

September 28, 2026

Executive Office for Immigration Review
Department of Justice
5107 Leesburg Pike, Suite 2400
Falls Church, VA 22041

**Re: Comment on Proposed Rule, *“Civil Money Penalty for Actions in Contempt of an Immigration Judge’s Proper Exercise of Authority,”* 91 Fed. Reg. 47979 (July 30, 2026);
Docket No. EOIR-26-AB02; RIN 1125-AB02**

Dear Acting Director Owen:

The National Immigrant Justice Center (NIJC or “we”) submits the following comments to the Department of Justice’s (DOJ or the “Department”) Executive Office for Immigration Review (EOIR) in response and opposition to the above-referenced Notice of Proposed Rulemaking (NPRM or “the Proposed Rule”) issued by the Department on July 30, 2026. NIJC calls on the Department to withdraw the Proposed Rule in its entirety, to ensure meaningful access to counsel, and to provide a fair hearing for individuals in removal proceedings without the threat of unequal and unfair monetary penalties.

NIJC’s Strong Interest in the Department’s Proposed Changes

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.

NIJC clients live below 200% of the federal poverty line. NIJC provides legal services to most of them on a completely pro bono basis. As a DOJ-accredited organization, our services are either pro bono or provided at substantially reduced rates. NIJC’s attorneys and accredited representatives are covered individuals under proposed § 1003.123(a)(1); our clients under (a)(2); and our expert and lay witnesses under (a)(3). NIJC comments as a directly impacted and regulated party.

NIJC’s clients include indigent, Black, Brown, Indigenous, and LGBTQ+ asylum seekers, children, and immigrants. In addition to our own direct representation, NIJC provides full and limited representation on a routine basis in multiple immigration courts. Our experience working

directly with clients and advising immigrants and asylum seekers makes it clear that the vast majority lack the linguistic and legal skills to navigate EOIR alone. Additionally, NIJC serves immigrants in detention throughout the Midwest and nationally, all of whom have no source of income and whose financially strained relatives can barely make ends meet. Finally, NIJC has a long history of representing unaccompanied children, asylum seekers, torture survivors, as well as survivors of domestic violence, trafficking, and other forms of crime—all of whom suffer significant financial instability.

NIJC attorneys and accredited representatives, as well as our expert and lay witnesses (who include our clients) would be severely impacted if this NPRM became final. The clients NIJC serves, as well as the attorneys and accredited representatives who support these individuals on a pro bono or substantially reduced rate, would experience both the penalties themselves and the \$675 appeal fee as insurmountable barriers to seeking fair review of their cases. For the reasons we outline below, we urge EOIR to rescind this profoundly ill-conceived Proposed Rule.

COMMENTS ON PROPOSED RULE

1. The Proposed Rule Would Create an Impermissible One-Sided Sanctions Regime That Undermines the Integrity of Immigration Adjudication.

Proposed 8 C.F.R. § 1003.123(b) exempts Department of Homeland Security (“DHS”) trial counsel and federal government witnesses from the civil money penalty scheme. This creates a fundamental inequality in adversarial proceedings and fatally undermines the Proposed Rule’s legitimacy.

a. The Statutory Authority Is Neutral and Does Not Authorize a One-Sided Contempt Regime.

The Proposed Rule’s fundamental structural defect is its asymmetrical application. Under proposed 8 C.F.R. § 1003.123(b), civil money penalties may not be imposed on “attorneys or witnesses who are employees or contractors of the federal government acting in their official capacity.” Yet the statutory authority on which EOIR relies¹ contains no such limitation. The statute authorizes Immigration Judges, under regulations prescribed by the Attorney General, to “sanction by civil money penalty any action (or inaction) in contempt of the [Immigration Judge’s] proper exercise of authority.”² Congress chose party-neutral language: the authority to sanction contemptuous “action (or inaction)” applies to *any* such conduct, without distinguishing between government and non-government participants.

The 2006 Attorney General directive that EOIR identifies as the genesis of this rulemaking was likewise neutral. Attorney General Gonzales directed EOIR to “draft a new proposed rule that creates a strictly defined and clearly delineated authority to sanction by civil money penalty an action (or inaction) in contempt of an immigration judge’s proper exercise of authority.”³ That

¹ See Section 240(b)(1) of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1229a(b)(1).

² *Id.*

³ See Memorandum from the Attorney General for the Deputy Attorney General, Assistant Attorney General for Legal Policy, Director of the Executive Office for Immigration Review, and Acting Chief Immigration Judge (Aug.

instruction said nothing about excluding government attorneys or witnesses from the contempt regime's reach. Rather, it reflected the straightforward principle that "Immigration judges should have the tools necessary to control their courtrooms and to protect the adjudicatory system from fraud and abuse."⁴ Courtroom control, by its nature, requires authority over all participants.

The exclusion at proposed 8 C.F.R. § 1003.123(b) is therefore an agency choice untethered from the statute. When Congress grants authority in neutral terms and an agency implements that authority in a non-neutral manner, the agency bears the burden of justifying the departure.⁵ EOIR has not met this burden. The preamble offers no reasoned analysis explaining why Congress's party-neutral grant of contempt authority should be implemented through a regime that applies exclusively to one side of an adversarial proceeding.

b. EOIR's Justifications for the Exclusion Are Unpersuasive

The Proposed Rule attempts to justify the exclusion of government attorneys by analogizing to the EOIR disciplinary rules at 8 C.F.R. §§ 1003.101–111. The Department also defends the exclusion on the ground that "government attorneys who appear in Immigration Court are subject to the jurisdiction of the Office of the Inspector General for the Department of Homeland Security" and "will be disciplined pursuant to DHS's attorney discipline procedures."⁶ Neither of these justifications pass muster, especially given DHS' routine conduct in immigration courts.

i. The Analogy to Subpart G Is Inapposite.

The preamble states that its exclusion of DHS attorneys is "analogous to the approach of the EOIR disciplinary rules"⁷ codified in Subpart G, which exclude "practitioners who represent the government from EOIR's authority to impose disciplinary sanctions for attorney misconduct."⁸

This analogy fails on its own terms. Subpart G of 8 C.F.R. § 1003 establishes a professional-responsibility regime for practitioners who appear before EOIR.⁹ It serves a different purpose—i.e., to regulate the attorney-client relationship and the practitioner's fitness to practice—and operates through a different mechanism. Disciplinary proceedings under Subpart G are initiated by EOIR disciplinary counsel, not by the presiding Immigration Judge; they involve distinct sanctions (including suspension and expulsion from practice); and they follow separate procedural tracks.¹⁰

9, 2006), <https://www.justice.gov/sites/default/files/ag/legacy/2009/02/10/ag-080906.pdf> [<https://perma.cc/V79ET87Q>].

⁴ *Id.*

⁵ *See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (requiring agencies to "examine the relevant data and articulate a satisfactory explanation for [their] action including a rational connection between the facts found and the choice made")(internal quotation marks omitted).

⁶ 91 Fed. Reg. at 47981.

⁷ 91 Fed. Reg. at 47981.

⁸ *See* 8 C.F.R. § 1003.101(b).

⁹ *See* 8 C.F.R. § 1003, subpart G.

¹⁰ *See generally* 8 C.F.R. §§ 1003.101–111 (detailing discipline procedural processes).

Contempt authority, by contrast, exists so that a presiding adjudicator can control the proceeding before her in real time. It is an inherent adjudicatory tool directed at maintaining order, ensuring compliance with court directives, and safeguarding the integrity of the proceedings. Contempt authority is, by its nature, party-neutral: every participant in a proceeding, government and private alike, must comply with the adjudicator's lawful orders, appear when required, refrain from making false statements, and conduct themselves with appropriate decorum.¹¹ The fact that EOIR chose to exclude government practitioners from a professional-responsibility regime designed does not justify excluding them adjudicators' contempt authority.

ii. DHS Self-Discipline Is Not a Meaningful Substitute.

The preamble further notes the Department's wariness about "creating a regulatory structure where one Executive agency may impose money sanctions on individuals engaging in official representation of another Executive agency."¹² This rationale is deficient for several reasons.

First, the alternative of DHS internal discipline is structurally inadequate. DHS disciplinary processes occur entirely within DHS, beyond the visibility of the respondent, the Immigration Judge, and the public. The respondent harmed by government counsel's misconduct has no role in and no notice of any internal disciplinary proceeding. By contrast, a civil money penalty imposed under the Proposed Rule is immediate, public, and directly consequential. A system in which one party's misconduct results in visible, enforceable sanctions while the other party's identical misconduct is addressed, if at all, through opaque internal processes that the harmed party can never observe or verify is the antithesis of evenhanded adjudication.

Second, there is no evidence that DHS self-discipline functions as an effective accountability mechanism in practice. The Department fails to disclose any information that DHS' self-discipline yields any reliable results. This could include documenting: (i) how many DHS attorneys have been disciplined under 8 C.F.R. § 292.3(i) for conduct occurring before the immigration courts in the past five years, and (ii) how many referrals EOIR has made to DHS for such discipline during the same period. If, as we suspect, EOIR lacks this information *or* the answer approaches zero, the alternative on which EOIR relies to justify the asymmetry is illusory. An internal disciplinary system is no substitute for an enforcement mechanism that provides the accountability that a functioning adjudicatory system demands.

Third, the inter-agency regulation concern the Department raises does not withstand scrutiny. Immigration proceedings are adversarial in structure. DHS trial attorneys appear as a party in interest before EOIR adjudicators, advocate positions, present evidence, examine witnesses, and seek specific legal outcomes. When an attorney, government or private, makes a false statement to the tribunal, fails to appear without good cause, or engages in abusive courtroom conduct, the harm to the proceeding is identical regardless of the attorney's employer. The proposition that inter-agency courtesy should shield one party's counsel from the same consequences imposed on opposing counsel elevates bureaucratic convenience over adjudicatory integrity. Moreover,

¹¹ See 18 U.S.C. § 401 (authorizing U.S. federal courts to sanction contemptuous misbehavior without regard to whether the contemnor is a government or private actor).

¹² *Id.*

federal courts routinely impose contempt sanctions on government attorneys who engage in contemptuous conduct, notwithstanding inter-branch and inter-agency considerations.¹³

iii. DHS Counsel Misconduct Is Not Hypothetical.

The Department's implicit suggestion that the exclusion of government attorneys is of little practical consequence ignores well-documented patterns of DHS attorney misconduct before the immigration courts. Such misconduct is neither rare nor trivial.

Consider the following real-world scenarios—experienced by NIJC—that illustrate the types of conduct the Proposed Rule would sanction if committed by a respondent's attorney but would leave entirely unaddressed when committed by government counsel:

Misrepresentations of the record and misstatements of law. DHS trial attorneys have, in documented cases, made misrepresentations about the contents of the administrative record, mischaracterized the governing legal standard, and provided inaccurate factual representations to Immigration Judges.¹⁴ Under proposed 8 C.F.R. § 1003.124(a)(4), “knowingly or recklessly making a false statement of material fact or law” is sanctionable conduct for private attorneys. A respondent's attorney who engages in such conduct faces a formal warning, initiation of civil money penalty proceedings, and potential fines ranging from \$1,000 to \$3,500, with the additional prospect of professional discipline and suspension from practice for failure to pay.¹⁵ A DHS attorney who engages in the identical conduct before the same Immigration Judge faces no consequence whatsoever under the Proposed Rule.

Failure to facilitate biometrics appointments, resulting in months or years of delays in adjudication. While non-detained respondents bear the burden to submit biometrics before their applications are finally adjudicated, respondents do not control that process. Instead, Immigration Judges and respondents frequently prompt DHS to facilitate for respondents to have their biometrics taken. In NIJC's experience, DHS has failed to facilitate those biometrics appointments for months if not years, resulting in many continuances or delayed merits hearings, through no fault of the respondents. Under this NPRM, DHS can continue this practice without any accountability.

Late disclosure and failure to comply with court orders. Immigration Judges regularly order the timely production of evidence or filings. DHS attorneys have failed to comply with such orders, producing materials late or not at all, thereby delaying proceedings and prejudicing respondents' ability to prepare their cases.¹⁶ Under proposed 8 C.F.R. § 1003.124(a)(2),

¹³ See, e.g., Fed. R. Civ. P. 11(c) (authorizing sanctions for, among other things, filing frivolous claims and presenting cases for improper purposes); Fed. R. Civ. P. 37(b)(2)(A) (authorizing sanctions for failure to comply with discovery orders, applicable to all parties including the government).

¹⁴ See, e.g., Roger Parloff, *DHS's Misleading Press Release Smears a U.S. Judge in Rhode Island*, Lawfare, available at <https://www.lawfaremedia.org/article/dhs-s-misleading-press-release-smears-a-u.s.-judge-in-rhode-island> (May 12, 2026) (documenting ICE's instruction to a government attorney to withhold material information from a federal court, resulting in a misleading DHS press release and a judicial disciplinary referral).

¹⁵ Proposed 8 C.F.R. §§ 1003.125(a)–(e), 1003.126(b), 1003.126(c)(1), 1003.129(c).

¹⁶ See Laila Khan & Chris Opila, *ICE Attorneys Increasingly Request Case Dismissals at Immigration Court Hearings—and Immigration Judges Grant Them on the Spot*, American Immigration Council, available at

“repeated failure to comply with Immigration Judge orders to timely file pleadings, applications, pre-hearing statements, evidentiary submissions, or any other filings, without good cause” is sanctionable. Again, this provision applies to respondents’ attorneys but not to DHS counsel, while EOIR imposes increasingly short deadlines on respondents and penalizing them with removal orders if they cannot comply.

Wrongful deportations accompanied by misleading statements. In some of the most egregious instances, government actors have coerced detained respondents into taking removal orders or deported respondents without adjudication of the merits of their claims, including in cases where federal courts had found the government in contempt for repeated violations of court-ordered settlement agreements.¹⁷ These deportations have been accompanied by misleading or misinforming statements to the court and to the affected individuals. Under proposed 8 C.F.R. § 1003.124(a)(5), “willfully misleading, misinforming, threatening, or deceiving any person (including a party to a case or an officer or employee of the Department of Justice), concerning any relevant matter relating to a case” is sanctionable. Yet the Proposed Rule would exempt the very government actors responsible for such disruptive conduct.

These are not abstract hypotheticals. They represent recurring patterns of conduct that directly delay, disrupt, and obstruct immigration proceedings, which are the precise harms the Proposed Rule purports to address. A rule that subjects respondents’ counsel to escalating financial penalties and potential suspension for such conduct while categorically immunizing government attorneys who engage in that same conduct cannot credibly claim to serve the fair and efficient administration of justice.

c. The Asymmetry Fundamentally Transforms EOIR’s Role.

The one-sided nature of the Proposed Rule does not merely create an enforcement gap, it fundamentally alters EOIR’s institutional character. A sanctions regime that runs in only one direction, imposing financial penalties and the threat of suspension on respondents’ attorneys and noncitizens while leaving government counsel untouched, converts EOIR from a neutral adjudicator into an instrument structurally aligned with one litigant.

This structural alignment is particularly dangerous in immigration proceedings, where the adversarial system already operates under conditions of profound inequality. Unlike in federal criminal proceedings, there is no constitutional right to appointed counsel in immigration court. Noncitizens, many of whom are detained, unrepresented, and unfamiliar with the legal system, already face the full institutional weight of the federal government. Adding a one-sided contempt regime that financially penalizes only the noncitizen and her counsel deepens that structural imbalance.

<https://www.americanimmigrationcouncil.org/blog/ice-attorneys-case-dismissals-immigration-court-hearings-judges-grant/> (Oct. 7, 2025) (documenting ICE attorneys filing oral motions in violation of written filing requirements, with immigration judges deciding 86% of oral motions the same day, denying respondents the required 10-day response period).

¹⁷ See *J.O.P., et al. v. U.S. Department of Homeland Security, et al.*, Civil Action No. 19-cv-01944-SAG (where the Department deported a class member (19-year-old Salvadoran asylum seeker) twice without adjudication of the merits of his asylum claim after the district court found the government in contempt for their repeated violations of the settlement and unlawful deportations).

Importantly, misconduct from DHS is far-reaching. Each DHS trial attorney may handle hundreds of cases simultaneously. When a government attorney engages in a pattern of misrepresentation, late disclosure, or noncompliance with court orders, the resulting harm is not confined to a single proceeding but reverberates across multiple immigration judges' docket. The adversarial system, which depends on both parties operating in good faith and under equivalent obligations, breaks down when one side can misbehave without consequences while the other faces financial ruin and professional destruction.

Furthermore, proposed 8 C.F.R. § 1003.124(a)(5) exacerbates this asymmetry by allowing DHS to supply the allegation that initiates the contempt process. Under the Proposed Rule, a DHS trial attorney may report any individual who may have engaged in conduct described in proposed 8 C.F.R. § 1003.124(a)(5)—“willfully mislead[ing], misinform[ing], threaten[ing], or deceiv[ing] any person (including a party to a case or an officer or employee of the Department of Justice), concerning any relevant matter relating to a case.” When DHS supplies information that forms the basis of a contempt allegation against a private attorney, the private attorney is exposed to the full machinery of the civil money penalty process, including warnings, a civil money penalty notice (the “CMP Notice”), adjudication by the Chief Immigration Judge, and potential suspension.¹⁸ But if DHS’s allegation is itself false or misleading, the DHS attorney faces no reciprocal exposure under the Proposed Rule. This creates a perverse incentive structure in which one party can weaponize the contempt process against the other without risk, transforming a tool ostensibly designed to maintain courtroom order into an instrument of unfair advantage.

d. The Asymmetry Impairs Immigration Judges’ Ability to Manage Their Dockets.

The Proposed Rule’s stated purpose is to “promote the fair, efficient, and consistent adjudication of immigration proceedings” and to give Immigration Judges “every tool available . . . to control the proceedings before them.”¹⁹ But the exclusion of government attorneys from the contempt regime undermines this objective.

Immigration Judges depend on DHS to provide critical information about detained individuals, including biometric data, respondent history, prior proceedings, and other materials essential to case management. When DHS fails to comply with court orders to produce such information, the Immigration Judge’s ability to fairly manage the docket is directly impaired. A contempt authority that cannot reach the government party provides Immigration Judges with, at best, a partial tool, one that allows them to enforce compliance against the less-resourced party while leaving them powerless to address the more-resourced party’s obstruction.

The Department cannot credibly assert that it is empowering Immigration Judges to “control their courtrooms” while simultaneously depriving them of authority over the single most powerful participant in every proceeding. An Immigration Judge who can sanction a solo practitioner for filing a brief one day late but cannot sanction DHS—e.g., for repeatedly filing late motions, reply briefs, or evidence—does not have “every tool available” to manage her

¹⁸See generally, proposed 8 C.F.R. §§ 1003.125(a)–(e), 1003.126(b), 1003.126(c)(1), 1003.129(c).

¹⁹ See proposed 8 C.F.R. § 1003.122(a); 91 Fed. Reg. at 47980.

docket. She has a tool that works in only one direction, and that directionality sends an unmistakable signal about whose interests the system is designed to serve.

2. The Proposed Rule Would Chill Zealous Advocacy.

The Proposed Rule, if finalized, would deter zealous advocacy by design, not because practitioners intend to approach the boundary of misconduct. In practical ways, there are a number of ways respondents' attorneys or accredited representatives may second-think actions, arguments, or motions they should champion as zealous advocates. This would especially harm indigent and low-income respondents and their witnesses. This result also cuts against the Department's own stated goal.

a. The Mechanism

The Proposed Rule fails to provide practitioners with the type of fair notice that due process requires. First, the standards do not describe conduct. They describe characterizations of conduct. Proposed 8 C.F.R. § 1003.124(a)(3) reaches “[d]isorderly or abusive behavior or language”²⁰, and the preamble explains that this includes behavior or language that “impugns the integrity of the court, unfairly maligns the competence or impartiality of the presiding Immigration Judge, is defamatory or slanderous, or inappropriately accosts any individual in the courtroom.”²¹ Proposed 8 C.F.R. § 1003.124(a)(4) reaches false statements of “material fact or law” made “[k]nowingly or recklessly.”²² The term “repeated,” which governs proposed 8 C.F.R. § 1003.124(a)(1) and (a)(2), is not defined in the regulatory text; the Department supplies content for it only in the preamble.²³ A practitioner cannot determine, at the moment he acts, whether his motion impugns the integrity of the court or whether his reading of a precedent is reckless. Those are conclusions someone else will reach later.

Second, the someone else is the judge whose treatment is at issue—and that judge's determination is not subject to any meaningful independent review or challenge. Under the Proposed Rule, the presiding Immigration Judge determines that the conduct occurred, that it falls within proposed 8 C.F.R. § 1003.124, and that it “delayed, disrupted, or obstructed the adjudicatory process”; issues the warning; and authors the Notice of Intent to Impose Civil Money Penalty.²⁴ Where an oral exchange was not recorded, that same judge writes the summary of it that enters the contempt Record of Proceeding.²⁵ The Chief Immigration Judge “may only consider the contempt Record of Proceeding,” may take no additional evidence, and “may not remand a CMP Notice to the Immigration Judge.”²⁶ Where the conduct at issue is a motion to recuse, an objection to a ruling, or an argument that the judge has misread the law, the judge assesses whether he was treated contemptuously by a lawyer who was disagreeing with him, and composes the record on which that assessment will be reviewed.

²⁰ 91 Fed. Reg. at 47990.

²¹ *Id.* at 47981.

²² *Id.* at 47990.

²³ *See id.* at 47981.

²⁴ Proposed 8 C.F.R. §§ 1003.124(a), 1003.125(a)–(c), 1003.126(b), 91 Fed. Reg. at 47990–91; *see id.* at 47982.

²⁵ Proposed 8 C.F.R. § 1003.126(e), 91 Fed. Reg. at 47991.

²⁶ Proposed 8 C.F.R. § 1003.127(b), 91 Fed. Reg. at 47992.

Third, the consequences reach a practitioner's livelihood rather than a case. The penalty schedule governs the amount of any single order,²⁷ but nothing in the Proposed Rule limits the number of orders a practitioner may accumulate across separate conduct in separate cases—and because a warning “is not limited to a single proceeding,”²⁸ escalation to the second and subsequent tiers runs across unrelated matters and unrelated clients. Nonpayment results in a petition to the Board for immediate suspension from practice before EOIR.²⁹ A final penalty order and the conduct underlying it become “factors that may be considered when determining if contemptuous or otherwise obnoxious conduct has occurred” for purposes of practitioner discipline, and repeated nonpayment becomes an independent ground for discipline.³⁰ The Department states expressly that these procedures are “independent of other sanctions or procedures that may be available,” and that the availability or imposition of a penalty “does not preclude the use of other sanctions or procedures.”³¹

The predictable result of this structure is that competent practitioners will hesitate before engaging in conduct that is not misconduct at all—moving to recuse a judge, arguing that a recent decision does not control, objecting on the record, or seeking the time a client's case requires. These are the ordinary components of competent representation, and the Proposed Rule attaches to each instance a risk that no practitioner can assess in advance. The problem is not that practitioners will cease engaging in actual misconduct; it is that the rule's vague standards will deter legitimate advocacy.

This conclusion does not depend on any assumption of bad-faith adjudication. It follows from the design of the Proposed Rule itself, because even good-faith application cannot supply the objective standard the Proposed Rule leaves out.

b. The Advocacy the Proposed Rule Reaches

i. Motions to recuse

An attorney's duty of zealous advocacy requires, among other things, filing a motion to recuse when a particular adjudicator cannot fairly decide a client's case. The Proposed Rule directly impedes that obligation. Such a motion is, by its very nature, an assertion that calls the adjudicator's impartiality into question. A party cannot file one without advancing that contention, particularly when the motion is based on the judge's own statements, professional background, or denial rate.

The preamble states that “disorderly or abusive behavior or language in and around the courtroom and before the Immigration Judge,” as used in proposed 8 C.F.R. § 1003.124(a)(3), “includes, but is not limited to, behavior or language that impugns the integrity of the court, [or] unfairly maligns the competence or impartiality of the presiding Immigration Judge.”³² The Department adds that “[t]hese types of abusive language in any filing with the Immigration Court

²⁷ Proposed 8 C.F.R. § 1003.126(c)(1), 91 Fed. Reg. at 47991.

²⁸ Proposed 8 C.F.R. § 1003.125(a), 91 Fed. Reg. at 47990.

²⁹ Proposed 8 C.F.R. § 1003.129(c), 91 Fed. Reg. at 47993.

³⁰ Proposed 8 C.F.R. § 1003.102(g), (x), 91 Fed. Reg. at 47989.

³¹ Proposed 8 C.F.R. § 1003.122(c), 91 Fed. Reg. at 47990.

³² 91 Fed. Reg. at 47981.

also constitute sanctionable conduct.”³³ A written motion to recuse is therefore reached on the Department’s own account of the provision. What the motion must say in order to be a motion is what the Department has identified as sanctionable.

The Department appears to recognize the difficulty, and its answer confirms it. In a footnote appended to the passage above, the Department states that “[t]o the extent that an attorney or representative has concerns about an Immigration Judge’s conduct, they may raise such concerns by filing a complaint with EOIR’s Judicial Conduct and Professionalism Unit.”³⁴ That is an instruction to take concerns about an adjudicator out of the proceeding and into an internal administrative channel. It is no substitute to a motion for recusal. A complaint to the Judicial Conduct and Professionalism Unit does not obtain relief for the client whose case is before the judge, does not create a record for review, and does not produce a ruling from which an appeal may be taken. Recusal practice exists because those things are necessary; a complaint process addresses a different problem. By offering the complaint channel as the answer, the Department confirms that it understands the Proposed Rule to reach the argument a recusal motion makes.

The Department may respond that only an *unfair* characterization is covered, and that a well-founded motion is therefore safe. That answer does not assist the practitioner, who must decide whether to file before anyone has ruled on whether the characterization was fair, and who must make that decision knowing that the person who will make the initial determination is the judge the motion concerns.³⁵

The timing of this proposal makes the risk concrete. The immigration bench has turned over substantially over the past eighteen months, and a significant number of newly appointed Immigration Judges have limited experience in immigration law.³⁶ The circumstances that make recusal practice necessary are the same circumstances that make it dangerous under the Proposed Rule.

NIJC has experienced courtroom hostility demonstrating how the Proposed Rule could empower Immigration Judges to preside less impartially over proceedings and retaliate against respondents and their counsel. At a recent hearing, an NIJC attorney contested the content of a Notice to Appear while the Immigration Judge dismissed their argument in DHS’ favor. When the attorney attempted to respond during a pause in the colloquy, the Immigration Judge told counsel, “Best thing for you to do is to keep quiet” and that respondents’ attorneys “just don’t get it” and disrespect the court. Concerned that this hostility would prejudice the client, the NIJC attorney apologized to the court. The Immigration Judge then expressed a wish to already have contempt authority that could be exercised against the NIJC attorney. A statement from the bench that the court intends to make matters easy for one party is a textbook basis for a motion to recuse. Under the Proposed Rule, the attorney who filed that motion would be exposed to a penalty under

³³ *Id.*

³⁴ *Id.* at 47981 n.8.

³⁵ See proposed 8 C.F.R. §§ 1003.124(a), 1003.126(b), 91 Fed. Reg. at 47990–91.

³⁶ See, e.g., Maria Sacchetti, *Many DOJ ‘deportation judges’ lack experience and training*, Wash. Post (Apr. 27, 2026) (reporting that more than 140 new judges have been appointed, many with no stated experience practicing immigration law); Savannah Estridge, *The Corps of Experienced Immigration Judges are Being Hollowed Out: A Crisis Explained*, Acacia Center for Justice (Apr. 2026) (documenting the net loss of 178 permanent judges since end of FY2024 and their replacement with temporary judges no longer required to have immigration law experience).

proposed 8 C.F.R. § 1003.124(a)(3) whose initial determination belongs to the judge who made the statement—and who has already expressed a wish to hold counsel in contempt.

ii. Argument about unsettled or changing law

Proposed 8 C.F.R. § 1003.124(a)(4) reaches “[k]nowingly or recklessly making a false statement of material fact or law.”³⁷ Applied to statements of law, a recklessness standard has no stable content. Law is contested by design; the adversarial system exists because competent advocates disagree about what the law requires, and appellate review exists because adjudicators are sometimes wrong about it. A provision penalizing “reckless” statements of law asks a practitioner to predict not what the law is, but what the presiding Immigration Judge believes the law to be, and to remain within that belief.

NIJC’s direct experience confirms that these concerns are not hypothetical. In two instances, a hostile Immigration Judge accused two NIJC attorneys of lying—one about a client’s criminal background and the other about the law. In both instances, the attorneys were presenting facts or legal arguments pertinent to their clients’ cases. Both attorneys fear that proposed 8 C.F.R. § 1003.124(a)(4)–(5) could empower the same Immigration Judge to retaliate against them for their advocacy.

The provision extends further. For attorneys and representatives, covered conduct “includes failing to take appropriate remedial measures after receiving notice of the falsity, or when the attorney or representative reasonably should have known of the falsity, of either a previous statement of material law or fact or previously offered material evidence.”³⁸ The Proposed Rule would make a conforming amendment to the practitioner discipline rules on the same terms.³⁹ This is a continuing duty measured by an objective standard—what counsel reasonably should have known—which is broader than the recklessness standard in the provision’s first sentence. A practitioner who advances a legal position, and whose position is later undercut by a decision he has not yet seen, is exposed to the contention that he should have known of it and should have corrected the record.

The Department describes this extension as correcting an “oversight,” reasoning that the existing discipline rule’s limitation to false evidence “has no basis in the professional responsibility obligations of practitioners,” and citing Model Rule of Professional Conduct 3.3(a)(1).⁴⁰ But that Rule addresses *knowing* false statements.⁴¹ And the professional-responsibility regime to which it belongs is administered by disciplinary authorities applying a developed body of interpretive guidance, through procedures designed for contested professional-conduct findings. The Proposed Rule imports the substance of that standard—and broadens it—into a penalty determination made in the first instance by the adjudicator before whom the statement was made, on a record that adjudicator compiles, with no evidentiary hearing.⁴² The analogy does not carry the procedural setting with it.

³⁷ 91 Fed. Reg. at 47990.

³⁸ *Id.*

³⁹ Proposed 8 C.F.R. § 1003.102(c), 91 Fed. Reg. at 47989.

⁴⁰ 91 Fed. Reg. at 47982 n.9.

⁴¹ See Model Rules of Pro. Conduct r. 3.3(a)(1) (Am. Bar Ass’n) (“A lawyer shall not knowingly make a false statement of fact or law to a tribunal . . .”).

⁴² Proposed 8 C.F.R. §§ 1003.126(e), 1003.127(b), 91 Fed. Reg. at 47991–92.

Asylum law requires an applicant to demonstrate persecution on account of a protected ground, including membership in a “particular social group.” The concept of a particular social group is grounded in the principle that persecution must target individuals based on an immutable characteristic—one that members either cannot change or should not be required to change. The Attorney General and the Board have repeatedly held that the validity of a proposed particular social group requires a fact-specific, case-by-case determination.⁴³ In practice, however, the Board has often treated its own prior decisions about particular proposed groups as categorical determinations requiring rejection of all similarly worded groups—and the courts of appeals have repeatedly held that doing so is error.⁴⁴

An attorney who proposes a particular social group resembling one the Board has previously rejected, and who asks the adjudicator to conduct the case-specific analysis the law requires, is doing what binding precedent directs. Under proposed 8 C.F.R. § 1003.124(a)(4), that attorney may nonetheless be accused of making a false statement of material law by an Immigration Judge who regards the Board’s earlier decision as having settled the question. The argument exposed to sanction is the argument the courts of appeals have repeatedly vindicated.

This matters now because the Board of Immigration Appeals is issuing decisions at a rapid pace that effectively instruct adjudicators to disregard binding precedents, characterizing contested questions as settled and contested records as undisputed. In the pretermission line, the Board has approved resolution of applications without a full evidentiary hearing on the ground that the governing law is clear and that testimony could not alter the outcome.⁴⁵

Opposing pretermission requires counsel to argue the opposite: that the question is unsettled, that the cited precedent is distinguishable, that a court of appeals has taken a contrary view, that the record is not as clear as the moving party asserts. That is the only argument available, and it is in substance an argument that the law is not what the judge has been told it is. An Immigration Judge persuaded that the question is settled has, under proposed 8 C.F.R. § 1003.124(a)(4), a ready characterization of that argument as a reckless misstatement of material law.

Over 22% of asylum applicants with a February 2026 hearing faced a motion to pretermit, rising past 36% at later-stage individual hearings.⁴⁶

A third category is more troubling still, because the Department has told its own adjudicators that binding law is indefensible. In April 2025, EOIR’s Acting Director issued a policy memorandum

⁴³ See *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (“The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis.”); *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 242 (B.I.A. 2014) (“[S]uch a social group determination must be made on a case-by-case basis.”); *Matter of L-E-A-*, 27 I. & N. Dec. 581, 591 (A.G. 2019) (“[The particular social group test] requires a fact-specific inquiry based on the evidence in a particular case.”).

⁴⁴ See *De Pena-Paniagua v. Barr*, 957 F.3d 88, 94 (1st Cir. 2020) (rejecting “as arbitrary and unexamined the BIA holding in this case that De Pena’s claim necessarily fails because the groups to which she claims to belong are necessarily deficient”); *Das v. Garland*, No. 22-1750, 2024 WL 4224904, at *1 (9th Cir. Sept. 18, 2024) (holding that the Board erred by failing to conduct a case-specific analysis); *Guardado v. Bondi*, 147 F.4th 432, 438–39 (4th Cir. 2025) (vacating where the Board “merely looked at the words used to describe the PSG and then ended [its] review” instead of conducting the required fact-based, case-specific inquiry).

⁴⁵ See *Matter of H-A-A-V-*, 29 I. & N. Dec. 233 (B.I.A. 2025); *Matter of A-C-M-*, 29 I. & N. Dec. 703 (B.I.A. 2026); *Matter of T-A-G-*, 29 I. & N. Dec. 715 (B.I.A. 2026); *Matter of L-F-R-*, 29 I. & N. Dec. 787 (B.I.A. 2026).

⁴⁶ Joseph Gunther & Brandon Marrow, *No Hearing Necessary*, bklg.org (updated with data through Feb. 2026).

stating that although *Matter of Avetisyan*, 25 I. & N. Dec. 688 (B.I.A. 2012), “remains precedential and binding, EOIR cannot—and will not—defend it in good faith if challenged in litigation,” and that EOIR “could not—and will not—defend” the rulemaking codifying administrative closure “in good faith against legal challenge.”⁴⁷ The same memorandum instructs that the rulemaking “remain[s] binding on EOIR adjudicators,” that the memorandum “cannot—and does not purport to—alter that rulemaking’s legal effect,” and that “adjudicators should continue to adhere to it unless they have a legal basis for not doing so.”⁴⁸

Until June 22, 2026, counsel who moved for administrative closure, and who cited the authority permitting it, stated the law accurately; on that date, the Department consented to a judgment vacating that authority.⁴⁹ The Department has announced that it regards that law as indefensible, has supplied its adjudicators with the arguments for that view, and has told them to follow the law “unless they have a legal basis for not doing so.”⁵⁰ Proposed 8 C.F.R. § 1003.124(a)(4) makes no allowance for the practitioner who invokes authority the agency has publicly disclaimed while continuing to treat it as binding. The risk is not that he will misstate the law. It is that he will state it correctly.

That difficulty has deepened. A practitioner who invokes administrative closure authority now cites law the Department has agreed is invalid. Proposed 8 C.F.R. § 1003.124(a)(4) provides no safe harbor for the practitioner caught between binding precedent and the agency’s announced position against it. As more cases are resolved on the papers, written filings carry the entire argument, which makes the clause of proposed 8 C.F.R. § 1003.124(a)(3) reaching “abusive language in any filing with the court” correspondingly more consequential.

iii. Asserting a claim the government has already characterized as fraudulent
The practical effect of proposed 8 C.F.R. § 1003.124(a)(4)’s prohibition on “false evidence” is to transfer the cost of the government’s characterization of certain claims as fraudulent onto the practitioner who, in the exercise of zealous advocacy, declines to accept that characterization and continues to represent clients asserting those claims.

Proposed 8 C.F.R. § 1003.124(a)(4) also reaches “offering false evidence,”⁵¹ and the Department’s stated purpose for the Proposed Rule situates that provision in a particular enforcement posture. The Department explains that the Proposed Rule “is consistent with the Administration’s goal of combatting fraud and abuse of legal processes, including in the immigration system,” citing the Presidential Memorandum on Preventing Abuses of the Legal System and the Federal Court (the “PM”).⁵² The Proposed Rule is thus offered not only as a

⁴⁷ Memorandum from Sirce E. Owen, Acting Dir., Exec. Off. for Immigr. Rev., *Cancellation of Director’s Memorandum 22-03* (PM 25-29), at 4 n.2, 8 (Apr. 18, 2025) [hereinafter PM 25-29] (referring to Efficient Case and Docket Management in Immigration Proceedings, 89 Fed. Reg. 46,742 (May 29, 2024)).

⁴⁸ *Id.* at 8.

⁴⁹ See 8 C.F.R. § 1003.18(c) (2025) (authorizing administrative closure); PM 25-29, *supra*, at 8 (acknowledging that the rulemaking “remain[s] binding on EOIR adjudicators”); *Texas v. Department of Justice*, No. 7:26-cv-00070 (N.D. Tex. June 22, 2026) (consent judgment vacating Efficient Case and Docket Management in Immigration Proceedings, 89 Fed. Reg. 46,742 (May 29, 2024)).

⁵⁰ PM 25-29, *supra*, at 8.

⁵¹ 91 Fed. Reg. at 47990.

⁵² *Id.* at 47980 & n.6 (citing Presidential Memorandum, Preventing Abuses of the Legal System and the Federal Court (Mar. 22, 2025)).

docket-management measure but as an instrument of an announced enforcement objective directed at litigation conduct.

That objective is being pursued elsewhere against immigration practitioners specifically. On May 26, 2026, DHS announced that it had directed U.S. Immigration and Customs Enforcement to take action against immigration attorneys who, in DHS's characterization, file false asylum claims in immigration court.⁵³ The announcement presents DHS's allegations as an enforcement rationale, not as adjudicated findings.

That characterization is not merely rhetorical; it has been accompanied by enforcement against practitioners. DHS General Counsel James Percival recently warned AILA that attorneys filing frivolous asylum applications would be "subject to penalties" and that DHS would "vigorously pursue all available remedies."⁵⁴ He reportedly described many Western Hemisphere asylum claims as "meritless" and motivated by "economic incentives." DHS has also pursued penalties against two immigration attorneys, including more than \$470,000 against an attorney whom ICE alleges submitted nearly identical declarations in 54 cases.⁵⁵ Although a meritless claim is not necessarily a knowingly or recklessly false statement, the Proposed Rule risks blurring that distinction by authorizing the presiding Immigration Judge to make the initial *prima facie* determination of falsity and initiate the penalty process. The Department has advanced similar characterizations in its own policy documents. In PM 25-29, EOIR stated that "many [noncitizens] seek administrative closure when they have no other viable form of relief or protection from removal available," and that "before seeking administrative closure, they often file an application for relief anyway and rely on that application to obtain employment authorization," with the result that administrative closure "often functions as a *de facto* amnesty program with benefits."⁵⁶ That is a blanket assertion, made by the adjudicating agency and directed to its own adjudicators, that applications for relief are commonly filed for a purpose other than obtaining the relief sought.

Against that backdrop, a provision reaching "false evidence" does not operate on a neutral field. The corroboration that asylum law requires an applicant to produce—a declaration, a country conditions report, a medical or psychological evaluation—is submitted to an adjudicator who may already regard the category of claim as suspect, and who under the Proposed Rule makes the initial determination whether the evidence was false and whether offering it delayed, disrupted, or obstructed the adjudicatory process.⁵⁷ The practitioner bears the risk of that disposition personally.

The point is not that a rule against offering false evidence is objectionable in principle. It is that the Department proposes to place the judgment of falsity in the hands of the presiding adjudicator, on a record that adjudicator compiles, at a moment when the government has publicly committed itself to the position that claims of this kind are frequently fraudulent, and has begun acting against the attorneys who bring them. In that setting, the provision's practical effect is to transfer the cost of the government's characterization of such claims as fraudulent

⁵³ See DHS, "DHS Takes Additional Steps to Crack Down on Asylum Fraud" (May 26, 2026).

⁵⁴ See Britain Eakin, *DHS Says Western Hemisphere Asylum Claims Are Meritless*, Law360 (Sept. 17, 2026, 8:11 PM EDT), <https://www.law360.com/immigration/articles/2526773>.

⁵⁵ *Id.*

⁵⁶ PM 25-29, *supra*, at 6.

⁵⁷ Proposed 8 C.F.R. § 1003.124(a), 91 Fed. Reg. at 47990.

onto the practitioner who, in the exercise of zealous advocacy, declines to accept that characterization and continues to bring those claims.

iv. Contemporaneous objection

The Proposed Rule creates a procedural trap: it extends to practitioners a right to respond to a warning, but simultaneously makes the exercise of that right a potential basis for the very penalty the warning threatens. The only avenue the Proposed Rule offers for contesting a warning is the avenue it identifies as a possible basis for initiating the penalty process. Proposed 8 C.F.R. § 1003.125(d) provides that an individual “may, but is not required to, respond” to a warning, “either on the record orally at the time of the warning or in writing within 10 days of the issuance of the warning.”⁵⁸ It then provides that “[a]ny response demonstrating further contemptuous conduct within the scope of § 1003.124 that the individual was warned about may form the basis for initiation of the civil money penalty process.”⁵⁹ The preamble states the point more broadly still: “Any contemptuous response to a warning may also be sufficient to initiate the civil money penalty process.”⁶⁰

The structural problem is now apparent. The right to respond is nominal: the judgment whether a response crosses the line into further contemptuous conduct is made by the same judge who issued the warning.

The practical setting matters. Where the individual is present when the conduct occurs, the warning is delivered orally, on the record, in the course of the hearing.⁶¹ A practitioner who believes the warning is unfounded has one professional obligation at that moment, which is to say so on the record. Making a record is not a challenge to the court’s authority; it is the mechanism by which any error becomes reviewable at all. But a warning under proposed 8 C.F.R. § 1003.124(a)(3) concerns language the judge has characterized as impugning the court’s integrity or maligning her competence or impartiality,⁶² and an objection to such a warning necessarily asserts that the characterization was wrong. The objection is therefore made in the same register as the conduct that prompted the warning and is assessed by the same person.

NIJC’s experience illustrates the risk of assigning legal consequences to a judge’s interpretation of counsel’s words. In one instance, after an Immigration Judge denied an NIJC attorney’s motion for a continuance and stated that counsel could appeal, counsel responded, “OK, I understand.” The Immigration Judge construed that response as a waiver of appeal, a misunderstanding counsel discovered only after filing a motion to clarify the record—which the judge denied on the basis that the court deemed the right to appeal had been waived. Although that incident has not yet involved a contempt warning, it illustrates how an Immigration Judge may assign consequences to counsel’s words that counsel neither intended nor reasonably anticipated. Under the Proposed Rule, a similar misunderstanding could determine whether counsel’s response to a warning constitutes further contemptuous conduct under proposed § 1003.125(d). The absence of any alternative compounds this. A warning is not separately

⁵⁸ 91 Fed. Reg. at 47990.

⁵⁹ *Id.* at 47990–91.

⁶⁰ *Id.* at 47982–83.

⁶¹ Proposed 8 C.F.R. § 1003.125(b), 91 Fed. Reg. at 47990.

⁶² 91 Fed. Reg. at 47981.

reviewable. Only an order imposing a penalty may be appealed,⁶³ and an order dismissing a CMP Notice “is final and not subject to further review.”⁶⁴ Nothing in the Proposed Rule permits a practitioner to contest a warning at the time it issues, to seek its withdrawal, or to obtain review of one improvidently given—and the warning is consequential, because it remains in effect for a year, applies across unrelated proceedings, and supplies the predicate for escalation under the penalty schedule.⁶⁵

The Proposed Rule’s procedural design thus comes full circle: the only mechanism it provides for challenging a warning is the very mechanism it treats as grounds for escalation.

v. Bringing or accompanying courtroom observers

Proposed 8 C.F.R. § 1003.124(a)(3) reaches conduct “in and around the courtroom.”⁶⁶ The Department confirms the breadth of that phrase: “for example, the disorderly or abusive behavior may occur in the court waiting room, hallway, or at the filing window.”⁶⁷

Observers are not themselves covered individuals. Proposed 8 C.F.R. § 1003.123(a) limits coverage to practitioners who have entered an appearance on Form EOIR-28 or Form EOIR-61, to the noncitizen who is the subject of the proceedings, and to witnesses.⁶⁸ A lawmaker, journalist, law student, clergy member, or community observer who attends a hearing therefore faces no exposure under the Proposed Rule. Counsel of record who invites or accompanies that observer, and who objects in the hallway or at the courtroom door when the observer is excluded, does.

The exposure attaches to the conduct on which public access depends. Observation of immigration court proceedings occurs because someone arranges it, and because counsel present in the building is willing to raise the matter when an observer is turned away. The Proposed Rule places a penalty risk on that person alone, in exactly the location—the waiting room, the hallway—where the question arises.

The practice this would govern is already inconsistent. Immigration Judges have been observed excluding observers from hearings; treatment has been more restrictive in internet-based hearings than in person; and elected officials have attended without objection in circumstances where others have been excluded. Litigation challenging the exclusion of observers from immigration court is pending.⁶⁹

The Department’s account of the contempt authority rests on the premise that Immigration Judges require tools “to uphold the dignity and authority of such proceedings.”⁷⁰ Public observation serves that same interest, through a mechanism that is not internal to the agency. Where DHS attorneys are excluded from the Proposed Rule’s coverage,⁷¹ where the record of

⁶³ Proposed 8 C.F.R. § 1003.128(a), 91 Fed. Reg. at 47992.

⁶⁴ Proposed 8 C.F.R. § 1003.127(d)(4), 91 Fed. Reg. at 47992.

⁶⁵ Proposed 8 C.F.R. §§ 1003.125(a), 1003.126(c)(1), 91 Fed. Reg. at 47990–91.

⁶⁶ 91 Fed. Reg. at 47990.

⁶⁷ *Id.* at 47982.

⁶⁸ 91 Fed. Reg. at 47990.

⁶⁹ *See The Advocates for Human Rights v. Todd Blanche, et al.*, No. 1:26-cv-00865-RC (D.D.C.) (filed Mar. 12, 2026).

⁷⁰ Proposed 8 C.F.R. § 1003.122(a), 91 Fed. Reg. at 47989.

⁷¹ Proposed 8 C.F.R. § 1003.123(b), 91 Fed. Reg. at 47990.

the contempt proceeding is compiled by the accusing judge;⁷² and where a dismissal of a CMP Notice is unreviewable,⁷³ the Proposed Rule leaves few external checks in place. Attaching penalty exposure to the practitioner who facilitates public observation removes another.

vi. Seeking time for collateral relief before USCIS

A substantial share of the relief available to noncitizens in removal proceedings can be granted only by U.S. Citizenship and Immigration Services. Special Immigrant Juvenile (“SIJ”) classification, U nonimmigrant status, and family-based petitions are adjudicated by that agency; the Immigration Court cannot award them. Counsel representing a client who is eligible for such relief has no alternative but to ask the Immigration Judge for time.

The Board has increasingly directed Immigration Judges not to extend proceedings on that basis.⁷⁴ The consequence under the Proposed Rule is that counsel who pursues the only avenue by which a client can obtain lawful status is exposed, under proposed 8 C.F.R. § 1003.124(a)(2), to a civil money penalty for the resulting delay. The Proposed Rule penalizes practitioners for the operation of a jurisdictional division that Congress created and that they cannot avoid.

The Department’s own account of “good cause” makes the problem worse. The preamble lists the factors an adjudicator would likely consider under proposed 8 C.F.R. § 1003.124(a)(2): “technical difficulties with filing if filing electronically; emergency medical or familial issues; or other similar, external factors that repeatedly prevented the individual from filing documents pursuant to the Immigration Judge’s order.”⁷⁵ The Department then states its expectation “that, ordinarily, an attorney or representative will not confront these types of external factors on a regular basis such that it would result in repeated inexcusable delays or absences.”⁷⁶

That expectation describes a practice that does not exist. The factors the Department contemplates are episodic misfortunes—such as a filing system outage or an illness in the family. The circumstances that actually produce late filings in immigration court are structural and recurring: proceedings that advance faster than the collateral application on which they depend; clients transferred between detention facilities; the absence of confidential space in which to meet a detained client; interpreter unavailability; and filing deadlines compressed to a point at which the work cannot be completed. These are not events a practitioner encounters occasionally. They are the conditions of the practice, and they arise from how EOIR schedules and administers its own docket.

The Department’s good-cause framework has no place for that category. A condition that recurs because the system produces it will appear, under the Department’s framing, not as good cause but as evidence of “repeated failure.”

The Department’s own policy reinforces the difficulty. EOIR has stated that administrative closure “often functions as a de facto amnesty program with benefits,”⁷⁷ and has directed

⁷² Proposed 8 C.F.R. § 1003.126(e), 91 Fed. Reg. at 47991.

⁷³ Proposed 8 C.F.R. § 1003.127(d)(4), 91 Fed. Reg. at 47992.

⁷⁴ See *Matter of Pinzon Rozo*, 29 I. & N. Dec. 507, 510 (B.I.A. 2026); *Matter of T-A-G-*, 29 I. & N. Dec. 715 (B.I.A. 2026).

⁷⁵ 91 Fed. Reg. at 47981.

⁷⁶ *Id.*

⁷⁷ PM 25-29, *supra*, at 6.

adjudicators not to grant it absent a legal basis. That hostility to continuances and administrative closure bears directly on collateral relief: respondents who need time for a USCIS adjudication face a bench that has been told to distrust the very requests they must make.⁷⁸

The effect falls most heavily on children. As reported by MS Now, recent Chicago immigration court hearings in Chicago included a docket on which nearly all of the children had pending applications for Special Immigrant Juvenile (SIJ) classification (which Congress created to provide these children a pathway to permanent status), yet the Immigration Judge issued removal orders anyway. One twelve-year-old child, wearing a baggy Air Jordan T-shirt, received a removal order to El Salvador even after his advocate explained that he was a vulnerable, tender-age child abandoned by his parents. The last child on the docket, a Guatemalan Indigenous child whom NIJC represents, asked through a translator: “Why are you sending me back to Guatemala? What did I do?” These accounts illustrate the human consequences when counsel is denied the time needed to pursue collateral relief before USCIS.⁷⁹

The docket has also been accelerated in ways that make those outcomes more likely. Children who previously appeared in immigration court three or four times a year are now returning every two weeks after the Trump administration rescinded the SIJ policy. NIJC and other experienced legal services providers nationwide lost funding when the federal government terminated a contracting impacting over 20,000 children nationwide, further reducing the legal support available to these children. During the same period, removal orders against children skyrocketed.⁸⁰ A rule that threatens counsel with penalties for seeking a continuance or other time to complete a pending SIJ application would convert these system-driven pressures into personal liability for the advocates attempting to protect children from removal.⁸¹

NIJC’s Know-Your-Rights materials document the procedural conditions underlying these cases. They explain that immigration courts may schedule hearings with very little notice and that Immigration Judges often create expedited timelines that imperil applications for relief and make people vulnerable to rapid deportation. The materials direct individuals to seek additional time to consult counsel and identify NIJC’s Immigration Court Helpdesk as a source of free legal information for unrepresented immigrants in Chicago and Indianapolis—the very helpdesk program whose federal funding EOIR terminated. These materials confirm that the delay addressed by counsel’s motion is often created by the court’s own scheduling practices and by the lack of adequate assistance. Penalizing attorneys under proposed 8 C.F.R. § 1003.124(a)(2) for seeking time for collateral relief before USCIS would therefore fall most heavily on children,

⁷⁸ See *supra* Part 2.b.ii (discussing PM 25-29 and the vacatur of the administrative closure rulemaking).

⁷⁹ MS Now, *Trump’s Deportation Crackdown Comes for Abandoned Migrant Children in Chicago* (Aug. 27, 2026), <https://www.ms.now/culture/trump-deportations-abandoned-migrant-children-chicago>.

⁸⁰ Joseph Gunther and Brandon Marrow, *Over 90 Percent of Newly Detained Unaccompanied Kids Sent to Texas Facilities*, bklg.org (Sept. 18, 2026), https://bklg.org/blog/newly-detained-kids-sent-to-texas/?utm_source=bento&utm_medium=email&utm_campaign=broadcast&bento_uuid=c5a7e5ee-32f0-4698-be2d-4a02ca48c63e (chart featuring number of children with a case on a juvenile detained docket who were ordered removed, by the month the judge issued the order)

⁸¹ See TRAC Reports, *Immigration Court Removal Orders* (2026), <https://tracreports.org/reports/776/> (documenting a 120% increase in removal orders in the Chicago Immigration Court between March and June 2026).

for whom the difference between a short continuance and an immediate removal order can spell life-threatening danger.⁸²

c. A Warning Follows the Practitioner Everywhere, But Is Not Subject to Review Until It Results in a Penalty Order.

Proposed 8 C.F.R. § 1003.125(a) provides that a warning “is not limited to a single proceeding” and “remains in effect for one year from the date of issuance of the warning.”⁸³ The preamble is explicit about the breadth of that provision: “if an individual is warned about the use of abusive language under § 1003.124(a)(3) (proposed) in a specific proceeding, that warning would be effective for any further abusive conduct under § 1003.124(a)(3) (proposed) by that individual in any other proceedings, even proceedings unrelated to the initial one.”⁸⁴

A warning issued in one client’s case, even if undeserved, therefore governs every other client’s case for a year, before every Immigration Judge, in every Immigration Court. A single adverse encounter converts a practitioner into a warned individual before all of EOIR.

Escalation compounds this. The penalty schedule keys the amount of any order to whether it is the practitioner’s first, second, or subsequent contempt order,⁸⁵ and a prior order “shall also serve as a warning for the imposition of future civil money penalties if the same type of contemptuous conduct continues or is repeated within one year of the previous order.”⁸⁶ Nothing confines that sequence to a single matter. The amount of a penalty imposed in one client’s case may therefore be determined by what occurred in another client’s case, before a different judge, on a different docket, involving facts the second judge has no occasion to examine.

The burden of this provision is not distributed evenly. A practitioner who appears occasionally in immigration court and then returns to other work may absorb a warning as a discrete event. An organization whose attorneys appear before the same small group of Immigration Judges every week cannot. For such an organization, a warning is not an incident that passes; it is a standing condition attached to every case the organization handles for the following year, and it attaches after a determination made by one judge, on one occasion, without any opportunity to test it.

That last point is the operative one. The Proposed Rule provides no mechanism to contest a warning, to seek its withdrawal, or to obtain review of one improvidently issued. Only an order imposing a penalty may be appealed.⁸⁷ The single avenue the Proposed Rule identifies for responding to a warning—a response under proposed 8 C.F.R. § 1003.125(d)—is also an avenue the Proposed Rule identifies as a possible basis for initiating the penalty process. A practitioner who believes a warning was wrongly issued must therefore carry it, unchallenged, across every case he handles for a year.

⁸² See Nat’l Immigrant Justice Ctr., Know Your Rights: “Mega Master” Hearings and Other New Immigration Court Policies (updated July 2026), <https://immigrantjustice.org/KnowYourRights>.

⁸³ 91 Fed. Reg. at 47990.

⁸⁴ *Id.* at 47983.

⁸⁵ Proposed 8 C.F.R. § 1003.126(c)(1), 91 Fed. Reg. at 47991.

⁸⁶ Proposed 8 C.F.R. § 1003.125(a), 91 Fed. Reg. at 47990.

⁸⁷ Proposed 8 C.F.R. § 1003.128(a), 91 Fed. Reg. at 47992.

d. The Burden Falls Unevenly Across the Immigration Bar.

The Proposed Rule applies identically to every practitioner who has entered an appearance. Its practical weight does not. Proposed 8 C.F.R. § 1003.123(a)(1) reaches attorneys and accredited representatives who have filed Form EOIR-28 or Form EOIR-61⁸⁸ and the exposure that follows—penalties without an aggregate limit, suspension upon nonpayment, and a disciplinary ground arising from the same conduct—attaches to the individual practitioner rather than to the entity that employs her.

Nonprofit and legal services organizations. For these organizations like NIJC, budgets are set in advance and are fixed. There is no client base to whom a penalty can be passed on to the client (who is frequently indigent), so a penalty is absorbed by providing less service. The Proposed Rule’s escalation structure operates against organizations most severely, because their attorneys appear repeatedly before the same Immigration Judges in the same courts; a warning that “is not limited to a single proceeding,”⁸⁹ is for such an organization a condition attached to its entire docket. And because coverage runs to the individual attorney, the consequence of nonpayment is not an organizational cost but the suspension of a staff member from practice before EOIR.⁹⁰

Accredited representatives and recognized organizations. Accredited representatives are covered on the same terms as attorneys.⁹¹ They practice in, and for, communities where no other representation is available, within organizations that operate on the smallest budgets of any provider the Proposed Rule reaches. The Proposed Rule imposes on them the same penalty schedule it imposes on the rest of the bar, and the same consequence for nonpayment.

Limited-scope document assistance. Proposed 8 C.F.R. § 1003.123(a)(1) extends coverage to any practitioner who has filed a Notice of Entry of Limited Appearance for Document Assistance (Form EOIR-61).⁹² Limited-scope representation exists so that some assistance can be provided to people who cannot obtain full representation—the assistance is partial precisely because the resources are not there for more. The Proposed Rule attaches full penalty, likely chilling the provision of this essential service.

Law school clinics. Law school clinics regularly represent respondents in removal proceedings. Supervised law students who enter appearances may themselves be subject to the Proposed Rule’s civil-money penalties. The Proposed Rule provides no express exception or adjusted standard for students in training or for the clinical supervisory relationship.

Solo and small-firm practitioners. Solo and small-firm practitioners handle a substantial share of private immigration representation. For such a practice, cumulative exposure at the proposed levels, together with the prospect of suspension from practice before EOIR upon nonpayment, is not a marginal deterrent. It is a threat to the practice’s continued existence.

Large-firm pro bono programs. Firms undertake immigration matters pro bono through associates who appear as counsel of record and who would be covered individuals in their own

⁸⁸ 91 Fed. Reg. at 47990.

⁸⁹ Proposed 8 C.F.R. § 1003.125(a), 91 Fed. Reg. at 47990.

⁹⁰ Proposed 8 C.F.R. § 1003.129(c), 91 Fed. Reg. at 47993.

⁹¹ Proposed 8 C.F.R. § 1003.123(a)(1), 91 Fed. Reg. at 47990; see 8 C.F.R. § 1001.1(j) (2025).

⁹² 91 Fed. Reg. at 47990.

right. A program that exposes individual associates to personal monetary liability, to suspension, and to a disciplinary ground under proposed 8 C.F.R. § 1003.102(x) will not survive internal review at most institutions.

The predictable consequence is a reduction in the volume of free representation available to noncitizens in removal proceedings—a cost the Department has not considered.⁹³

The Department’s Regulatory Flexibility Act analysis acknowledges the first half of this problem and then sets it aside. The Department states that the Proposed Rule “regulates attorneys and accredited representatives, which qualify as ‘small entities’ under the RFA,” but certifies no significant economic impact on the ground that “the imposition of a civil money penalty is intended to be an extraordinary sanction that is used infrequently in response to misconduct occurring before an Immigration Judge.”⁹⁴ That reasoning addresses how often the Department expects penalties to issue. It does not address what a penalty, or the prospect of one, does to the entities the Department has just identified as small.

e. Impact on Respondents and Witnesses

The Proposed Rule does not stop at barred and accredited representatives. Proposed 8 C.F.R. § 1003.123(a)(2) covers the noncitizen who is the subject of the proceedings, and § 1003.123(a)(3) covers witnesses.⁹⁵

Respondents. Proposed 8 C.F.R. § 1003.124(a)(1), which reaches the repeated failure to appear on time, is expressly limited to “attorneys and representatives.”⁹⁶ Proposed 8 C.F.R. § 1003.124(a)(2) is not. A respondent may therefore be penalized for the “[r]epeated failure to comply with Immigration Judge orders to timely file pleadings, applications, pre-hearing statements, evidentiary submissions, or any other filings, without good cause.”⁹⁷ Respondents in removal proceedings are frequently indigent, frequently detained, frequently limited in English proficiency, and—in the great majority of cases—unrepresented. The Proposed Rule subjects that population to penalties of \$1,000 to \$3,500 for procedural failures in a system they are attempting to navigate alone.⁹⁸

The procedural requirements the Proposed Rule attaches to a penalty proceeding confirm how little it accounts for that population. A respondent served with a CMP Notice has 30 days to respond, extendable once by a maximum of seven days for good cause.⁹⁹ The response must state the individual’s position on the charges and attach any supporting evidence.¹⁰⁰ All filings “must be submitted in English or accompanied by a certified English translation.”¹⁰¹ The individual “may be represented at their own expense.”¹⁰² A detained respondent with no income

⁹³ See 91 Fed. Reg. at 47986 (identifying only individual penalty liability and the appeal filing fee as costs of the Proposed Rule).

⁹⁴ *Id.* at 47986; see 5 U.S.C. § 605(b).

⁹⁵ 91 Fed. Reg. at 47990.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See proposed 8 C.F.R. § 1003.126(c)(1), 91 Fed. Reg. at 47991.

⁹⁹ Proposed 8 C.F.R. § 1003.126(b)(3)(ii)–(iii), (d), 91 Fed. Reg. at 47991.

¹⁰⁰ *Id.* § 1003.126(d).

¹⁰¹ *Id.* § 1003.126(f).

¹⁰² *Id.* § 1003.126(b)(3)(iv).

is thus expected, within 30 days, to compose a written submission in English or purchase a certified translation, and to retain counsel for the penalty proceeding at his own cost, in order to contest a monetary penalty he has no means to pay.

The Department's own recent conduct bears directly on this. EOIR terminated funding for the immigration court helpdesk program, through which NIJC and other organizations provided orientation and assistance to unrepresented respondents in Chicago and elsewhere. NIJC is a named plaintiff in litigation challenging that termination, now on appeal.¹⁰³ NIJC has continued to provide those services without federal support. EOIR eliminated the program designed to help unrepresented respondents comply with immigration court procedure, and now proposes to fine unrepresented respondents for failing to comply with immigration court procedure.

Whether a respondent is penalized turns on the timing of her removal. If the Chief Immigration Judge learns that a respondent has been removed or has departed before a decision issues, the CMP Notice must be dismissed; if the Board learns of it before deciding an appeal, the penalty must be vacated.¹⁰⁴ Meanwhile, “[n]o civil money penalty proceedings initiated against an alien described in § 1003.123(a)(2) may stay or otherwise interfere with the proceedings before the Immigration Judge or, as appropriate, the removal of the alien.”¹⁰⁵ Whether a respondent is penalized at all therefore turns on the timing of her removal relative to the penalty decision—a variable controlled by DHS and unrelated to the conduct charged. Two respondents who engage in identical conduct may be treated differently because one was removed first. The Department offers no explanation for that outcome, and it is difficult to reconcile with the penalty factors the Proposed Rule directs Immigration Judges to weigh, which concern harm, egregiousness, pervasiveness, deterrence, and prior offenses.¹⁰⁶

Lay witnesses. Witnesses in immigration proceedings are frequently family members of the respondent, and may lack permanent status themselves. Coverage extends to witnesses “whether physically present in the courtroom or whose presence in the courtroom is effectuated through telephonic or videoconferencing equipment,”¹⁰⁷ which the Department confirms includes witnesses appearing “during internet-based hearings.”¹⁰⁸ The Proposed Rule does not explain how a penalty would be served on such a witness, how this witness would exercise the right of appeal within 10 days, or how the penalty would be collected.

Expert witnesses. Country conditions experts, treating physicians, and evaluating clinicians supply the corroboration that asylum law requires applicants to produce. Proposed 8 C.F.R. § 1003.124(a)(4) would expose them to personal financial liability for a “reckless” false statement of material fact in the course of offering an opinion—which is to say, to personal liability arising from an adjudicator's subjective disagreement with their testimony. Experts who provide this assistance—most of whom do so pro bono—do not accept exposure of that kind, and there is no basis to expect them to accept it here. The predictable effect is a reduction in the availability of expert evidence in precisely the proceedings where respondents bear the burden of corroboration.

¹⁰³ *Amica Ctr. for Immigrant Rts. v. U.S. Dep't of Just.*, No. 25-5254 (D.C. Cir. argued Oct. 14, 2025).

¹⁰⁴ Proposed 8 C.F.R. §§ 1003.127(d)(3)(ii), 1003.128(d)(2), 91 Fed. Reg. at 47992.

¹⁰⁵ Proposed 8 C.F.R. § 1003.126(a), 91 Fed. Reg. at 47991.

¹⁰⁶ Proposed 8 C.F.R. § 1003.126(c)(2), 91 Fed. Reg. at 47991.

¹⁰⁷ Proposed 8 C.F.R. § 1003.123(a)(3), 91 Fed. Reg. at 47990.

¹⁰⁸ *Id.* at 47981 n.7.

f. The Proposed Rule Works Against the Purpose the Department Offers for It.

The Department's stated justification is volume. It explains that implementing the contempt authority "is now imperative" because "EOIR currently has a backlog of over 3.5 million cases," and that "[g]iven the scope of this backlog, it is crucial for Immigration Judges to have every tool available . . . to control the proceedings before them and address and deter conduct that prevents efficient completion of removal proceedings."¹⁰⁹ Measured against that objective, the Proposed Rule does not work.

It reduces representation, when representation is what moves cases. The effects described throughout this Part converge on a single outcome, which is fewer represented respondents. Unrepresented cases do not resolve faster. They require more hearing time, generate more continuances, produce more appealable error, and return more often on remand.¹¹⁰ A measure justified by the need to complete cases efficiently should not be expected to succeed by reducing the share of cases in which anyone is present to prepare the record.

It creates proceedings rather than concluding them. The Proposed Rule does not resolve contempt allegations within the removal case. It builds a separate adjudication alongside it. Each penalty requires a warning, a written memorialization of that warning, service, an optional response, a finding on the record of continued conduct, a CMP Notice containing six specified elements, a referral, a 30-day response period, a written decision by the Chief Immigration Judge or a designee, and—for what the Department estimates at 50 matters annually—an appeal to the Board with simultaneous briefing.¹¹¹ The Proposed Rule further requires the Immigration Court to compile a contempt Record of Proceeding "separate and apart from any underlying case Record of Proceeding(s)," and to transcribe every oral statement, warning, and warning response given on the record for inclusion in it.¹¹² Transcription and record assembly are existing constraints on EOIR's capacity. The Proposed Rule adds to them.

It adds burdens to the very cases it is meant to expedite. A respondent defending against removal who is simultaneously subject to a penalty proceeding faces additional filings, additional deadlines, and the need to obtain representation for the penalty matter at her own expense.¹¹³ The Department appears to assume these are separate matters with no effect on the underlying case. They are not. They consume the time of the respondent, of counsel, and of EOIR, and they do so within the same docket the Department describes as overburdened.

The Department's own analysis of the backlog does not identify the conduct this Rule targets. In April 2025, EOIR published an extended account of what has driven its caseload,

¹⁰⁹ 91 Fed. Reg. at 47980.

¹¹⁰ See Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1 (2015) (finding that 37% of respondents overall were represented, but only 14% of detained respondents were represented, and that represented respondents had approximately 15 times the odds of seeking relief and approximately 5.5 times the odds of obtaining relief); Jennifer Stave et al., *Evaluation of the New York Immigrant Family Unity Project* (Vera Inst. of Justice, Nov. 2017) (reporting that immigration court operations ran more smoothly with universal representation and that unrepresented detained respondents had a 4% success rate compared with a projected 48% under NYIFUP); Vera Inst. of Justice, *Legal Orientation Program: Case Time Analysis* (2018) (finding that LOP participation was associated with faster case completion times).

¹¹¹ Proposed 8 C.F.R. §§ 1003.125–.128, 91 Fed. Reg. at 47990–93; see *id.* at 47986.

¹¹² Proposed 8 C.F.R. § 1003.126(e), 91 Fed. Reg. at 47991.

¹¹³ Proposed 8 C.F.R. § 1003.126(b)(3)(iv), (d), 91 Fed. Reg. at 47991.

attributing significant growth to the use of administrative closure and tracing the correlation: between January 2021 and January 2025, administratively closed cases rose from nearly 278,000 to almost 392,000, while the backlog grew from approximately 1.68 million to over 4.1 million.¹¹⁴ *Nothing in that analysis identifies untimely appearance by counsel, untimely filing, or any other conduct described in proposed 8 C.F.R. § 1003.124 as a contributor.* The Department now invokes the same backlog to justify penalizing that conduct, without reconciling the two accounts or offering data connecting the conduct to case completion times.

The Department’s own estimates confirm that the Proposed Rule cannot do the work assigned to it. The Department characterizes the civil money penalty as “an extraordinary sanction that is used infrequently,”¹¹⁵ instructs adjudicators to resort to it “only after other reasonably available means have failed to restore proper conduct,”¹¹⁶ and “does not anticipate that a significant number of individuals will ultimately be subject to such a penalty.”¹¹⁷ A sanction the Department expects to impose rarely cannot meaningfully reduce a backlog of 3.5 million cases. Either the penalty will be rare, in which case it will not address the problem the Department invokes, or it will be common enough to matter, in which case the Department’s regulatory analyses rest on an assumption it does not believe.

The NPRM accounts for none of this. An agency must consider whether the remedy it selects aggravates the condition it invokes.¹¹⁸ The Department’s cost discussion identifies two costs: “the individual liabilities for individuals who may be subject to a civil money penalty . . . as well as the filing fee for any appeals of the Chief Immigration Judge’s civil money penalty order.”¹¹⁹ It then discounts even those, reasoning that “any burden would only be held by a covered individual who engaged in contemptuous conduct that delayed, disrupted, or obstructed the adjudicatory process, which holds comparatively little weight in balancing the costs and benefits of the proposed rule.”¹²⁰ That reasoning assumes the conclusion—that every penalized individual will have been correctly penalized—and in any event does not reach the costs described here, which fall on clients who never appear in a contempt proceeding at all.

The Department’s many omissions are a failure of reasoned decision-making independent of every other objection in this comment.

3. This NPRM Exceeds and Contravenes EOIR’s Statutory Mandate.

The statutory grant is not a general contempt power and does not permit the asymmetry this NPRM contemplates. This Proposed Rule is also a marked departure from decades of failure to promulgate regulations responsive to this statute, for good reason.

¹¹⁴ PM 25-29, *supra*, at 5–6.

¹¹⁵ 91 Fed. Reg. at 47986.

¹¹⁶ Proposed 8 C.F.R. § 1003.122(b), 91 Fed. Reg. at 47989–90.

¹¹⁷ *Id.* at 47986.

¹¹⁸ *See State Farm*, 463 U.S. at 43.

¹¹⁹ *Id.* at 47986.

¹²⁰ *Id.* at 47987.

a. “Proper Exercise of Authority” Is a Textual Limit That the Proposed Rule’s Procedures Fail to Enforce.

The Department itself describes the authority as reaching action or inaction “in contempt of the proper exercise of their authority” by Immigration Judges, and the Proposed Rule carries that limitation into the regulatory text, providing that the penalty reaches an individual “who engages in conduct, as set forth in §1003.124, in contempt of the Immigration Judge’s proper exercise of authority under the Act during the course of proceedings conducted under section 240 of the Act.”¹²¹ The word “proper” must have meaning. Where the order or directive that the individual is accused of resisting itself exceeded the Immigration Judge’s authority under the Act, the predicate for contempt is absent, and no penalty may lawfully attach.

Yet the Proposed Rule furnishes no mechanism to test or define what that conduct is. Proposed § 1003.127(d)(1) permits the Chief Immigration Judge to find contempt and impose a penalty upon clear and convincing evidence of only four things: that the person charged is a covered individual under § 1003.123; that the conduct set forth in the CMP Notice occurred; that the conduct falls within the scope of § 1003.124(a); and that the Immigration Judge properly provided the required warning, time to respond, and CMP Notice.¹²² Notably, these four required findings do not include any determination that the Immigration Judge’s underlying order or directive—the authority the individual is accused of having defied—was itself a proper exercise of authority. The Proposed Rule compounds this omission by narrowing the adjudicative record and the adjudicator’s tools, stating that the Chief Immigration Judge “may only consider the contempt Record of Proceeding as described in §1003.126(e)” and “may not remand a CMP Notice to the Immigration Judge for further clarification or proceedings.”¹²³ The Department itself describes this as a limit on the “ability of the Chief Immigration Judge to engage in additional factfinding.”¹²⁴ The Proposed Rule thus omits the very inquiry the statute demands. The result is a scheme in which the statutory qualifier “proper” is recited in the text of the Proposed Rule but rendered unenforceable at every stage where it would matter—allowing any abuse of power by the initial Immigration Judge to go unchecked. The penalty inquiry would proceed on the basis of a one-sided account of the incident, compiled by the accusing judge, with no mechanism to test whether the authority that was allegedly defied was properly exercised in the first place.

b. The Proposed Rule’s Coverage Exceeds the Statutory Grant.

The Department grounds this rulemaking in section 103(g) of the INA, 8 U.S.C. § 1103(g), and in INA § 240(b)(1), 8 U.S.C. § 1229a(b)(1). As the preamble itself frames the grant of authority, “the INA explicitly authorizes the Attorney General to prescribe regulations related to Immigration Judges’ authority to issue civil money penalties for any contemptuous action or inaction during the course of removal proceedings under section 240 of the INA, 8 U.S.C. 1229a. INA 240(b)(1), 8 U.S.C. 1229a(b)(1).”¹²⁵ The Proposed Rule continues to acknowledge that

¹²¹ 91 Fed. Reg. at 47989.

¹²² Proposed 8 C.F.R. § 1003.127(d)(1), 91 Fed. Reg at 47990.

¹²³ Proposed 8 C.F.R. § 1003.127(b), 91 Fed. Reg. at 47992.

¹²⁴ 91 Fed. Reg. at 47984.

¹²⁵ *Id.*

limitation, confining the penalty to contempt of the “Immigration Judge’s proper exercise of authority under the Act during the course of proceedings conducted under section 240 of the Act.”¹²⁶

8 U.S.C. § 1229a(b)(1) is silent as to who may be sanctioned. That silence does not license asymmetry: the Department extends the penalty to indigent respondents, pro bono counsel, and lay witnesses while categorically exempting opposing government counsel and government witnesses—and it offers no reasoned basis for drawing the line where it does. The categories of covered individuals likely sweep more broadly than Congress contemplated. Congress authorized sanctions for contempt of an Immigration Judge’s proper exercise of authority but said nothing about extending monetary penalties to indigent asylum seekers navigating the system without counsel, to pro bono attorneys and accredited representatives operating on minimal resources, or to lay and expert witnesses whose only connection to the proceeding is their testimony.

The breadth of the Proposed Rule’s coverage goes well beyond what the neutral statutory language suggests Congress intended. The Proposed Rule extends the penalty to any “attorney or representative, as defined in §1001.1(f) and (j), who has filed a Notice of Entry of Appearance as Attorney or Representative before the Immigration Court (Form EOIR–28) or a Notice of Entry of Limited Appearance for Document Assistance before the Immigration Court (Form EOIR–61),” to an individual “who is the subject of proceedings before the Immigration Judge,” and to witnesses in any proceedings before the Immigration Judge, including witnesses appearing telephonically or by videoconference.¹²⁷ Yet the Department categorically excludes all attorneys and witnesses who are employees or contractors of the federal government acting in their official capacity.¹²⁸ This asymmetry—a penalty regime that reaches indigent respondents, pro bono legal counsel, and lay witnesses but categorically exempts opposing government counsel—is not contemplated by the statute. The overbroad definition of covered individuals, combined with the categorical exemption for their opposing counsel, creates perverse incentives and invites unjust outcomes.

Furthermore, the Proposed Rule attempts to regulate “[d]isorderly or abusive behavior or language in and around the courtroom and before the Immigration Judge or abusive language in any filing with the court,” and the preamble confirms that the standard applies to conduct “inside or outside of the courtroom,” offering as examples disorderly or abusive behavior occurring “in the court waiting room, hallway, or at the filing window.”¹²⁹ Conduct at a filing window is not necessarily contempt of any exercise of an Immigration Judge’s adjudicatory authority. The statute reaches only “action (or inaction) in contempt of the judge’s proper exercise of authority under this chapter,” 8 U.S.C. § 1229a(b)(1); it does not authorize a general decorum code for agency premises.

¹²⁶ Proposed 8 C.F.R. § 1003.121, 91 Fed. Reg. at 47989.

¹²⁷ Proposed 8 C.F.R. § 1003.123(a)(1)-(3), 91 Fed. Reg. at 47990.

¹²⁸ *Id.*

¹²⁹ Proposed 8 C.F.R. § 1003.124(a)(3), 91 Fed. Reg. at 47982, 47990.

More fundamentally, the Proposed Rule provides that the required warning “is not limited to a single proceeding” and “remains in effect for one year from the date of issuance.”¹³⁰ The preamble makes the consequence explicit: a warning “would not be limited to the particular proceeding in which the initial contemptuous conduct occurred but, rather, would apply across all future proceedings.”¹³¹ Under that design, the warning that supplies the predicate for a penalty in Case B may have been issued in Case A, before a different judge, perhaps a different immigration court, involving a different respondent, on a different record—and the Chief Immigration Judge adjudicating the penalty may consider only the contempt Record of Proceeding assembled around it. Untethering the penalty from the specific section 240 proceeding in which the conduct occurred exceeds the statutory text and goes beyond what Congress intended.

c. Nearly Thirty Years of Non-Implementation Demands a Reasoned Explanation.

The Department’s nearly thirty-year failure to implement the statutory contempt authority is itself significant. Across three decades and administrations of both parties, the Department repeatedly declined to exercise this power. That prolonged inaction has generated substantial reliance interests among the immigration bar, and the Department bears a heightened explanatory burden to justify reversing course now—a burden the preamble does not carry.

Congress codified the contempt authority in 1996 and conditioned its exercise on the Attorney General’s promulgation of regulations to define and delineate that statutory authority.¹³² The Department concedes that no such regulations have ever issued, notwithstanding then-Attorney General Gonzales’s 2006 directive that EOIR “draft a new proposed rule that creates a strictly defined and clearly delineated authority to sanction by civil money penalty an action (or inaction) in contempt of an immigration judge’s proper exercise of authority.” Despite “Departmental efforts over time,” the Department acknowledges that it “has not published a rulemaking implementing a strictly defined and clearly delineated authority.”¹³³ The preamble accordingly describes the Proposed Rule as implementing authority “Congress provided for nearly 30 years ago.”¹³⁴

The record of prior attempts is documented in the Department’s own materials. In 2000, the Department stated in the practitioner-conduct rulemaking that “[i]t is expected that the contempt regulations, once published, will provide that a practitioner can be disciplined under the Professional Conduct Rules when the practitioner has been sanctioned for contemptuous conduct by an Immigration Judge,” and that “[a] finding of contempt will become a prerequisite to the imposition of disciplinary action pursuant to this subsection.”¹³⁵

That history imposes an explanatory burden on the Department that the preamble does not carry. Across three decades and administrations of both parties, the Department repeatedly declined to

¹³⁰ Proposed 8 C.F.R. § 1003.125(a), 91 Fed. Reg. at 47990.

¹³¹ *Id.* at 47983.

¹³² 91 Fed. Reg. at 47980.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Professional Conduct for Practitioners—Rules and Procedures, 65 Fed. Reg. 39513, 39518–19 (June 27, 2000).

implement this statutory authority; the only new factual predicate offered for reversing course is the case backlog, which, by definition, is not new but has cumulated over many years.¹³⁶ The remaining justifications—the 2006 directive and the statutory grant itself—were equally available during each of the three decades in which the Department declined to act.

An agency changing a longstanding position must supply “a reasoned explanation [] for disregarding facts and circumstances that underlay or were engendered by the prior policy,” and must “display awareness that it is changing position” and “show that there are good reasons for the new policy.”¹³⁷ It must likewise assess the existence and strength of any reliance interests that have accumulated in the interim and weigh them against any competing policy concerns.¹³⁸ Here the reliance interests are substantial and concrete: for nearly thirty years, the immigration bar has structured its practices—including pro bono and nonprofit representation models operating on thin margins—around a system in which the disciplinary exposure is the counsel-initiated process at 8 C.F.R. §§ 1003.101–.111, a process the Department acknowledges “is initiated and led by the EOIR disciplinary counsel” rather than by a single Immigration Judge.¹³⁹ The Proposed Rule fails to acknowledge the change in position, fails to offer a reasoned explanation for the change or good reasons for the new policy, and fails to address those reliance interests.

4. The Proposed Rule Would Place the United States in Tension with its Treaty Obligations.

The Proposed Rule must also be evaluated against the United States’ binding international obligations. The United States is a party to several international instruments that impose specific duties regarding the treatment of asylum seekers and refugees in removal proceedings. The Proposed Rule is in tension with at least three of these instruments.

First, the United States acceded to the 1967 Protocol Relating to the Status of Refugees on November 1, 1968, thereby undertaking to comply with Articles 2 through 34 of the 1951 Convention Relating to the Status of Refugees.¹⁴⁰ Article 16 of the 1951 Convention guarantees refugees “national treatment” with respect to access to courts, legal assistance, and exemption from the requirement to give security for costs in court proceedings. A rule that chills attorney representation and imposes financial penalties on respondents who participate in proceedings undermines this guaranteed right of access. Article 32 provides that expulsion of a refugee lawfully present may only occur “in pursuance of a decision reached in accordance with due process of law” and that the refugee “shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority.” A rule that deters attorneys from representing refugees or penalizes zealous advocacy impairs the right to be represented that Article 32 preserves. Article 33’s prohibition on refoulement—the return of a refugee to territories where their life or freedom would be threatened—is also implicated: if the

¹³⁶ 91 Fed. Reg. at 47980.

¹³⁷ *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221–22 (2016) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

¹³⁸ *DHS v. Regents of the University of California*, 591 U.S. 1, 30–31 (2020).

¹³⁹ 91 Fed. Reg. at 47980.

¹⁴⁰ Memorandum Opinion for the Legal Adviser, *Legal Obligations of the United States Under Article 33 of the Refugee Convention* (Dec. 21, 1991), <https://www.justice.gov/file/150216/dl>.

Proposed Rule causes respondents to abandon meritorious asylum claims or causes attorneys to temper their advocacy, it may indirectly result in the return of individuals to countries where they face persecution, in violation of this foundational obligation.

Second, the United States ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”) in 1994. Article 3 of the CAT prohibits the expulsion or return of a person to a state where there are substantial grounds for believing that they would be in danger of being subjected to torture. The United States implemented this obligation through domestic regulations at 8 C.F.R. §§ 208.16–.18, and CAT claims are adjudicated in immigration court. Any rule that chills counsel’s ability to advocate in those proceedings directly affects the United States’ compliance with its Article 3 obligations. Critically, Article 13 of the CAT requires that “steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.” The Proposed Rule does the opposite: it exposes witnesses in immigration proceedings—including those testifying about torture and persecution—to civil money penalties for testimony an Immigration Judge characterizes as “reckless” or a misstatement. This is directly contrary to the United States’ obligation under Article 13 to protect witnesses from intimidation as a consequence of their evidence.

Third, the United States ratified the International Covenant on Civil and Political Rights (“ICCPR”) in 1992. Article 13 of the ICCPR provides that an alien lawfully in a state’s territory may be expelled only “in pursuance of a decision reached in accordance with law” and shall, except where compelling reasons of national security otherwise require, “be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority.” The Proposed Rule’s deterrent effect on legal representation is in tension with this explicit right to representation in expulsion proceedings. The ICCPR’s Article 14 guarantee of a fair hearing by an impartial tribunal, and the associated principle of equality of arms, is further implicated by a rule that subjects one party’s counsel to financial sanctions while exempting the other’s.

Although the United States has taken the position that certain treaty provisions are not self-executing, these obligations remain binding as a matter of international law and should inform the agency’s exercise of its regulatory discretion. At minimum, EOIR should have considered—and the preamble should have addressed—whether the Proposed Rule is consistent with the United States’ obligations under these instruments. The failure to do so is a further failure of reasoned decision-making under the APA.

5. The Proposed Rule, if Final, Would be Arbitrary and Capricious.

The APA states that a court must “hold unlawful and set aside” agency action that is “arbitrary, capricious, [or] an abuse of discretion, or otherwise not in accordance with law; . . . (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; . . . (D) without observance of procedure required by law . . .” or “(E) unsupported by substantial evidence.”¹⁴¹ Courts will invalidate agency determinations that fail to “examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found

¹⁴¹ 5 U.S.C. § 706(2).

and the choice made.”¹⁴² The Proposed Rule fails this standard in at least four independently sufficient respects.

a. First, the Department Has Failed to Establish a Rational Connection Between the Asserted Problem and the Chosen Remedy.

The preamble’s central justification for the Proposed Rule is EOIR’s case backlog, yet the Department fails to establish a rational connection between the problem and its proposed solution. The Department states that “EOIR currently has a backlog of over 3.5 million cases” and that “[g]iven the scope of this backlog, it is crucial for Immigration Judges to have every tool available—including the authority to impose civil money penalties—to control the proceedings before them and address and deter conduct that prevents efficient completion of removal proceedings.”¹⁴³ Yet the Department offers no data quantifying the number of contempt incidents in the Immigration Courts, the frequency of any of the five conduct categories targeted by the Proposed Rule, or the share of the 3.5-million-case backlog attributable to contemptuous behavior as opposed to structural resource shortfalls, staffing gaps, or policy changes. The Department fails to offer any evidence that this Proposed Rule will actually solve the problem it purports to address.

Nowhere in the Proposed Rule does the Department actually state that these instances of contempt cause this backlog. This failure to establish a causal connection means that there is no rational connection between the asserted problem and the chosen remedy. No evidence—or even statement—in the Proposed Rule purports that the Proposed Rule will actually eliminate the identified backlog, or considers whether there are other factors which would prevent the clearing out of this backlog. This failure to establish a rational connection between the asserted problem and the chosen remedy is fatal under *State Farm*.

b. Second, the Department's Reasoning Is Internally Contradictory.

For purposes of the Regulatory Flexibility Act (“RFA”), the Department “has determined that the proposed rule will not have a significant economic impact on a substantial number of small entities”—a determination that rests on the premise that “imposition of a civil money penalty is intended to be an extraordinary sanction that is used infrequently in response to misconduct occurring before an Immigration Judge.”¹⁴⁴ In the Executive Order 12866 discussion, the Department repeats this characterization, stating that it “intends for the civil money penalty to be an ‘extraordinary’ sanction” and therefore “does not anticipate that a significant number of individuals will ultimately be subject to such a penalty.”¹⁴⁵ Yet the same preamble asserts that it is “now imperative”—after thirty years—to issue these regulations and “crucial” that Immigration Judges have this tool, precisely because of a 3.5-million-case backlog.¹⁴⁶ A sanction this rare—and expected to be displaced in most cases by warnings alone—cannot simultaneously be frequent enough to make a measurable dent in such a backlog. This internal inconsistency

¹⁴² *State Farm*, 463 U.S. at 43 (internal citation omitted).

¹⁴³ 91 Fed. Reg. at 47980.

¹⁴⁴ 91 Fed. Reg. at 47986; see 5 U.S.C. § 605(b).

¹⁴⁵ 91 Fed. Reg. at 47986.

¹⁴⁶ *Id.* at 47980.

demonstrates that the Department’s reasoning is arbitrary and capricious, and that its offered explanation “runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”¹⁴⁷

Additionally, the Department fails to offer a satisfactory explanation or evidence in support of categorically excluding “attorneys acting in their official capacity representing the Federal Government” and “witnesses who are current employees or contractors of the Federal government acting in their official capacity.”¹⁴⁸ The reasoning here is internally inconsistent. The Department claims to exclude government attorneys due to alternative disciplinary procedures available.¹⁴⁹ However, the existing practitioner-conduct rules already reach nearly all of the conduct the Proposed Rule targets. Section 1003.102(c) covers knowingly or recklessly making a false statement of material fact or law and willfully misleading, misinforming, threatening, or deceiving any person—language proposed § 1003.124(a)(4) and (a)(5) reproduce almost verbatim.¹⁵⁰ Section 1003.102(l) covers repeated untimely failure to appear at hearings and pre-hearing conferences, the substance of proposed § 1003.124(a)(1).¹⁵¹ Sections 1003.102(g), (j), and (n) already reach contumelious conduct, frivolous behavior, and conduct prejudicial to the administration of justice.¹⁵² The Department nowhere explains why these existing grounds are inadequate, or why another penalty regime is necessary in light of them.¹⁵³ The Department offers no explanation for this internal inconsistency—no explanation why one existing framework is sufficient while the other is not, and no explanation for the inconsistent exclusion of government witnesses while including those on the other side. These unexplained inconsistencies render the Proposed Rule arbitrary and capricious.¹⁵⁴

c. Third, the Department Entirely Failed to Consider Critical Aspects of the Problem.

Under *State Farm*, an agency acts arbitrarily when it has “entirely failed to consider an important aspect of the problem.”¹⁵⁵ The Proposed Rule imposes penalties ranging from “not less than \$1,000 and not more than \$1,500” for a first contempt order to “not less than \$2,500 and not more than \$3,500” for any subsequent order after a second.¹⁵⁶ Those penalties reach even immigrants who are the subject of removal proceedings and those seeking asylum—a population that is frequently indigent, often detained, and overwhelmingly unrepresented. The mandatory factors for determining the penalty amount include the harm from the conduct, its egregiousness, its pervasiveness, the probable deterrent effect of the penalty, and the number of prior offenses or warnings; ability to pay appears nowhere among them.¹⁵⁷ Nor does the Proposed Rule exempt children or pro se respondents from its coverage; the Proposed Rule instead reaches every

¹⁴⁷ *State Farm*, 463 U.S. at 43; see also *ANR Storage Co. v. FERC*, 904 F.3d 1020, 1028 (D.C. Cir. 2018).

¹⁴⁸ 91 Fed. Reg. at 47981.

¹⁴⁹ *Id.*

¹⁵⁰ 8 C.F.R. § 1003.102(c); Proposed 8 C.F.R. § 1003.124(a)(4)-(5), 91 Fed. Reg. at 47990.

¹⁵¹ 8 C.F.R. § 1003.102(l); Proposed 8 C.F.R. § 1003.124(a)(1), 91 Fed. Reg. at 47990.

¹⁵² 8 C.F.R. § 1003.102(g), (j), (n).

¹⁵³ 91 Fed. Reg. at 47986.

¹⁵⁴ See *Encino Motorcars*, 579 U.S. at 222.

¹⁵⁵ *State Farm*, 463 U.S. at 43.

¹⁵⁶ Proposed 8 C.F.R. § 1003.126, 91 Fed. Reg. at 47991.

¹⁵⁷ *Id.*

individual “who is the subject of proceedings before the Immigration Judge” without qualification.¹⁵⁸ In fact, the only consideration for reviewing penalty amounts is to *increase them for inflation*.¹⁵⁹ The Department utterly fails to consider how this Proposed Rule will affect those most vulnerable.

The Proposed Rule further reaches witnesses, attorneys, and accredited representatives who often work at drastically reduced rates—or pro bono—and would bear the burden of these monetary penalties. The Proposed Rule nowhere addresses the deterrent and chilling effect on witness testimony in these immigration proceedings—even though the Proposed Rule expressly covers witnesses, including those appearing remotely—or the consequences for access to counsel when practitioners face suspension for nonpayment. A practitioner who fails to pay within 30 days receives a notice that the EOIR disciplinary counsel will petition the Board to suspend the practitioner “from practice before the Board and the Immigration Courts immediately,” unless the practitioner pays the penalty “and a late fee of \$50 within 15 days from the date of issuance of the notice.”¹⁶⁰ The Department does not analyze what removing practitioners from the immigration bar over unpaid four-figure penalties will do to representation rates in a system already straining under 3.5 million pending cases. This failure alone renders the Proposed Rule arbitrary and capricious.

d. Fourth, the Department Failed to Adequately Consider Less Restrictive Alternatives.

“It may be arbitrary or capricious for an agency to ignore an obvious alternative, such as when the failure to consider an alternative reflects a failure to ‘consider an important aspect of the problem.’”¹⁶¹ The only regulatory alternative the preamble discusses is a choice between two methods for setting the amount of a penalty the Department has already decided to authorize: the Department “considered leaving the civil money penalty amounts to the Immigration Judge’s discretion, similar to the discretion afforded to Federal court judges,” but “determined that providing a generally applicable penalty schedule will better promote consistency among the Immigration Courts.”¹⁶²

The Department does not seriously analyze alternatives that would accomplish the same stated goals without such detrimental and devastating financial and chilling effects, such as a warning-only system without monetary penalties—which, by the Department’s own expectation, would suffice because “in most cases, warnings issued under this proposed rule will be sufficient to deter contemptuous conduct without having to initiate the civil money penalty process.”¹⁶³ Nor does the Department consider relying on and strengthening the existing practitioner discipline process, which the Proposed Rule acknowledges is already operational and which already treats “[e]ngag[ing] in contemptuous or otherwise obnoxious conduct” as a ground for discipline—and the Department offers no indication that this authority is unable to address conduct issues in

¹⁵⁸ Proposed 8 C.F.R. § 1003.123(a)(2), 91 Fed. Reg. at 47990.

¹⁵⁹ 91 Fed. Reg. at 47984.

¹⁶⁰ Proposed 8 C.F.R. § 1003.129(c), 91 Fed. Reg. at 47993.

¹⁶¹ *California v. Env’t Prot. Agency*, 72 F.4th 308, 317 (D.C. Cir. 2023) (quoting *State Farm*, 463 U.S. at 43).

¹⁶² 91 Fed. Reg. at 47984.

¹⁶³ *Id.* at 47986.

immigration proceedings.¹⁶⁴ Finally, as discussed above, the Department does not consider adopting measures to mitigate the Proposed Rule’s impact on vulnerable populations and attorneys or accredited representatives offering services at low or no cost. By failing to adequately consider these obvious alternatives—including those the Proposed Rule itself mentions—the Department acts in an arbitrary and capricious manner.

6. The Proposed Rule Would Violate the First Amendment by Having a Chilling Effect on Attorney/Accredited Representative Speech.

The Proposed Rule would allow the federal government to impose monetary penalties based on attorney speech in and about adjudicative proceedings.¹⁶⁵ Even the mere threat of these monetary penalties chills protected speech and carries important downstream consequences. This regulated speech includes conduct that the lone Immigration Judge determines is “[d]isorderly or abusive behavior or language in and around the courtroom and before the Immigration Judge or abusive language in any filing with the court” and “[k]nowingly or recklessly making a false statement of material fact or law.”¹⁶⁶ Neither turns on the time, place, or manner of the expression; both turn on the content of what the speaker said. And the latter expressly extends to the written word—“abusive language in any filing”—which is to say to the core work product of an advocate.

Even under the more permissive standard applicable to lawyer speech in pending proceedings, a restriction must be drawn with sufficient precision to give a practitioner fair notice of what is forbidden.¹⁶⁷ The Proposed Rule’s terms—“disorderly,” “abusive,” and, in the preamble’s gloss, language that “impugns the integrity of the court” or “unfairly maligns the competence or impartiality of the presiding Immigration Judge”—supply no such notice, and the qualifier “unfairly” is nowhere defined.¹⁶⁸ A restriction on free speech is “void for vagueness” where it fails to provide “‘fair notice to those to whom [it] is directed.’”¹⁶⁹ *Gentile* thus supplies the governing principle: whatever latitude the Department has to regulate advocacy, the standard it adopts must give a practitioner fair notice of what is forbidden before a penalty attaches. The Proposed Rule’s undefined terms do not supply that notice.¹⁷⁰

Additionally, the Proposed Rule would chill the speech of non-lawyers before the court as well. Witnesses, individuals working through the immigration process, and any other covered individual may have their First Amendment rights unlawfully restricted through the imposition of these penalties, or the mere threat of imposition.

The vagueness problem is aggravated by what the preamble’s gloss actually covers. Language that “unfairly maligns the competence or impartiality of the presiding Immigration Judge” encompasses criticism of a government adjudicator, and could perhaps expand beyond in-court statements. The Proposed Rule empowers that same adjudicator to issue the warning and to

¹⁶⁴ *Id.* at 47986.

¹⁶⁵ Proposed 8 C.F.R. § 1003.124(a)(3)-(4), 91 Fed. Reg. at 47990.

¹⁶⁶ *Id.*

¹⁶⁷ *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048–51 (1991) (holding Nevada’s rule void for vagueness as applied).

¹⁶⁸ Proposed 8 C.F.R. § 1003.124(a)(3)-(4), 91 Fed. Reg. at 47982, 47990.

¹⁶⁹ *Gentile*, 501 U.S. at 1048.

¹⁷⁰ 91 Fed. Reg. at 47981–82.

propose the penalty, notwithstanding that the qualifier “unfairly” is nowhere defined and that a motion to recuse, an appellate brief assigning error to a judge’s conduct of a hearing, or a complaint about disparate treatment of asylum claims will frequently be indistinguishable in substance from an allegation that the judge lacked competence or impartiality.

The Department’s answer—a mere footnote observing that an attorney or representative with concerns about an Immigration Judge’s conduct “may raise such concerns by filing a complaint with EOIR’s Judicial Conduct and Professionalism Unit”—does not cure this defect.¹⁷¹ And it cannot cure the chilling effect this type of threatened action has on practitioners before the court. It channels criticism into a nonpublic administrative complaint while leaving the practitioner exposed to a monetary penalty for making the same point on the record, where it can be preserved for review. This violates the First Amendment and improperly restricts speech. The Proposed Rule will chill attorneys’ speech, as well as ability to properly and zealously represent their clients.

7. The NPRM Runs Afoul of Constitutional Due Process Rights.

The Proposed Rule authorizes an unconstitutional deprivation of property and, for practitioners, of the ability to earn a living. Such a deprivation must satisfy the framework of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), which weighs the private interest affected, “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards,” against the government’s interest, including the fiscal and administrative burdens of additional process prior to the deprivation.

Each factor cuts against the Proposed Rule as proposed. The private interests are substantial: for practitioners, exposure to a penalty of up to \$3,500 per order, immediate suspension from practice before the Board and the Immigration Courts for nonpayment, a new independent ground for discipline for repeated nonpayment, and the reputational consequence of a contempt finding that the Board may publish—which “will serve as precedents in all proceedings involving the same issue(s).”¹⁷² For respondents, liability for sums beyond what many individuals can pay, assessed without any consideration of ability to pay. The risk of erroneous deprivation under these procedures is correspondingly high. There is no hearing: the Chief Immigration Judge decides on the papers, “[a]fter reviewing the CMP Notice and the response to the CMP Notice, if any,” and “may only consider the contempt Record of Proceeding as described in §1003.126(e)” —a record compiled by the accusing judge, who summarizes in writing any oral statements, warnings, or warning responses that were not recorded.¹⁷³ There is no live testimony, no cross-examination, and no remand for clarification. The response window is 30 days with a single 7-day extension for good cause, the appeal window is only 10 days from the date of the order, and the appeal carries a \$675 fee.¹⁷⁴ Filing an appeal does stay the order and the payment obligation, though this stay is available only to those who can pay the \$675 fee or successfully seek a waiver within 10 days—which relocates rather than removes the barrier for indigent respondents and thinly funded nonprofit practitioners.

¹⁷¹ *Id.* at 47981, n.8.

¹⁷² Proposed 8 C.F.R. § 1003.128(d), 91 Fed. Reg. at 47993.

¹⁷³ Proposed 8 C.F.R. § 1003.127(b), 91 Fed. Reg. at 47992.

¹⁷⁴ Proposed 8 C.F.R. §§ 1003.126-.128, 91 Fed. Reg. at 47992-93.

The Proposed Rule’s allocation of functions independently offends the neutral-adjudicator principle. The Immigration Judge who witnesses the conduct issues the warning, makes the on-the-record finding that the conduct continued, drafts the factual description, selects the charge, proposes the penalty amount, and assembles the contempt Record of Proceeding to which the decisionmaker is confined. Review then goes to the Chief Immigration Judge—the Immigration Judge’s own supervisor, who under proposed § 1003.130 supervises the exercise of this very authority and may suspend an Immigration Judge’s use of it for up to 30 days. The only separation the Proposed Rule provides is a bar on designating as decisionmaker a Deputy Chief Immigration Judge who is “the present first-line supervisor of the Immigration Judge who issued the CMP Notice”—which leaves untouched the structural fact that the reviewer sits atop the same chain of command as the accuser.¹⁷⁵

The Department appears to recognize this fundamental flaw and attempts to address it as a jurisdictional assertion rather than an explanation. The preamble states that these contempt proceedings “are not ‘required by statute to be determined on the record after opportunity for an agency hearing’ and, thus, are not subject to the Administrative Procedure Act’s requirements for formal adjudications under 5 U.S.C. §§ 554, 556–57,” adding that INA § 240(b)(1) does not itself require specific hearing procedures for the contempt authority.¹⁷⁶ Even assuming that conclusion is correct as a matter of statutory coverage, it does not answer the constitutional question. The preamble offers no such analysis, and the Department’s own authority underscores the point: it invokes *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950), for the proposition that notice and an opportunity to be heard must be “appropriate to the nature of the case,” without ever analyzing what the nature of the potential proceedings here—an accusation of misconduct leveled by a judge against an advocate or other individual appearing before them, adjudicated on that judge’s own record by that judge’s supervisor—requires.

These deficiencies create substantial due process concerns for the advocates and other individuals operating within this system.

8. EOIR’s Sudden Plan to Regulate Contempt and Civil Fines Is Politically Motivated.

The NPRM does not attempt to disguise the political origins of this rule. It explicitly cites the March 2025 Presidential Memorandum, “Preventing Abuses of the Legal System and the Federal Court,” as a basis for the rulemaking. The NPRM is further layering onto a larger pattern of punitive fines on immigrants and their counsel championed by EOIR and DHS.

a. The Presidential Memorandum Has Been Challenged as Unconstitutional.

The Presidential Memorandum, issued on March 22, 2025, made sweeping and unsubstantiated accusations against the entire immigration bar, claiming that “the immigration bar, and powerful Big Law pro bono practices” “frequently coach[] clients to conceal their past or lie about their circumstances when asserting their asylum claims.” The memorandum directed the Attorney

¹⁷⁵ Proposed 8 C.F.R. § 1003.127(a), 91 Fed. Reg. at 47992.

¹⁷⁶ 91 Fed. Reg. at 47983.

General to “seek sanctions against attorneys and law firms who engage in frivolous, unreasonable, and vexatious litigation against the United States.”

The American Bar Association (“ABA”) filed suit on June 16, 2025, in *ABA v. Executive Office of the President*, challenging the Presidential Memorandum as violating the First Amendment and the separation of powers.¹⁷⁷ The New York City Bar Association condemned the memorandum’s “sweeping accusations” as “devoid of any legitimate factual basis.” The Economic Policy Institute characterized the memorandum as intended to “intimidate and deter law firms” from providing legal representation to noncitizens.

b. The Proposed Rule Implements a Political Directive, Not a Regulatory Need.

The timing and content of the Proposed Rule strongly suggest that it is designed to implement the political directive set forth in the Presidential Memorandum rather than to address a genuine regulatory need. The statutory authority at issue has existed since 1996—nearly three decades—without any prior administration finding it necessary to implement contempt regulations. The current administration’s decision to act now, in direct response to a Presidential Memorandum that singled out the immigration bar and pro bono attorneys for criticism, undermines the legitimacy of the rulemaking.

This context is further illuminated by reports that EOIR leadership has publicly chastised (and fired) Immigration Judges for having “bias in favor of respondents and against DHS,” and that EOIR has adopted policies that systematically favor the government—including permitting IJs to accept oral motions from DHS to dismiss or terminate cases without waiting for documentation from respondent’s counsel. The Proposed Rule is but a piece of this broader pattern of institutional conduct that tilts the scales of immigration adjudication in favor of the government and against noncitizens and their advocates.

c. A Broader Pattern of Punitive Monetary Measures and Retaliation

This rule cannot be assessed in isolation. On June 11, 2026, EOIR published an interim final rule titled “EOIR Fees,”¹⁷⁸ amending 8 C.F.R. Parts 1003, 1103, 1208, and 1240 to implement fee requirements enacted by the One Big Beautiful Bill Act, Pub. L. 119-21. Among other changes, that rule added a new asylum application fee that cannot be waived or reduced and an annual asylum fee for each calendar year an asylum application remains pending; narrowed fee exceptions for motions to reopen or reconsider; eliminated the prior provision allowing payment of only the highest single fee when multiple applications are filed; and required payment through the EOIR Payment Portal with proof accompanying filings.

The broader pattern also includes *Maria L. v. Mullin* (formerly *Maria L. v. Noem*), No. 1:25-cv-13471 (D. Mass. filed Nov. 20, 2025), a class action challenging DHS civil fines under 8 U.S.C. §§ 1229c and 1324d. As of March 18, 2026, the case involved more than 65,000 fine notices and more than \$36 billion in pending fines. This is a different agency and different statutory scheme,

¹⁷⁷ *American Bar Association v. Executive Office of the President, et al.*, No. 1:25-cv-01888 (D.D.C. filed June 16, 2025).

¹⁷⁸ EOIR Fees, 91 Fed. Reg. 35369 (June 11, 2026).

but it is part of the broader pattern. DHS has also directed ICE to take actions against immigration attorneys who file “false asylum claims” in Immigration Court, contributing to a hostile and retaliatory environment for practitioners.

The cumulative burden is the relevant one. The proposed penalties would fall on a population already carrying escalating monetary burdens imposed by the same agencies, yet EOIR has not calculated the combined effect of its fee rule, DHS fines, and the proposed sanctions regime. The Department cannot evaluate this rule as though its costs arise in a vacuum while disregarding the practical consequences of layering one monetary measure on top of another.

The Proposed Rule is also inconsistent with principles that have been articulated across the political spectrum—including by conservative leaders and jurists—regarding fair notice, the limits on government power, and the treatment of immigrants and asylum seekers. President Reagan repeatedly insisted that immigration enforcement must be “consistent with fair procedures and our Constitution” and “consistent with our values of individual privacy and freedom.”¹⁷⁹ Upon signing the Immigration Reform and Control Act of 1986, he stated that “[o]ur objective is only to establish a reasonable, fair, orderly, and secure system of immigration into this country and not to discriminate in any way against particular nations or people.” A one-sided sanctions regime that deters attorneys from representing refugees and penalizes the advocacy that gives those individuals a meaningful voice in proceedings is fundamentally at odds with these principles.

Justice Scalia struck down a vague penalty provision in *Johnson v. United States*, 576 U.S. 591 (2015), holding that laws which fail to give fair notice or invite arbitrary enforcement violate due process. Justice Gorsuch extended that holding to civil immigration proceedings in *Sessions v. Dimaya*, 584 U.S. 148 (2018), declaring that “[v]ague laws invite arbitrary power” and rejecting any lesser standard for immigration law. The Proposed Rule’s operative terms—“unfairly maligns,” or “disorderly”—are at least as standardless as the provisions these Justices invalidated, and more dangerous because the adjudicator being criticized decides whether the advocacy is impermissible.

Justice Gorsuch, joined by Chief Justice Roberts and Justice Thomas in dissent, further warned in *Gundy v. United States*, 139 S. Ct. 2116 (2019), that Congress may not delegate standardless discretion to executive officials—yet the Proposed Rule does exactly that by empowering roughly 600 Immigration Judges to determine what speech “unfairly maligns” them. These are not partisan objections; the constitutional principles condemning this rule—fair notice, the prohibition on standardless discretion, and protection of critical speech—have been championed most forcefully by the conservative wing of the Court.

Conclusion

Despite the Department’s invocation of docket efficiency, this Proposed Rule would constitute a foundational shift in immigration adjudication, replacing evenhanded courtroom management with a one-sided sanctions regime that chills zealous advocacy, strips procedural protections from the most vulnerable participants in the system, and breaks with nearly thirty years of

¹⁷⁹ Statement on United States Immigration and Refugee Policy (July 30, 1981).

reasoned restraint in exercising the statutory contempt authority. Rather than reducing the 3.5-million-case backlog, the Proposed Rule would deter representation, drive pro bono counsel and nonprofit providers from immigration practice, and generate parallel penalty proceedings that consume the very resources the Department claims to lack, thereby aggravating the crisis it purports to address. The Proposed Rule's asymmetrical design, vague standards, and absence of meaningful procedural safeguards independently violate the Department's statutory authority, the First Amendment, the Due Process Clause, and the United States' binding obligations under the Refugee Convention, the Convention Against Torture, and the ICCPR. NIJC urges the Department to withdraw the Proposed Rule in its entirety and to comply with its domestic and international obligations to preserve meaningful access to counsel and a fair hearing for every individual in removal proceedings without the threat of unequal and punitive monetary penalties.

Thank you for your consideration of this comment. Please do not hesitate to contact Azadeh Erfani for further information.

/s/

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