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Re: “Civil Money Penalty for Actions in Contempt of an Immigration Judge’s Proper Exercise of Authority.” EOIR Docket No. EOIR-26-AB02; RIN 1125-AB02.

America First Legal Foundation (“AFL”) supports the proposed rule of the Department of Justice (“DOJ”) and the Executive Office for Immigration Review (“EOIR”), “Civil Money Penalty for Actions in Contempt of an Immigration Judge’s Proper Exercise of Authority.”¹

Congress gave immigration judges civil-contempt authority in 1996. *See* 8 U.S.C. § 1229a(b)(1). Until now, regulations had never been promulgated, and therefore, no one has used this contempt authority for thirty years. The result is a docket of more than 3.5 million cases in which the private immigration bar and aliens treat immigration-court orders as optional. AFL supports the proposed rule and urges the Department to finalize it without delay.

EOIR immigration judges adjudicate alien removal proceedings under the Immigration and Nationality Act (“INA”).² Through the third quarter of FY2026, the immigration courts received more than 390,000 new cases during the fiscal year and completed more than 660,000 cases.³ More than 3.5 million cases remain pending.⁴ It will

¹ Civil Money Penalty for Actions in Contempt of an Immigration Judge’s Proper Exercise of Authority, 91 Fed. Reg. 47,979 (July 30, 2026) (to be codified at 8 C.F.R. parts 1003, 1103) (Dir. Order No. 07-2026; Docket No. EOIR-26-AB02; RIN 1125-AB02), <https://perma.cc/3UX4-RB4B>.

² 8 U.S.C. § 1101 *et seq.*

³ *See* EXEC. OFF. FOR IMMIGR. REV., U.S. DEPT’ OF JUST., ADJUDICATION STATISTICS: PENDING CASES, NEW CASES, AND TOTAL COMPLETIONS (July 24, 2026), <https://perma.cc/2W8Y-9829> (listing case numbers).

⁴ 91 Fed. Reg. at 47,980.

be difficult to cut that backlog substantially if immigration judges cannot sanction contempt, enforce their own dates, and keep order in the courtroom. The proposed rule also advances Executive Order 14,159’s direction that the Executive Branch “employ all lawful means to ensure the faithful execution of the immigration laws.”⁵ AFL urges EOIR to finalize the rule.

I. Statement of Interest

AFL is a national nonprofit organization dedicated to the rule of law, the separation of powers, due process, and equal protection, and it regularly participates in administrative rulemakings on matters of significant public concern. AFL has consistently advocated in administrative and judicial proceedings for the faithful enforcement of congressionally enacted immigration law. This comment reflects that perspective and offers legal and policy analysis grounded in the text of the INA.

II. The NPRM Corrects a Recognized Deficiency in Immigration Review

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996⁶ reformed immigration review procedures under the INA, and specifically provided the power to sanction contempt as an integral part of the immigration judge’s authority.⁷ Under the statute, “[t]he immigration judge shall have authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge’s proper exercise of authority under this chapter.”⁸ After decades of inaction by previous administrations, the NPRM finally effectuates Congress’s statutory intent by setting forth rules implementing the contempt sanction.

Contempt is defined “as an act of disobedience or disrespect toward a judicial or legislative body, or interference with its orderly process, for which a summary punishment is usually exacted.”⁹ A court’s power to punish disobedience has long been recognized in both federal and state courts as necessary to enforce court orders.¹⁰ While courts have held that the power is inherent,¹¹ the Founders recognized that Congress

⁵ Protecting the American People Against Invasion, Exec. Order No. 14,159, 90 Fed. Reg. 8443 (Jan. 20, 2025), <https://perma.cc/ZXR5-RU5P>.

⁶ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, div. C, 110 Stat. 3009–546.

⁷ 8 U.S.C. § 1229a(b)(1).

⁸ *Id.*

⁹ Ronald Goldfarb, *The History of the Contempt Power*, 1961 WASH. U. L.Q. 1, 1 (1961).

¹⁰ *See, e.g., id.* at 13; 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 122–26 (1st ed. 1769) (discussing the history of contempt in the common law).

¹¹ *Ex Parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1873) (“The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the . . . due administration of justice.”); *see also Isaacson v. Manty*, 721 F.3d 533, 539 (8th Cir. 2013) (recognizing a bankruptcy court’s inherent authority to punish contempt, notwithstanding the inapplicability of the relevant procedural rule governing sanctions).

could also grant the power to sanction contempt.¹² Congress granted the contempt power to Article III courts in the Judiciary Act of 1789.¹³ Thus, the statutory grant of contempt power in the INA is in keeping with Article I powers and the history of federal contempt authority.

The need for immigration judges to have the authority to sanction contempt has been repeatedly recognized since the 1996 INA reforms. In its 1997 Final Report, the U.S. Commission on Immigration Reform recommended that immigration courts should have the authority to sanction unprepared attorneys.¹⁴ In August 2006, then-Attorney General Alberto Gonzales announced a plan to reform immigration courts, including a plan to draft rules for immigration judges' exercise of the contempt authority:

To ensure that immigration judges have the tools they need to control their courtrooms and to protect the adjudicatory system from fraud and abuse, EOIR will consider and, where appropriate, draft proposed revisions to the existing rules that provide sanction authority for false statements, frivolous behavior, and other gross misconduct. EOIR will also 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. To make sure that statutory limits on this power are respected, the proposal will provide for substantial oversight. . . . By better enabling judges to address frivolous submissions and to maintain an appropriate atmosphere in their courtrooms, we will reduce the pressures that may have contributed to intemperate conduct in the past.¹⁵

The Attorney General's statement explained that false statements, frivolous submissions, and inappropriate courtroom behavior were some of the contumacious behaviors driving the directive. In March 2007, then-EOIR Director Kevin Rooney wrote in a memorandum to EOIR employees that measures pertaining to "implementing sanction authority for immigration judges [and] expanding the bases of attorney discipline" were in the rule-making process.¹⁶ However, until this NPRM, EOIR has not promulgated rules implementing the contempt authority.

¹² FED. JUD. CTR., THE CONTEMPT POWER OF THE FEDERAL COURTS, <https://perma.cc/Z2CT-YBBN> ("Available evidence . . . suggests that the framers of the Constitution did not consider contempt to be part of the 'judicial power' conveyed by Article III.").

¹³ Judiciary Act of 1789, Ch. 20, § 17, 1 Stat. 73, 83 (1789); *see also* FED. JUD. CTR., *supra* note 12 ("Congress vested the judiciary with Contempt power.").

¹⁴ U.S. COMM'N ON IMMIGR. REFORM, BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRANT POLICY 160 (1997), <https://perma.cc/3EX7-7EN3>.

¹⁵ Press Release, *Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals*, U.S. DEP'T OF JUST. (Aug. 9, 2006), <https://perma.cc/R5ZM-L2A7>.

¹⁶ Memorandum from Kevin D. Rooney, Director, Exec. Off. for Immigr. Rev., to All EOIR Emps. (Mar. 2007), <https://perma.cc/TH49-YR6U>.

The lack of contempt authority has led to delays in immigration proceedings, because “litigants before the immigration courts . . . cannot be held accountable to the judge with respect to matters such as timelines, docketing dates, or even court orders.”¹⁷ This lack of authority has translated into a lack of respect for immigration court orders, as demonstrated by the fact that “immigration courts hav[e] higher failure-to-appear rates than does any state or federal court in the country.”¹⁸

Immigration judges have found that “it is not uncommon for cases to be continued due to private counsel’s failure to appear or be prepared for a hearing.”¹⁹ For example, an attorney admitted to an immigration judge that, when presented with a schedule conflict with a state court, the attorney chose not to appear in immigration court because he “fear[ed] the state court judge’s sanction authority.”²⁰ Thus, the lack of authority to sanction contempt has historically led parties to disregard immigration court orders and deadlines, contributed to a high rate of failures to appear, and caused delay and disrespect to flourish in immigration courts.²¹

The NPRM is necessary to implement the clear statutory intent to grant immigration judges the authority to sanction contempt and promote a respect for orders and deadlines in EOIR’s immigration courts. A reduction in the failure to appear rate, an incentive to prepare for hearings and meet court-ordered deadlines, and a method for judges to control obstructive behavior will reduce the pending case backlog.

The rule reaches respondents, private counsel, and witnesses.²² It does not reach government attorneys or government witnesses.²³ That is the correct approach. Government employees are already subject to agency discipline. The civil-money penalty is the tool Congress gave immigration judges for the private actors who have treated immigration court proceedings and orders as optional. The Department should finalize the exemption as proposed.

The proposed procedures supply notice, an opportunity to be heard, a neutral decisionmaker, and an appeal.²⁴ That is more than ample for due process requirements.

¹⁷ CHARLES STIMSON & GIANCARLO CANAPARO, *AUTHORITY DELAYED IS AUTHORITY DENIED: GIVING IMMIGRATION JUDGES CONTEMPT AUTHORITY 2* (Heritage Found. 2019), <https://perma.cc/N2DN-Y2TH>.

¹⁸ Note, *Courts in Name Only: Repairing America’s Immigration Adjudication System*, 136 HARV. L. REV. 908, 926 (2023) (citing MARK H. METCALF, CTR. FOR IMMIGR. STUD., *SKIPPING COURT: U.S. IMMIGRATION COURTS & ALIENS WHO DISAPPEAR BEFORE TRIAL 1–5* (2019)).

¹⁹ *Id.* at 925–26 (quoting *Strengthening and Reforming America’s Immigration Court System: Hearing Before the Subcomm. on Border Sec. & Immigr. of the S. Comm. on the Judiciary*, 115th Cong. 8 (2018) (statement of A. Ashley Tabaddor, President, Nat’l Ass’n of Immigr. Judges)).

²⁰ *Id.* at 926.

²¹ See, e.g., STIMSON & CANAPARO, *supra* note 17, at 6; Note, *supra* note 18, at 925–26.

²² 91 Fed. Reg. at 47,981.

²³ *Id.*

²⁴ *Id.* at 47,983–85.

III. The NPRM Provides Immigration Judges with a Necessary Tool to Deter Abuse, Disruption, and Delay in Immigration Proceedings

In a 2011 survey, immigration judges rated 33% of legal representatives of aliens as inadequate and an additional 14% as grossly inadequate.²⁵ To combat this problem, practitioners have recommended that immigration judges require “the lawyers who appear before them to conform to an appropriate level of competence and ethical behavior.”²⁶ While practitioners may be referred to the EOIR’s Attorney Discipline program, that program may take years to resolve an issue.²⁷ Immigration judges need the tools to promptly sanction repeated misconduct. The NPRM provides a more immediate means for the immigration judge to impose the sanction, should the need arise. With the advent of artificial intelligence, the need to sanction misconduct promptly is essential to maintain efficiency in adjudications.²⁸

The process outlined in the NPRM is measured, providing opportunities to respond to both the warning and the Notice of Intent to Impose Civil Money Penalty (“CMP Notice”), a neutral adjudicator, and the opportunity for an appeal. The NPRM requires the immigration judge to make a clear and specific warning regarding the misconduct on the record, a finding of continued misconduct on the record, and service of the CMP Notice on the sanctioned individual. The NPRM provides for the individual to respond both to the warning and the CMP Notice. The Chief Immigration Judge serves as a neutral adjudicator to review the record of the contempt proceeding and order the civil money penalty. If the penalty is imposed by the Chief Immigration Judge, the penalized individual may appeal the decision to the Board of Immigration Appeals.

The time-intensive nature of the steps involved in imposing the penalty makes it likely that, as the NPRM recommends, this process will be reserved for obstructive behavior that the immigration judge cannot ameliorate by less intensive means. Immigration judges are expected to complete around 700 cases per year.²⁹ The necessary procedural steps, notice requirement, and the opportunity for appeal, set atop a busy caseload, will likely mean the penalty is reserved for exceptional or intractable of-

²⁵ Stacy Caplow, et al., *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings: New York Immigrant Representation Study Report*, 33 CARDOZO L. REV. 357, 364 (2011).

²⁶ Andrew R. Arthur, *How Bad is the Immigration Bar?* CTR. FOR IMMIGR. STUD. (Nov. 28, 2017), <https://perma.cc/73AD-4ED6>.

²⁷ *Vaz v. Neal*, 33 F.4th 1131, 1138 (9th Cir. 2022) (stating EOIR was continuing to investigate an attorney discipline complaint four years after it was referred to the Attorney Discipline Program).

²⁸ See, e.g., *Malkeet Lnu v. Blanche*, 177 F.4th 1014, 1026 (9th Cir. 2026) (finding an immigration attorney committed gross misrepresentations, citation errors, and violated the duty of candor by denying that generative AI might have been the source of errors).

²⁹ See, e.g., HOLLY STRAUT-EPPSTEINER, CONG. RSCH. SERV., IF11690, PENDING CASES IN U.S. IMMIGRATION COURTS, FY2008-FY2020 (Nov. 19, 2020), <https://perma.cc/94S2-GBLN> (“DOJ issued new quotas to IJs that require them to complete at least 700 cases annually.”).

fenses. The NPRM sets forth a process that comports with the due process requirements of notice, the opportunity to be heard, and a neutral decisionmaker.³⁰ This is appropriate to protect the rights of individuals who may be sanctioned while providing an avenue for immigration judges to address misconduct.

The NPRM implements an authority that Congress, the former Attorney General, the former EOIR Director, immigration judges, and scholars have recognized as crucial to allow immigration judges to manage immigration court dockets competently and efficiently. The NPRM's proposed process comports with due process, and the rule should be finalized.

IV. Conclusion

The proposed rulemaking is a critical step toward reducing the backlog of cases in immigration courts, by providing immigration judges with authority to sanction misconduct. For decades, Congress's clear intent to vest immigration judges with the power to sanction contempt with a civil money penalty has not been implemented. This has prevented immigration judges from responding to misconduct, and the resulting delay and obstruction to immigration review proceedings has exacerbated the problem of an immense case backlog.

The proposed rule correctly exercises Congress's grant of authority to sanction contempt by establishing specific rules for who, what, where, and when immigration judges may sanction misconduct, while also providing an opportunity for the sanctioned individual to be heard and mechanisms to appeal contempt orders. AFL strongly supports the proposed rule and urges EOIR to finalize it as proposed, while continuing to pursue every available tool to empower immigration judges to ensure immigration review decisions are made in a civil, respectful, and truthful environment.

Respectfully submitted,
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³⁰ See, e.g., *Isaacson*, 721 F.3d at 539 (discussing due process requirements for contempt proceedings of notice and the opportunity to be heard).