely reflect lack of diligence and instead reflect the backlog that the particular court or agency faces, their adjudication or processing times, or barriers respondents face such as access to counsel. For example, this factor has been used to fault respondents for adjudicatory delays due to requests for evidence by USCIS—a common feature of administrative filings with the agency and one that does not necessarily reflect an inadequate filing from the noncitizen. As such, we recommend omitting this factor as it risks shifting blame to the respondent for bureaucratic or administrative delays or decisions they rarely control.

Finally in response to the Department's inquiry, we do not view written motions for administrative closure from either party as a necessity for administrative closure. 88 Fed. Reg. at 62,262. Oral motions can suffice, so long as the IJ makes findings on the record as to the grounds for granting or denying such motion. Where respondents are unrepresented, IJs have a duty to develop the record and inquire about all forms of relief, some of which may require administrative closure in order for the noncitizen to pursue them. Such cases make it necessary for IJs not to require written motions in each case, as many respondents may be unaware that they could move the court in this fashion. However, we do not believe that *sua sponte* administrative closures (from the IJ or the Board) without granting parties the opportunity to weigh in will comply with *Matter of G-N-C-*. Where the IJ or the Board considers the value of administrative closure, proper procedure would require granting parties a chance to present their view of the impact of such closure on their interests and/or claim.

C. Termination and Dismissal

We support the Department's proposal to afford mandatory and discretionary grounds of termination. We further note with appreciation the recognition that the specific circumstances or

health of respondents may require IJs to terminate as a matter of fundamental fairness. 88 Fed. Reg. at 62,263. In our experience representing noncitizens with particular vulnerability, including individuals found to be incompetent under *Matter of M-A-M-*, 25 I&N Dec. 474, 483 (BIA 2011), DHS often persuades IJs to proceed at all costs—even where no safeguard can mitigate the due process concerns the respondent faces. We are thus grateful that the Department seeks to formalize termination as a required tool to protect respondents from unfair proceedings. We further encourage the Department to ensure that terminations are *not* automatically without prejudice, as this strips respondents of much-needed finality.

Finally, we raise three points regarding termination: (1) a precedential conflict that unduly harms noncitizens seeking naturalization from termination; (2) a recommendation against using USCIS filings as a prerequisite to termination; and (3) a clarification that noncitizens must be afforded the opportunity to oppose the termination or dismissal of their claim.

1. The Department should ensure IJs have authority to terminate removal proceedings based on prima facie eligibility for naturalization.

The Department proposes to remove and reserve 8 C.F.R. § 1239.2(f), because it would be duplicative of 8 C.F.R. § 1003.1(m)(1)(ii)(B) (proposed). 88 Fed. Reg. at 62,265. This approach would appear sensible but for the BIA's inconsistent positions regarding how and whether it should assess prima facie eligibility for applications in the jurisdiction of USCIS. In the context of I-130 petitions, the Board has focused on the prima facie merits of the visa petition. *See Matter of Garcia*, 16 I&N Dec. 653, 656 (BIA 1978). The *Garcia* approach has generally been approved by federal courts. *Onyeme v. INS*, 146 F.3d 227, 233 (4th Cir. 1998); *see also Pedreros v. Keisler*, 503 F.3d 162, 166 (2d Cir. 2007); *Hassan v. INS*, 110 F.3d 490 (7th Cir. 1997); *Oluyemi v. INS*, 902 F.2d 1032, 1034 (1st Cir. 1990). Similarly, in the context of U visas, though it is undoubtedly solely in the authority of USCIS to adjudicate U visas, the Board also considers prima facie eligibility. *Hashmi*, 24 I&N Dec. 785. Again, the Courts have approved that approach, finding that the Board can and should assess prima facie case for relief with USCIS, notwithstanding that the immigration courts and the BIA lack authority over those applications. *See Quecheluno v. Garland*, 9 F.4th 585, 588–89 (8th Cir. 2021); *Guerra Rocha v. Barr*, 951 F.3d 848 (7th Cir. 2020); *Benitez v. Wilkinson*, 987 F.3d 46 (1st Cir. 2021).

By contrast, in the naturalization context, the Board has found that immigration judges are not capable of deciding whether a noncitizen actually is prima facie eligible for that relief. *See Matter of Cruz*, 15 I. & N. Dec. 236 (BIA 1975). The Board recently reaffirmed *Cruz* in *Matter of Acosta Hidalgo*, 24 I. & N. Dec. 103 (BIA 2007). That precedent leaves IJs unable to determine prima facie eligibility for naturalization, instead requiring an "affirmative communication" from USCIS in order for an IJ to terminate proceedings. *Acosta Hidalgo*, 24 I&N at 106.

We do not agree with *Cruz* and *Acosta Hidalgo*'s restriction of IJs' authority to terminate proceedings. The conclusion that IJs should not assess prima facie eligibility for naturalization simply does not follow from the fact of USCIS jurisdiction. If it did, IJs would not be able to assess prima facie eligibility for adjustment of status, visa petitions, or U visas. Moreover, as Board Member Filppu noted in dissent in *Acosta Hidalgo*, this rule effectively gives USCIS veto

power over termination, which it can exercise simply by being silent. 24 I&N at 109. Third, *Cruz* and *Acosta Hidalgo* are inefficient and tend to defeat the purpose of the regulation. Congress granted USCIS sole authority to adjudicate naturalization applications. 8 U.S.C. § 1421(a); *Poursina v. United States Citizenship & Immigr. Servs.*, 936 F.3d 868, 870 n.1 (9th Cir. 2019) (on Congress transferring attorney from Attorney General to USCIS). USCIS has chronic backlogs, with many thousands of applications to adjudicate daily. During the normal course of its application review, USCIS's caseload precludes the agency from adjudicating cases before many months or years pass. Expecting the agency to issue an affirmative communication of prima facie eligibility all but guarantees that individuals eligible for naturalization will be ordered removed unjustly, simply because Board precedent prevents termination.

This has also led to a three-way circuit split regarding federal court authority to review these USCIS decisions. Some courts find that they lack jurisdiction to consider naturalization applications while there are pending removal proceedings. *Barnes v. Holder*, 625 F.3d 801 (4th Cir. 2010); *Saba-Bakare v. Chertoff*, 507 F.3d 337 (5th Cir. 2007). Other courts find that they have jurisdiction, but they cannot grant effective relief. *Saba-Bakare v. Chertoff*, 507 F.3d 337, 341 (5th Cir. 2007); *Ajlani v. Chertoff*, 545 F.3d 229 (2d Cir. 2008). Still other circuits find themselves able to review and grant relief, including declaratory relief. *Yith v. Nielsen*, 881 F.3d 1155 (9th Cir. 2018); *see also generally Klene v. Napolitano*, 697 F.3d 666 (7th Cir. 2012); *Aljabri v. Holder*, 745 F.3d 816 (7th Cir. 2014); *Gonzalez v. Sec'y of DHS*, 678 F.3d 254 (3d Cir. 2012). The Department should clarify that immigration judges may determine prima facie eligibility without waiting for or requiring a communication from USCIS. This would be consistent with BIA case law in most areas, would resolve a circuit split, and would ensure that respondents seeking naturalization would not face undue burdens in seeking termination.

2. Filings with USCIS should not be a prerequisite to termination.

The Department should not require evidence of USCIS filings as an evidentiary prerequisite to termination. Prima facie eligibility is not contingent on filing with USCIS, but underlying evidence that an individual meets the grounds of eligibility. However, USCIS filings are a labor-intensive task that may take multiple months for respondents and their attorneys. Requiring proof of filing with USCIS will keep cases eligible for termination on IJs' dockets unnecessarily, while risking rushed or incomplete filings with USCIS simply to reach termination within the court's schedule. Since a filing is not equivalent to prima facie eligibility, we believe requiring one for termination will unnecessarily delay and burden respondents.

3. The Department should ensure all respondents have an opportunity to oppose termination or dismissal of their proceedings.

The Department seeks comments on proposed 8 C.F.R. § 1239.2(b), which states that IJs or the BIA may dismiss proceedings upon a motion by DHS. Here, too, as in the case of administrative closure, we find *Matter of G-N-C-* instructive. 22 I&N Dec. at 284 (noting that the regulatory language "marks a clear boundary between the time prior to commencement of proceedings, where a [DHS] officer has decisive power to cancel proceedings, and the time following commencement, where the . . . officer merely has the privilege to move for dismissal of proceedings."). We urge the Department to ensure that IJs and the Board consider any opposition

from the respondent to dismissal and not treat DHS' motion to dismiss as a fait accompli. Instead, IJs and the Board must treat DHS as any other movant and consider both parties' argument prior to termination.

Similar to our comments in the prior section, our organizations do not support *sua sponte* termination without granting parties the opportunity to present their case in opposition to such termination. For example, a *sua sponte* termination could deprive respondents of the ability to pursue relief before the immigration court on the basis that the respondent could seek it before USCIS. However, respondents may await a decision from USCIS for years and lose their chance at speedier resolution of their claim while in proceedings.

D. Sua Sponte Reopening or Reconsideration and Self-Certification

We strongly support the restoration in 8 C.F.R. 1003.2(a) of the BIA's authority to *sua sponte* reopen cases. That authority serves as a critical safeguard without which just results could not be achieved in a range of situations. As the NPRM notes, one such situation involves a change in law: if a noncitizen is denied relief and the law changes in a way that renders the noncitizen eligible for relief, *sua sponte* reopening is an appropriate response. *Matter of X-G-W-*, 22 I&N Dec. 71 (BIA 1998). This remains true no matter whether the change in law comes from a judicial gloss on governing law or from the vacatur or rescission of regulations limiting eligibility for relief. Moreover, given the time and number limitations on a noncitizen's ability to request reopening, *sua sponte* reopening will often be the *only* way to remedy the denial of relief on grounds that are no longer valid.

Sua sponte reopening is also critical in other situations. These include cases in which a noncitizen has received ineffective assistance of counsel; new facts emerge that bear on a noncitizen's application for relief; situations in which a noncitizen with a removal order receives immigration status from USCIS, *see* 88 Fed. Reg. at 62,266; and cases in which a noncitizen has received an *in absentia* order through no fault of their own. In all of these situations, reopening is appropriate, but the time and number limitations on statutory motions to reopen mean that *sua sponte* reopening is the only way for EOIR to take account of the relevant change absent ICE joinder. Moreover, as the NPRM notes, there is "no evidence that immigration judges or the Board routinely used *sua sponte* authority to reopen cases in which a motion to reopen would have been time- or number-barred without considering whether the 'exceptional circumstances' standard was met." 88 Fed. Reg. at 62,266.

To take just one example, NIJC client Erick[1] fled to the United States as an unaccompanied child and was placed in the custody of the Office of Refugee Resettlement (ORR). ORR released him to the care of a cousin, but his cousin abused and neglected Erick before kicking him out of the house. Homeless and 16 years old, Erick was able to find a home with another relative in a different state. After moving, however, Erick lacked the resources and information to change venue or travel to Florida, where his case was previously docketed. An IJ ordered Erick's removal *in absentia* in early 2019. Later, Erick was detained and transferred back to ORR custody where he learned for the first time of his removal order. Erick, through his NIJC counsel,

[1] Pseudonym used to protect confidentiality.

filed a motion to reopen so that Erick could seek asylum. The IJ denied the motion without addressing the arguments presented. On appeal, the BIA properly exercised its *sua sponte* authority to reopen the case, enabling Erick to seek asylum.

We also welcome the restoration of the BIA's authority to certify cases to itself under 8 C.F.R. 1003.1(c). This authority is especially important given that the deadline for filing an appeal with the BIA is not jurisdictional and that the prevalence of pro se litigants in immigration proceedings frequently combine to cause unintentionally missed deadlines.

As a means of increasing efficiency and forestalling the need to use the BIA's self-certification and *sua sponte* reopening authorities to remedy filings that arrive late, we recommend instituting a mailbox rule for all BIA pleadings, briefs, and other papers. A rule that timely mailing of a document equates to timely filing would eliminate the possibility of delays or other mail issues, especially for *pro se* and detained respondents. Indeed, given that all new counseled cases use the ECAS system, in which filing is instantaneous, a mailbox rule is necessary to prevent respondents without ECAS access from being at a significant time disadvantage when compared to other respondents. A mailbox rule would also bring the BIA in line with the federal courts.

Finally, we suggest that the Department consider renaming this form of reopening. Various courts have commented that sua sponte reopening seems a misnomer given that it is generally at the suggestion of one of both parties. *Cordova-Soto v. Holder*, 732 F.3d 789, 791 (7th Cir. 2013) ("A request for sua sponte reopening is an oxymoron, but the odd concept seems to be well entrenched in immigration law."). We suggest that "reopening in the interests of justice" would be a more appropriate title.

E. Board Findings of Fact — Administrative Notice

We support the proposal to remove the provisions in 8 C.F.R. 1003.1(d)(3)(iv) giving the BIA the authority to take administrative notice of certain materials. That authority has no basis in either the INA or prior regulations; indeed, it directly contradicts preexisting regulations making clear that immigration courts are the primary finders of fact. *See* 8 C.F.R. 1003.1(d)(3). It also has no basis in the practice of federal courts, which only very rarely accept facts outside the record as true. Further, the provision improperly and incorrectly treats government documents as beyond reasonable dispute, even though the deficiencies in those documents are well recognized. *See, e.g.*, *Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000) (State Department reports); Am. Immigration Council, *Deportations in the Dark*, https://www.americanimmigrationcouncil.org/research/deportations-dark (DHS statements). The NPRM is thus correct to note that the provision "invite[s] impermissible factfinding." 88 Fed. Reg. at 62,266.

F. Board Findings of Fact—Voluntary Departure

Given the other changes proposed by the NPRM, we do not, as a general matter, oppose the proposal to preserve the BIA's ability to issue orders of voluntary departure in many cases. We support the proposed change that would reinstate remands for voluntary departure where, for instance, the immigration court has not yet ruled on outstanding requests for relief. *See* 88 Fed. Reg. at 62,267. We also acknowledge that there are adjudicative efficiencies to eliminating remands for voluntary departure in many other circumstances. *See id.*

That said, the shift of this authority to the BIA has created problems that should be remedied in this Rule. The major issue is that of notice. As an appellate court that otherwise lacks direct contact with petitioners, problems with the service of BIA opinions and orders are routine—even when a noncitizen dutifully updates their address with EOIR. The Department should thus create procedural mechanisms to ensure that *all* change-of-address forms are promptly processed and applied throughout EOIR's systems. The Department should also begin the process of coordinating with DHS to create a single change-of-address form for ICE, USCIS, and EOIR.

Further, 8 C.F.R. § 1240.26(k)(4) provides only 10 days of a voluntary departure order for a noncitizen to post bond—and that short period starts running when the BIA *issues* the order, not when the noncitizen receives it, or even when the BIA mails it. In light of mailing delays and service problems, this period is wholly inadequate to consult with counsel and procure the money to post bond, especially given that the same regulation draws a conclusive presumption that a noncitizen is rejecting voluntary departure. To ensure equity and minimize the number of presumptions drawn simply because a noncitizen did not timely receive an order, we ask that the final rule extend this period to 30 days.

G. Board Remand Authority

We support the proposal to remove the portions of 8 C.F.R. § 1003.1(d)(3) and 8 C.F.R. § 1003.1(d)(7) that stripped the BIA of its ability to remand cases on the basis of new evidence. Those provisions irrationally required noncitizens to predict, and preemptively introduce evidence to rebut, all errors that an IJ and the BIA might make. They also removed strong incentives for IJs to comply with their duty to develop the record, especially in cases with *pro se* respondents. The removal of remands for new evidence would inevitably create both situations in which noncitizens suffered illegal *refoulement* because of changed country conditions and would also severely undermine the ability of noncitizens with psychiatric conditions or cognitive limitations to show that an IJ had not taken appropriate precautions under *Matter of M-A-M-*. The NPRM correctly notes that these provisions raise serious "fairness concerns," both because they bar remands sought by the noncitizen, but *not* remands sought by DHS, and because they would create situations in which noncitizens with meritorious claims based on new evidence would have no avenue to present those claims. 88 Fed. Reg. at 62,268.

We likewise support the proposal to remove the limitations on the scope of remands from the BIA that had been imposed by the AA96 Final Rule. As the NPRM notes, 88 Fed. Reg. at 62,268, those limitations create inefficiencies by forcing issues that could otherwise be disposed of easily on remand to be decided on motions to reopen or petitions for review in federal court.

H. Board Remand Authority—Errors in Fact or Law

For similar reasons, we support the NPRM's proposal to remove many of the restrictions on the BIA's ability to remand for changes in facts or the law that were imposed by the Final AA96 Rule and codified in 8 CFR 1003.1(d)(7).

I. Background Check

We support the NPRM's proposal to amend 8 C.F.R. 1003.1(d)(6)(iii) to stop automatically treating missed background-check appointments as abandonment of an application. Although we do not oppose the BIA's continued ability to issue background-check orders in principle, we reiterate that service and notice issues are rife at the BIA and that the agencies thus should overhaul and formalize their internal processes for ensuring that orders reach noncitizens and their counsel.

J. Adjudication Timelines

We support the removal of most of the internal adjudication timelines that were added to 8 C.F.R. 1003.1(e)(1) by the AA96 Final Rule. We acknowledge that the BIA is slow in issuing opinions and encourage it to proceed more speedily wherever possible. But speed cannot come at the cost of justice, and the application of those deadlines would prevent the BIA from giving sufficient attention to complicated cases and issues of general importance. It is therefore entirely appropriate to "giv[e] the Board appropriate flexibility to set internal case management deadlines based on the particular circumstances of the cases at issue." 88 Fed. Reg. at 62,270.

K. Director's Authority to Issue Decisions

We strongly support the proposal to remove the authority of the EOIR Director to decide individual case by revoking 8 C.F.R. § 1003.1(e)(8)(ii), 8 C.F.R. § 1003.1(k), and related provisions in 8 C.F.R. §§ 1003.0(b)(2)(ii), 1003.1(e)(8)(v), and 1003.10(b). That authority, which did not exist until the Department promulgated an interim final rule in 2019, conflicts both with the provision of the INA making clear that a removal order becomes final only after "a determination by the [BIA]," 8 U.S.C. 1101(a)(47)(B), and with preexisting regulations prohibiting the Director from adjudicating cases absent a specific delegation from the Attorney General, 8 C.F.R. 1003.0(c).

Further, we agree with the NPRM (88 Fed. Reg. at 62,271-72) that nothing about the position of EOIR Director—which need not be filled by an attorney, much less an experienced adjudicator—qualifies the Director to decide cases of any kind, much less the life-and-death appeals that routinely reach the BIA. Providing a functionary of the Attorney General with the power to effectively veto BIA decisions means that appellate immigration judges must consider the Director's predispositions in addition to the merits of a case; this, in turn, would seriously undermine their judicial independence.

L. Quality Assurance Certification

The NPRM appropriately proposes removing the provision allowing IJs to request further review of BIA decisions in cases they themselves decided. This provision turns IJs from neutral adjudicators into advocates for their own decisions; IJs who seek review in this way effectively become parties in their own cases. It also upends the normal appellate process in ways not permitted in any other federal adjudicatory system. The situations in which IJs are allowed to do so sweep far more broadly than the AA96 Final Rule's supposed "quality assurance" rationale for the provision. And the choice of the EOIR Director as the decisionmaker hearing IJs' appeals is exceedingly problematic for the reasons discussed in Section II.K above.

M. Forwarding of Record on Appeal

Last, we support reinstatement in the NPRM of the requirements for IJs to review their oral decision transcripts and approve them within specified timeframes, as well as the Department's removal of a reference to the EOIR Director regarding the transcription process. 8 C.F.R. § 1003.5(a) (proposed).

III. Additional Comments regarding *Matter of Thomas and Thompson*

The Department should adopt a reading of *Matter of Thomas and Thompson*, 27 I&N Dec. 674 (A.G. 2019), that is non-retroactive.

First, we note that applying that decision to convictions that predate *Matter of Thomas* would have retroactive effect. *Matter of Thomas* changed the well-established law governing the immigration effect of sentence modifications and suspended sentences. That change causes some noncitizens to become removable or to lose eligibility for relief from removal, which means that it attaches a new disability to the prior conviction and sentence. *See INS v. St. Cyr*, 533 U.S. at 289, 321 (2001) (noting that the noncitizen in that case would have been eligible to apply for a frequently granted discretionary waiver of deportation at the time he was convicted, and holding that disallowance of that opportunity attached a new disability in respect to transactions or considerations already past); *see also Jeudy v. Holder*, 768 F.3d 595, 603 (7th Cir. 2014); *Reyes-Hernandez v. INS*, 89 F.3d 490, 493 (7th Cir. 1996). And the Supreme Court has made clear that, to determine the reference point for deciding whether the application of a new rule is retroactive, courts look to the time of the conduct targeted by the rule. *See Vartelas v. Holder*, 566 U.S. 257, 269-70 (2012) (because new statute treating reentering lawful permanent residents who committed crimes of moral turpitude as applicants for admission targeted the crime, retroactivity turned on date of crime and not date of reentry). Applying *Matter of Thomas* to existing convictions would thus have a retroactive effect. *See Vartelas v. Holder*, 566 U.S. 257, 269-70 (2012) (explaining that the reference point for determining whether a new rule would have retroactive effect in a particular case was at the time of the conduct targeted by the rule).

However, it would be fundamentally unfair to apply *Matter of Thomas* retroactively. The substance and effect of any change in legal regime dictates the reliance interests involved. *See, e.g.*, *St. Cyr*, 533 U.S. at 321; *Jeudy v. Holder*, 768 F.3d 595, 604 (7th Cir. 2014)). This follows from the equitable foundation of retroactivity doctrine: "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Landgraf*, 511 U.S. at 266. Further, "the critical question is not whether a party actually relied on the old law, but whether such reliance would have been reasonable." *Velásquez-García*, 760 F.3d at 582 (citing *Vartelas*, 566 U.S. at 274). That is, what matters is identifying the point in time when an individual *could* have altered her conduct to avoid a legal penalty.

Here, the relevant legal change ushered in by the Attorney General's decision in *Matter of Thomas* altered the considerations that a noncitizen could have reasonably relied on both at the time of her sentence modification and at the time of her guilty plea and conviction. A noncitizen seeking a modified sentence reasonably would have relied on the longstanding agency rule allowing the modified sentence to count for immigration purposes. Likewise, when a noncitizen

pled guilty and was convicted, competent legal counsel would have advised her that even if there was some risk that her offense would be labeled a removable offense, a sentence modification would be available to help ameliorate the consequences of the conviction. *See Matter of Cota-Vargas*, 23 I. & N. Dec. 849, 852 (B.I.A. 2005). Indeed, given the frequency with which noncitizens obtained sentence modifications that were then given effect for purposes of federal immigration law, the possibility of this future relief would have been a relevant consideration for any noncitizen pleading guilty to an offense.

Additionally, the multi-factor tests applied by some federal courts to decide whether a new agency interpretation should be applied retroactively also demonstrate that *Matter of Thomas* should not receive retroactive effect. *See Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (en banc); *Retail, Wholesale and Dep't Store Union, AFL-CIO v. NLRB*, 466 F.2d 380, 391 (D.C. Cir. 1972); *Velasquez-Garcia v. Holder*, 760 F.3d 571, 579 (7th Cir. 2014). Under *Velasquez-Garcia,* for instance, the factors are "whether the particular case is one of first impression," "whether the new rule represents an abrupt departure from well-established precedent," reliance on the prior rule, the burden of retroactive application on those affected, and uniformity in immigration law. 760 F.3d at 582-84. Here, the facts that the issue in *Matter of Thomas* had been previously decided and that the opinion constitutes an abrupt break with prior policy both weigh strongly against retroactivity. So do reliance interests, for the reasons discussed above. As for burdens, there can be no doubt that removal is a severe penalty and will place a heavy burden on an affected noncitizen—leaving her home and family. *See Velasquez-Garcia*, 760 F.3d at 584. And uniformity also weighs against retroactivity here, because retroactive application based on the date on which the agency decides to act creates non-uniformity between one person's case and any case in which the agency had acted before the *Thomas* decision.

For these reasons, the agency should adopt a bright-line rule that *Thomas* will be applied only to convictions that became final after that decision was issued. Such a rule is easily understood and explained, is easily administered, would be fair and just, treating like individuals similarly, and would advance efficiency and avoid future litigation.

IV. Conclusion

Our organizations appreciate the Department's efforts to restore key elements of fairness to IJ and BIA adjudications, by undoing many harms of the AA96. We further encourage the Department to consider the discrete changes proposed in this comment to improve and strengthen access to justice in immigration proceedings.

For any questions, please reach out to rcaldarone@heartlandalliance.org for NIJC, slmarquez@bds.org for BDS, lstjohn@firrp.org for the Florence Project, stephen.brown@hias.org for HIAS, asullivanengen@centrolegal.org for Centro Legal de la Raza, and javier.hidalgo@raicestexas.org for RAICES.

Sincerely,

National Immigrant Justice Center
Brooklyn Defenders Service
Centro Legal de la Raza
Florence Immigrant and Refugee Rights Project
HIAS
RAICES