ROUND TABLE
of Former Immigration Judges

December 28, 2020

Lauren Alder Reid, Assistant Director
Office of Policy, Executive Office for Immigration Review
5107 Leesburg Pike, Suite 2616
Falls Church, VA 22041
Federal eRulemaking Portal: http://www.regulations.gov.

Re: Comments in Opposition to Proposed Rulemaking: 85 FR 75942
Motions to Reopen and Reconsider; Effect of Departure; Stay of Removal
RIN 1125-AB01
EOIR Docket No. 18-0503

Dear Ms. Alder Reid,

The Round Table of Former Immigration Judges is composed of 47 former Immigration Judges and Appellate Immigration Judges of the Board of Immigration Appeals (hereinafter Round Table). We were appointed by and served under both Republican and Democratic administrations. We have centuries of combined experience adjudicating various applications, motions, and appeals. Our members include nationally-respected experts on immigration law; many regularly lecture at law schools and conferences and author articles on the topic.

Our members issued decisions encompassing wide-ranging interpretations of our immigration laws during our service on the bench. We also ruled on motions to reopen and recognize the importance of the statutory right to file such a motion. Whether or not we ultimately reached the correct result in our decisions, those decisions were always exercised according to our "own understanding and conscience,"[1] and not in acquiescence to the political agenda of the party or administration under which we served.

We as judges understood that whether or not we agreed with the intent of Congress, we were still bound to follow it. The same is true of the Attorney General, Secretary of Homeland Security (DHS), and for that matter, the President.

[1] *See Accardi v. Shaughnessy*, 347 U.S. 260, 266-67 (1954).

INTRODUCTION

Initially, we note that the current practice of reducing the time for notice and comment severely undermines the ability for the public to digest and comment on rules. The reduction of time to 30 days violates the intent of Congress to give full deliberation to regulatory changes. As experienced adjudicators, we are in a unique position to contextualize these changes, but even with our experience, the breadth of these proposed regulations should allow for additional time to review and comment.

In our review we do not object to the clarifications and changes regarding: 1) the revision of the departure bar, which eliminates the departure bar in 8 C.F.R. §§ 1003.2(d) and 1003.23(b)(1); 2) the definition of "depart" and "departure"; 3) considering a Form I-589 to be "filed" at the time the motion to reopen is granted.

However, we do object to the remaining proposed changes in the NPRM, which we believe interfere with the statutory right to a motion to reopen and noncitizens' due process rights in immigration proceedings.

FAILURE TO SURRENDER AND FUGITIVE DISENTITLEMENT; 8 C.F.R. § 1003.48(C)

The Round Table opposes the proposed rule requiring a noncitizen to include a statement of prior removal orders and whether the noncitizen complied with said removal order(s) in all motions to reopen removal proceedings.[2] We are concerned that accurately complying with this requirement is overly burdensome, and not the ministerial task the proposed regulation suggests. We are also concerned that this new requirement is motivated by the false narrative that noncitizens use reopening as a delay tactic to remain in the United States, rather than as an appropriate way to redress errors and bring new evidence to light. Finally, by requiring a specific statement on all removal orders in motions to reopen and noting how that factor must be weighed as a "very serious adverse factor" warranting the denial of any motion, the proposed regulation continues the longstanding attempt by the current administration to regulate away judicial discretion.

As adjudicators, we know that motions to reopen serve a critical purpose in removal proceedings, including to rescind in absentia removal orders due to lack of notice or exceptional circumstances, and to allege ineffective assistance of counsel. The proposed rule requires that a noncitizen's failure to depart the United States pursuant to a removal order shall be deemed a very serious negative factor in the adjudicator's exercise of discretion. For many motions to reopen, the reason for the issuance of a removal order and subsequent failure to depart is the subject of the motion, and does not show any disdain for the law, as the proposed regulation suggests. Under the proposed regulation, a noncitizen who never received notice of her removal hearing and is ordered removed in absentia would be saddled with a serious negative discretionary factor, despite the merits of her motion addressing the validity of the removal order itself, and regardless of the adjudicator's evaluation of her fault in failing to comply with the order. Similarly, a noncitizen alleging ineffective assistance of counsel may likely have a final removal order

[8] 85 FR 75943, 85 FR 75948, 9.

through no fault of her own, and precisely because her due process rights had been violated, the ultimate subject of the motion.

In addition, in our collective experience, it is not uncommon for a noncitizen to be unaware of any prior removal orders entered against him; thus, accurately meeting this requirement is a complicated and burdensome endeavor. For example, a noncitizen who entered as a juvenile and never received notice of the hearing might very well unknowingly have had a final order of removal for years. Similarly, any noncitizen who is issued a Notice to Appear by DHS might never receive notice of the hearing if he moves and was unaware of the change of address requirement. Certainly, an outstanding removal order without a surrender order does not, as the regulation assumes, constitute a deliberate flouting of our nation's immigration laws.

Even for the represented noncitizen, obtaining clarifying evidence regarding the results of prior proceedings and border encounters is problematic. Representatives are unable to obtain a timely response to Freedom of Information Act requests, which would confirm the existence of any prior orders. Finally, many noncitizens are unclear on the legal result of their merits hearing or border encounters, as the distinction between being ordered removed, voluntarily departing, or receiving another disposition, such as administrative closure, is a legal one, often misunderstood by noncitizens encountering a legal system for the first time. Accurately reporting the presence of any removal orders the noncitizen may have is not a simple endeavor, especially while complying with the motions deadline.

NEW STANDARDS FOR MOTIONS TO REOPEN AND RECONSIDER

The Department acknowledges, as it must, that the new regulations pertaining to motions to reopen and reconsider it proposes arise in the context of rulemaking of statutory provisions "[u]nder the Immigration and Nationality Act." The relevant NPRM states that,

> Under the Immigration and Nationality Act ("INA" or "Act"), parties to proceedings before EOIR may file a motion to reopen or reconsider certain decisions of immigration judges or the Board of Immigration Appeals ("BIA" or "Board"). *See* INA 240(c)(6)-(7), 8 U.S.C. 1229a(c)(6)-(7). . . . [3]

This NPRM is the first comprehensive rulemaking activity undertaken by the Department since initial regulations were adopted immediately after the 1996 enactment of the statutory motion to reopen and reconsider provisions in the IIRIRA. *See* 8 CFR §§ 1003.2, 1003.23. It also is the first promulgation of regulations issued subsequent to recent case law interpreting the degree of judicial scrutiny applicable to agency regulations. *See Kisor v. Wilkie*, 588 U.S._____ (2019).

Prior to *Kisor,* a line of precedent decisions, last represented by the Supreme Court's opinion in *Auer v. Robbins,* 519 U.S. 452 (1997), provided that courts are required to defer to the agency's interpretation of its regulations unless it is "plainly erroneous or inconsistent with the regulation." *Id. Kisor* revolutionized judicial deference to the agency, conditioning it on judicial scrutiny of 6 specific factors:

[3] 85 FR 75942.

- Is the regulation "genuinely ambiguous"? Under *Kisor*, deference is not due to an agency unless a regulation is "genuinely ambiguous." Genuine ambiguity is to be determined only after exhausting "all the traditional tools of construction," including the "text, structure, history and purpose of the regulation." *Auer* deference may be inappropriate for "many seeming ambiguities."

- Is the agency's interpretation reasonable? The agency interpretation must fall within the "zone of ambiguity" identified by the court in determining whether the regulation is "genuinely ambiguous." In other words, the scope of genuine ambiguity determines the range within which reasonable interpretations exist.

- Does the "character and context" of the agency interpretation entitle it to deference? The "character and context" of the agency interpretation must warrant deference; that is, it must support a presumption that Congress would have wanted the agency to resolve the issue according to "some especially important markers" and other relevant considerations.

- Was the interpretation actually the agency's "authoritative or official position?" To receive deference, the interpretation "must at the least emanate from those actors, using those vehicles, understood to make authoritative policy." *Id.*

- Does the interpretation implicate the agency's substantive technical or policy expertise, as compared to an area in which the interpretation "falls more naturally into the judge's bailiwick," such as attorney's fees? *Id.*

- Does the interpretation reflect the "fair and considered judgment" of the agency? Deference may not be appropriate where the agency interpretation creates "unfair surprise," when it conflicts with its prior interpretation or imposes retroactive liability or defends questionable agency action that occurred in the past.

Given the applicability of *Kisor v. Wilkie, supra,* to the interpretation of the regulations being proposed, the Round Table believes that the promulgation of such extensive and far reaching rules regarding motions to reopen and reconsider will lead to extensive litigation and therefore will delay, not expedite removal proceedings. Similarly, the proposed regulations create yet another disadvantage for low income and pro se respondents because they will be unable to navigate the federal court litigation that will be required should these regulations be published.

Standards for Motions to Reopen or Reconsider Generally

Nearly the entirety of the NPRM relating to general standards for motions to reopen and reconsider proves to be a means by which to more easily deny any form of relief sought, streamline proceedings to the noncitizen's disadvantage, and increase the issuance of removal orders. The Department's proposals consistently favor one party, DHS, and restrict access to relief for noncitizens.

The Department intends to offer some general standards that clarify the requirements for adjudicating a motion for reopening or reconsideration before immigration judges or the BIA. For example, regarding motions relating to termination or dismissal: Neither an immigration judge nor the BIA may grant a motion to reopen or reconsider for the purpose of terminating or dismissing the proceeding, unless the motion satisfies the standards for both the motion, including the prima facie eligibility requirement, and the requested termination or dismissal. *See* 8 CFR 1239.2(c), (f) (additional citations omitted).[4]

Similarly, no motion to reopen or reconsider may be granted if the immigration judge or the BIA do not have authority to grant the underlying relief being sought in the first instance. Instead, the noncitizen seeking relief that remains pending may seek a stay of removal with DHS pursuant to 8 CFR § 241.6.[5]

However, this proposed codification is unnecessary. There is no evidence that granting motions to reopen to allow noncitizens to apply for relief which cannot be presented before an immigration court is abused or even a routine practice. To the contrary, *Matter of Velarde*, 23 I&N Dec. 253 (BIA 2002) covers the circumstance in which both DHS and EOIR share an incentive to promptly adjudicate underlying I-130/I-485 applications that will, in turn, facilitate a fair and efficient disposition of the proceedings. *Velarde*'s holding that a properly filed motion to reopen for adjustment of status based on a marriage entered into after the commencement of proceedings may be granted in the exercise of discretion, notwithstanding a pending visa petition, serves the interests of all parties. There is no benefit to frustrating a case involving a valid marriage that would support the approval of the adjustment of status application and avoid piecemeal proceedings, unnecessary removal, family hardship, appeals and other collateral actions.

Furthermore, as discussed in greater detail below, it should go without saying that the proposed stay of removal alternative is unrealistic, as, in practice, such stay requests are almost universally either ignored or denied.

Likewise, there is no advantage to be gained by codifying *Matter of Yauri*, 25 I&N Dec. 103, (BIA 2009), as the NPRM proposes.[6] It is to no one's benefit to limit the factors that immigration judges or the BIA may consider in arriving at a fair and reasoned conclusion concerning the propriety of reopening to apply for available relief from removal. Restricting an immigration judge to having to find prima facie eligibility before engaging in an exercise of discretion, only invites an incomplete adjudication of the record. What is more, the current regulations already provide the same authority. *Cf.* 8 C.F.R. § 1003.2(a) ("The Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief").

A better construction is one that the BIA set forth 25 years ago in *Matter of L-O-G-*, 21 I&N Dec. 413 (BIA 1996). There, the BIA ruled that it should not prejudge the merits of a case before

[4] 85 FR 75948, 9.
[5] *Id.*
[6] *Matter of Yauri, supra,* dealt with a specific and discrete issue: which agency retained jurisdiction over an adjustment of status application for an arriving alien who also has a final order of removal that has not been executed; 85 FR 75948,9, fn 11.

the applicant has had an opportunity to prove the case. *See generally Motamedi v. INS*, 713 F.2d 575 (10th Cir. 1983). The BIA treated the "prima facie" standard as simply a decision that "there is a reasonable likelihood that the statutory requirements for the relief sought have been satisfied, and that there is a reasonable likelihood that relief will be granted in the exercise of discretion." *Id.* at 419 (citing *M.A. v. United States INS*, 899 F.2d 304 (4th Cir. 1990); *Marcello v. INS*, 694 F.2d 1033 (5th Cir.), cert. denied, 462 U.S. 1132 (1983)).

The Department's propensity in the NPRM to offer only options that allow judges and the BIA to deny motions to reopen and reconsider is contrary to the agency's promise of an independent and impartial adjudicative process and does not facilitate the prompt completion of removal proceedings. The mere proposal of such an approach calls the Department's purpose in promulgating these regulations into question.

Moreover, the jurisprudence developed by the BIA over more than 6 decades of statutory construction, regulatory interpretation, and discretionary application provides a more than adequate basis on which to clarify the requirements for relief from removal as well as for imposition of removal. Strengthening the singular authority of the Attorney General through regulations rather than case law may appear to be more definitive but will, in fact, add more confusion, and result in more litigation, especially in light of the Supreme Court's recent ruling in *Kisor v. Wilkie, supra*.

These proposed changes, like many contained in the proposed regulations, are designed to eliminate judges' authority by undermining their ability to exercise discretion, and ensuring the finality of removal orders, without regard to due process and fundamental fairness, and the Round Table opposes the codification of these changes.

Finally, in considering the purported goal of providing "clearer standards for adjudicating motions to reopen and reconsider,"[7] the Round Table does not dispute that having accurate, up to date, information available in one place for the consideration of judges and BIA adjudicators is desirable. The Round Table further agrees with the proposed relocation of language concerning "criminal aliens," adding requirements regarding information about pending criminal prosecutions . . . to the new regulation at 8 CFR § 1003.48, and the consolidation of information concerning new convictions and disclosures about any reinstatement of removal.[8]

Similarly, the Round Table recognizes the value of conforming the regulations to the statutory text and standards in the INA. Furthermore, we endorse the use of standards found in the statutory language for adjudication of regulatory provisions for changed country conditions. Accordingly, the Round Table does not object to inserting the language of 8 CFR § 1003.23(b)(4)(i), which tracks the statutory provisions of INA § 240(c)(7)(C)(ii), 8 U.S.C. § 1229a(c)(7)(C)(ii), into regulations applicable to the Board by adding new paragraph 8 CFR § 1003.2(c)(3)(v).[9]

[7] 85 FR 75950.
[8] *Id.*
[9] *Id.*

INEFFECTIVE ASSISTANCE OF COUNSEL

The Round Table opposes the proposed regulation's approach to ineffective assistance of counsel claims raised in motions to reopen or reconsider. At its core, the proposed regulation assumes that the noncitizen is raising non-meritorious claims in a motion to reopen to perpetrate a fraud on the Court. Instead of emphasizing due process of law, the proposed regulation prioritizes the finality of decisions, which may contain legal or factual errors, and divests adjudicators of discretion, a necessary component of providing due process of law.

As a preliminary matter, the Round Table does not oppose the proposed regulation's amended definition of "counsel" for purposes of ineffective assistance of counsel claims.[10] In our collective experience, fraud by notarios and other non-attorneys has a significant impact on a noncitizen's ability to accurately and persuasively present his case in Court. We agree that this change in the proposed rule appropriately expands protections for noncitizens who rely on the advice of an ineffective non-attorney to their detriment.

The proposed regulation is contradictory in articulating its legal foundation, raising the concern that the actual goal of these proposed changes is not ensuring due process and fundamental fairness in hearings before the immigration courts, but rather expedited finality of removal orders, and erosion of judicial discretion. While emphasizing that noncitizens have no Sixth Amendment right to counsel, the regulation proposes reliance on a Sixth Amendment standard for demonstrating both ineffectiveness as well as prejudice.[11] The Sixth Amendment affords most criminal defendants the *right* to appointed counsel, often at government expense.[12] While noncitizens in immigration matters, like all civil matters, also have a *right* to counsel, they do not have a *right to appointed counsel at government expense*. Therefore, the reliance on the *Strickland* standard is misplaced.

Most disturbingly, the proposed regulation adopts *Strickland*'s presumption of effective counsel, codifying that there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. In immigration proceedings, whether counsel is ineffective is a due process concern, to be assessed according to the specific facts of the case, and a presumption of competence from the outset is not in line with providing due process of law.

For years, the Board has relied on the refined framework articulated in *Matter of Lozada* when assessing ineffective assistance of counsel claims raised by a noncitizen in a motion to reopen.[13] This framework has been embraced by every circuit court, and immigration practitioners are well aware of the three steps that *Lozada* compliance requires. *Lozada* was developed through a judicial process rooted in actual cases in controversy, as have the limited judicial exceptions to strict compliance with *Lozada* set forth by circuit courts. The exceptions to *Lozada* compliance are im-

[10] 85 FR 75952.
[11] *Strickland v. Washington*, 466 U.S. 668 (1984); 85 FR 75951, 2.
[12] *Gideon v Wainwright*, 372 US 335 (1963).
[13] 19 I&N Dec. 637 (BIA 1988).

portant, as they represent limited, but not uncommon, situations where the insufficiency of counsel is clear, and strict compliance is unnecessary to adjudicate the motion.[14] The proposed regulations attempt to make each *Lozada* requirement more complex and difficult to perfect, creating multiple new ways for an adjudicator to quickly reject a meritorious claim.

The Round Table has concerns that the enhanced procedural requirements proposed in the regulation will prevent meritorious motions from being considered at all. The detailed declaration requirement will be a nearly impossible hurdle for the detained and/or unrepresented noncitizen to comply with. The vast majority of noncitizens in removal proceedings are non-English speakers, often with minimal formal education. The enhanced requirement that a noncitizen's declaration recount a legal representation agreement in detail is contrary to reality, where a noncitizen may only vaguely understand that a representative is their lawyer. Alternatively, an unqualified representative may not provide a noncitizen with a detailed and comprehensible explanation of the limits and contours of representation, rendering the noncitizen unable to provide the required details in their personal declaration.

In addition, we fear that the enhanced bar complaint process is excessive and will result in denial of meritorious motions. In our extensive experience, the requirement of filing a complaint with the relevant state bar produces little actual discipline of practitioners. Rather, the bar complaint requirement in *Lozada* was formulated as a proxy to establish the seriousness of the claim, and to ensure that serially incompetent practitioners did not collude with one another after insufficient representation. Each state has a different procedure for handling voluminous immigration-related bar complaints. We also have serious concerns that this narrowing eligibility for establishing ineffective assistance of counsel claims is at the core of the new requirement that a complaint also be filed with EOIR disciplinary counsel. The requirement that a non-English speaking noncitizen with little education or legal knowledge must navigate two systems of attorney discipline is inappropriate, overly burdensome, and, frankly, unnecessary.

Based on our decades of experience adjudicating motions, the Round Table also opposes the new, more stringent prejudice standard articulated in the proposed regulation, which requires the noncitizen to present their entire claim, in detail, to establish a due process violation. Circuit courts are split on what the correct standard should be. The Round Table strongly believes that if a standard is to be codified in regulations, the proper standard is the one articulated by the Ninth Circuit, which requires a noncitizen to demonstrate that their prior counsel's conduct **may have** affected the outcome of proceedings.[15] This standard appropriately does not require a noncitizen to decisively demonstrate that they would have prevailed with competent counsel, only that they demonstrate a plausible ground for relief from removal.[16] Under the proposed regulation, a noncitizen must meet a higher burden of proof to establish prejudice--whether a reasonable probability exists that, absent counsel's ineffective assistance, the outcome of the proceedings would have been different.[17] This overly stringent standard presents a daunting task to achieve while complying with the strict deadline for filing motions to reopen--the noncitizen must collect and

[14] *See, e.g., Ray v. Gonzales*, 439 F.3d 582, 588 (9th Cir. 2006); *Fadiga v. Att'y Gen.*, 488 F.3d 142 (3d Cir. 2007).
[15] *Lin v. Ashcroft*, 377 F.3d 1014, 1027 (9th Cir. 2004) (emphasis added).
[16] *Id., see also Flores v. Barr,* 930 F.3d 1082, 1087 (9th Cir. 2019) (per curiam).
[17] 85 FR 75944, 5.

present evidence to show the definitive ability to prevail on his claim in order to establish a due process violation.

In addition, the proposed regulation inappropriately limits the scope of how a noncitizen may demonstrate prejudice.[18] Under the proposed regulation, eligibility for relief or protection arising after the conclusion of proceedings will typically not affect the determination whether the individual was prejudiced during such proceedings. In our collective experience, many noncitizens have immigration relief available to them that the Court has no jurisdiction to adjudicate and could be deemed relief that arises after the conclusion of proceedings. A critical part of providing appropriate, effective legal counsel is to assess all available forms of immigration benefits and relief from removal in the client's case, even when that relief is not immediately available before the Court. A United States citizen or lawful permanent resident may file a visa petition for their noncitizen relative, providing a lawful mechanism for their relative to remain in the United States. For an abandoned child or survivor of domestic violence, Congress has crafted a self-petitioning process, acknowledging the need to protect these vulnerable categories of noncitizens. Similarly, Congress has created U visa petitions for victims of qualifying crimes who provide assistance to law enforcement, which, when approved, require a lengthy wait to ripen. Each of these forms of well-established relief may be the best option for a noncitizen to resolve her immigration status but require competent counsel's advice, and often a prolonged delay while the noncitizen awaits a visa number. Each of these benefits promote important goals of the immigration court system, including family unity and protection of vulnerable populations. An attorney who does not offer these options to her client during removal proceedings may well be ineffective in her representation of her client. In fact, this very ineffectiveness may be what causes such relief to appear to have arisen after conclusion of the proceedings.

MOTIONS TO REOPEN TO SUBMIT A NEW OR UPDATED ASYLUM APPLICATION

This section proposes considering Form I-589 applications for asylum included as support for a motion to reopen based on changed country conditions and filed with the BIA or Immigration Judge under 8 C.F.R. §§ 1003.2(c)(1) and 1003.23(b)(3) to be deemed "filed" as of the date the motion is granted.[19] On its face, this is a positive change which the Round Table supports. It would allow a noncitizen who is at risk of removal to benefit not only from the protection of having his or her proceedings reopened, but to also immediately be recognized as an asylum-seeker.

What we do find objectionable is the gratuitous language in which this proposal is cloaked in the NPRM, suggesting an improper motive behind the filing of such motions and the accompanying asylum applications. One such example is the purported need to codify how immigration judges and the BIA should consider the evidence submitted in support of a motion: Factual assertions that are contradicted, unsupported, conclusory, ambiguous, or otherwise unreliable should not be accepted as true, consistent with current standards. *See, e.g., Dieng* v. *Barr,* 947 F.3d 956, 961 (6th Cir. 2020) (affidavits that are "self-serving and speculative," statements concerning changed

[18] 85 FR 75951, 2.
[19] 8 FR 75953; 8 CFR§§ 1003.2(c)(1), 1003.23(b)(3).

country conditions that are not "based on personal knowledge," and letters from petitioners' family members that are "speculative, and not corroborated with objective evidence," may be discredited as "inherently unbelievable").[20] As an initial matter, judges are the triers of fact; this proposed codification is meant to prohibit judges from using their discretion in weighing evidence presented to them. Moreover, this restriction refers only to evidence submitted by noncitizens; there is no reference to any unsubstantiated evidence submitted by DHS.

The Department of Justice's prosecutorial focus should not carry over to EOIR, which, although housed within the Department of Justice, is meant to remain independent, neutral, and fair in its decision-making, and before whom noncitizen respondents and government prosecutors appear as equal parties.

In proposing the rule change, the Department need not add the insinuation of fraudulent motive. Doing so accomplishes no purpose other than creating at least the perception of bias, or worse, an actual threat to the neutrality of EOIR's judges.

LIMITING SCOPE OF REOPENED PROCEEDINGS

The new rule proposes that where a motion to reopen is exempt from the time restrictions because such motion is based on changed country conditions under section 240(c)(7)(C)(ii) of the Immigration and Nationality Act (INA), the scope of the reopened proceedings "shall be limited to the issues upon which reopening or reconsideration was sought and granted, and issues directly related."[21] The proposal would leave the IJ or BIA unable to consider other facts, arguments, or alternative forms of relief in the reopened proceedings.

The NPRM claims that the present rules allowing a case to be reopened for all purposes "undermines the Department's commitment to efficient and fair case processing."[22] Having collectively presided over many thousands of Immigration Court proceedings, we strongly disagree.

It should first be stated that reopening removal proceedings is no simple matter. In *Matter of S-Y-G-*, 24 I&N Dec. 247, 251 (BIA 2007), the BIA stated: "We have held that the applicant must meet the 'heavy burden' of showing that 'if proceedings before the immigration judge were reopened, with all the attendant delays, the new evidence offered would likely change the result in the case.' *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992); *see also INS v. Abudu*, 485 U.S. 94, 110 (1988) (stating that a motion to reopen is analogous to a motion for a new trial in a criminal case on the basis of newly discovered evidence and that the movant therefore faces a 'heavy burden'); *Cao v. U.S. Dep't of Justice*, 421 F.3d 149, 156-57 (2d Cir. 2005).

Where reopening is sought on the basis of changed country conditions, the BIA has held that "evidence of widespread violence and human rights violations affecting all citizens is generally insufficient to establish persecution for purposes of the Act." *Matter of Sanchez & Escobar*, 19 I. & N. Dec. 276, 284 (BIA 1985).

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[20] 85 FR 75949, 50.
[21] Proposed 8 C.F.R. § 1003.48(e)(3), 85 FR 75957.
[22] 85 FR 75953.

In justifying the heightened standard for reopening, the Supreme Court has recognized that in immigration proceedings, "[t]here is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases." *INS v. Abudu*, *supra* at 107. Justice thus requires that efficiency be balanced against the requirement of fairness - e.g. the opportunity to develop and present one's case.

The rigorous standard required for reopening is at odds with the Department's unsupported contention that the ability to seek reopening on the basis of changed country conditions somehow lends itself to abuse. Assuming the high standard for reopening is met, we contend that the new rule would deny fairness to respondents in the reopened proceedings, while negatively impacting efficiency.

The Department concedes in the NPRM that "[u]nder current practice, a grant to reopen a case effectively reopens the case for any purpose, regardless of the motion's articulated basis."[23] *See also Johnson v. Ashcroft*, 286 F.3d 696, 705 (3rd Cir. 2002). Such policy was announced 42 years ago, in *Matter of Patel*, 16 I. & N. Dec. 600 (BIA 1978). "Although an agency can change or adapt its policies, it acts arbitrarily if it departs from its established precedents without 'announcing a principled reason' for the departure." *Johnson v. Ashcroft*, *supra* at 700 (citing *Fertilizer Inst. v. Browner*, 163 F.3d 774, 778 (3d Cir.1998)).

The NPRM does not provide the required principled reason for such a drastic departure from established precedent and is thus impermissibly arbitrary. Its language provides only a vague, unsupported claim that a continuation of the decades-old policy is suddenly "unfair" to those whose countries haven't suffered sufficiently changed conditions to put their lives at risk.[24]

Regarding fairness, in spite of the Department's apparent skepticism, conditions in the country of asylum are not the only facts that change over time. As life goes on, respondents experience changed personal circumstances. Applicable law may change as well.

If a case is reopened based on changed conditions (which, of course, may occur years after the conclusion of the removal hearing), and over the course of that time, a life event occurred affecting immigration eligibility (examples include the respondent's marrying a U.S. citizen; his U.S. citizen child reaching the age of 21, or being chosen in the annual visa lottery), in what way is "fairness" achieved by preventing the respondent from pursuing a form of relief to which she is legally entitled? In answering that question, it is important to note that a respondent's decision to pursue an alternative form of relief in no way indicates that the asylum claim lacks merit, or that the respondent's intent to pursue the asylum claim was insincere.[25] The true motive for pursuing an alternate form of relief is related to the question of efficiency.

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[23] *Id*.

[24] 85 FR 75953; proposed 8 CFR § 1003.48(d)(3).

[25] It should be noted that the law already provides protection against the purported practice of noncitizens filing motions to reopen based on meritless asylum claims in order to simply have the case reopened. Noncitizens cannot seek to reopen a case to seek asylum based on changed personal circumstances, particularly affirmative or intentional changes. *See, e.g. C-W-L*, 24 I & N. Dec. 346 (2007); *Matter of* C-C-, 23 I&N Dec. 899 (BIA 2006).

As judges, we saw the efficiency of removal proceedings improve drastically when multiple avenues to resolution existed. For example, when faced with the options of hearing a lengthy and complex asylum claim which was likely to require a detailed written decision and then be appealed to the BIA by one of the parties regardless of the outcome, or instead holding what is often a fifteen-minute hearing for adjustment of status, which is uncontested by either party, and likely to end in a final order without appeal, the choice is an obvious one for all involved. An attorney rejecting the latter approach to pursue the former would likely be found to have provided ineffective assistance of counsel.

The Department fails to support its views to the contrary with any type of facts or statistics. That some within the Department may disagree with attorneys and judges as to the fairness and efficiency of sound legal strategies does not constitute a principled reason for an abrupt departure from 42 years of sound policy. Should the Department possess facts or statistics to support its position, it should provide them in support of its argument.

In addition to curtailing alternative forms of relief, the proposed regulation as worded would also impact on asylum claims that raise multiple bases for relief. This issue is best illustrated through an invitation for amicus briefs issued by the BIA in 2017 on the following issue: whether one seeking asylum on two distinct grounds - religion and coercive family planning policy - but who established changed country conditions warranting reopening only as to the former, could have both grounds considered in their reopened proceedings. The request was ultimately withdrawn.

Instead of allowing the BIA to be briefed on this and decide the issue in the first instance, the new regulation takes the unresolved question and answers it in the negative, while citing no rationale to support its conclusion. Ironically, two Attorneys General under the present administration have justified vacating important BIA precedent (which constitutes another form of agency rulemaking) on the grounds that those decisions lacked the rigorous legal analysis that such precedent warrants. *See Matter of L-E-A-*, 27 I&N Dec. 581, 586 (A.G. 2019); *Matter of A-B-*, 27 I&N Dec. 316, 319 (A.G. 2018).

Although the Department now proposes a more rigorous form of agency rulemaking via regulation than BIA precedent, it provides no legal analysis at all as to the issue of alternative asylum claims. The explanatory language in the NPRM discusses only the issue of pursuing non-asylum forms of relief in the reopened proceedings, in spite of the fact that the language limiting consideration in reopened proceedings to "issues upon which reopening was sought and granted, and issues directly related" would also impact alternative asylum claims that did not form the basis for reopening.[26] If the Department does not intend for the regulations to curtail other asylum-related claims, it should explicitly say so.

Based on our many years of experience in scheduling, hearing, and deciding asylum applications, we attest that one whose proceedings have been reopened based on one ground for asylum does not either gain an additional benefit or prolong their proceedings by raising additional legal bases for asylum. All of the claims are presented in one written asylum application. All are heard at the same merits hearing. An Immigration Judge will not schedule a case further into the future

[26] 85 FR 75953.

because it is based on more than one basis for asylum. Asylum claims commonly rely on multiple factual bases or legal theories even where proceedings have not been reopened.

For all of the above reasons, it is not clear how the regulation would address either fairness or efficiency. What is clear is that the rule risks removing individuals with a genuine fear of persecution on account of a legally protected ground to face serious harm by refusing to even consider their alternative claims.

To remove someone to face persecution on the technicality that the basis for such harm wasn't the one impacted by the changed country conditions that formed the basis for reopening appears to violate our country's non-refoulement obligations under the 1967 Protocol. The proposed rule would therefore violate the requirement to interpret statutes consistently with international law whenever possible. *See Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (noting that construing federal statutes to avoid violating international law has 'been a maxim of statutory construction since the decision' in *Charming Betsy* (citing *Murray v. The Charming Betsy*, 6 U.S. 64 (1804); *Lauritizen v. Larsen*, 345 U.S. 571, 578-79 (1953); *MacLeod v. United States*, 229 U.S. 416, 434 (1913); *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)).

STAYS OF REMOVAL; 8 C.F.R. § 1003.48(k)[27]

The Department seeks to amend the regulations to limit the authority of immigration judges and the BIA to grant stays of removal. The Round Table opposes these proposed changes, as the Department continues its efforts to regulate away the discretionary authority of immigration judges and appellate immigration judges in an attempt to expedite the removal of noncitizens, even those with legitimate claims for immigration relief.

The Round Table has no objection to clear standards for the adjudication of a motion for stay of removal, and agrees with the Department that utilizing the standard set forth by the Supreme Court in *Nken v. Holder* is appropriate.[28] The proposed regulation, following *Nken*, suggests that the standards include: "The likelihood of success on the merits; the likelihood of irreparable injury; harm that the stay may cause to other parties interested in the proceeding; and the public interest."[29] The Round Table agrees with the Department that "the inclusion of these provisions in the regulations will promote consistency in the adjudication of discretionary stay requests."[30]

However, the Round Table objects to the limitations placed on the immigration judges' and appellate immigration judges' authority to consider, adjudicate, and grant motions for stay of removal. The proposed regulation prioritizes efficiency over due process and fundamental fairness.[31]

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[27] 85 FR 75958.
[28] 556 U.S. 418, 425-26 (2009); 85 FR 75954.
[29] 85 FR 75954.
[30] 85 FR 75954.
[31] 85 FR 75854 ("These provisions in the proposed regulation act as additional tools for case management, the importance of which the Attorney General emphasized in *Matter of L-A-B-R-,* 27 I&N Dec. 405, 406 (A.G. 2018) ('Efficiency is . . . a common theme in the immigration courts' procedural regulations, which promote the `timely' and `expeditious' resolution of removal proceedings.'")).

One provision in the proposed regulation would prohibit an immigration judge or the BIA from granting a request for a discretionary stay unless the noncitizen provides proof that a stay request was first filed with DHS.[32] The proposed regulation provides that immigration judges or the BIA only have the authority to grant a stay request if DHS denied the stay or failed to respond to the request within five business days.[33] The Round Table strongly disagrees with the premise that this is a commonsense approach to the adjudication of stays of removal. Rather, it is an approach that all but ensures the removal of noncitizens seeking motions to reopen. Requiring a noncitizen to await a denial of a stay from DHS before being allowed to seek a stay from the immigration court or the BIA poses substantial risk to the individual, as DHS has the power to remove the noncitizen as soon as it denies the stay. Under the proposed regulation, should DHS immediately remove noncitizens in that procedural posture, they lose their opportunity to seek a stay with the immigration court or BIA, as nothing in the proposed regulation provides a temporary stay of removal while the noncitizen pursues all potential jurisdictions for a stay. This requirement is particularly burdensome for pro se respondents and exceptionally burdensome for unrepresented respondents who are detained, for whom a stay of removal can be a crucial remedy. The proposed multi-step process will be confusing for noncitizens for whom removal is imminent, who do not speak English, and are unable to secure counsel.

Moreover, there are a multitude of reasons why noncitizens file legitimate motions to reopen and require a corresponding stay of removal. For example, some noncitizens seek assistance from notarios, not understanding the difference between attorneys and "notarios," because in many countries, the word "notario" is synonymous with the word "lawyer." Often, assistance from notarios prejudices noncitizens in their immigration court proceedings; yet, the noncitizens do not understand the ramifications until they are facing actual removal. Similarly, attorneys who decide to dabble in immigration law make serious mistakes that can lead to their clients' removal. We have seen hundreds of cases deserving of reopening because of ineffective assistance of counsel and notary fraud. The noncitizens in these situations should not be required to seek a stay from DHS prior to requesting the immigration court or BIA for a stay in conjunction with a motion to reopen, as this process puts noncitizens at grave, imminent risk of removal.

In addition, some noncitizens face changed country conditions at the time their removal becomes imminent. Individuals in that situation are eligible to file motions to reopen to pursue asylum based on changed country conditions. Requiring them to seek a stay from DHS rather than seeking a stay simultaneously with a motion to reopen is nonsensical. Moreover, this process puts legitimate refugees at risk of removal to countries where they face persecution.

For similar reasons, the Round Table opposes the proposed changes to the regulation that would prevent an immigration judge or the BIA from granting a stay request unless the opposing party is notified, has an opportunity to respond and either affirmatively consents, joins the motion, or fails to respond to the request within three business days from the date of filing the stay request.[34] The Department states in the Federal Register publication, "[b]oth parties in immigration proceedings are entitled to fair process, and notice to the opposing party is a tenet of fair

[32] 85 FR 75854; 85 FR 75858 (proposing 8 C.F.R. §1003.48(k)(v)).
[33] 85 FR 75954.
[34] 85 FR 75954; 8 FR 75958 (proposing 8 C.F.R. § 1003.48(k)(6)(A)).

process. Accordingly, to ensure fair consideration of all requests and consistency with how it addresses other motions, the Department proposes to require notice and an opportunity to respond before it will grant any motion for a discretionary stay."[35] However, this proposal does not ensure fair process for both parties. Rather it allows one party, DHS, to prevent the immigration court and BIA from granting a stay in an exigent situation, where removal is imminent. The Department suggests that the moving party could move for expedited adjudication but still would require that DHS agrees to the emergency stay before an immigration judge or the BIA would have the authority to grant the request. This process provides DHS with exceptional power, as DHS could oppose or not respond, and the immigration judge would have no recourse. The language of the proposed regulation suggests that an immigration judge or the BIA would not have the power to grant a stay request over the objection of DHS. Rather, a stay can only be granted if DHS agrees or fails to respond.[36]

CONCLUSION

The Department has begun systematically eliminating the independence of immigration judges and appellate immigration judges; this proposal is a clear move to remove independence and discretion from the judges and grant exceptional power to DHS. We strongly oppose this proposal. But for the three sections noted in the introduction, we respectfully request that the Department of Justice withdraw, rather than finalize, the proposed rule for all of the reasons discussed above.

Very truly yours,
The Round Table of Former Immigration Judges
/s/
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[35] 85 FR 75954.
[36] *Id.*

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