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KATHRYN O. GREENBERG IMMIGRATION JUSTICE CLINIC

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Submitted via http://www.regulations.gov

Re: Executive Office for Immigration Review, Department of Justice Notice of Proposed Rulemaking: *Motions To Reopen and Reconsider; Effect of Departure; Stay of Removal* (EOIR Docket No. 18–0503, RIN 1125–AB01)

Dear Ms. Reid:

The National Immigration Litigation Alliance (NILA), Northwest Immigrant Rights Project (NWIRP), and the Kathryn O. Greenberg Immigration Justice Clinic at the Benjamin N. Cardozo School of Law (Clinic) submit the following comments in response to the above-referenced Executive Office for Immigration Review (EOIR) proposed rule, EOIR Docket No. 18–0503, *Motions To Reopen and Reconsider; Effect of Departure; Stay of Removal*, 85 Fed. Reg. 75942 (Nov. 27, 2020) (hereinafter, Proposed Rules).

NILA is a nonprofit organization that seeks to realize systemic change in the immigrants' rights arena through federal court litigation. NILA engages in impact litigation to extend the rights of noncitizens and to eliminate systemic obstacles they or their counsel routinely face. In addition, NILA builds the capacity of social justice attorneys to litigate in federal court by co-counseling individual federal court cases and by providing strategic advice and assistance to its members. Through its membership and litigation work, NILA is highly aware of the practical and legal obstacles imposed by the Proposed Rules.

The Clinic is a nonprofit dedicated to advocating in support of immigrant communities and providing quality legal representation for indigent immigrants facing deportation. Students at the Clinic have won relief for many individuals facing deportation, and their work has helped change laws and policies affecting immigrants in New York and nationally. Through its own case work and an investigation that has included extensive research, Freedom of Information Act (FOIA) litigation, and interviews with immigration practitioners across the nation, the Clinic maintains a deep knowledge of the practices and problems associated with the EOIR's policies for adjudicating motions to reopen and reconsider and discretionary stays.

NWIRP is a nonprofit organization dedicated to defending and advancing the rights of immigrants through direct legal services, systemic advocacy, and community education. NWIRP provides legal services to thousands of noncitizens each year, including detained and nondetained persons who have been placed in removal proceedings. Apart from providing direct legal services, NWIRP also provides individual consultations, limited legal services and know-your-rights workshops to persons in removal proceedings.

These organizations are acutely familiar with the burdens noncitizens face when filing motions to reopen or reconsider removal proceedings and seeking stays of removal in conjunction with those motions. Accordingly, they have a direct interest in ensuring that EOIR's practices are improved and that noncitizens are not erroneously denied post-order relief or irreparably harmed in the process of pursuing their statutory, regulatory, and constitutional rights.

I. INTRODUCTION

Individuals facing removal are entitled to fundamentally fair hearings, including fair procedures for raising newly available facts, law, or circumstances, and for seeking protection from irreparable harm that would arise from their removal while the agency considers their claims. To that end, the Immigration and Nationality Act (INA) and accompanying regulations have long allowed for individuals to (1) move immigration judges (IJs) and the Board of Immigration Appeals (BIA or Board) to reopen or reconsider prior removal orders by filing a motion to reconsider or a motion to reopen (collectively, MTRs), *see* 8 U.S.C. § 1229a(c)(6)–(7), 8 C.F.R. §§ 1003.23, 1003.2; and (2) protect themselves from the harm they would experience from being deported before EOIR adjudicates their MTR by seeking a stay of removal, *see* 8 C.F.R. §§ 1003.23(b)(1)(v), 1003.2(f), 1003.6(b); *see also* 8 C.F.R. § 241.6.

For decades, EOIR adjudicators have used processes and legal frameworks for adjudicating MTRs and stay motions that have focused on procedure over substance. As discussed below, EOIR's existing rules and practices unnecessarily burden individuals pursuing MTRs and seeking stays, especially individuals facing imminent removal and in need of emergency review and protection. EOIR's policies have proven unworkable for noncitizens and EOIR itself, leading to the very

irreparable harm and erroneous denial of meritorious claims that these mechanisms were intended to protect against.

The Proposed Rules would dramatically worsen these problems. They would impose new and arbitrary procedural hurdles; make seeking reopening and reconsideration significantly more burdensome; and result in the denial of meritorious claims for relief and protection from unlawful deportation.

EOIR must ensure that any rules it adopts regarding MTRs and stay motions account for and redress (1) the enormous barriers that movants face; (2) EOIR's and the Department of Homeland Security's (DHS) own demonstrated inability to timely provide critical information and adjudications; (3) the irreparable harm that can result from erroneous determinations on MTRs and stay motions; and (4) the importance and purpose of the statutory rights to file MTRs following Congress's codification of these rights and as recognized by the Supreme Court. We submit the following comments in opposition to the Proposed Rules and, for the reasons stated below, urge EOIR to withdraw the Proposed Rules and propose new rules with the considerations outlined below in mind.

II. THE PROPOSED RULES' HEIGHTENED STANDARDS AND PROCEDURES FOR MTRs CONFLICT WITH THE IMMIGRATION AND NATIONALITY ACT, PLACE UNREASONABLE AND UNLAWFUL BURDENS ON NONCITIZENS, AND WOULD RESULT IN THE DENIAL OF MERITORIOUS MTRs.

As the Supreme Court has recognized, motions to reopen serve as an "important safeguard" to "ensure a proper and lawful disposition" of immigration proceedings. *Dada v. Mukasey*, 554 U.S. 1, 18 (2008); *see also Kucana v. Holder*, 558 U.S. 233, 242 (2010). Motions to reconsider serve a similar purpose. However, the substantive and procedural changes to MTRs in the Proposed Rules would fundamentally undermine this core function and result in the removal of individuals with valid claims for reopening, reconsideration, relief, and protection.

Any rules that EOIR adopts regarding MTRs must ensure that noncitizens are able to present colorable claims and avoid irreparable harm. EOIR can only accomplish this if it recognizes the significant challenges that individuals with final orders face. First, many individuals filing MTRs are unable to hire an attorney, and there are simply not enough pro bono attorneys to represent them.[1] Second, even if a noncitizen is fortunate enough to have counsel, an attorney has an ethical

[1] *See, e.g.*, Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, American Immigration Council (Sept. 28, 2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf (finding that nearly two-thirds of immigrants do not have access to counsel in removal proceedings). Additionally, even noncitizens who are able to afford an attorney in their

obligation to take a number of steps before seeking reopening. This includes assessing the merits of a claim, attempting to obtain the complete record of proceedings and, per the MTR statutes and regulations, compiling new evidence.[2] If the MTR is based on changed country conditions, gathering evidence normally requires extensive research and communication with the noncitizen's friends or family members abroad. Third, many individuals who have claims for reopening, reconsideration, and stays of removal are detained, which means that, whether they have an attorney or not, it is extraordinarily challenging to gather evidence or communicate with them or other relevant parties. Fourth, many noncitizens lack English language skills and/or legal expertise, making it difficult and sometimes impossible for them to understand and precisely comply with complex procedural requirements or to conduct research in the notoriously technical field of immigration law. Fifth, many individuals who are detained and facing removal are disabled as a result of severe past trauma, cognitive conditions, and/or other impairments. These factors create enormous obstacles for individuals in any type of proceeding; and they make it virtually impossible for noncitizens to satisfy the burdensome procedural requirements and stringent evidentiary standards here—when the movants are often under extraordinary time pressure because they are facing imminent deportation.[3] Moreover, EOIR and DHS handle hundreds of thousands of matters annually with inadequate resources, leading to significant delays, administrative errors, and erroneous adjudications. Given this, any rules adopted by EOIR must prioritize the merits of the claims, e.g., whether the individual was wrongfully denied an opportunity to present her case, whether changed country conditions give her a new basis for relief, and whether other circumstances entitle her to reopening. By erecting a host of unnecessary and impractical obstacles that individuals filing MTRs must confront, the Proposed Rules do the opposite.

A. EOIR Should Eliminate the Rule Preventing Adjudicators from Considering Credible Factual Allegations.

The Proposed Rules provide that there is "no presumption that factual allegations offered in support of a motion to reopen or motion to reconsider are true" and prohibit EOIR adjudicators from accepting critical factual allegations as true, even when credible and when uncontradicted by the record. Proposed Rules at 75956 (8 C.F.R. § 1003.48(b)(2)). For example, the Proposed Rules categorically forbid adjudicators from considering allegations "made solely by the respondent

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initial removal proceedings may not be able to afford to pay for additional representation for a subsequent MTR and stay motion. Furthermore, even in areas with relatively high rates of pro bono representation, there is significantly less funding for pro bono post-order representation, including the filing of MTRs and discretionary stays of removal.

[2] *See generally* Affidavit of Trina A. Realmuto ¶¶ 5–12, *Devitri v. Cronen*, 290 F. Supp. 3d 86 (D. Mass. 2017) (No. 17-CV-11842 (PBS)), ECF No. 49-5.

[3] *Id.* ¶ 12 (estimating that "a lawyer with an active removal docket may take somewhere between 6 - 12 weeks to adequately prepare and file a motion to reopen, including preparation of the underlying application for relief").

regarding individuals who are not presently within the United States." *Id.* This blanket bar would prevent such allegations from being accepted even without any indication that they are untrue and even though facts about what others have done (or will do) to a noncitizen in their country of origin are often the linchpin of MTRs. Indeed, the Proposed Rules are in direct tension with the INA, which affords persons the right to file a motion to reopen to apply for asylum and related forms of protection based on "changed country conditions *arising in* the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding." 8 U.S.C. § 1229a(c)(7)(C)(ii) (emphasis added).

The Proposed Rules also preclude adjudicators from considering factual assertions merely because they are not supported by additional evidence or because they are based on hearsay. This contradicts decades of existing law holding that credible factual assertions and hearsay are given evidentiary weight in immigration proceedings.[4] Furthermore, factual allegations may be the only evidence available at the MTR stage. Finally, the Proposed Rules will foster decisions based on speculation and bias because they forbid adjudicators from considering any evidence that they find "otherwise inherently unbelievable." *Id.* (8 C.F.R. §§ 1003.48(b)(2)(iv), (v)).

Furthermore, raising the already too-high bar for the evidence presented in support of MTRs is unworkable and burdensome for the approximately 70% of individuals who appear *pro se* in removal proceedings.[5] These individuals often lack counsel to help them gather corroborating evidence, are impeded from conducting fact-gathering because they are in detention, and must file MTRs on truncated timelines. Barring EOIR adjudicators from considering such credible evidence is, moreover, unfair and inappropriate given that any facts asserted by noncitizens will be subject to the ordinary tests of the adversarial process.[6] The government prosecutor in these proceedings—which is DHS, *not* EOIR—will have the opportunity to respond to any facts it believes are untrue with contrary evidence. And, if the MTR is granted, the individual's claims will be tested in removal proceedings before the immigration court, which has a panoply of tools

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[4] *See Matter of D-R-*, 25 I&N Dec. 445, 461 (BIA 2011) ("In immigration proceedings, the sole test for admission of evidence is whether the evidence is probative and its admission is fundamentally fair." (internal quotation marks and citation omitted)); *id.* at 461 ("Hearsay is admissible in immigration proceedings if it is reliable and probative."); *Matter of Kwan*, 14 I&N Dec. 175, 177 (BIA 1972) ("Information contained in an affidavit should not be disregarded simply because it appears to be hearsay. In administrative proceedings that fact merely affects the weight to be afforded such evidence, not its admissibility.").

[5] Noncitizens were *pro se* in 132,653 out of 191,633 (69.2%) cases initiated in FY 2020. State and County Details on Deportation Proceedings in Immigration Court, TRACImmigration (last updated Nov. 2020), https://trac.syr.edu/phptools/immigration/nta/.

[6] *Cf. Chen v. Gonzales*, 434 F.3d 212, 219 (3d Cir. 2005) ("In an adversarial system of adjudication, it is typical that each side to the dispute has access to facts which might support its position or contradict the assertions of the other side.").

for just such a purpose. EOIR should instead adopt a rule that requires adjudicators to treat all factual allegations as presumptively true at the MTR stage unless they are contradicted by the record, internally contradictory, utterly devoid of detail sufficient to make them credible, or objectively could not be true.

B. EOIR Should Eliminate the Rule Permitting Denial of MTRs Where Individuals Have Not Departed.

The Proposed Rules broadly and impermissibly incorporate the fugitive disentitlement doctrine, a standard selectively applied by federal courts, into the MTR process. *See* Proposed Rules at 75956 (8 C.F.R. § 1003.48(c)) (providing that the "failure to comply with a notification to surrender [for removal] may result in the denial of the [noncitizen]'s motion"). By authorizing the denial of MTRs based on the failure to surrender for removal, the Proposed Rules adopt a penalty that federal courts have recognized is an "extreme sanction" and one so "severe" that it "should not be lightly imposed,"[7] and permit adjudicators to apply it to any and all MTRs.

This harsh penalty should not apply in the MTR context. First, denying MTRs because an individual seeks reopening after they have been ordered removed and remained in the United States would undermine the very purpose of MTRs, which are an "important [procedural] safeguard" intended "to ensure a proper and lawful disposition" of immigration proceedings. *Dada*, 554 U.S. at 18. Had Congress intended to place such a significant limitation on the availability of reopening, it surely would have made that evident in the statute. *See* 8 U.S.C. § 1229a(c)(7)(C)(ii) (containing no such language and exempting fear-based MTRs from 90-day deadline). Indeed, it made the consequences of not complying with a removal order plain elsewhere, and notably chose not to include them in the MTR framework. *See, e.g.*, 8 U.S.C. §§ 1253(a), 1324d(a). As such, the Proposed Rules are in conflict with, and ultra vires to, the MTR statutes. Second, this rule is based on EOIR's exercise of discretion, and EOIR lacks discretion to deny statutory MTRs. Rather, in the context of statutory MTRs, EOIR may only review the propriety and legality of the earlier removal proceeding in light of new and previously unavailable evidence. *Compare* 8 U.S.C. §§ 1158(b)(2)(A)(v), 1255(a), 1229b(b)(2)(D), 1182(h)–(i) (containing plain language authorizing use of discretion), *with* 8 U.S.C. § 1229a(c)(7) (containing no discretionary language). Moreover, even if EOIR retained discretion to deny some statutory MTRs, it lacks discretion to deny where the person was not in fact removable or where the relief that forms the basis of MTR is non-discretionary, e.g., withholding of removal or Convention Against Torture Act protection. Third, even if the fugitive disentitlement doctrine were ever appropriate for MTRs, the Proposed Rules

[7] *Gutierrez-Almazan v. Gonzales*, 453 F.3d 956, 957 (7th Cir. 2006) ("[T]he Supreme Court cautioned against frequent use of fugitive dismissal, stating that it is too blunt an instrument for deterring other petitioners from absconding and for preserving the court's authority and dignity."); *Hassan v. Gonzales*, 484 F.3d 513, 516 (8th Cir. 2007) (describing the doctrine as "an extreme sanction").

adopt a vague, broadly applicable rule that permits the dismissal of an MTR without any indication of when or how this extreme sanction should be applied, or how noncitizens can show that it would be inapplicable or inappropriate as applied to their case. Finally, this rule would undermine EOIR's own objectives of encouraging people to comply with U.S. immigration laws. By creating a categorical basis for denying a wide swath of meritorious claims, it would instead incentivize individuals with removal orders to continue living in the shadows rather than exercising their statutory rights to seek reopening or reconsideration of removal proceedings and to regularize their status.[8]

C. EOIR Should Eliminate All Rules that Bar Colorable Ineffective Assistance of Counsel Claims Based on Procedural Requirements And Adopt a Flexible Prejudice Rule.

The Proposed Rules for presenting ineffective assistance of counsel (IAC) claims in MTRs also wrongfully ratchet up the standard for IAC claims at the MTR stage, imposing senseless requirements that have nothing to do with the merits of the claim. In so doing, the Proposed Rules depart from precedent in several courts of appeal and make the burdensome framework set forth decades ago in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), even more onerous. *See* Proposed Rules at 75957 (8 C.F.R. § 1003.48(i)).

For example, the proposed standard for evaluating prejudice would require the EOIR adjudicator to decide "whether there is a reasonable probability that, but for counsel's ineffective assistance, the result of the proceeding would have been different." Proposed Rules at 75957 (8 C.F.R. § 1003.48(i)(4)). In adopting this "standard similar to the one rooted in *Strickland v. Washington*, 466 U.S. 668 (1984)," Proposed Rules at 75951, EOIR chose the most stringent interpretation of the prejudice standard articulated by a select subset of courts of appeal reviewing IAC in the immigration context, ignoring courts that have expressly rejected such a heightened standard.[9]

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[8] Lenni B. Benson, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, 51 N.Y.L. SCH. L. REV. 37, 66 (2007) ("When an individual is placed in removal proceedings and learns that he or she has no legal basis to remain in the United States, the obvious incentive is to evade the entire proceeding and to live underground."); Amanda Frost, *Cooperative Enforcement in Immigration Law*, 103 IOWA L. REV. 1, 47 (2017) ("[U]nder the current removal-or-forbearance approach, [] unauthorized immigrants will spend a lifetime in the United States without legal status—ever afraid of being deported, unable to build secure lives or protect their own rights in the workplace and at home, and degrading wages and working conditions for all employees.").

[9] *See, e.g.*, *Rabiu v. I.N.S.*, 41 F.3d 879, 882 (2d Cir. 1994) (stating that establishing prejudice requires a noncitizen to "make a prima facie showing that he would have been eligible for the relief and that he could have made a strong showing in support of his application"); *Calderon-Rosas v. Att'y Gen.*, 957 F.3d 378, 387 (3d Cir. 2020) ("[W]e have cautioned, 'reasonable probability' means merely a 'significant possibility.'" (citation omitted)); *Garcia-Arce v. Barr*, 946 F.3d 371,

While EOIR claims that this standard should provide greater protection to individuals in removal proceedings because individuals in criminal proceedings generally have greater rights, it fails to recognize that the fact criminal defendants have greater protections in the first instance is precisely why the *Strickland* standard is so exacting and why it is an inappropriate standard for immigration IAC claims. Additionally, EOIR's decision to adopt a *Strickland* standard that is more stringent—and less protective of noncitizens' rights—conflicts with the current immigration standard used by at least four circuits (in which nearly half of all removal hearings are venued).[10] Accordingly, the rule adopts an impermissibly heightened prejudice standard that will provide lesser protections to a significant proportion of noncitizens.

Moreover, the proposed prejudice standard ignores the critical reasons that a lower and more flexible standard is appropriate. First, a lower prejudice and more flexible standard accounts for the enormous burden that the investigation and documentation imposes on noncitizens, including and especially for *pro se* and detained individuals. This set of burdens includes the unique challenges of investigating IAC claims in the immigration realm, e.g., limited access to the record of proceedings, massive FOIA backlogs among the federal agencies that possess relevant evidence, and changes in complex immigration law, as well as the unique obstacles that individuals face.[11] Second, a lower prejudice standard properly accounts for the fact that the adjudicator is often not well positioned to make an accurate determination about the claims that a prior attorney could and should have presented until noncitizen has been provided a new hearing with competent counsel—one who has fully investigated the claim for relief and has the opportunity to present that evidence at a hearing. *See* 8 U.S.C. § 1229a(c)(7)(B) (explaining that MTRs must set forth the "new facts that *will be proven* at a hearing to be held if the motion is granted." (emphasis added)). In light of this, EOIR must evaluate prejudice using one of the more flexible standards adopted by federal courts,[12] such as the rule requiring a noncitizen to show that the deficient performance "may have

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378 (7th Cir. 2019) ("The prejudice prong requires a showing that counsel's errors actually had the potential for affecting the outcome of the proceedings." (citation omitted)); *Flores v. Barr*, 930 F.3d 1082, 1088–89 (9th Cir. 2019) ("[T]he question with respect to prejudice is whether counsel's deficient performance *may* have affected the outcome of the proceedings, which means that the petitioner need only show plausible grounds for relief." (emphasis in original) (internal quotation marks and citation omitted)).

[10] More than 43% of removal proceedings take place in the 11 states with immigration courts found within the United States Courts of Appeal for the Second, Third, Seventh, and Ninth Circuits. *See* State and County Details on Deportation Proceedings in Immigration Court, TRACImmigration (last updated Nov. 2020), https://trac.syr.edu/phptools/immigration/nta/. In these circuits, the standard for showing prejudice is lower than that of *Strickland*, which the Proposed Rules seek to incorporate. *See supra* note 8.

[11] *See* Affidavit of Trina A. Realmuto ¶¶ 5–12, *Devitri v. Cronen*, 290 F. Supp. 3d 86 (D. Mass. 2017) (No. 17-CV-11842 (PBS)), ECF No. 49-5.

[12] *See supra* note 8.

affected the outcome of the proceedings," and that a noncitizen "need only show plausible grounds for relief."[13]

EOIR should also eliminate the language providing that prejudice cannot be established based on the subsequent availability of relief. Proposed Rules at 75957 (8 C.F.R. § 1003.48(i)(4)). As the Department of Justice has previously recognized, *see* Motions To Reopen Removal, Deportation, or Exclusion Proceedings Based Upon a Claim of Ineffective Assistance of Counsel, 81 Fed. Reg. 49556, 49566 (July 28, 2016), eligibility for relief or protection arising after the conclusion of proceedings can sometimes inform the prejudice inquiry in an IAC claim. For example, EOIR has already acknowledged that an attorney who is aware that his or her client is likely to become eligible for relief through a pending petition or application, but who fails to request a continuance to allow for adjudication of the relevant application, prejudices the outcome of her client's case. EOIR should therefore remove the language in this proposed regulation, which risks foreclosing claims where subsequent relief is indeed relevant to prove IAC, and specifically, prejudice.

Finally, the Proposed Rules impose impracticable and additional procedural requirements that go even further than the *Lozada* requirements, which have proven to be unworkable and been rejected by several circuit courts.[14] For instance, the proposed rule requiring noncitizens to file complaints with *both* the appropriate bar disciplinary authorities and EOIR is an unnecessary hurdle for movants attempting to present their IAC claim. Proposed Rules at 75958 (8 C.F.R. § 1003.48(i)(5)(iii)). EOIR should not require noncitizens to file a bar complaint at all, as this also creates a burden on state agencies who are not equipped to evaluate the nuances of immigrant representation, will not assist EOIR, and may be inappropriate depending on the substance of the IAC claim. In fact, as the Attorney General previously noted, the requirement may encourage frivolous bar complaints that overwhelm state bars, making it impracticable for them "to identify meritorious complaints."[15] And, since EOIR appears to see *Strickland* as relevant guidance for

[13] *Morales Apolinar v. Mukasey*, 514 F.3d 893, 898 (9th Cir. 2008).

[14] *See, e.g.*, *Piranej v. Mukasey*, 516 F.3d 137, 142 (2d Cir. 2008) ("We have recognized that requiring strict compliance increases the danger of foreclosing those claims that are colorable and may be meritorious."); *Rranci v. Att'y Gen.*, 540 F.3d 165, 173–74 (3d Cir. 2008) ("Where a petitioner succeeds on the first two prongs of *Lozada* but does not file a disciplinary complaint or provide an explanation, we have held that the third prong does not necessarily sink a petitioner's ineffective-assistance-of-counsel claim."); *Barry v. Gonzales*, 445 F.3d 741, 746 (4th Cir. 2006) ("[A]lthough *Lozada* provides a useful framework for assessing ineffective assistance claims, an [noncitizen]'s failure to satisfy all three requirements does not preclude appellate court review in every case. We will reach the merits of an ineffective assistance of counsel claim where the [noncitizen] substantially complies with the *Lozada* requirements."); *Correa-Rivera v. Holder*, 706 F.3d 1128, 1131 (9th Cir. 2013) ("[*Lozada*] requirements are not rigidly applied, especially when the record shows a clear and obvious case of ineffective assistance." (internal quotation marks and citation omitted)); *Flores- Panameno v. Att'y Gen.*, 913 F.3d 1036, 1040 (11th Cir. 2019) (requiring "substantial, if not exact, compliance" with *Lozada* requirements).

[15] *Matter of Compean*, 24 I&N Dec. 710, 737 (AG 2009), *vacated by* 25 I&N Dec. 1 (AG 2009).

IAC-based MTRs, it bears noting that *Strickland* imposed no obligation to file a bar complaint. Accordingly, if EOIR retains any default requirement to file a complaint, it should not require individuals to file bar complaints or, at minimum, follow *Lozada* in permitting them to instead submit a statement explaining why they did not file a complaint.

Finally, the proposed IAC rule requires that individuals submit a copy of their relevant representation agreement or explain its absence in the affidavit together with "reasonably available evidence on the scope of the agreement and the reason for its absence." Proposed Rules at 75957 (8 C.F.R. § 1003.48(i)(5)(i)). This rule provides EOIR with no relevant information that a noncitizen could not provide in other, easier-to-effectuate ways, e.g., their affidavit. This also provides a particularly difficult barrier for detained immigrants, who often are not in possession of prior paperwork. At the very least, any such proposed regulations must allow for a waiver of these requirements for good cause (other than, for example, the prior counsel's death), and do so regardless of whether the person is *pro se*.

Ultimately, the IAC-related rules should be revised to dispense with rigid procedural obstacles that winnow out meritorious claims and instead adopt flexible standards that allow noncitizens to fully present claims notwithstanding the challenges they face. Moreover, because of the unique difficulties faced by movants in this posture—who are typically presenting new facts and often *pro se*, detained, and/or Limited English Proficient—substantial compliance with the rule should be sufficient.

D. EOIR Should Not Limit the Scope of Reopened Proceedings.

The Proposed Rules also seek to dramatically limit the scope of reopened proceedings to "only those issues or issues upon which reopening or reconsideration was granted, as well as matters directly related." Proposed Rules at 75953; *see also id.* at 75953 (8 C.F.R. § 1003.48(e)(3)). Such an arbitrarily narrow rule conflicts with the unrestricted reopening procedure described in the governing statute and would create absurd results. In 8 U.S.C. § 1229a, Congress provided a framework for MTRs, explaining that they must set forth the "new *facts* that will be proven at a hearing to be held if the motion is granted." 8 U.S.C. § 1229a(c)(7)(B) (emphasis added). But it never suggested that the reopened proceedings would be limited to those facts, nor would it make sense to preclude someone from providing the agency with a fuller factual record on remand than she could provide in the limited time people often have to prepare MTRs. To construe § 1229a to permit such limited remand proceedings would not only create a dramatic departure from past practice without any good justification, it would also create absurd consequences. Consider, for example, the case of an individual who won an IAC-based MTR and whose proceedings were reopened and remanded so she could seek adjustment of status. If country conditions changed in her country of origin such that she acquired an asylum claim while her proceedings were on remand, or if intervening law made her no longer removable at all, she would have no way to raise

those claims under the Proposed Rules. She would be prevented from litigating the new claims in immigration court on remand and, because her proceedings had already been reopened, would not be able to timely raise them through a new MTR. To the extent that she could raise them at all, it would be through a second MTR at the conclusion of the reopened proceedings. Situations like this will result in the deprivation of rights and serious inefficiencies—including prolonged proceedings with multiple MTRs and remands—which undermines EOIR's stated goal.

As explained above, Congress's intent in codifying MTRs was "to ensure a proper and lawful disposition" of immigration proceedings. *Dada*, 554 U.S. at 18. Indeed, Congress "transform[ed] the motion to reopen from a regulatory procedure to a statutory form of relief available to [noncitizens,] . . . took a significant degree of discretion out of the agency's hands and vested a statutory right in the noncitizen."[16] In other words, "by elevating the motion to reopen to a statutory right and carefully delineating its contours," Congress "instituted a 'pertinent change' to any regulatory roadblock to the exercise of this newly-created right."[17] Yet, these Proposed Rules represent exactly the type of "regulatory roadblock" proscribed by Congress and therefore must be withdrawn.

The rule would dramatically increase the amount of *ex ante* work for individuals—who are often *pro se* and facing imminent deportation when filing MTRs—and their attorneys, by forcing them to investigate and present every potential future claim for relief at the threshold MTR stage. In addition, where a person is facing imminent deportation, they do not have the time to explore the full range of potential and theoretically available claims to ensure that they are not waiving an additional basis for relief. The rule would also increase the cost of counsel for MTRs (on top of the recently increased cost of filing MTRs),[18] forcing individuals to spend significant sums of money before they even had any assurance that the MTR would be grantable. Lastly, the rule would increase the workload for adjudicators forced to review and decide each and every issue and claim, leading to an even greater backlog in MTR adjudications.[19] For all of these reasons, EOIR should eliminate the Proposed Rule restricting the ordinary scope of reopened proceedings.

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[16] *Perez Santana v. Holder*, 731 F.3d 50, 58–59 (1st Cir. 2013) (internal quotation marks and citation omitted) (finding Congress's intent with MTRs to be "manifest" and explaining that such "statutory changes are inconsistent with the notion that Congress simply intended to stay silent regarding [] substantial [] limitation[s] on the motion to reopen proceeding").

[17] *Id.* at 59.

[18] Executive Office for Immigration Review; Fee Review, 85 Fed. Reg. 82750, 82751 (Dec. 18, 2020) (raising the fee for filing an MTR before the BIA from $110 to $895, and the fee for filing an MTR before the immigration court from $110 to $145).

[19] *See Active and Inactive Pending Cases*, EOIR Adjudication Statistics (last updated Oct. 13, 2020) https://www.justice.gov/eoir/page/file/1139516/download (listing 1,252,028 active pending cases at the end of FY 2020).

E. EOIR Should Eliminate the Rule Preventing Adjudicators from Granting MTRs Premised On Relief from Other Agencies Unless the Other Agency Has Already Granted the Underlying Relief.

The Proposed Rules prohibit adjudicators from granting MTRs "premised upon relief that the immigration judge or the BIA lacks authority to grant," unless "another agency has first granted the underlying relief." Proposed Rules at 75948; *id.* at 75948 n.11; *see also id.* at 75956–57 (8 C.F.R. §§ 1003.48(e)(1), (2)).[20] EOIR purports to adopt this rule largely out of concerns about the continuances and outside considerations that adjudicators must contend with when applications for relief (virtually always before USCIS) are pending. But EOIR's rationale for this rule ignores the fact that any challenges posed by these delays—which have been worsened by the government's own resource allocation choices[21]—are caused by DHS, a sister federal agency. It is therefore unreasonable for EOIR to impose the harsh consequences due to this delay on noncitizens who otherwise may have *prima facie* grantable MTRs. It should instead address these concerns by taking action focused on DHS, whether it be joint rulemaking with USCIS to ensure that USCIS adjudicates the underlying applications before the person is deported, or penalizing DHS to incentivize it to allocate appropriate resources to USCIS to correct these delays.

EOIR's purported justification that its refusal to grant an MTR in this context "does not prejudice the [noncitizen] because the [noncitizen] can always apply to DHS for a stay of removal while DHS adjudicates the underlying application," Proposed Rules at 75948; *see also id.* at 75957 (8 C.F.R. § 1003.48(e)(1)(ii)), is inaccurate. First, DHS stays are not designed to be—and are not—a substitute for EOIR's role in ensuring noncitizens a meaningful opportunity to be heard on MTR claims related to newly available arguments and forms of relief. The regulations authorize DHS to issue stays based largely on the considerations for parole, e.g., medical emergencies, and vague considerations of DHS's view of practicality and propriety.[22] None of the standards for DHS stays require it to even consider the issues that would be relevant an MTR: an individual's basis for reopening and the availability of relief. Even if DHS were required to consider an individual's likelihood of reopening their case (which it is not), ICE—which is both the subcomponent that adjudicates DHS stay applications *and* noncitizens' adversary before EOIR—would be especially

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[20] The proposed regulation additionally specifies that "a grant of an application for relief does not include interim relief, *prima facie* determinations, parole, deferred action, bona fide determinations or any similar dispositions short of final approval of the application for relief." Proposed Rules at 75957 (8 C.F.R. § 1003.48(e)(1)(i)).

[21] *Press Release: USCIS Averts Furlough of Nearly 70% of Workforce*, USCIS (Aug. 25, 2020), https://www.uscis.gov/news/news-releases/uscis-averts-furlough-of-nearly-70-of-workforce (quoting USCIS Deputy Director for Policy Joseph Edlow as stating that future spending cuts "will increase backlogs and wait times across the board").

[22] *See* 8 C.F.R. § 241.6 (authorizing DHS stays based on the factors set forth in 8 C.F.R. § 212.5(c), which governs parole, and 8 U.S.C. § 1231(c)); *see also* ICE Form I-246, https://www.ice.gov/doclib/forms/i246.pdf.

ill-suited to determine the viability of an MTR. DHS officers are tasked with police-type enforcement duties and jailor-type detention responsibilities; they are not lawyers equipped to undertake legal analyses or make judgments on the merits of complex motions. Second, contrary to EOIR's assertion, requiring individuals to apply for DHS stays would prejudice them because filing these applications are extremely onerous given the extent of material that individuals must submit; DHS stays can be denied for many reasons that are irrelevant to the merits of the applicants' MTR; and applications are expensive and perhaps cost-prohibitive (it costs $155 to file an I-246). Third, EOIR has provided no indication of whether and to what extent DHS stays offer any real means of protection from removal pending adjudication of a relief application. Indeed, at least as late as 2017, ICE has stated that it does not track I-246 grants or denials, which means that (1) neither EOIR nor ICE can draw realistic conclusions about protection that DHS stays can offer to individuals with bases for reopening; and (2) commenters are prejudiced in their ability to respond to EOIR's conjecture.

EOIR should adopt a rule that encourages EOIR adjudicators to either grant MTRs if underlying relief applications before other agencies appear *prima facie* grantable, or grant a stay pending adjudication of the pending application.[23] Alternatively, EOIR should undertake joint rulemaking with DHS that requires DHS to expeditiously adjudicate underlying relief applications for individuals with MTRs pending and EOIR adjudicators to issue temporary stays while the expedited relief application is pending.

F. EOIR Should Adopt a Practical Rule Regarding Contact Information for the Movant.

The Proposed Rules would categorically prohibit IJs and the BIA from granting MTRs unless the noncitizen has provided a physical street address, Proposed Rules at 75958 (8 C.F.R. § 1003.48(j) (referencing 8 C.F.R. § 1003.20(c)), adding yet another unnecessarily rigid hurdle to the MTR process. After all, if anyone has a vested interest in updates from EOIR regarding a pending or adjudicated MTR, it is the individual who stands to benefit from it being granted. This rule is, however, impractical for individuals who file MTRs, as they may lack access to stable housing, be forced to live in hiding in their country of origin if they were removed before their MTR was adjudicated, or be battered spouses, children, and parents—MTR movants of special concern to Congress, *see* 8 U.S.C. § 1229a(c)(7)(C)(iv)—who frequently and often suddenly need to move physical locations for their own safety.[24] This rule is also unnecessary, as there are a range of

[23] *Cf. Matter of Velarde*, 23 I&N Dec. 253, 256 (BIA 2002) (concluding "that a properly filed motion to reopen may be granted, in the exercise of discretion, to provide a [noncitizen] an opportunity to pursue an application for adjustment" in certain circumstances).

[24] *Domestic Violence, Housing, and Homelessness*, National Network to End Domestic Violence (July 2019) https://nnedv.org/wp-content/uploads/2019/07/Library_TH_2018_DV_Housing_Homelessness.pdf (explaining that

other, easily administrable ways that EOIR can accomplish its stated objective of ensuring "that proceedings are not reopened only to be delayed because the Board or an immigration court lacks a current address for the noncitizen." Proposed Rules at 75950. EOIR could accomplish this goal by accepting other types of contact information—such as contact information for counsel, cell phone numbers, email addresses, or family member addresses, instead. Therefore, EOIR should eliminate the proposed address rule, which would penalize noncitizens for circumstances outside their control, and adopt a more flexible, practical rule regarding contact information.

G. EOIR's Proposed Rules Erroneously Treat Motions to Reopen and Motions to Reconsider as "Discretionary" and "Disfavored."

The Proposed Rules contain numerous antiquated and erroneous references to MTRs as "discretionary" and "disfavored." *See* Proposed Rules at 75947–49 ("[T]he BIA is vested with broad discretion to grant or deny these motions . . . ."); 75955 ("[M]otions to reopen are disfavored already as a matter of law . . . ."). Historically, the Supreme Court and courts of appeal have considered IJs and the BIA to have "broad discretion" over motions to reopen and have reviewed them under an abuse of discretion standard. *See Kucana*, 558 U.S. at 242. Significantly, however, when much of the initial case law on which EOIR relies was developed, such motions were merely creatures of regulation.

Then, through the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996), Congress, for the first time, codified the right to file a motion to reopen. In so doing, Congress "transform[ed]" the motion to reopen process, "took a significant degree of discretion out of the agency's hands and vested a statutory right in the noncitizen." *Perez Santana v. Holder*, 731 F.3d 50, 58–59 (1st Cir. 2013) (citing cases). In reviewing this new statutory right, the Supreme Court held in *Dada v. Mukasey* that "[t]he purpose of a motion to reopen is to ensure a proper and lawful disposition" of immigration proceedings. 554 U.S. 1, 18 (2008).[25] Taken together, Congress's codification of motions to reopen and the Supreme Court's interpretation of the motion to reopen statute as intended to ensure "a proper and lawful disposition" of removal proceedings suggests that EOIR adjudications must confine their substantive review of motions to reopen to the propriety and legality of the earlier removal proceeding in light of new and previously unavailable evidence.

Rather than acknowledge the significance of Congress's choice to codify MTRs, EOIR continues to rely on case law that pre-dates codification and/or the regulatory language providing that the

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"38% of all victims of domestic violence become homeless at some point in their lives" and that "a victim of domestic violence will often leave an abuser multiple times before finally escaping the violence, therefore, experiencing multiple periods of homelessness").

[25] *See also Kucana*, 558 U.S. at 242 (reaffirming that a motion to reopen is an "important safeguard").

BIA has discretion to grant or deny a motion (even if the party has made a *prima facie* case for relief). *See* Proposed Rules at 75949 (citing *INS v. Doherty*, 502 U.S. 314 (1992); *INS v. Abudu*, 485 U.S. 94, 104 (1988)). These cases, as well as the Proposed Rules regarding discretion, conflict with Congressional intent to divest the agency of discretionary authority over statutory MTRs.[26] The plain language of the MTR statute, 8 U.S.C. § 1229a(c)(7), contains no such discretionary component.[27] Moreover, Congress's use of expressly discretionary authority elsewhere in the INA, *see e.g.*, 8 U.S.C. §§ 1158(b)(2)(v); 1255(a), 1229b(b)(2)(D), 1182(h)–(i), and its omission of such language in the motion reopen statute, further evidences its intent to eliminate broad discretion in the adjudication of motions to reopen.

Even if the congressional intent to divest the agency of discretion over statutory MTRs was unclear, the ongoing treatment of motions to reopen as discretionary and disfavored, as contemplated by the Proposed Rules and their purported justification, is an impermissible construction of the MTR statutes. The purpose of a motion to reopen is to correct errors in a removal proceeding that affected the lawfulness and propriety of the outcome in that proceeding. The agency cannot deny motions to reopen where the lawfulness and propriety of the outcome is not contingent upon a favorable exercise of discretion. Accordingly, EOIR must update the fundamentally incorrect framing of the Proposed Rules concerning the nature of MTRs.

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In sum, EOIR should withdraw the Proposed Rules regarding MTRs and propose rules that focus on ensuring that noncitizens are able to present the substance of their claims.[28]

III. THE PROPOSED EOIR STAYS RULES CONTRAVENE THE UNDERLYING PURPOSE OF THE STAY MECHANISM, PLACE TOO HIGH A BURDEN ON NONCITIZENS, AND WILL RESULT IN PEOPLE SUFFERING IRREPARABLE HARM, INCLUDING DEATH.

Stays of removal play a critical role in allowing noncitizens to both meaningfully litigate MTRs and benefit from the defenses available under immigration law. EOIR stays—i.e., stays issued by EOIR to halt removal while an MTR is pending—protect noncitizens from irreparable harm,

[26] However, the agency retains discretion over statutory findings that are contingent upon a favorable exercise of such discretion. *See, e.g.*, 8 U.S.C. § 1182(a)(9)(B)(v).

[27] *See Kucana*, 558 U.S. at 838 ("Congress did not codify the regulation delegating to the BIA discretion to grant or deny motions to reopen."). To the extent that the Court in *Kucana* assumed that Congress left discretion to the agency, that assumption was not briefed or argued by the parties, did not implicate the holding of the case, and is *dicta*.

[28] We note that, although EOIR purported to adopt comprehensive rules regarding MTRs, it did not address equitable tolling of filing deadlines, which is an important aspect of MTRs and should be incorporated into a modified proposed rule.

including being returned to their country of origin to face persecution while their MTR is undecided. EOIR stays also allow noncitizens, especially *pro se* noncitizens, to supplement their pending MTRs with further evidence and arguments critical to the success of their cases, which is often difficult or impossible for them to do after deportation. Moreover, although the Proposed Rules attempt to position DHS stays as an adequate alternative remedy to EOIR stays, such stay requests have historically afforded little protection to noncitizens facing deportation, and are especially ill-suited to this context because DHS officers have neither the experience nor any type of training to evaluate the legal claims raised in MTRs. Finally, EOIR stays afford noncitizens a meaningful opportunity to access the judicial review process that Congress provided for denials of MTRs. For all of these reasons, the EOIR stay mechanism is essential to the fairness and efficacy of the MTR process and to ensure that a favorable decision does not come too late for the party seeking review. Indeed, the Department of Justice has recognized as much, explaining that this mechanism serves to "safeguard [a noncitizen] from being inappropriately deported before he is heard on his motion to reopen or motion to reconsider."[29]

As important as EOIR stays are in theory, EOIR has never had a functional system for making sure that such stays adequately and effectively protect noncitizens from being wrongfully deported while their MTRs are pending, particularly when their removal is imminent. Up until now, EOIR has never published any standard whatsoever to guide the adjudication of stay motions, and it has not trained its own adjudicators on how to decide these motions. Further, EOIR has not tracked the resolution—or even filing of—an important portion of stay motions,[30] meaning that the agency itself lacks a genuine understanding of the outcomes of these motions (on their own or in relation to MTRs and petitions for review (PFRs)), and that stay motions fall through the cracks. Perhaps worst of all, EOIR has long adhered to a set of internal rules and practices for processing and adjudicating stay motions, and especially emergency motions, that imposes extraordinary and unworkable burdens on individuals; makes it virtually impossible for adjudicators to adequately review the stay motion—much less the underlying MTR; deprives noncitizens of their statutory rights; and violates due process and other critical rights. *See infra* Section III.A.

In light of these entrenched deficiencies in the current EOIR stay process and the devastating impact on noncitizens, rulemaking is essential. However, the proposed stay rules will only exacerbate the problems that permeate the current EOIR stay process. They will codify EOIR's misunderstanding of the relevant legal framework, erect insurmountable and unnecessary

[29] Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10312, 10321 (Mar. 6, 1997).
[30] Declaration of Joseph R. Schaaf, Exhibit D at 5, *American Immigr. Council et. al. v. Executive Office of Immigration Review et. al.*, 19-CV-1835 (DLC) (S.D.N.Y. filed July 19, 2019), ECF No. 35-4 (explaining that the Board could not produce records related to stay motions filed before the noncitizen alerted the Board that situation met the Board's interpretation of "imminent," *see infra* notes 30–31, because "[t]he Board only tracks requests for Emergency Stays").

obstacles, and guarantee that individuals with meritorious MTRs are wrongfully deported to face irreparable harm, including death. EOIR must recognize that, in addition to the extraordinary challenges many individuals face when filing MTRs, *see supra* Section II, individuals who are in need of EOIR stays are typically forced—through no fault of their own—to file these stay motions under extraordinary time pressure. Accordingly, EOIR must adopt stay rules that allow individuals in this situation a full and fair opportunity to present their claims and create a process to ensure that EOIR adjudicators meaningfully review them. EOIR should revise its Proposed Rules as described below and reissue them for comment.

A. The Proposed Rules Do Not Adequately Consider the Existing EOIR Stay Process and Burdens on Noncitizens.

As a threshold matter, the notice of proposed rulemaking does not describe—and indicates that EOIR failed to adequately consider—the structure of and significant deficiencies in the current EOIR stay process. The agency's internal processes and actual practices are critical to consider when adopting any agency rule, and particularly so here, where the cost of erroneous results can be so grave.

First, any rule relating to EOIR stay motions must take into account the fact that EOIR adjudicators at the BIA generally do not process or decide time-sensitive stay motions until the proverbial eleventh hour. The BIA has long adhered to an internal rule of refusing to adjudicate time-sensitive stay motions unless the movant is detained and deportation is "imminent,"[31] which generally means that removal is approximately 48 hours or less away. And, in practice, BIA members give themselves even less time to adjudicate these stay motions, as BIA staff specifically assigned to handle such motions have repeatedly stated that they do not process such motions until the individual is 24 to 48 hours away from being removed.[32] As a result, EOIR's policies are designed to, and do, force any review of these critical motions—including the often voluminous underlying MTRs—to the last minute. This makes it impossible for adjudicators to meaningfully review the merits of noncitizens' underlying claims.[33]

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[31] *See* BIA Practice Manual, Ch. 6.3(c)(ii)(A) (last revised Oct. 5, 2020), available at https://www.justice.gov/eoir/board-immigration-appeals-2. Otherwise, if a noncitizen's removal is not scheduled imminently, their stay motion is treated as "non-emergency" and is "considered during the normal course of adjudication." *Id.* Ch. 6.3(c)(ii)(B).

[32] As part of its investigation into how the BIA handles discretionary stay requests, the Clinic called the Board's Emergency Stay Unit (ESU) several times and ESU staff repeatedly stated that they do not process motions for stays until the government confirms that the individual is 24 to 48 hours away from being removed. Information regarding these calls is on file with the Clinic.

[33] *See Raymond v. United States*, 983 F.2d 63, 66 (6th Cir. 1993) (suggesting that a "reasoned agency response" is precluded when agencies are making "expedient and possibly arbitrary decisions" at the "eleventh hour"); *United States v. NCR Corp.*, 911 F. Supp. 2d 767, 773 (E.D. Wis. 2012) (stating that the definition of "capricious" is when an adjudicator "rushe[s] through the

Second, the current EOIR stay process already places an often insurmountable burden on individuals. For one thing, because noncitizens generally only learn of a scheduled removal a few days, or even hours, before it is scheduled to occur, noncitizens are left with essentially no time to prepare and file both their MTR and stay motion, or, if they already have pending motions, to move for expedited adjudication. Moreover, in order to get the BIA to adjudicate their stay motions, noncitizens must jump through a number of hoops to trigger the adjudicatory process, including calling the BIA and confirming (or waiting for the BIA to confirm) their specific deportation date.[34] Further, because EOIR relies on DHS officers to provide information on deportation schedules, and does not leave itself enough time to correct any misinformation or miscommunication from DHS officers who supply deportation dates and times, noncitizens have been erroneously deported before the EOIR adjudicator can even weigh in on the matter. Indeed, the BIA often fails to adjudicate the stay motions before detained persons are physically removed from the country. This has led to repeated claims that the BIA has constructively denied MTRs by failing to adjudicate stay motions.

Third, the BIA, and presumably immigration courts as well, routinely deny stay motions and allow individuals to be removed without first adjudicating the underlying MTR. This prevents noncitizens from exercising their statutory right to seek a judicial stay—i.e., a stay of deportation issued by a federal court of appeals. While federal courts of appeal have authority to review "a final order of removal"—including the denial of an MTR, 8 U.S.C. § 1252(a)(1), and to issue a judicial stay while they conduct this review, *id.* § 1252(b)(3)(B), courts' jurisdiction is limited to cases in which the person files a PFR of a final removal order. By denying an EOIR stay request without adjudicating the MTR, the BIA withholds the predicate final order—i.e., the MTR denial—necessary for filing a PFR. Without a PFR on file, courts will not consider a motion for a judicial stay.[35] Accordingly, because the BIA routinely denies stay motions without deciding the MTR, it regularly deprives individuals of their statutory right to seek a judicial stay.

Fourth, while noncitizens can technically continue to litigate an MTR (or a subsequent PFR) even after they are deported, legal and practical obstacles often make it impossible to do so. For example, noncitizens seeking to reopen proceedings based on a pending application for relief, e.g., T visa or adjustment of status applicants, will be automatically denied that relief if they are removed. Additionally, once deported, noncitizens may be unable to access legal resources or

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process or [makes] a sudden, kneejerk decision without hearing enough evidence"), a*ff'd sub nom. United States v. P.H. Glatfelter Co*., 768 F.3d 662 (7th Cir. 2014).

[34] BIA Practice Manual, Ch. 6.3(c)(ii)(A). Additionally, the BIA must then separately confirm with DHS that removal is indeed imminent, which can involve tracking down the individual's specific deportation officer who will be newly assigned if the noncitizen has been transferred ahead of removal.

[35] *See, e.g.*, *Shaboyan v. Holder*, 652 F.3d 988, 989–90 (9th Cir. 2011).

even contact their attorneys if they are represented. Furthermore, individuals who face persecution in their country of origin face particular impediments in their country of origin that make it difficult or impossible to litigate their case or benefit from a favorable ruling. And, as EOIR has made clear, *see* Proposed Rules at 75945 n.6., it will not ensure that noncitizens can return to the United States to benefit from a favorable outcome, making it all the more important that individuals—especially those who face irreparable harm—are not deported before the resolution of the process that Congress provided.[36]

The Proposed Rules fail to account for these significant challenges that individuals and adjudicators confront, including the risk of erroneous assessments regarding the merits of noncitizens' claims, and the likelihood of irreparable harm for individuals seeking stays. Any such rules must prioritize full review of the substance of an individual's claim while reducing the risk of irreparable harm.

B. The Proposed Rules Would Exacerbate Existing Deficiencies in EOIR's Process for Adjudicating Stay Motions, Particularly When a Noncitizen is Facing Imminent Removal.

The Proposed Rules will exacerbate existing deficiencies in the EOIR stay system and lead to grave consequences for noncitizens. They add impracticable bars that will be insurmountable for many movants with meritorious stay claims; conflict with the purpose of the stay mechanism; and undermine the efficacy and accuracy of the EOIR stay process.

For instance, the proposed stay rule would impose an exhaustion requirement for individuals seeking stays, requiring that they first submit a stay application to DHS and then wait five business days before filing a stay motion with the IJ or the Board. Proposed Rules at 75958 (8 C.F.R. § 1003.48(k)(1)(v)). EOIR claims that this rule would give the noncitizen multiple opportunities to have their stay request considered and that DHS is well-positioned to adjudicate these stay requests, but ignores the facts that (1) individuals can already file stay requests with EOIR and DHS if and when appropriate; (2) DHS considers factors very different than the ones relevant for EOIR stays; and (3) DHS officers lack the expertise that would be relevant for assessing, for example, the likelihood of an MTR's success on the merits. *See supra* Section II.E. Finally, EOIR asserts that this rule would discourage gamesmanship that could occur if individuals file a stay motion at the last minute, but does not explain what actual problem—if any—EOIR is attempting to address or, as importantly, why it would place the responsibility for any last-minute filings on noncitizens when the agency itself has adopted a policy of refusing to process time-sensitive stay

[36] *See, e.g.*, *Desta v. Ashcroft*, 365 F.3d 741, 748 (9th Cir. 2004) ("If Desta or others like him are required to return to their countries of origin while they petition for review by this court, they may not be able to return to this country even if they are eventually successful on the merits of their petitions.").

motions until the hours before deportation. *See supra* Section III.A. At the same time, this rule does not address, much less protect against, the very real problems that this regulation would create, including the burden of applying for a second, costly DHS stay while under significant time and resource constraints.[37] Nor does it address the fact that individuals may only get a few days' or even hours' notice of their imminent deportation, meaning they could be deported in the five days the rule requires them to wait for DHS's response to their stay request.

The Proposed Rules also prohibit EOIR adjudicators from granting any stay motions unless the movant has notified DHS of the motion *and* waited at least three business days until the motion could be decided. *Id.* (8 C.F.R. § 1003.48(k)(1)(vi)). This requirement, particularly coupled with the preceding requirement regarding DHS stays, means that noncitizens must file their first stay motion with DHS at least eight-business days[38] before EOIR will adjudicate the motion, and categorically precludes EOIR from providing protection to individuals who are unable to file at least eight days before their deportation.

These rigid exhaustion and timing bars—which effectively preclude EOIR adjudicators from granting stay motions when deportation is imminent under the agency's own definition—are unworkable for noncitizens and conflict with the very purpose of a stay motion, which is to provide protection from impending irreparable harm. These rules would mean that an individual who is, for example, arrested with no notice and faces deportation within a few days would be completely shut out of the EOIR stay process no matter how strong their evidence of irreparable harm or how likely they are to succeed on the merits of their claims.[39] Or, even where the BIA made a clear and fundamental error in denying discretionary relief, there would be no immediate mechanism for a noncitizen or their attorney to reliably obtain a stay while filing an MTR.

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[37] *Cf. Barroso v. Gonzales*, 429 F.3d 1195, 1207 (9th Cir. 2005) (decrying "empty procedural requirement[s] that [] simply place an additional bureaucratic burden on [noncitizens] who in any event often have difficulty following the complex procedural requirements of our immigration laws," as well as the prospect of generating "unnecessary paperwork for all parties involved, including the overworked and undermanned bureaucracy that is currently struggling to keep up with the rapidly increasing number of filings of motions, notices, stays, orders, decisions, appeals and other types of papers").

[38] If for example, this process was started on a Friday, the IJ and BIA would be precluded from adjudicating the stay for 12 calendar days, and it could be even longer if there were holidays during that period.

[39] Although the Proposed Rules state that "[f]or genuinely exigent situations, nothing in this proposed rule prevents a party for [sic] moving for expedited treatment of its stay request or for the parties to file a joint request for a stay," Proposed Rules at 75954, that does nothing to ameliorate the deficiencies described above. Rather, EOIR makes the unrealistic suggestion that noncitizens in "genuinely exigent" should and could bear the burden of filing yet another motion with EOIR, and provides no indication that a motion to expedite would or even could alleviate the mandatory denial provisions of the rigid timing rules it seeks to adopt.

To the extent that EOIR believes it important to give DHS a specific amount of time to respond to a DHS stay application and a stay motion, it can do so by (1) following the example set by multiple federal courts of appeal and imposing a temporary automatic stay while the stay motion is decided;[40] and/or (2) requiring DHS to provide at least 30 days' notice of removal so that individuals can accurately assess when they face imminent harm and file in accord with EOIR's desired timeline.

The various other procedural requirements that the Proposed Rules would create are unreasonable for similar reasons. For example, the certificate of service rule imposes overly formalistic requirements regarding service and the certificate of service for stay motions. Proposed Rules at 75958 (8 C.F.R. § 1003.48(k)(1)(vi)(B)). Even if it is reasonable for EOIR to encourage noncitizens to serve EOIR and DHS in the same manner and to say so in the certificate of service, mandating summary denial for anyone who serves EOIR and DHS through different methods (and even for anyone who serves them using the same methods but fails to say so in their certificate of service) is an unacceptably harsh penalty to impose on individuals given the challenges they face in this context and the risk of irreparable harm.

In sum, EOIR's proposed rules impose a host of needless procedural obstacles for noncitizens who are, almost by definition, facing imminent and serious—if not irreparable—harm. EOIR should adopt rules that are focused on making the stay process more flexible and accessible to individuals in light of the substantial difficulties that stay movants face, and that err on the side of granting stays while an MTR is pending to permit full consideration of the issues, protect noncitizens from harm, and preserve noncitizens' statutory rights.

C. EOIR Should Adopt A Clear Standard for Adjudicating Stay Motions that Requires Proper Consideration of Irreparable Harm.

Given the stakes associated with stay requests filed in connection with MTRs, the fact that the adjudicator is often necessarily reviewing the facts in the first instance, and the significant challenges that noncitizens and EOIR adjudicators face in the stay process, EOIR stay standards must provide decisionmakers clear guidance and prioritize protection from irreparable harm. The Proposed Rules do neither. Instead, they adopt a standard that is inappropriate and unworkable

[40] *See, e.g.*, *Efstathiadis v. Holder*, 752 F.3d 591, 599 n.5 (2d Cir. 2014) (describing the Second Circuit's "forbearance policy"); *In re Immigration Petitions for Review Pending in U.S. Court of Appeals for Second Circuit*, 702 F.3d 160, 162 (2d Cir. 2012) (same); Third Circuit Standing Order Regarding Immigration Cases (Aug. 5, 2015) (explaining that the standing order was designed "to ensure that petitioners . . . are not deported before the Court has an opportunity to act"). Several circuit courts have adopted some version of a policy like this because, as the Ninth Circuit explained, such procedures are necessary to "to eliminate the risk that petitioners will be deported before their stay requests are decided." *De Leon v. INS*, 115 F.3d 643, 644 (9th Cir. 1997).

for EOIR stays and layer on irrelevant requirements that will prevent EOIR adjudicators from reaching the key questions in any stay inquiry.

EOIR has proposed to adopt the four-factor standard for *judicial* stays issued by a *reviewing* federal court articulated in *Nken v. Holder*, 556 U.S. 418 (2009). However, simply adopting *Nken*'s four-factor standard is inappropriate for EOIR stays. First, this standard governs judicial stay motions filed before federal courts of appeal in connection with judicial review of removal orders (including MTR decisions). This means that, in every one of those cases, the court is reviewing a decision issued after one to four agency adjudicators have already evaluated and decided the underlying factual and legal questions. By contrast, EOIR stay motions filed in connection with motions to reopen present previously unavailable evidence and claims that no adjudicator has previously reviewed. This makes the assessment of the merits of the underlying motion far more time-consuming and prone to error if done on a rushed timeline.

Second, the context in which EOIR stays are adjudicated is different in critical ways than the context in which judicial stays are decided. As explained, *see supra* Section III.A, due to a number of government policies—including DHS's refusal to tell noncitizens when they are going to be deported and EOIR's policy of refusing to adjudicate time-sensitive stay motions until the last minute—EOIR adjudicates stay motions (including the merits of the underlying motion) in an extraordinarily rushed timeframe. This makes meaningful review of the merits of a noncitizen's claim, typically one that *no* adjudicator has yet reviewed, virtually impossible at the stay stage. Third, because EOIR routinely denies stay motions before deciding the underlying MTRs, individuals seeking EOIR stays face a form of irreparable harm that litigants before federal courts do not, namely, deprivation of their statutory right to seek a judicial stay. *See supra* Section III.A. Accordingly, noncitizens seeking EOIR stays face a unique harm that individuals seeking judicial stays do not.

Given these significant differences between EOIR stays and judicial stays, EOIR must adopt a different approach. As a general matter, it should establish a rebuttable presumption in favor of granting discretionary stays motions—and thereby preserving the status quo—until the underlying MTR is adjudicated. And, for certain categories of noncitizens where irreparable harm should be presumed, EOIR should provide for automatic stays.

This approach is based on the traditional purpose of stays, which is to resolve a two-pronged problem: "what to do when there is insufficient time to resolve the merits and irreparable harm [that] may result from delay." *Nken*, 556 U.S. at 432; *see also id.* ("The authority to grant stays has historically been justified by the perceived need to prevent irreparable injury to the parties or to the public pending review." (internal quotations omitted)). Thus, stays in the MTR context should generally be based on the traditional two-factor test of likelihood of success on the merits and risk of irreparable harm. EOIR should also direct adjudicators that "likelihood of success on

the merits" means that an individual has demonstrated that the MTR presents a "serious question" *or* a probability of success on the merits, and that adjudicators should use the sliding scale approach when considering the two stay factors.[41]

In addition, certain categories of noncitizens should be entitled to automatic stays in order to ensure independent review of claims presented for the first time and to avoid sending people facing often life-threatening harm to the very persecution they fear before their underlying motions are adjudicated.[42] At least three categories of movants should be entitled to these automatic stays. First, EOIR should adopt a rule requiring adjudicators to grant automatic stays to individuals with bona fide fear-based MTR claims. This will ensure that noncitizens are not injured or even killed while their MTR, premised on a fear of such injuries, is pending adjudication.[43] Second, EOIR should grant automatic stays to individuals appealing IJ denials of *in absentia* orders to the BIA, in order to ensure that noncitizens have one fair and meaningful opportunity to present new and previously unreviewed claims prior to their removal.[44] Third, EOIR should grant automatic stays to individuals seeking to reopen final orders of removal who are now presenting evidence of pending applications for relief that will be denied if the person is removed, such as T visas for victims of trafficking, as only persons within the United States are eligible for such visas.

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[41] *See*, *e.g.*, *Leiva-Perez v. Holder,* 640 F.3d 962 (9th Cir. 2011) (concluded that, even post-*Nken,* the likelihood of success factor required only that litigants show "a probability of success on the merits" or that "serious legal questions are raised" and reaffirming a sliding scale balancing approach); *Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund Ltd*., 598 F.3d 30, 38 (2d Cir. 2010) (using a sliding scale approach and concluding that the "serious questions" test remained consistent with the judicial stay standard from *Nken*).

[42] *Leiva-Perez v. Holder*, 640 F.3d 962, 967 (9th Cir. 2011) (cautioning courts against "attempting to predict with accuracy the resolution of often-thorny legal issues without adequate briefing and argument" and explaining that "[s]uch pre-adjudication adjudication would defeat the purpose of a stay, which is to give the reviewing court the time to 'act responsibly,' rather than doling out 'justice on the fly.'" (quoting *Nken*, 556 U.S. at 427)).

[43] *Cf. Sean B. v. McAleenan*, 412 F. Supp. 3d 472, 476–77 (D.N.J. 2019) (explaining in the habeas context the constitutional inadequacy of removing a noncitizen "to a country where he says he is likely to be killed while the propriety of removing him to such a place is being decided," and finding that a "'bridge' stay [is] sufficient to hold off removal until the BIA grants Petitioner's requested relief or the Court of Appeals takes jurisdiction over an appeal from a final BIA decision"), *appeal dismissed sub nom. Blake v. Sec'y United States Depart*, No. 19-3548, 2019 WL 8645626 (3d Cir. Dec. 13, 2019).

[44] The INA and accompanying regulations provide for automatic stays for individuals who were ordered deported *in absentia* and never received notice of their hearing. 8 U.S.C. § 1229a(b)(5)(C)(ii) (providing an automatic stay of removal "pending the disposition of the motion [to reopen] by the immigration judge"); *see also* 8 C.F.R. § 1003.23(b)(4)(ii)–(iii). However, there is no corresponding automatic stay for individuals while they are appealing the denial of their MTR. New regulations must address this disparity and create a system where noncitizens can access at least one layer of administrative review of their substantive claims prior to removal.

Furthermore, before moving forward on any stay-related rulemaking, EOIR should gather information on other groups of individuals that may fall into this category and issue a new set of proposed rules for comments so that the public can provide suggestions and experiences on this issue.

Given the considerations described above, EOIR should eliminate the proposed rule prohibiting EOIR adjudicators from granting stay motions unless the underlying MTR is "*prima facie* grantable." Proposed Rules at 75953 (8 C.F.R. § 1003.48(k)(1)(iii)). In fact, such a rule would, in essence, impermissibly require an expedited merits decision.[45] Similarly, the Proposed Rules' requirement that a noncitizen must "exercise[] reasonable diligence in seeking a stay" and filing an MTR after "the circumstances underlying the motion arose," Proposed Rules at 75958 (8 C.F.R. § 1003.48(k)(1)(iv)), erroneously imports later-stage merits questions into the preliminary stay stage. This will burden noncitizens, prevent adjudicators from focusing on the key questions central to the stay inquiry, and unfairly hold individuals responsible for circumstances in which they lack information and control.

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For these reasons, EOIR should withdraw the Proposed Rules regarding EOIR stays and propose rules that focus on ensuring that noncitizens are able to present—and EOIR adjudicators review—the substance of their claims, and that prioritize preventing irreparable harm.

IV. THE PROPOSED RULES VIOLATE THE REHABILITATION ACT.

The Rehabilitation Act prohibits federal agencies from preventing the participation of, denying benefits to, and discriminating against people on the basis of their disabilities.[46] It is well recognized that this means that government agencies will, at times, have to make reasonable accommodations to ensure meaningful access.[47] However, the Proposed Rules do the reverse. They make access more difficult by increasing and making more difficult the procedural requirements for submitting and prevailing on MTRs and stay motions, and they fail to make any provisions to assure meaningful access to individuals who will, as a result of their disabilities and the rigid Proposed Rules, be deprived of the ability to meaningfully participate in the MTR and stay processes.

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[45] *See Nken*, 556 U.S. at 432 (finding that a merits-focused stay standard "would invert the customary role of a stay, requiring a definitive merits decision earlier rather than later"); *Leiva-Perez*, 640 F.3d at 967 (finding such a standard either would "put every case in which a stay is requested on an expedited schedule, with the parties required to brief the merits of the case in depth for stay purposes, or would have the court attempting to predict with accuracy the resolution of often-thorny legal issues without adequate briefing and argument").

[46] 29 U.S.C. § 794.

[47] *See Alexander v. Choate*, 469 U.S. 287, 301 (1985).

The ways in which the Proposed Rules prejudice and deny disabled noncitizens from participating are too numerous to catalog here, but some examples show the magnitude of the problem that will result from a regulatory framework that fails to consider or provide meaningful access to noncitizens with disabilities. For example, the burdensome rules related to applying for a stay from DHS would be extraordinarily difficult or impossible for sight-impaired people, as the form DHS requires applicants to use (Form I-246) does not offer any other mechanisms for submission besides the completion of the paper form. As another example, the Proposed Rules impose numerous filing and timing requirements on litigants seeking stays, but make no provision for sight-impaired litigants to make emergency stay requests by telephone; given the very short time within which litigants must seek stays, it may be impossible for a litigant who cannot draft their own filings to get drafting assistance to comply with all of these unnecessary requirements in time. In that same vein, the rules also make it extraordinarily difficult for deaf people, particularly those who are detained, to comply with some of these same requirements. They will face dramatically increased difficulties in gathering specific pieces of evidence that require telephonic conversations. In addition, because many deaf people are fluent in sign language and—by virtue of their disability—not in written English, they will be denied the ability to participate in much the same way as blind people.

The Proposed Rules also entirely fail to take into account the large category of noncitizens who are disabled as a result of trauma-based conditions and other psychological or cognitive impairments. As EOIR knows, many individuals in removal proceedings—and therefore many people who will be filing MTRs and in need of stays—have mental disabilities and related cognitive conditions. This population is likely even higher in the case of movants seeking to reopen their removal proceedings and stay deportation. Many are doing so based on a fear of persecution and torture in their country of origin and that population is likely to include a significant proportion of people who suffer from post-traumatic stress disorder and other trauma-related disabilities. These conditions manifest in numerous ways that will make it difficult or impossible for them to comply with these complex, highly technical, and onerous requirements, and the rigid Proposed Rules make no accommodation to allow them to do so. Accordingly, EOIR must withdraw the Proposed Rules and propose new rules that permit disabled individuals to meaningfully participate in these processes.

V. EOIR HAS NOT PROVIDED THE PUBLIC WITH ADEQUATE TIME TO COMMENT ON THE PROPOSED RULE.

The Clinic, NILA, and NWIRP also note that EOIR failed to provide sufficient time or information for interested parties to comment on these Proposed Rules. Even in ordinary circumstances, agencies must generally provide public comment periods of at least 60 days to ensure that

interested parties have a fair opportunity to participate.[48] Current circumstances are anything but ordinary, but rather than extend the comment period, EOIR has truncated it, providing only 30 days (from November 27, 2020 to December 28, 2020) in the midst of a deadly pandemic and during a period that overlaps with the holiday season. These unprecedented circumstances have made communication—particularly with many people who would be impacted by the proposed rule—difficult and time-consuming (if not impossible), and created a situation in which interested parties who lack access to, or familiarity with, technology will be denied the opportunity to comment. This is particularly so for individuals who are detained, Limited English Proficient, have limited or no access to attorneys, and/or have physical or cognitive disabilities, and therefore could offer perspectives that are critical and unique for EOIR to consider.

EOIR should reissue a modified notice of proposed rulemaking to provide the public a minimum of 60 days to provide input on the proposed rule so that interested and impacted parties can participate in the promulgation of these enormously consequential rules.

VI. CONCLUSION

The Clinic, NILA, and NWIRP oppose the Proposed Rules because they will create significant burdens for individuals seeking reopening or reconsideration of their removal orders, lead to the denial of meritorious claims, and cause irreparable harm to individuals during the pendency of their motions. We urge EOIR to modify the proposed rule consistent with the points we have described and reissue the proposed rule for public comment.

Sincerely,

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[48] Regulatory Timeline, regulations.gov (last accessed Dec. 28, 2020), https://www.regulations.gov/docs/FactSheet_Regulatory_Timeline.pdf.

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