CATHOLIC LEGAL IMMIGRATION NETWORK, INC.

NATIONAL OFFICE

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RE: RIN 1125–AA93 or EOIR Docket No. 19–0010; A.G. Order No. 4843–2020, Public Comment Opposing Proposed Rules Titled: Procedures for Asylum and Withholding of Removal

I. INTRODUCTION

The Catholic Legal Immigration Network, Inc. (CLINIC)[1] submits these comments in strong opposition to the proposed rules, which are the most recent in a series of proposed changes that together form a concerted attack on the U.S. asylum system.[2] The proposed rule would dramatically alter procedures for asylum applications adjudicated before the Executive Office for Immigration Review (EOIR) by speeding up cases without protecting Due Process, making it more difficult for asylum seekers to obtain continuances, forcing judges to reject asylum applications for minor typographical errors, and further eroding the line between immigration judges and Immigration and Customs Enforcement (ICE) attorneys by allowing immigration judges to submit their own evidence into the record.

Embracing the Gospel value of welcoming the stranger, CLINIC has promoted the dignity and protected the rights of immigrants in partnership with a dedicated network of Catholic and community legal immigration programs since its founding in 1988. CLINIC's network, originally comprised of 17 programs, has now increased to close to 400 diocesan and community-based programs in 48 states and the District of Columbia. CLINIC is the largest nationwide network of nonprofit immigration programs. CLINIC and its affiliates advocate for the just and humane treatment of noncitizens through direct representation, pro bono referrals, and engagement with policy makers. CLINIC provides direct representation and *pro bono* referrals through several projects: 1) the Board of Immigration Appeals (BIA) Pro Bono Project, 2) the Formerly Separated Families Project, 3) the Remote Motions to Reopen Project, and 4) and Religious Immigrant Services. CLINIC also provides training and mentoring on asylum-related issues as well as direct

[1] Victoria Neilson, Defending Vulnerable Populations (DVP) Managing Attorney authored these comments. The author would like to thank Michelle Mendez, DVP Director for her contributions to this comment.
[2] *See* National Immigrant Justice Center, *A Timeline of the Trump Administration's Efforts to End Asylum*, https://immigrantjustice.org/issues/asylum-seekers-refugees. [Hereinafter "NIJC. *Trump Efforts to End Asylum*."]

representation before the Board of Immigration Appeals, federal district courts, and the federal courts of appeals.

If published in their current form, the proposed rules would unfairly harm noncitizens and their families by unduly burdening them further as they navigate an already complicated immigration maze.[3] The NPRM justifies its proposed changes by claiming they will increase efficiency in asylum adjudications, but the government's own decisions such as the elimination of immigration judges' ability to administratively close cases and the frequent shuffling of immigration judges (IJs) and dockets based on shifting EOIR priorities have led to increases in the immigration court backlog. Moreover, as discussed more fully below, if EOIR expedites newly filed asylum cases, it is likely that cases that have been long-pending will face even longer delays.

Decisions from the BIA and the attorneys general have also slowed down adjudications, by depriving, or greatly limiting, the ability of IJs to manage their dockets through administrative closure,[4] terminating proceedings,[5] or granting continuances.[6] In fact, a 2018 attorney general decision that ended the authority of IJs to administratively close cases includes an admission that the move "would likely overwhelm the immigration courts and undercut the efficient administration of immigration law." Moreover, this NPRM fails to recognize that unprecedented levels of violence, "comparable to the experience in war zones," have forced tens of thousands of people, including an increasing number of women and children, to flee Central America for safety in the United States.[7]

People of faith have consistently stood by the principle that all immigrants, especially the most vulnerable among us, including asylum seekers, deserve an immigration system that is fair and humane. As Pope Francis has said, "I ask leaders and legislators and the entire international community to confront the reality of those who have been displaced by force, with effective projects and new approaches in order to protect their dignity, to improve the quality of their life and to face the challenges that are emerging from modern forms of persecution, oppression and slavery."[8] CLINIC likewise believes that the most vulnerable among us need greater protections and opportunities, including the ability to work to support themselves and their families. In this vein, CLINIC submits the following comments in opposition to the proposed changes.

CLINIC submits this comment urging the Department of Justice (DOJ or the agency) to withdraw these proposed rules in their entirety. CLINIC believes that U.S. policies on immigration

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[3] *See, e.g.*, Joshua Daley Paulin, *Immigration Law 101*, AMERICAN BAR ASSOCIATION POLO MAGAZINE (Sept. 1, 2013) ("Immigration law is widely regarded as second only to tax law in its statutory complexity.").

[4] *Matter of Castro-Tum*, 27 I&N Dec. 271, 293 (A.G. 2018) (Admitting that recalendering the administratively closed cases "would likely overwhelm the immigration courts and undercut the efficient administration of immigration law."); Migration Policy Institute, *Crisis in the Courts: Is the Backlogged U.S. Immigration Court System at Its Breaking Point?* (Oct. 3, 2019), .

[5] *See, Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018).

[6] *See, e.g.*, *Matter of L-N-Y-*, 27 I&N Dec. 755 (BIA 2020); *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018).

[7] Doctors Without Borders, *Forced to Flee Central America's Northern Triangle: A Neglected Humanitarian Crisis* (May 2017), ; United States Conference of Catholic Bishops, *Mission to Central America: The Flight of Unaccompanied Children to the United States* (Nov. 2013), .

[8] Pope Francis, *Address to Participants in the Plenary of the Pontifical Council for the Pastoral Care of Migrants and Itinerant People*, (May 24, 2013), http://w2.vatican.va/content/francesco/en/speeches/2013/may/documents/papa-francesco_20130524_migranti-itineranti.html.

should reflect the country's core moral values and historical practice of welcoming immigrants and refugees. Immigration policies should ensure justice, offer protection, and treat immigrants fairly.

II. CLINIC STRONGLY OBJECTS TO THE NPRM PROCESS, WHICH ONLY ALOWED 30 DAYS FOR COMMENTS IN THE MIDST OF A PANDEMIC

The Administrative Procedures Act (APA) § 553 requires that "interested persons" from the public have "an opportunity to participate in the rule making." In general, the agencies, must afford "interested persons a reasonable and meaningful opportunity to participate in the rulemaking process."[9] Courts have found that for agencies to comply with this participation requirement the comment period must be "adequate" to provide a "meaningful opportunity"[10] for public participation. DOJ acknowledges that this rule is a "significant regulatory action" under section 30(f) of Executive Order 12866, yet it contradictorily concludes that "this proposed rule would impose only minimal direct costs on the public, to include the costs associated with attorneys and regulated entities familiarizing themselves with this rule."[11] As explained below, CLINIC strongly disagrees. The changes contemplated by the rule would substantially impact attorneys, accredited representatives, and asylum seekers. Moreover, with the staggered rulemaking the administration has engaged in, this proposed rule does not adequately allow the public to take into account other proposed rules which are currently pending.[12] With several significant NPRMs currently under review by DOJ, the public cannot reasonably comment on this proposed rulemaking since it is not possible to know whether those other rules will be published and if so how they may change in response to the voluminous comments submitted opposing them.[13]

Given the importance of the public's participation in the rule-making process, Executive Order 12866 specifies that "in most cases [rulemaking] should include a comment period of not less than 60 days."[14] Executive Order 13563 explicitly states, "To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should **generally be at least 60 days."**[15]

Under any circumstances, the government should not provide such a short time period to comment on these extensive changes, but the ongoing COVID-19 pandemic makes this timeframe

[9] *Forester v. CPSC*, 559 F.2d 774, 787 (D.C. Cir. 1977).
[10] *N.C. Growers' Ass'n v. UFW*, 702 F.3d 755, 770 (4th Cir. 2012).
[11] 85 Fed. Reg. 59692, 59698 (Proposed Sep. 23, 2020).
[12] *See* for example, Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 52491, (Proposed Aug. 26, 2020); Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36289 (proposed June 15, 2020); Procedures for Asylum and Bars to Asylum Eligibility, 84 Fed. Reg. 69651 (Dec. 19, 2019).
[13] The Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review NPRM received 88,933 comments. .
[14] *See* Exec. Order No. 12866 – Regulatory Planning and Review, § 6(a), 58 Fed. Reg. 51735 (Oct. 4, 1993).
[15] *See* Exec. Order No. 13563 – Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821 (Jan. 18, 2011) (emphasis added).

even more unreasonable.[16] On October 8, 2020, CLINIC, and 85 organizations submitted a letter to DOJ requesting an additional 30 days to submit comments on this rulemaking in light of the voluminous rulemaking the government has engaged in over the past several months and the effects of the pandemic;[17] to date CLINIC has not received any response to that request.

The Bureau of Consumer Financial Protection extended a comment period from 60 days to 150 days as a result of the COVID-19 pandemic.[18] The Commodity Futures Trading Commission determined that during the pandemic the public should have at least 90 days to comment on regulations.[19] And the Federal Deposit Insurance Corporation extended a rulemaking by 60 days in response to the pandemic.[20] By way of contrast, DOJ, often jointly with the Department of Homeland Security (DHS), have pushed forward with complex, overlapping rules, ignoring letters from the public calling for additional time to submit comments, and ignoring the extraordinary pressure and challenges imposed by the COVID-19 pandemic.

For this procedural reason alone, we urge the administration to rescind the proposed rule. If it wishes to reissue the proposed regulations, it should grant the public at least 60 days to have adequate time to provide comprehensive comments.

Despite this inadequate and unfair 30-day timeframe, CLINIC submits this comment because we must object to the proposed regulations. CLINIC must object because the proposed rules would severely limit due process for asylum seekers appearing before EOIR and result in many bona fide asylum seekers being returned to the countries in which they fear harm.

III. CLINIC STRONGLY OBJECTS TO THE SUBSTANCE OF THIS NPRM AND CALLS UPON DOJ TO RESCIND IT IN ITS ENTIRETY

Although we object to DOJ's unfair 30-day timeframe in which to submit a comment to the proposed rule, we submit this comment, nonetheless, because we feel compelled to object to the proposed regulations, which would severely limit asylum[21] protections by speeding up proceedings and codifying procedures that require immigration judges to reject asylum applications based on minor omissions in completing the form. The rule would further erode EOIR's stated mission of independently administering the nation's immigration laws fairly and independently[22] by allowing immigration judges to submit their own evidence packets into the

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[16] *See* Deb Perelman, *In the Covid-19 Economy, You Can Have a Kid or a Job. You Can't Have Both*. THE NEW YORK TIMES, Jul. 2, 2020, .

[17] Nearly 90 Organizations Join to Urge the Justice Department to Provide a 60-Day Comment Period to Respond to EOIR's Proposed Changes to Asylum and Withholding of Removal Procedures, (Oct. 8, 2020) https://cliniclegal.org/resources/federal-administrative-advocacy/nearly-90-organizations-join-urge-justice-department.

[18] 85 Fed. Reg. (May 21, 2020).

[19] CFTC Extends Certain Comment Periods in Response to COVID-19, (Apr. 10, 2020), .

[20] FDIC Extends Comment Period on Modernizing Brokered Deposit Restrictions (Apr. 3, 2020), .

[21] Many of the proposed rules would harm those seeking withholding of removal and protection under the Convention Against Torture (CAT) as well. These comments frequently use the term "asylum seeker" but the reader should construe the term to encompass those seeking withholding or CAT protection as well if the rule discussed also affects those forms of protection.

[22] Executive Office for Immigration Review, *About the Office* (Aug. 2018), .

record while simultaneously imposing a greater burden on judges to evaluate evidence submitted by the asylum seeker.

A. 8 CFR §§ 1003.10(b), 1003.29, 1003.31, and 1240.6—The Proposed Rule Would Prioritize Speed over Fairness in Asylum Adjudications

The proposed rule would make several changes to the asylum adjudication system that would speed up the process and make it more difficult for asylum seekers to obtain counsel, to obtain evidence, and, if needed, to obtain mental health services. These regulations would codify INA §208(d)(5)(ii), which states that asylum adjudications shall be adjudicated within 180 days of the application being filed absent "exceptional circumstances." The proposed regulation then defines "exceptional circumstances" in an extremely limited way, allowing only for battery, serious illness, or death to the applicant or an immediate relative as circumstances that would allow an immigration judge to postpone an adjudication beyond 180 days.

While the 180-day language derives from the statute, it is worth noting that DOJ has never attempted to implement this unworkable timeframe through regulations in the quarter century that has passed since the enactment of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act. Moreover, since the time that Congress created this time limit, the immigration court landscape has changed dramatically, as today there is a backlog of 1,246,164 cases,[23] a number that is more than a million cases higher than the number of cases pending in 1996.[24] Of this number, EOIR states that 560,000 cases include applications for asylum or withholding of removal.[25] If EOIR now prioritizes the adjudication of newly filed asylum cases,[26] the half million cases in the backlog that EOIR has created will further languish as judges would be required to schedule the newly filed cases for individual hearings on an expedited basis.

Beginning on January 29, 2018, the Asylum Offices implemented a similar system of prioritizing newly filed cases over cases that have been in the backlog for years.[27] This "Last In, First Out," system is, like the proposed rule, based on the language of the INA which states that absent exceptional circumstances, the initial interview shall take place within 45 days of filing the asylum application.[28] As a result of this system, there are affirmative asylum cases that have been pending for several years that the asylum offices literally have no plan or ability to ever schedule for interviews.[29] The proposed rule would codify a similar irrational system for immigration court hearings.

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[23] TRAC, Immigration Court Backlog Tool, https://trac.syr.edu/phptools/immigration/court_backlog/.
[24] U.S. DOJ, EOIR, Statistical Yearbook 2000, at 6, .
[25] 85 Fed. Reg. 59696.
[26] It appears from this language in the NPRM that EOIR would only apply the 180-day adjudication requirement prospectively. "This proposed rule would assist EOIR in adjudicating new asylum cases more efficiently in order to ensure that this volume does not increase to an insurmountable degree." 85 Fed. Reg. 59698. If EOIR actually intends to fast forward cases with individual hearings set years in the future, that change would place an unreasonable burden on immigration counsel and the asylum seekers themselves.
[27] United States Citizenship and Immigration Services, Affirmative Asylum Interview Scheduling, .
[28] INA § 208(d)(5)(ii).
[29] Asylum Office Liaison meeting notes, Aug. 26, 2020, on file with the author.

According to the NPRM, the median processing time for asylum cases is currently 807 days.[30] The agency never discusses how immigration judges will be able to address the existing backlog of asylum cases if every newly filed case must be completed within 180 days. This rule would create a two-tier system where asylum seekers who file after the rule would often have to move forward on their cases before they are ready to do so, while those whose cases have already been languishing in the backlog are likely to have to wait beyond the current median time of almost three years.[31] The result would likely be that many older cases go "stale" as asylum seekers find it more difficult to secure relevant evidence and remember key details about past events, making it more likely that immigration judges would make adverse credibility findings in their cases. In fact, this NPRM acknowledges that "delaying filing of the claim risks delaying protection or relief for meritorious claims and increases the likelihood that important evidence, including personal recollections, may degrade or be lost over time,"[32] yet it never acknowledges or discusses the inevitability that if some cases are speeded up, others will be pushed deeper into the backlog. At the same time, asylum seekers who have recently arrived in the United States will be forced to move forward on their asylum claims before they are able to secure legal counsel, mental health counseling, and expert witnesses for their cases. Again, the NPRM does not acknowledge the hardship this expedited process would cause asylum seekers, nor does it acknowledge the effects the proposed rule would have on immigration practitioners.[33]

A federal district court recently found that asylum seekers "state[d] a claim for actual bias" based on allegations of the "unusually high rate of denials for asylum petitions in some courts, the extreme backlog in the system, strict case-management guidelines, and policies that require judges to fast-track certain cases or certain aliens."[34] These biases would only be exacerbated by speeding up cases of recently arrived asylum seekers while leaving others in the years-long backlog to languish potentially indefinitely.

Compounding the problems created by the 180-day rule are the performance metrics that the attorney general created for immigration judges in January 2018.[35] Under these metrics, to receive a satisfactory job performance, immigration judges are required to complete 700 cases per year, and they must complete 95 percent of individual hearings on the day that they are started in order to receive a satisfactory job performance.[36] The performance metrics are deeply problematic, as they create financial incentives for immigration judges to prize speed over fairness because if

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[30] 85 Fed. Reg. 59698.

[31] *See*, Southern Poverty Law Center and Innovation Law Lab, *The Attorney General's Judges How The U.S. Immigration Courts Became A Deportation Tool* at 20 (June 2019), , ("'arbitrary prioritizations wreak havoc on case management,' giving so-called 'priority' cases inadequate time to prepare while further extending the backlog for pending cases that may have been waiting for years.'") [Hereinafter "SPLC, Attorney General's Judges."]

[32] 85 Fed. Reg. 59694.

[33] *See* section E *infra* for a discussion of the NPRM's failure to discuss the proposed rules' effects on small entities. *See* also, *See* CLINIC, *CLINIC Submits Comments on Proposed Rule that Significantly Changes EOIR Procedures*, (Sep. 25, 2020) https://cliniclegal.org/resources/federal-administrative-advocacy/clinic-submits-comments-proposed-rule-significantly. [Hereinafter "CLINIC Comment on EOIR Changes"]

[34] *Las Americas Immigrant Advocacy Ctr. v. Trump*, No. 3:19-CV-02051-IM, 2020 WL 4431682, at *13 (D. Or. July 31, 2020).

[35] James McHenry, DOJ, *Case Priorities and Immigration Court Measures*, (Jan. 17, 2018) .

[36] *Id.*

they do not complete the cases quickly they could lose their jobs.[37] With the new regulatory command that all asylum cases must be adjudicated within 180 days, absent extraordinary circumstances, immigration judges will have two strong pressures to complete cases on the first day they are scheduled for an individual hearing. These pressures would make it more difficult for asylum seekers to get all of the testimony that they need into the record and make it more difficult for asylum seekers to postpone cases when they have good cause to do so to obtain required evidence or medical or mental health treatment.

The attorney general has added yet another pressure by issuing the recent decision *Matter of A-C-A-A-*.[38] The headnote[39] of this decision explicitly states, "When reviewing a grant of asylum, the Board should not accept the parties' stipulations to, or failures to address, any of the particular elements of asylum—including, where necessary, the elements of a particular social group."[40] Thus, the attorney general has made it impossible for asylum seekers to accept stipulations that DHS may offer on any element of their claim, and instead asylum seekers must present evidence on every aspect of their asylum case. As a result, hearings in which DHS may only be concerned about one element that could have been resolved in under an hour, will likely take several hours to complete as asylum seekers must present evidence on every single element of the claim in every case. The result of the decision will be that immigration judges will have to budget more time for each hearing. With the proposed rule requiring completion of asylum cases within 180 days, if the immigration judge cannot complete the hearing on the first day it is scheduled, the judge may have to bump other scheduled cases to ensure that the asylum case is completed within the 180-day timeline. This type of docket shuffling—moving already scheduled cases to later dates—to ensure that the asylum hearing concludes within 180 days would decrease overall efficiency and add uncertainty to all adjudication timelines.[41]

Even worse, the combination of these pressures on immigration judges create extraordinary incentives for them to find that an asylum application does not meet at least one element of the claim. Under *Matter of A-B-*, if the judge finds that "an alien's asylum application is fatally flawed in one respect—for example, for failure to show membership in a proposed social group. . .—an immigration judge or the Board need not examine the remaining elements of the asylum claim."[42] Thus, immigration judges who are under time pressure may look for any reason to find that an asylum seeker did not meet one element of the claim and could immediately halt the hearing, saving the time of taking testimony on every element.

On June 15, 2020, DOJ and DHS issued an NPRM titled "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review" [hereinafter "June 15

[37] Judge A. Ashley Tabaddor, President National Association of Immigration Judges, *Testimony Before the Senate Judiciary Committee, Border Security and Immigration Subcommittee Hearing on "Strengthening and Reforming America's Immigration Court System"* (Apr. 18, 2018), ("production quotas and time-based deadlines violate a fundamental canon of judicial ethics which requires a judge to recuse herself in any matter in which she has a financial interest that could be affected substantially by the outcome of the proceeding.").
[38] *Matter of A-C-A-A-*, 28 I&N Dec. 84 (A.G. 2020).
[39] While the headnote makes this explicit statement, the same statement does not exist anywhere in the text of the decision making it unclear whether or not this statement is binding.
[40] *Id.*
[41] *See* SPLC, Attorney General's Judges, *supra* note 31 at 19.
[42] *Matter of A-B-*, 27 I&N Dec. 316, 340 (A.G. 2018) [citation omitted].

Proposed Asylum Rule"], that would dramatically alter virtually every aspect of asylum adjudication; CLINIC submitted comments strongly opposing this proposed rule and hereby incorporates those comments into this record by reference.[43] Among the radical of the proposed changes, that rule would allow immigration judges to pretermit asylum cases if the immigration judge finds that the asylum seeker "has not established a prima facie claim for relief."[44] Since DOJ has engaged in staggered rulemaking, it is impossible for the public to adequately comment on the current proposed rule since it is not clear whether that rule will go into effect as proposed or whether it will change in response to the 88,933 comments the agencies received.[45] If that proposed rule goes into effect, the newly proposed 180-day completion rule would create strong incentives for immigration judges to pretermit asylum claims rather than devote scarce individual hearing time to asylum claims that must be completed on a fast track.

At the same time that immigration judges will be required to complete asylum cases on an expedited track, over 40 percent of immigration judges have been on the bench for fewer than three years.[46] Many of these immigration judges have backgrounds in criminal prosecution or the military[47] and need to learn the increasingly complex procedural and substantive immigration rules on the job. The likely result of DOJ exerting multiple pressures for new immigration judges to complete asylum cases quickly, is that more cases will be denied with less due process.

Finally, the proposed rule does not take into account the recently published rules that change eligibility for employment authorization documents (EAD) for asylum seekers. Under this rule, which just went into effect on August 25, 2020, asylum seekers cannot apply for an EAD until their asylum application has been pending for 365 days.[48] While a federal district court has found parts of the rule unlawful and issued a preliminary injunction in favor of members of the named plaintiffs,[49] the rule is still in effect for most asylum seekers. The EAD rule coupled with this proposed rule, would mean that an asylum seeker who files defensively would never be eligible for an asylum-pending EAD because the immigration judge would be required to decide the case within 180 days but the asylum seeker could not even submit an application for an asylum-pending EAD until 365 days have elapsed. Denying asylum seekers the ability to work lawfully in the United States at any point before the immigration judge is required to hold the individual asylum hearing, would make it much more difficult for asylum seekers to be able to pay for legal representation for their asylum hearings, and therefore make it more likely they will lose at their hearings solely on account of being *pro se*.[50]

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[43] *See*, CLINIC, *CLINIC Submits Comments on Proposed Rule that Would Gut Asylum Protections*, (Jul. 15, 2020) https://cliniclegal.org/resources/asylum-and-refugee-law/clinic-submits-comments-proposed-rule-would-gut-asylum-protections.

[44] Proposed 8 CFR § 1208.13(e). 85 Fed. Reg. 36264 (Proposed June 15, 2020).

[45] *See*, Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, .

[46] EOIR, *Executive Office for Immigration Review Announces Investiture of 20 New Immigration Judges, Resulting in a 70 Percent Expansion of the Immigration Judge Corps Since 2017*, (Oct. 9, 2020) (214 out of 520 immigration judges have been hired since January 20, 2017).

[47] *See* EOIR press releases on immigration judge hiring at . [Hereinafter, "EOIR press releases."]

[48] 8 CFR § 208.7a(ii).

[49] *See Casa de Maryland, Inc. v. Wolf*, No. 8:20-CV-02118-PX, 2020 WL 5500165, at *34 (D. Md. Sept. 11, 2020).

[50] Asylum seekers cannot afford legal representation without the ability to lawfully work, and asylum seekers represented by legal counsel are nearly four times more likely to win their cases than those appearing in immigration court without an attorney. *See,* Human Rights First, *Fact Sheet: Central Americans were Increasingly Winning Asylum Before President Trump Took Office*, (Jan. 2019), ; s*ee* also TRAC, *Asylum Decisions by Custody,*

Since speeding up individual hearings at the same time the government has slowed down eligibility for EADs would mean that fewer asylum seekers could afford counsel, the proposed rule contradicts asylum seekers' statutory right to counsel.[51] The combination of recently enacted and recently proposed regulations would render INA § 292 largely meaningless. That provision of the INA states that "In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose." Yet asylum seekers would be foreclosed from qualifying for an EAD before the immigration judge decides the case or while the case is pending on appeal.[52] The NPRM does not explain how asylum seekers could exercise their statutory right to obtain counsel at no expense to the government while requiring immigration judges to complete merits hearings before the asylum seeker could qualify to work in the United States. Furthermore, if the asylum seeker loses before the immigration judge, they cannot qualify for an initial EAD so must also somehow pay for counsel to pursue and appeal still with no legal ability to work in the United States.

Speeding up asylum hearings at the same time that the administration has taken unprecedented steps to undermine asylum seekers' rights is unconscionable; this proposed rule must be withdrawn.

B. 8 CFR § 1208.3(c)(3)—The Proposed Rule Would Require Immigration Judges to Reject Asylum Applications Based on Minor, Technical Errors

The proposed rule would codify instructions on the USCIS website that require the agency to reject Form I-589, Application for Asylum and for Withholding of Removal, unless every box on the asylum application form to be completed.[53] Since USCIS has implemented this requirement, practitioners have had applications rejected for inconsequential or nonsensical omissions such as leaving the middle name box blank when the applicant has no middle name, or for not completing the apartment number box when an applicant resides in a house.[54] The USCIS Ombudsman's response to complaints about this newly implemented policy was merely to remind applicants to complete every box, "even if the field is optional, has been answered elsewhere, or does not apply to you."[55] There is no explanation on the USCIS website *why* an asylum seeker must complete fields even if they are optional, nor is there any explanation in the current NPRM as to why an immigration judge must reject an I-589 for failing to write "not applicable" in a box that is clearly

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Representation, Nationality, Location, Month and Year, Outcome and More, (through Aug. 2019), https://trac.syr.edu/phptools/immigration/asylum/.

[51] *See* INA § 292.

[52] Under 8 CFR § 208.7(b)(1)(ii), an asylum seeker who has an EAD may renew it while the case is on appeal before the BIA, but combined with the proposed new rule, an asylum seeker would not be eligible for an asylum pending EAD before the immigration judge issues a decision so it would not be possible to renew while the case is on appeal.

[53] USCIS, Form I-589 Instructions at 5, .

[54] Catherine Rampell, *The Trump Administration's No-Blanks Policy Is the Latest Kafkaesque Plan Designed to Curb Immigration,* THE WASHINGTON POST, Aug. 6, 2020, .

[55] DHS, *Ombudsman Alert: Recent Updates to USCIS Form Instructions*, (Jan. 23, 2020) .

not applicable. Instead, EOIR now seeks to codify a nonsensical policy that USCIS has used to reject bona fide asylum applications and endanger asylum seekers' safety.[56]

Again, the fast-paced, voluminous, and staggered rulemaking that the administration has engaged in over the past six months makes it impossible to fully evaluate the effect of this proposed rule while overlapping proposed rules are still in the review process. The June 15 Proposed Asylum Rule, in addition to eviscerating established substantive and procedural protections for asylum seekers, would significantly lengthen the asylum application form with the proposed form increasing in length by 33 percent, thus increasing the likelihood of an applicant mistakenly leaving a box blank.[57]

Under current practice, the immigration judge allows the asylum seeker to review the I-589 form before signing the court's copy in open court. If there is a blank box that raises a concern for the immigration judge, the judge can have the asylum seeker complete the box in court. There is no discussion in the NPRM about why this process needs to change or why forcing immigration judges or their overburdened staff to engage in the kind of enhanced review that USCIS does to try to spot a blank box would increase the efficiency of the court, or provide greater protections for vulnerable asylum seekers. A study on increasing immigration court efficiency commissioned by EOIR found, among other things that, "Many courts of all types and sizes are understaffed, which impacts case processing, court morale, and office culture. Staff across all positions indicated that, on average, they have less time than they need to finish their tasks each day."[58] The proposed rule would force already overburdened court staff, or immigration judges subject to performance metrics, to review every box of every I-589 form for completeness. In cases where family members seek asylum as primary applicants as well as derivative applicants, each administrative record before the court could include multiple I-589s, each of which would be 16 pages long if the June 15 Proposed Asylum Rule goes into effect. The NPRM does not explain why this additional review and rejection is necessary. Instead, it appears that this proposed rule is designed to encourage immigration courts to reject asylum filings for minor technical omissions as a means of denying asylum applications.

In August 2019, CLINIC launched a project named *Estamos Unidos*, in Ciudad Juarez, Mexico, to provide legal assistance to asylum seekers who have been subjected to the so-called Migrant Protection Protocols (MPP). The vast majority of asylum seekers subjected to MPP are unable to secure full legal representation for their claims. Some of these asylum seekers are fortunate to be able to attend a "Know Your Rights" training or have individualized assistance in translating and filling in I-589 forms. In this context—limited meetings in dangerous conditions—it is easy to overlook a box on a form. The consequences of rejecting an asylum application for those subjected to MPP are enormous. Under the proposed rule, the immigration judge would give the asylum seeker 30 days to correct the oversight, thus sending the asylum seeker back to a

[56] Charles Davis, *Bureaucracy as a Weapon: How the Trump Administration Is Slowing Asylum Cases*, THE GUARDIAN, Dec. 23, 2019, .

[57] *See* NPRM, . The form I-589 would increase in length from 12 pages to 16 pages, and require applicants to perform complex legal analysis in responding to the newly proposed questions.

[58] Department of Justice, Executive Office for Immigration Review, *Legal Case Study Summary Report*, Booz Allen Hamilton at 19, (Apr. 6, 2017), https://www.americanimmigrationcouncil.org/sites/default/files/foia_documents/immigration_judge_+ormance_metrics_foia_request_booz_allen_hamilton_case_study.pdf [hereinafter "Booz Allen EOIR Study"].

dangerous border city for an additional month.[59] If the asylum seeker is unable to correct the omission in that time, the asylum application would be deemed waived under the proposed rule. This harsh result is out of all proportion to omitting a response on a form.

This proposed rule would further require immigration courts to reject asylum applications for failure to pay the fee, if any. CLINIC strongly objected to the proposed rules that would require, for the first time ever, a fee for asylum applications.[60] We likewise object to the rejection of asylum applications and potential waiver of the ability to ever file for asylum that this rule would impose. There should be no fee for the world's most vulnerable to seek safety in the United States, and the Department of Justice should not erect additional barriers for asylum seekers who are unable to pay.

CLINIC is particularly concerned with how asylum seekers subjected to MPP would be able to pay the proposed asylum application fee. In addition to being stranded in a country where they must often struggle on a day-to-day basis to survive,[61] it is unclear, as a practical matter, how an asylum seeker who cannot enter the United States would be able to "fee in" their application with DHS. This NPRM does not in any way address the special vulnerabilities of those subjected to MPP. CLINIC strongly urges the administration to end MPP. If it continues to subject asylum seekers to MPP, it must acknowledge MPP's existence and consider the effects of proposed asylum regulations on those subjected to MPP.

This section of the proposed rule also cross-references 8 CFR § 1208.3(a) which states "An asylum applicant must file Form I-589, Application for Asylum and for Withholding of Removal, together with any additional supporting evidence in accordance with the instructions on the form." CLINIC is concerned that the new language at 8 CFR § 1208.3(c) may lead immigration judges to reject evidence if it is not filed at the same time as the I-589. As discussed more fully below, it often takes asylum seekers a substantial amount of time to secure the evidence they need to support their applications for asylum. CLINIC urges DOJ to reject this proposed rule, which would likely lead to many bona fide asylum seekers waiving their right to seek asylum.

C. 8 CFR § 1208.4—The Proposed Rule Would Create an Impossible Filing Deadline for Individuals in Asylum-only or Withholding-only Proceedings

Proposed section 1208.4 would create an impossible filing deadline for those asylum seekers who are in asylum-only or withholding-only proceedings, requiring them to submit their

[59] Human Rights First, *Delivered to Danger, Trump Administration Sending Asylum Seekers and Migrants to Danger*, (May 13, 2020) . (Reporting that as of that date there had been "at least 1,114 publicly reported cases of murder, rape, torture, kidnapping & other violent assaults").

[60] CLINIC Submits Comments in Opposition to Proposed EOIR Fee Rule, Urges the Justice Department to Rescind, (Mar. 30, 2020) https://cliniclegal.org/resources/federal-administrative-advocacy/clinic-submits-comments-opposition-proposed-eoir-fee-rule; Catholic Partners Join in Submitting Comment in Opposition to USCIS' Proposed Fee Schedule, (Dec. 19, 2019) https://cliniclegal.org/resources/federal-administrative-advocacy/catholic-partners-join-submitting-comment-opposition.

[61] *See* Strauss Center, *Migrant Protection Protocols: Implementation And Consequences For Asylum Seekers In Mexico*, at 26 et seq., (Fall 2019 – Spring 2020) . (Reporting on substandard living conditions for those subjected to MPP).

I-589 applications for asylum and withholding of removal within 15 days of being placed into immigration court proceedings.

The NPRM fails to acknowledge that if the June 15 Proposed Asylum Rule is published in a similar form to the proposed rule, every asylum seeker who is processed through expedited removal and passes a credible fear or reasonable fear interview would be placed in asylum-only or withholding-only proceedings.[62] Under existing regulations, only crew members and asylum seekers from Visa Waiver countries are placed in asylum-only proceedings and in 2018, the last year in which DOJ released a statistical yearbook, there were only 726 such cases scheduled.[63] By way of contrast, in 2018, the last year for which DHS released a statistical yearbook, 74,287 individuals were found to have a credible fear.[64] The NPRM does not explain how implementing this deadline will affect the courts, asylum seekers, or their counsel when the number of respondents in asylum-only proceedings could increase one thousand-fold if the June 15 Proposed Asylum Rule are published as proposed.

The NPRM incorrectly states that since asylum seekers would already have passed their credible fear interview (CFI) or reasonable fear interview (RFI), "there is no reason not to expect the alien to be prepared to state his or her claim as quickly as possible."[65] Of course, the legal standard and context of passing a credible fear interview is completely different from that of the full merits asylum hearing. There is no written application for an asylum seeker who is given a CFI, and the onus is on the asylum officer to elicit testimony through a non-adversarial interview process.[66] The asylum seeker need only show that there is a significant possibility of succeeding on the asylum claim to pass the CFI.[67] These interviews generally take place within a few days of the asylum seeker being apprehended at the border, and the asylum seeker is almost always detained during the process. Those subject to expedited removal and CFIs, receive "considerably less process than the formal proceedings required to remove other aliens."[68]

Once an asylum seeker passes their CFI and is placed in removal proceedings, the burden of proof on the asylum seeker is much higher, as they must now demonstrate a well-founded fear of future persecution or must prove that they have been persecuted in the past. [69] If the recently proposed changes to the I-589 form go into effect, the agencies themselves predict that the estimated time burden for completing the revised form would be 18 hours.[70] Yet the NPRM does not address how the asylum seeker is expected to devote almost a full half-work week to completing the asylum application within a two-week period of time. Given that most asylum

[62] Proposed 8 C.F.R. § 208.2(c)(3)(i); 8 C.F.R. § 1208.2(c)(3)(i).
[63] U.S. DOJ, EOIR, Statistical Yearbook 2000, at 13,
[64] See DHS, *Credible Fear Cases Completed and Referrals for Credible Fear Interview*, .
[65] 85 Fed. Reg. 59694.
[66] 8 CFR § 208.30(d) ("The asylum officer. . . will conduct the interview in a nonadversarial manner, separate and apart from the general public. The purpose of the interview shall be to elicit all relevant and useful information bearing on whether the applicant has a credible fear.").
[67]INA § 235 (b)(1)(A)(v).
[68] *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 9 (D.D.C. 2020), judgment entered, No. CV 19-2676 (RDM), 2020 WL 1905063 (D.D.C. Apr. 16, 2020), appeal dismissed, No. 20-5141, 2020 WL 5358686 (D.C. Cir. Aug. 25, 2020).
[69] *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987).
[70] 85 Fed. R. 36290. The NPRM further estimated that the cost burden of the new form would be It further estimates the cost associated with this burden at $46,968,000 but gave no explanation whatsoever of how it calculated this number.

seekers need translation assistance, and that it is extremely difficult for an asylum seeker to understand the questions on the asylum application without legal counsel, this time constraint would create insurmountable hurdles for most asylum seekers.

Once again, this proposed rule does not address the June 15 Proposed Asylum Rule, which would allow an immigration judge to pretermit the asylum application if the judge finds that the asylum seeker "has not established a prima facie claim for relief."[71] If that proposed rule goes into effect, it would be critical for the asylum seeker to fully evaluate current asylum legal standards,[72] and provide a comprehensive answer to each question just to ensure that they receive a hearing before the immigration judge. The likely result of this proposed rule would be that fewer asylum seekers would be represented on their I-589s as immigration practitioners would be unable to meet their ethical obligations in completing the form on such an expedited timeframe.

Although this section of the proposed rule would permit judges to extend the filing deadline "for good cause," it does not state that the immigration judge can give further extensions. Moreover, the proposed rule has mandatory language stating that if the asylum seeker misses the newly set deadline, the immigration judge "shall" deem the asylum seeker's right to file for asylum waived and "the case *shall* be returned to the Department of Homeland Security for execution of an order of removal." [Emphasis added.] The proposed rule does not explain how this section of the proposed rule would interact with proposed 8 CFR § 1208.3(c)(3), the new rule that would require the immigration court to reject any I-589 that does not have every box filled in. For example, if the asylum seeker has been granted an extension beyond the 15 days to file the I-589, but then the court rejects the application for failing to write "not applicable" in an irrelevant box, it is likely that the asylum seeker would forfeit their right to seek asylum and be returned to DHS to execute the order of removal. Such a harsh result directly conflicts with U.S. obligations under international law as well as asylum seekers' rights under the INA.[73] The agency should withdraw this proposed rule.

D. 8 CFR § 1208.12—The Proposed Rule Would Severely Limit Immigration Judges' Ability to Consider Country Conditions Evidence Submitted by Asylum Seekers While Allowing Immigration Judges to Compile and Introduce Their Own Evidence, Turning Immigration Judges into Prosecutors Instead of Adjudicators

The proposed rule would make it more difficult for asylum seekers to meet their evidentiary burden in three significant ways. First immigration judges would be permitted to rely on government-issued reports without examining whether they are comprehensive or accurate. Second, the immigration judge would have to make a specific finding that non-governmental reports are "credible and probative" before relying on them in decision-making. And, finally, immigration judges would be permitted to introduce their own country conditions evidence into

[71] Proposed 8 CFR § 1208.13(e); 85 Fed. Reg. 366264.
[72] *See* NIJC, *Trump Efforts to End Asylum*, *supra* note 2, detailing the dozens of changes that have occurred on a near-monthly basis to the substance and procedures of asylum adjudication under the Trump administration.
[73] *See* INA 208(a)(1). ("Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.")

the record and rely on it in their decisions. The combination of these three changes would dramatically alter immigration court practice, turning judges into prosecutors, and giving the executive branch unprecedented control over all aspects of the case.

First the proposed rule would create a rule that deems U.S. government issued evidence reliable, stating that the immigration judge "*may rely* on material provided by the Department of State (DOS), other Department of Justice offices, the Department of Homeland Security, or other U.S. government agencies." This portion of the rule is contrasted with all other evidence, including "foreign government and nongovernmental sources" which an immigration judge may only rely on if the judge also determines that "those sources. . .are credible and probative." As a result, in addition to providing the prosecutor and judge in the case, the executive branch would also be the primary creator of evidence in each case and that evidence would be given a presumption of reliability. This concentration of power and authority in the executive branch, at a time when the president himself has indicated that there is no need for noncitizens to even receive court hearings,[74] raises extraordinary due process concerns.

CLINIC is very concerned that the DOS Human Rights Reports have become increasingly politicized under the current administration as the Department of State has become more overtly political. [75] For example, the reports have been criticized for cutting critical information about the mistreatment of women as human rights abuses.[76] Political Violence at a Glance performed a comprehensive review of all of the 2017 DOS Human Rights Reports, that is the first report for which the Trump administration was responsible for all of the material in the DOS Reports. It found that overall, the reports decreased in length by 14 percent and that the greatest decreases were found in the sections on discrimination, societal abuses, and human trafficking, and the other for corruption.[77] It also noted that the sections covering reproductive rights and human rights conditions in Gaza and the West Bank had been completely eliminated.[78]

CLINIC performed its own comparison of the DOS Human Right Report for Honduras, one of the countries with the highest numbers of asylum seekers. CLINIC compared the report for 2016, the final year of the prior administration, with the most recent report, for 2019. In that

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[74] *See* Alana Abramson, *President Trump Calls for Immediate Deportation of Undocumented Immigrants With 'No Judges or Court Cases'*, TIME, June 24, 2018, https://time.com/5320551/trump-immediate-deportation-no-court-hearing/. ("'We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came,' Trump said in a series of two tweets Sunday morning.")

[75] Brian Slodysko, *Watchdog Groups Say Convention Appearances Broke Hatch Act*, AP NEWS, Aug. 27, 2020, https://apnews.com/article/a6ea0162c2ea6242cb9c8284c451560f (Reporting that in an unprecedented move, Secretary of State Mike Pompeo appeared at the Republican National Convention while on a diplomatic mission to Israel.).

[76] *See* Amanda Klasing & Elisa Epstein, Human Rights Watch *US Again Cuts Women from State Department's Human Rights Report*, (Mar. 13, 2019) ; Tarah Demant, Amnesty International *A Critique of the US Department of State 2017 Country Reports on Human Rights Practices*, (May 8, 2018) https://medium.com/@amnestyusa/a-critiqueof-the-us-department-of-state-2017-country-reports-on-human-rights-practices-f313ec5fe8ca.

[77] Rebecca Cordell, et al., Political Violence at a Glance, *How Does The Trump Administration Think About Human Rights? Evidence From The State Department Country Reports*, (June 1, 2018) https://politicalviolenceataglance.org/2018/06/01/how-does-the-trump-administration-think-about-human-rights-evidence-from-the-state-department-country-reports/.

[78] *Id.*

comparison, CLINIC noted that the report decreased in length from 43 to 26 pages—a 39.5 percent decrease in length—eliminated key sections, and relied more heavily on foreign government sources than on non-governmental sources.[79] Overall, the newer DOS Report was less detailed and would likely make it harder for an asylum seeker to prevail if this were the primary country condition evidence on which they relied.

This concern that the changes to the DOS reports have been intentional and political were recently borne out by a Whistleblower Reprisal Complaint with the DHS Office of Inspector General filed by Brian Murphy alleging the following:

> In December 2019, Mr. Murphy attended a meeting with Messrs. Cuccinelli and Glawe to discuss intelligence reports regarding conditions in Guatemala, Honduras, and El Salvador. The intelligence reports were designed to help asylum officers render better determinations regarding their legal standards. Mr. Murphy's team at DHS I&A completed the intelligence reports and he presented them to Mr. Cuccinelli in the meeting. Mr. Murphy defended the work in the reports, but Mr. Cuccinelli stated he wanted changes to the information outlining high levels of corruption, violence, and poor economic conditions in the three respective countries. Mr. Cuccinelli expressed frustration with the intelligence reports, and he accused unknown "deep state intelligence analysts" of compiling the intelligence information to *undermine President Donald J. Trump's policy objectives with respect to asylum.* Notwithstanding Mr. Murphy's response that the intelligence reports' assessments were consistent with past assessments made for several years, Mr. Cuccinelli ordered Messrs. Murphy and Glawe to identify the names of the "deep state" individuals who compiled the intelligence reports and to either fire or reassign them immediately.[80]

Under any circumstances, this level of political interference in a reporting process that is supposed to be objective is extremely alarming, but if the proposed rule is published, immigration judge will be required to accept the DOS Reports as reliable even if the reported "facts" are changed as a result of undue political influence.

The proposed rule would force adjudicators to give greater weight to the DOS Human Rights Reports and other U.S. government reports than to nongovernmental sources. Allowing the executive branch to be responsible for the primary evidence that adjudicators consider in asylum cases could place an impossible burden on asylum seekers. In *Matter of A-B-*, the attorney general stated that for an asylum case involving private actor harm to succeed, the applicant should show more than that the government is unable or unwilling to provide protection, and instead should show that the government condoned or showed complete helplessness to provide protection.[81]

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[79] CLINIC, Department of State Country Report on Human Rights Practices: Honduras: Comparison Chart : 2016 and 2019, (Oct. 20, 2020) https://cliniclegal.org/resources/asylum-and-refugee-law/clinic-department-state-shifts-human-rights-reports-comparison.

[80] Whistleblower Reprisal Complaint by Mr. Brian Murphy, Principal Deputy Under Secretary, DHS Office of Intelligence and Analysis, (Sept. 8, 2020), https://intelligence.house.gov/uploadedfiles/murphy_wb_dhs_oig_complaint9.8.20.pdf?fbclid=IwAR1gn8fjs2abNFSAnwYrw541D1-xHPHlxoUA7qe09Vp0h6LrgujJDdnd4qs. [Emphasis added.]

[81] *Matter of A-B-*, 27 I&N Dec. 316, 337 (A.G. 2018).

Under the proposed rule, the Department of State could include evidence from the foreign government that it is making some efforts to provide protection, and an immigration judge could potentially deny private actor harm cases based solely on that evidence. If the asylum seeker seeks to introduce nongovernmental evidence that the home country would not provide protection, the asylum seeker would need to clear an additional evidentiary hurdle to demonstrate that that evidence is "credible and probative" before the immigration judge could even consider it.

Finally, and of greatest concern, the proposed rule would allow immigration judges to introduce evidence into the record of their own accord. This dramatic change would fundamentally alter the role of the immigration judge in the courtroom. The stated mission of EOIR is "to adjudicate immigration cases by fairly, expeditiously, and uniformly interpreting and administering the Nation's immigration laws."[82] This rule would insert immigration judges into the role of a party rather than impartial adjudicator, placing respondents in an impossible position of potentially arguing that the immigration judge's own evidence is not reliable when the judge is the one introducing it. Allowing a judge to step into the role of a party like this, especially when the vast majority of immigration judges are former DHS, DOJ, or criminal prosecutors,[83] would fundamentally shift the balance of power in the courtroom and erode public trust in the immigration court as a fair adjudicative body. This rule change would also lead to more appeals to the federal circuit courts as asylum seekers and their representatives seek due process from adjudicators who are not part of a politicized executive branch.

The NPRM cites 8 CFR § 1003.10(b) as justification for this dramatic change in courtroom dynamics, stating that that "In deciding the individual cases before them, . . . immigration judges shall exercise their independent judgment and discretion and may take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases." Given that the attorney general has used his appellate authority to strip immigration judges of the ability to exercise their judgment and discretion to administratively close cases, to terminate cases, and substantially limited judges' ability to grant continuances,[84] this justification rings hollow. Moreover, through staggered rulemaking, DOJ has proposed other rules that would further limit immigration judges' judgment and discretion, including a proposal that would prevent immigration judges from exercising *sua sponte* authority to reopen cases.[85]

Allowing immigration judges to introduce their own evidence erodes trust in the independence of the immigration court system. At best, the proposed rule is misguided. CLINIC recently pointed out DOJ's increasing and improper reliance by EOIR on Social Security Administration practices as a model for immigration court proceedings and incorporates those comments by reference into this comment.[86] However, the context of asylum cases where the noncitizen's "stake in the proceeding is enormous (sometimes life or death in the asylum context),"[87] is very different from the review of medical records that occurs in Social Security

[82] Executive Office for Immigration Review, *About the Office* (Aug. 2018), .
[83] *See* EOIR press releases *supra* note 47.
[84] *See* cases cited *supra* notes 4-6.
[85] *See* proposed 8 CFR §§ 1003.2(a) and 1003.23(b)(1) at 85 Fed. Reg. 52491 (Proposed Aug. 26, 2020).
[86]. CLINIC Comment on EOIR Changes, *supra* note 33.
[87] *Ardestani v. I.N.S.*, 502 U.S. 129, 140 (1991) (Justice Blackmun dissent). The holding in this case overturned a lower court's decision granting Equal Access to Justice Act fees in a petition for review.

Administration (SSA) hearings. And DOJ does not explain in any NPRM why it would be appropriate to make EOIR more like SSA hearings.

There are already immigration courts in the United States that some advocates have labelled "asylum-free zones" because the immigration judges who preside over those courts have such low asylum grant rates that asylum seekers there, especially those fleeing violence in Central America, have almost no chance of success on their applications for asylum.[88] The proposed rule would provide immigration judges in "asylum-free zones" the tool to deny virtually every asylum case by introducing their own curated evidence packets that they have determined to be "credible and probative." Asylum seekers would then be fighting an adversarial immigration judge simultaneously with an adversarial DHS attorney. This proposed rule does not comport with due process or fundamental fairness and must be withdrawn.

E. The Proposed Rule Does Not Adequately Analyze Its Effect on Small Entities

As discussed at length above, the proposed rule would significantly alter asylum practice before the immigration court. Immigration attorneys and accredited representatives would, in many cases, have to file asylum applications within 15 days of an asylum seeker's first master calendar hearing, putting extraordinary pressure on the practitioner to develop a relationship with a new client in a short amount of time and complete an application that, by the government's own estimate, would take 18 hours to complete. Practitioners would also be unable to continue most asylum cases beyond 180 days, again significantly altering established practice and putting greater pressure on them to take fewer cases or work longer hours to meet deadlines that would be almost unmovable. And finally, changes to evidentiary requirements would require practitioners to invest more time and resources in compiling country conditions materials to support asylum seekers' cases. Under the added requirement in the proposed rule that an immigration judge must specifically find nongovernmental evidence to be "credible and probative," a practitioner may need to provide evidence about the source of the evidence, adding substantially to their burden in proving the case.

These changes would dramatically affect how small law offices, both private attorneys and non-profit organizations, would be able to accept cases, manage their dockets, and, in some instances, charge fees. Most private attorneys bill their clients based on flat fees[89] and virtually all non-profit legal service providers that charge a nominal fee, do so on a flat-fee basis.[90] As a result, as immigration procedures become more complicated, immigration practitioners either lose money

[88] *See* SPLC, Attorney General's Judges, *supra* note 31, at 12. ("Although judges' dockets vary in the types of cases they are assigned, the huge range and regional patterns of disparate grant rates merit close scrutiny. Today, 'asylum-free zones' like Atlanta, Georgia; Charlotte, North Carolina; and El Paso, Texas—where immigration judges deny asylum applications at rates much higher than in other jurisdictions—are further evidence of a system that allows judicial bias to reign unchecked.").

[89] *See* American Immigration Lawyers Association, The 2016 AILA Marketplace Study, at 18 (Sept. 8, 2016), AILA Doc. No. 16040816, (Available only to AILA members; on file with CLINIC and available by request). [Hereinafter, "AILA Study."].

[90] Even non-profit organizations, like those in CLINIC's network, that provide legal services for free to indigent clients often have numerical deliverables for funders, meaning that as each case becomes more complex, the organization can take on fewer cases, jeopardizing their ongoing funding.

or charge higher fees. Charging more in fees means that representation will be cost-prohibitive and more respondents would proceed *pro se*.

The small entity "analysis" in the NPRM also does not take into account other pending proposed rules. This staggered rulemaking makes it impossible to fully comment on the current proposed rule. On August 26, DOJ issued a proposed rule that would require simultaneous briefing in BIA appeals and restrict potential briefing extensions to a maximum of 14 days. CLINIC strongly opposed that proposed rule, in part because of the effect it would have on small practitioners who could have simultaneous deadlines that would be made unmovable.[91] The combination of that proposed rule with the current proposed rule would mean that practitioners would have almost no ability to obtain a continuance in an asylum hearing if doing so would push the hearing date beyond the 180-day deadline, while the practitioner would simultaneously be unable to obtain extensions on BIA briefing deadlines. These combined rules provide a substantial burden on small practitioners and the NPRM fails to provide any data and analysis of how it reached the conclusion that the proposed rule would not affect small entities, who make up more than 50% of all immigration practitioners.[92]

The NPRM erroneously states, "The proposed rule would not regulate 'small entities' as that term is defined in 5 U.S.C. 601(6). Only individuals, rather than entities, are eligible to apply for asylum, and only individuals are placed in immigration proceedings."[93] But as described above, the proposed rule would substantially change the way that small entities—law offices run by immigration attorneys and non-profits that employ fully accredited representatives[94]—are able to conduct their business.

In another recent, and still pending, proposed rulemaking, EOIR, Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative, Closure, DOJ did acknowledge that changes to immigration court procedures affect immigration practitioners, though it erroneously concluded that there would be no economic impact. In that NPRM, EOIR, stated that that rule "will not economically impact representatives of aliens in immigration proceedings. It does not limit the fees they may charge, or the number of cases a representative may ethically accept under the rules of professional responsibility."[95] It is irrational that in one NPRM EOIR acknowledges the effect of changes to immigration court procedure on those who earn their livelihood by practicing before the courts but in another NPRM that changes immigration court procedures the agency does not even acknowledge the rule's potential effect.[96] Because the agency

[91] *See* CLINIC Comment on EOIR Changes, *supra* note 85.
[92] *See* AILA Study, *supra* note 89, at 8.
[93] 85 Fed. Reg. 59697.
[94] Note that those seeking to become accredited representatives or renew their accreditation under the DOJ Recognition & Accreditation Program will also spend additional time completing Form EOIR-31, Request for New Recognition, Renewal of Recognition, Extension of Recognition of a Non-Profit Religious, Charitable, Social Service, or Similar Organization, should DOJ proceed with revising the form pursuant to its Justice Department's Information Collection. Indeed, the combined effect of all the recent proposed changes is best characterized as "death by a thousand cuts" to recognized non-profit religious, charitable, social service, or similar organization agencies.
[95] 85 Fed. Reg. 52491, 52509 (Proposed Aug. 26, 2020).
[96] It is also worth noting that the faster timeframes and inflexible proposed rules on extensions and continuances would have a much greater negative impact on immigrants' attorneys who primarily work in small practices, than on

has not performed the required analysis of how the proposed rule would affect small entities it should be withdrawn and, if it is reissued, it must contain this analysis.

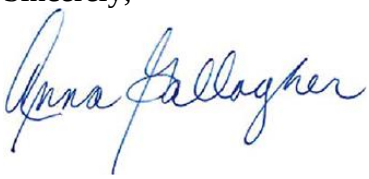
IV. CONCLUSION

CLINIC strongly opposes the proposed changes to asylum and withholding procedures. As detailed above, these proposed rules would dramatically alter long-established practice, and would add to a recent onslaught of changes designed to make it difficult, if not impossible, for asylum seekers to find safety in the United States. These changes would eviscerate asylum seekers' ability to have a fair hearing in immigration court and subvert the will of Congress in allowing asylum seekers to pursue their claims.[97] "When Congress directs an agency to establish a procedure, it can be assumed that Congress intends that procedure to be a fair one."[98] Because the procedural changes proposed here are patently unfair and would result in bona fide asylum seekers being returned to harm's way, CLINIC recommends that this NPRM be withdrawn in its entirety.

As Pope Francis has said, "thousands of persons are led to travel [here] in search of a better life for themselves and for their loved ones, in search of greater opportunities . . . We must not be taken aback by their numbers, but rather view them as persons, seeing their faces and listening to their stories, trying to respond as best we can to their situation. To respond in a way which is always humane, just and fraternal."[99] CLINIC likewise believes that the most vulnerable among us deserve compassion, fairness and due process in the adjudication of their claims for relief. In this vein, CLINIC submits the following comments in opposition to the proposed changes.

Thank you for your consideration of these comments. Please do not hesitate to contact Jill Marie Bussey, Director of Advocacy, at jbussey@cliniclegal.org, with any questions or concerns about our recommendations.

Sincerely,



Anna Gallagher
Executive Director

DHS which is a sprawling agency with thousands of attorneys who could more easily transfer cases internally to meet deadlines.

[97] *See* INA § 208(a)(1).

[98] *De Belbruno v. Ashcroft*, 362 F.3d 272, 280-81 (4th Cir. 2004) (internal quotations omitted).

[99] *Transcript: Read the Speech Pope Francis Gave to Congress*, TIME, Sept. 24, 2015, https://time.com/4048176/pope-francis-us-visit-congress-transcript/.