November 7, 2023

Submitted via: https://www.regulations.gov.

Raechel Horowitz
Chief, Immigration Law Division
Office of Policy
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 1800
Falls Church, VA 22041

Re: National Immigration Project's Comment on the Proposed Rule by the Executive Office for Immigration Review on Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure; Docket No. EOIR 021–0410; AG Order No. 5738–2023; RIN 1125–AB18

Dear Chief Horowitz:

The National Immigration Project (NIPNLG) submits this comment in response to the request for comments on the Executive Office for Immigration Review's (EOIR) Notice of Proposed Rulemaking (NPRM) on Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 88 Fed. Reg. 62242 (Sept. 8, 2023).[1]

NIPNLG is a national membership organization of attorneys, advocates, and community members driven by the belief that all people should be treated with dignity, live freely, and flourish. For over 50 years, the organization has litigated, educated, advocated, and built bridges across movements so that those who are most harmed by the immigration and criminal systems are uplifted and supported. NIPNLG attorneys are nationally recognized for their expertise in removal defense, asylum law, special immigrant juvenile status, consequences of criminal convictions on immigration status analysis, and affirmative federal litigation. Additionally, we fight for fairness and transparency in immigration adjudication systems and believe that all noncitizens should be afforded the right to fair adjudication of their claims to remain in or return to the United States.

[1] Victoria Neilson and Michelle N. Méndez are the primary authors of this comment. Khaled Alrabe, Rebecca Scholtz, and Matthew Vogel contributed to this comment. The authors extend their gratitude to NIPNLG's Justice Catalyst Fellow Yulie Landan for her thoughtful review and diligent assistance.

NIPNLG supports many aspects of this rule, especially EOIR's decision to rescind most aspects of the damaging final rule published on December 20, 2020[2] and referred to throughout the current NPRM, and in our comment, as "AA96." NIPNLG supports EOIR's efforts to restore the authority of immigration judges and the Board of Immigration Appeals (BIA) to manage their own dockets, in a manner that ensures fairness for noncitizens. There are several aspects of the proposed rule which NIPNLG generally supports but could be improved, and there are several aspects with which we disagree and explain the reasons why herein.

I. PROPOSALS IMPACTING ALL EOIR ADJUDICATORS

a. NIPNLG strongly supports the proposed rule's elimination of the word "alien" and the use of gender-neutral language

(Proposed 8 CFR § 1001.1(gg))

NIPNLG welcomes EOIR replacing offensive language through these regulations, both in the proposed definitions section at 8 CFR § 1001.1(gg) and throughout the proposed rule. First, the term "alien" is dehumanizing and offensive and NIPNLG fully supports EOIR's changes to the regulations to remove this term. EOIR issued a Director's Memo on this subject two years ago instructing EOIR staff to use the term "noncitizen" instead of "alien," recognizing that that term had become "pejorative," unless the term was included in a direct quotation.[3] NIPNLG also fully supports the replacement of the term "unaccompanied alien child" with "unaccompanied child," proposed 8 CFR § 1001.1(hh), since "unaccompanied alien child" incorporates the offensive term "alien."

Second, NIPNLG supports the removal of gendered pronouns and supports their replacement with gender-neutral language at 8 CFR §§ 1003.1(e)(8)(ii), 1003.2(c)(1), 1003.23(b)(1), 1003.23(b)(1)(iii), and 1240.26. NIPNLG supports gender equity and agrees that the language of the regulations should not be gender-specific and likewise supports the elimination of the term "he or she" where it can be replaced by language that does not designate any gender, given that some people do not self-identify as "he" or "she." NIPNLG applauds EOIR's efforts to adopt and codify language that treats noncitizens with dignity.

b. NIPNLG strongly supports requiring that all EOIR adjudicators grant joint motions to terminate or affirmatively unopposed motions to terminate without exception

(Proposed 8 CFR §§ 1003.1(m)(1)(i)(G); 1003.18(d)(1)(i)(G))

Through proposed 8 CFR §§ 1003.1(m)(1)(i)(G) and 1003.18(d)(1)(i)(G), EOIR recognizes that without specific regulatory requirements, EOIR adjudicators are currently free to deny joint motions to terminate and unopposed motions to terminate. In denying these motions, EOIR adjudicators unnecessarily add to their dockets and seek to resolve a controversy where the

[2] *See* 85 Fed. Reg. 81588 (Dec. 16, 2020), https://www.govinfo.gov/content/pkg/FR-2020-12-16/pdf/2020-27008.pdf.

[3] Jean King, Acting Director, EOIR, Clarify the Agency's Use of Terminology Regarding Noncitizens (Jul. 26, 2021), https://www.justice.gov/eoir/book/file/1415216/download.

parties have already decided that none exists. Whether these EOIR adjudicators deny these motions due to political bias or a desire to engage with the merits of the case, a denial of a joint motion or an unopposed motion contravenes longstanding BIA precedent. *See Matter of Yewondwosen*, 21 I&N Dec. 1025, 1026 (BIA 1997). Lastly, when immigration judges improperly deny joint or unopposed motions, this makes immigration judges susceptible to complaints with EOIR's Judicial Conduct and Professionalism Unit. Indeed, NIPNLG has filed complaints against immigration judges who have denied joint motions and plans to continue filing these complaints as needed. NIPNLG has filed complaints on behalf of its members because too often practitioners fear retaliation if they alone file a complaint against an immigration judge. Investigating and responding to complaints against EOIR adjudicators requires resources that EOIR cannot afford to waste.

While EOIR proposes that EOIR adjudicators may deny joint motions if they articulate "unusual, clearly identified, and supported reasons for denying the motion," NIPNLG recommends omitting this exception. By requiring that the EOIR adjudicator articulate "unusual, clearly identified, and supported reasons for denying the motion," EOIR adjudicators should be deterred from unnecessarily denying joint or unopposed motions. However, NIPNLG has seen legally unsound but lengthy immigration judge decisions articulating their reasons for denying the joint or unopposed motion. For example, one immigration judge issued a three-page decision in which they concluded that the temporary protected status (TPS) beneficiary respondent was not adjustment eligible notwithstanding the respondent's travel on advance parole. This particular immigration judge was seemingly unfamiliar with current USCIS policy and interpretations of law impacting TPS beneficiaries with removal orders who have departed the United States with government authorization, but that did not prevent the immigration judge from issuing a lengthy decision. This example highlights that the same immigration judges who are currently denying these motions may continue to deny them notwithstanding proposed 8 CFR §§ 1003.1(m)(1)(i)(G) and 1003.18(d)(1)(i)(G). Prescriptive language without an exception will conserve resources by ensuring that EOIR adjudicators will dispose of cases that should not be on their docket. NIPNLG therefore encourages EOIR to eliminate this exception and instead require EOIR adjudicators to grant joint or unopposed motions to terminate.

c. NIPNLG urges EOIR to expand the discretionary termination category related to unaccompanied child asylum seekers to align with longstanding USCIS policy
(Proposed 8 CFR §§ 1003.18(d)(1)(ii)(A); 1003.1(m)(1)(ii)(A))

NIPNLG appreciates the proposed rule's inclusion of a specific discretionary termination category for unaccompanied child asylum seekers; however, we urge EOIR to consider modifications described below that would promote fairness, consistency, and efficiency.

As currently drafted, the proposed rule allows immigration judges and the BIA to terminate cases in an exercise of discretion where "[a]n unaccompanied child, as defined in 8 CFR 1001.1(hh), states an intent in writing or on the record at a hearing to seek asylum with USCIS, and USCIS has initial jurisdiction over the application pursuant to section 208(b)(3)(C) of the Act." Proposed CFR §§ 1003.18(d)(1)(ii)(A); 1003.1(m)(1)(ii)(A). NIPNLG supports the proposed rule's authorization of termination for young people pursuing asylum in the first

instance with USCIS. This approach promotes efficiency and reduces burdens on both young asylum seekers and the immigration court system.

However, NIPNLG urges EOIR to amend these proposed provisions to include the full scope of cases over which USCIS has initial jurisdiction pursuant to USCIS's policy regarding unaccompanied children, as explained below. The amended language would read as follows (proposed changes are in italicized text):

> An unaccompanied child, as defined in 8 CFR 1001.1(hh), *or a person previously determined by a federal official to be an unaccompanied child, as defined in 8 CFR 1001.1(hh),* states an intent in writing or on the record at a hearing to seek asylum with USCIS, and USCIS has initial jurisdiction over the application pursuant to *USCIS's policy regarding* section 208(b)(3)(C) of the Act.

These proposed changes would afford consistent treatment to all young people over whom USCIS has initial asylum jurisdiction, rather than favoring only a subset of those young people, as the current proposed rule does. As EOIR recognizes, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA"), Public Law 110–457, 122 Stat. 5044 (2008), grants USCIS initial jurisdiction over asylum applications filed by unaccompanied children in removal proceedings. USCIS exercises that statutorily granted initial jurisdiction pursuant to a 2013 policy[4]—currently mandated by a preliminary injunction[5]—pursuant to which USCIS takes initial jurisdiction over asylum applications filed by those with a prior unaccompanied child determination even if there is evidence that the applicant turned 18 or reunified with a parent or legal guardian before filing an asylum application.[6] NIPNLG's proposed changes would better honor Congress's intent in granting initial jurisdiction over the asylum applications of unaccompanied children to USCIS, not EOIR. Inherent in USCIS's statutorily-conferred authority to exercise initial jurisdiction is the corresponding authority to enact a policy interpreting when USCIS has initial jurisdiction under INA § 208(b)(3)(C). USCIS has enacted such a policy, and EOIR should defer to USCIS's jurisdictional determinations following that policy, rather than usurp USCIS's initial jurisdiction authority.

Allowing for termination in the full range of cases where USCIS has initial asylum jurisdiction pursuant to that agency's policy would also promote efficiency. It would reduce the immigration court backlog and reduce the possibility of duplicative, concurrent adjudications of young people's asylum claims with both USCIS and the immigration court. Reducing this possibility would also lessen burdens on young asylum seekers, who would then not be required

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[4] USCIS Asylum Division, *Updated Procedures for Determination of Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children* (May 28, 2013), https://www.uscis.gov/sites/default/files/document/memos/determ-juris-asylum-app-file-unaccompanied-alien-children.pdf.

[5] *J.O.P. v. DHS,* No. 8:19-cv-01944 (D. Md. Dec. 21, 2020), https://www.uscis.gov/sites/default/files/document/memos/Order_Granting_Class_Certification_Granting_in_Part_Plaintiffs_Mtn_to_Amend_PI.12.21.2020_for_website.pdf. NIPNLG is part of the counsel team appointed to represent the class in the *J.O.P.* litigation.

[6] If an applicant has no previous unaccompanied child determination, then USCIS takes jurisdiction if an asylum officer finds that the applicant met the unaccompanied child definition on the date of initial filing of the asylum application.

to prepare for an immigration court merits' hearing while also preparing their asylum claim with USCIS, and for whom impending immigration court proceedings can cause additional stress and anxiety—on top of the mental health issues these young people already often grapple with as survivors of childhood persecution and trauma.[7]

d. NIPNLG urges EOIR to modify the administrative closure factors to respect USCIS's authority over certain applications and petitions
(Proposed 8 CFR §§ 1003.18(c)(3); 1003.1(l)(3))

NIPNLG urges EOIR to amend the proposed rule to clarify that, in cases where USCIS has initial or exclusive jurisdiction over a petition or application, EOIR will respect USCIS's role as the designated adjudicator. As written, the proposed rule allows immigration judges and the BIA to deny administrative closure if they determine that the USCIS petition or application is not sufficiently likely to succeed. *See* proposed 8 CFR §§ 1003.18(c)(3)(i)(D), 1003.1(*l*)(3)(i)(D) (listing administrative closure factor as "[t]he likelihood the noncitizen will succeed on any petition, application, or other action that the noncitizen is pursuing . . . . outside of proceedings before the immigration judge"). To respect USCIS's adjudication authority, the proposed rule should clarify that, in cases where USCIS has exclusive or initial jurisdiction over a pending petition or application, EOIR adjudicators will consider this factor favorably to the noncitizen if the noncitizen includes proof that the petition or application is pending with USCIS and proof—such as in the form of a cover letter or index of exhibits—that it was filed with all required initial evidence. Without such clarification, the proposed rule as written risks erroneous pre-judgment of USCIS matters over which EOIR adjudicators have no expertise, such as with petitions for Special Immigrant Juvenile Status, U Nonimmigrant Status, and T Nonimmigrant Status. If the EOIR adjudicator denies administrative closure based on a belief that the application is not likely to succeed, unnecessary resources will be spent with appeals of EOIR removal orders and motions to remand and/or reopen if USCIS subsequently grants the immigration benefit.

Similarly, the proposed rule should clarify that in situations where USCIS has initial jurisdiction pursuant to law and/or USCIS policy, EOIR adjudicators should grant administrative closure to allow USCIS to exercise its initial jurisdiction provided the noncitizen submits proof that they properly filed the application or petition with USCIS, rather than separately considering the likelihood of success before granting administrative closure. To do otherwise would essentially usurp USCIS's initial jurisdiction. Examples of situations where USCIS has initial jurisdiction include asylum applications filed by "unaccompanied children" or those with previous "unaccompanied child" determinations, *see* Section I.c., *supra*, Form I-751 petitions to remove conditions, applications for Temporary Protected Status, and adjustment of status applications filed by refugees.

[7] Nor would these proposed changes conflict with *Matter of M-A-C-O-*, 27 I&N Dec. 477 (BIA 2018)—a decision that NIPNLG urges the Department of Justice to vacate in any event. That decision allows, *but does not require*, immigration judges to exercise jurisdiction over asylum applications filed by individuals 18 years of age or older who were previously determined to be "unaccompanied children."

e. NIPNLG believes *Matter of Thomas & Thompson*, 27 I&N Dec. 674 (A.G. 2019) must be overturned, but should EOIR preserve this wrongly decided case, EOIR must not apply it retroactively

NIPNLG appreciates the opportunity to comment on the retroactive application of *Matter of Thomas & Thompson* as well as the opportunity to comment on the effect of *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), on particular types of orders. 88 Fed. Reg. 62273. Before addressing the retroactivity question, NIPNLG reiterates its position on *Thomas & Thompson*: the case was wrongly decided and must be overturned.[8]

As to retroactivity, *Thomas & Thompson* should not be applied retroactively because doing so would violate the long-standing principle against the unfair retroactive application of laws and administrative rules. More specifically, all the relevant factors that must be considered when determining the retroactivity of an agency decision weigh against retroactive application to noncitizens who modified their sentence prior to *Thomas & Thompson*.

i. Applicable Retroactivity Test

"Retroactivity is not favored in the law."[9] In the context of new *statutory* provisions, there is a presumption against their retroactive application that "is deeply rooted in [American] jurisprudence, and embodies a legal doctrine centuries older than our Republic."[10] This presumption is based on the principle that "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."[11] These principles also motivate the test for the retroactivity of *administrative* decisions and rules, such as *Thomas & Thompson*.[12] While there is a presumption against the retroactivity of administrative or legislative rules and decisions, *judicial* decisions are presumed to apply retroactively.[13] The retroactivity of judicial decisions is not applicable to agency decisions or rulemaking.[14]

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[8] *See* Brief of Amici Curiae Immigrant Defense Project et al. in Support of Petitioner's Petition for Rehearing En Banc, *Edwards v. U.S. Att'y Gen.*, 56 F.4th 951, 962 (11th Cir. 2022).

[9] *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

[10] *Landgraf v. USI Film Prod.*, 511 U.S. 244, 265 (1994).

[11] *I.N.S. v. St. Cyr*, 533 U.S. 289, 316 (2001) (quoting *Landgraf*, 511 U.S. at 265).

[12] *See Sec. & Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 203 (1947) ("[R]etroactivity [of agency rules] must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.").

[13] *See*, *e.g.*, *Harper v. Virginia Dep't of Tax'n*, 509 U.S. 86, 97 (1993) ("When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events.").

[14] *See United States v. Security Industrial Bank*, 459 U.S. 70, 79 (1982) ("The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student."); *Contra De Niz Robles v. Lynch*, 803 F.3d 1165, 1172 (10th Cir. 2015) (Gorsuch, J.) ("[W]hen Congress's delegates seek to exercise delegated legislative policymaking authority: their rules too should be presumed prospective in operation unless Congress has clearly authorized retroactive application.").

In *SEC v. Chenery Corp*, the Supreme Court explained that the retroactive application of agency rules may be permissible only after courts weigh the advantages gained by the retroactive application of the rule against the harms of its application, which include results that would be contrary to equitable principles.[15] Based on *Chenery*, courts have traditionally examined five factors to assess whether an agency decision may apply retroactively: "(1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard."[16] Every U.S. court of appeals applies this test or some similar variation of the *Chenery* balancing test.[17] The BIA has also applied this test.[18]

U.S. courts of appeals have regularly applied these principles to limit the retroactive application of BIA or Attorney General decisions. For example, multiple courts have held that the BIA's definition of a crime of moral turpitude in *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847 (BIA 2016), cannot be applied retroactively to guilty pleas entered before its publication.[19] Similarly, the Ninth Circuit held that *Matter of Y-L-*, 23 I&N Dec. 270 (A.G. 2002), where the Attorney General established a rebuttable presumption that drug trafficking offenses are per se particularly serious crimes, cannot be applied retroactively to pleas preceding the publication of the decision.[20]

In assessing the retroactivity of *Thomas & Thompson*, therefore, EOIR must apply the *Chenery* balancing test. The Seventh Circuit, one of only two U.S. courts of appeals that have addressed the retroactivity of this decision, applied the five-factor test and held that retroactive application of *Thomas & Thompson* would be impermissible because four of the five factors weigh against retroactive application.[21]

EOIR should not adopt the approach of the Eleventh Circuit, the other court to address the retroactivity of *Thomas & Thompson*. That court did not apply any variation of the *Chenery* balancing test but erroneously applied the standard for the retroactivity of *judicial* decisions. In

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[15] *See Chenery,* 332 U.S. at 203.

[16] *Retail, Wholesale & Dep't Store Union, AFL-CIO v. N.L.R.B.*, 466 F.2d 380, 390 (D.C. Cir. 1972).

[17] *See Haas Elec., Inc. v. N.L.R.B.*, 299 F.3d 23, 35 (1st Cir. 2002); *Lugo v. Holder*, 783 F.3d 119, 121 (2d Cir. 2015); *Francisco-Lopez v. Att'y Gen.,* 970 F.3d 431, 437 (3d Cir. 2020); *Jimenez-Cedillo v. Sessions*, 885 F.3d 292, 300 (4th Cir. 2018); *McDonald v. Watt*, 653 F.2d 1035, 1042 (5th Cir. 1981); *Cleveland-Cliffs Iron Co. v. I.C.C.*, 664 F.2d 568, 576 (6th Cir. 1981); *Velasquez-Garcia v. Holder*, 760 F.3d 571, 581 (7th Cir. 2014); *Minnesota Licensed Prac. Nurses Ass'n v. N.L.R.B.*, 406 F.3d 1020, 1026 (8th Cir. 2005); *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 951 (9th Cir. 2007); *De Niz Robles*, 303 F.3d at 1177-80; *Tallahassee Mem'l Reg'l Med. Ctr. v. Bowen*, 815 F.2d 1435, 1454 (11th Cir. 1987).

[18] *See, e.g., Matter of Cordero-Garcia*, 27 I. & N. Dec. 652 (BIA 2019).

[19] *See Monteon-Camargo v. Barr*, 918 F.3d 423, 431 (5th Cir. 2019); *Obeya v. Sessions*, 884 F.3d 442, 449 (2d Cir. 2018); *Garcia-Martinez v. Sessions*, 886 F.3d 1291, 1296 (9th Cir. 2018); *Lucio-Rayos v. Sessions*, 875 F.3d 573, 578 (10th Cir. 2017).

[20] *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 951 (9th Cir. 2007).

[21] *Zaragoza v. Garland*, 52 F.4th 1006, 1024 (7th Cir. 2022).

Edwards v. U.S. Att'y Gen, the Eleventh Circuit, in two cursory paragraphs, held that *Thomas & Thompson* applied retroactively because the "BIA did not retroactively apply a new law but instead applied the Attorney General's determination of what the law had always meant."[22] That language is quoted from another Eleventh Circuit case that relies solely and incorrectly on one Supreme Court case advancing the uncontroversial proposition that *judicial* decisions, unlike legislative or administrative rules apply retroactively.[23] The Eleventh Circuit therefore did not apply any balancing test as required under *Chenery* and simply applied the wrong standard.

ii. The *Chenery* Balancing Test Weighs Against Applying *Thomas & Thompson* retroactively.

All five factors that most U.S. courts of appeals have traditionally considered when assessing the retroactivity of agency rules weigh against retroactive application to noncitizens who negotiated and pled to or modified sentences prior to *Thomas & Thompson*.

The first factor favors non-retroactivity. The first factor looks to whether the particular case is addressing a novel issue and only favors the retroactive application of a new agency rule where the case is one of first impression. That is so because the factor is "directed towards maintaining an incentive for litigants to raise novel claims by allowing a litigant who successfully argues for a new rule to get the benefit of that rule."[24] All cases considering whether to apply *Thomas & Thompson* are by definition not ones of first impression. U.S. courts of appeals regularly apply this factor in favor of the noncitizen in the context of the retroactivity of BIA or AG decisions.[25]

Under the second factor, courts ask whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law. Here, again, this factor weighs against retroactive application. This factor "implicitly recognizes that the longer and more consistently an agency has followed one view of the law, the more likely it is that private parties have reasonably relied to their detriment on that view."[26] For decades preceding *Thomas & Thompson*, the BIA and U.S. courts of appeals recognized the full effect of

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[22] *Edwards v. U.S. Att'y Gen.*, 56 F.4th 951, 962 (11th Cir. 2022) (quoting *Yu v. U.S. Att'y Gen.*, 568 F.3d 1328, 1333 (11th Cir. 2009)).

[23] *See Yu,* 568 F.3d at 1333 (erroneously citing to *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 313, n.12 (1994) to support the proposition that BIA rules apply retroactivity using the following explanatory parenthetical: "(concluding that the *Supreme Court's judicial construction of a statute* did not change the prevailing law but merely decided the statutes original meaning and explained why the Courts of Appeals had misinterpreted Congressional intent)") (emphasis added).

[24] *Miguel-Miguel*, 500 F.3d at 951.

[25] *See Zaragoza*, 52 F.4th at 1023; *Obeya*, 884 F.3d at 445; *Lugo*, 783 F.3d at 121; *Miguel-Miguel*, 500 F.3d at 951.

[26] *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1082–83 (D.C. Cir. 1987).

criminal sentencing modifications in the immigration context.[27] *Thomas & Thompson* explicitly overrules this well-settled law.[28]

The third factor also favors non-retroactivity. This factor looks to the extent to which the party against whom the new rule is applied relied on the former rule. Under this factor, "[t]he critical question is not whether a party actually relied on the old law, but whether such reliance would have been reasonable."[29] Prior to *Thomas & Thompson*, a noncitizen who accepts a particular sentence in a criminal case or who seeks a modification of their sentence, did so with reasonable reliance on the BIA's long-standing rule that sentence modifications have full legal effect for immigration purposes regardless of the purpose of the modification. Generally, because of the life-altering immigration consequences of criminal convictions, noncitizens tend to be particularly vigilant about the immigration consequences of criminal convictions and sentences.[30] Moreover, criminal defense attorneys are constitutionally required to inform noncitizens of the immigration consequences of their criminal conviction.[31] It is therefore not only objectively reasonable but also extremely likely that noncitizens actually relied on the pre-*Thomas & Thompson* line of cases when considering their sentencing options or seeking sentencing modifications.

The significance of sentence modification as a mitigating tool for immigration consequences is evident in training and reference resources used by criminal defense and immigration attorneys. Leading reference materials regularly emphasized the pre-*Thomas & Thompson* sentence modification rules explaining that the "BIA will respect a trial court's reduction of a defendant's sentence even if the judge lowered the sentence for equitable reasons."[32] Other leading treatises specifically advised using sentence modification as a crucial means of addressing immigration consequences, explaining that "vacating or reducing a criminal sentence is one of *the most important areas* of post-conviction relief for immigration, since it is frequently possible to arrange modest change in the judgment and thereby confer tremendous

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[27] *See*, *e.g., Matter of Martin,* 18 I&N Dec. 226, 227 (BIA 1982); *Matter of Song*, 23 I&N Dec. 173 (BIA 2001); *Garcia-Lopez v. Ashcroft*, 334 F.3d 840, 846 (9th Cir. 2003); *Matter of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005); *Matter of Estrada*, 26 I&N Dec. 749 (BIA 2016).

[28] *Matter of Thomas & Thompson*, 27 I&N Dec. 674, 674 (A.G. 2019) ("I overrule the Board's decisions in *Matter of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005); *Matter of Song*, 23 I&N Dec. 173 (BIA 2001); and *Matter of Estrada*, 26 I&N Dec. 749 (BIA 2016).").

[29] *Zaragoza*, 52 F.4th at 1023 (7th Cir. 2022). *See also Obeya*, 884 F.3d at 448 ("[W]hen conducting retroactivity analysis in the immigration context, we look to whether it would have been reasonable for a criminal defendant to rely on the immigration rules in effect at the time that he or she entered a guilty plea."); *Francisco-Lopez*, 970 F.3d at 439 ("[I]n immigration cases, the third factor will favor the party challenging retroactivity if it would have been reasonable for the alien to have relied on the BIA's prior precedent.").

[30] *See St. Cyr*, 533 U.S. at 322 ("There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions.")

[31] *Padilla v. Kentucky*, 559 U.S. 356 (2010).

[32] Dan Kesselbrenner & Lory Rosenerg, *Immigration Law and Crimes*, 81 (Westlaw, Winter 2017 ed.). *See also* Ira Kurzban, *Kurzban's Immigration Law Sourcebook*, 266 (16th ed. 2019) (noting that "if a sentence is vacated or modified *nunc pro tunc*, the new sentence will determine whether the person is removable even if it is vacated or modified solely for immigration purposes"); Immigrant Defense Project, *Representing Immigrant Defendants in New York*, K-43 (Manuel D. Vargas, 5th ed. 2011) (clarifying that '"where an individual is re-sentenced to a shorter prison sentence, the new sentence counts for immigration purposes").

immigration benefits upon the defendant." [33] A competent immigration or criminal defense attorney, therefore, would have been aware of the importance of sentence modification and would have reasonably relied on pre-*Thomas & Thompson* case law when assessing a proposed sentence or when seeking sentence modification.

For example, before *Thomas &Thompson*, in a situation where criminal defense counsel was able to negotiate a plea bargain with an offense of conviction that is favorable for immigration purposes, but the prosecutor absolutely would not allow a sentence that is favorable for immigration purposes, it may have been entirely reasonable for immigration or criminal defense counsel to have advised their client to accept such a plea bargain, relying upon the availability of sentence modification under the pre-*Thomas &Thompson* case law. Relying upon that case law, counsel could reasonably have advised their client to accept the plea bargain and then seek a sentence modification in order to achieve a favorable outcome. The critical point for assessing reliance is at the point of sentencing—that is the first point at which immigration and criminal defense counsel and their clients would be making decisions in reliance on the prior law. To assess reliance at a later point in time, such as at the time of subsequent sentence modification, would ignore reasonable reliance on the prior law at sentencing, which the above example illustrates.

The fourth factor, the degree of the burden which a retroactive order imposes on a party, equally favors non-retroactive application. Courts that have addressed the retroactive application of BIA and AG decisions have overwhelmingly considered this factor in favor of noncitizens given the extreme burden of retroactivity.[34] The Supreme Court has recognized that deportation "may result in the loss of all that makes life worth living"[35] and that "[d]eportation is always 'a particularly severe penalty.'"[36] There is no question that the burden of retroactive application on noncitizens here is enormous.

Finally, the fifth factor, which considers the government's interest in applying a new rule despite the reliance of a party on the old standard, does not tip the balance in favor of retroactive application. Under this factor, the government regularly cites the importance of maintaining uniformity under the immigration law in favor of retroactive application.[37] While courts have recognized the value of uniformity in this context, they have also noted that the constantly changing nature of immigration law has resulted in a legal landscape where it is a fairly regular

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[33] Norton Tooby & Kathy Brady, *California Criminal Defense of Immigrants*, 526 (2017) (emphasis added). *See also* Lori Rosenberg, *Immigration Consequences of Criminal Proceedings,* 30 (Daniel Kanstroom & Jennifer J. Smith, 2d ed. 2011) (explaining that unlike the vacatur of a conviction, "sentence reductions, however, may be treated more generously, and *can make a huge difference* in the aggravated felony context" and citing to the pre-*Thomas & Thompson* standard) (emphasis added).

[34] *See*, *e.g.*, *Zaragoza*, 52 F.4th at 1023 (finding that this factor "clearly favors" the non-citizen); *Obeya*, 884 F.3d at 449 (explaining that the fourth factor is "not seriously at issue" because it unambiguously favors non-retroactivity to the benefit of the non-citizen); *Garcia-Martinez*, 886 F.3d at 1296 (finding that there is "little doubt" that retroactivity "will impose a new and severe burden" on the non-citizen).

[35] *Bridges v. Wixon*, 326 U.S. 135, 147 (1945) (internal quotation marks omitted).

[36] *Lee v. United States*, 137 S. Ct. 1958, 1968 (2017) (quoting *Padilla*, 559 U.S. at 365).

[37] *See*, *e.g.*, *Obeya*, 884 F.3d at 449; *Garcia-Martinez*, 886 F.3d at 1295; *Velasquez-Garcia*, 760 F.3d at 584.

occurrence that the immigration consequences of a conviction will depend on *when* it occurred.[38] This would not be a new phenomenon nor a particularly difficult rule to administer. Moreover, to the extent that this factor favors the government, courts have held that in the immigration context, it is heavily outweighed by the other four factors especially where the agency accepted a pre-existing rule that noncitizens regularly relied on for decades and then chose to abruptly change the rules of the game.[39]

In sum, considering all the relevant factors, EOIR should adopt a rule that ensures that *Thomas & Thompson* does not apply retroactively. Not doing so would result in a great number of removals for individuals who reasonably relied on longstanding case law that ensured that their sentence modifications would shield them from such an outcome.

II. PROPOSALS SPECIFIC TO THE BOARD OF IMMIGRATION APPEALS

a. NIPNLG strongly supports sections of the rule that restore and codify appellate immigration judges' ability to manage their own dockets through tools including administrative closure

(Proposed 8 CFR §§ 1003.1(d)(1)(ii); 1003.1(*l*)(l), (3))

Proposed 8 CFR § 1003.1(d)(1)(ii) restores BIA appellate judges' authority to reduce their dockets through docketing tools and alternatives to adjudication including administrative closure.[40] Proposed 8 CFR § 1003.1(*l*)(1) specifies that appellate immigration judges' are required to administratively close cases in certain circumstances and may administratively close cases as a matter of discretion. Proposed 8 CFR § 1003.1(*l*)(3) states that appellate immigration judges "shall" administratively close or recalendar cases if both parties agree to the action unless there are "unusual" and "clearly articulated reasons" for the BIA not to do so. This provision is important to ensure that the BIA is adjudicating disputes, or holding in abeyance cases that are not in dispute, as expressed by the actual litigants. Indeed, EOIR Director David L. Neal recently reminded all EOIR adjudicators that "efficiency and fairness are served where [they] focus on resolving disputes between the parties, and adjudicators need not spend time on questions or

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[38] *See Obeya*, 884 F.3d at 449 (explaining that "[t]he frequent changes in immigration law provisions, and the corresponding judicial decisions limiting retroactive application of those provisions, demonstrate that, in many circumstances, the immigration consequences of a conviction can depend on when a conviction occurred. 'Uniformity,' under these circumstances, has hardly been a consistent feature of immigration law.").

[39] *See*, *e.g.*, *Zaragoza*, 52 F.4th at 1006 (acknowledging that uniformity would be promoted by applying the new rule retroactively but that this factor is outweighed by all others); *Garcia-Martinez*, 886 F.3d at 1295–96 (explaining that while uniformity is an important interest, the court "do[es] not think those have a great deal of weight in a case like this one where the BIA lived with the preexisting rule for seven decades and, in fact, until just a couple of years ago would have treated" the non-citizen under the old rule).

[40] Proposed 8 CFR § 1003.1(m) clarifies that the term "terminate" includes motions to end the removal proceedings made to EOIR other than those motions pursuant to 8 CFR §1239.2(c). NIPNLG agrees that it is helpful to clarify that motions made to EOIR to end proceedings are correctly referred to as motions to terminate. As detailed in the text of our comment, however, we believe the reference to "dismissal" as a distinct concept in the proposed rule improperly relies on regulations that only apply to notices to appear before jurisdiction has vested with the immigration court.

issues about which the parties agree or about which a party has the prerogative to decide."[41] In cases where the parties are not in agreement, the regulations set forth factors that the BIA should consider as part of the administrative closure discretionary analysis. While NIPNLG agrees with the enumerated factors, subject to the comment made in Section I.d, *supra*, NIPNLG recommends amending one factor in furtherance of fairness. NIPNLG recommends that factor (E), "the anticipated duration of the administrative closure," recognize that delays outside of the moving party's control should not factor against granting administrative closure. Because the moving party cannot control the delay, it is only fair that the length of the anticipated duration does not count against the moving party.

b. NIPNLG strongly supports sections of the rule that restore and codify appellate immigration judges' ability to manage their own dockets through tools including termination and dismissal
(Proposed 8 CFR § 1003.1(m))

NIPNLG agrees with the mandatory bases for terminating proceedings laid out at proposed 8 CFR § 1003.1(m) but has a couple concerns and suggestions. NIPNLG agrees that if a respondent obtains a lawful status, such as U.S. citizenship or lawful permanent residence, DHS would not be able to sustain a charge of removability. It is illogical and a waste of resources to not terminate proceedings under these circumstances. NIPNLG also strongly supports proposed 8 CFR § 1003.1(m)(1)(B) which requires the BIA to terminate proceedings if the respondent is not mentally competent and no adequate safeguards can be provided. This rule will ensure that noncitizens who cannot participate in their representation, and for whom adequate safeguards cannot be provided, will not be removed in violation of their fundamental rights. However, while EOIR has identified vulnerable groups of immigrants who qualify for humanitarian protections, proposed 8 CFR § 1003.1(m) overlooks a particularly vulnerable group by failing to include Special Immigration Juvenile Status (SIJS) beneficiaries; mandatory termination, unless the respondent opposes termination, would protect them given the SIJS visa backlog and that deferred action is subject to the political whims of future administrations.

Additionally, NIPNLG is concerned about the BIA terminating a case over the respondent's objection and where termination is not required by law. NIPNLG recommends issuing due process-related parameters to appellate immigration judges' authority to mandatorily terminate. When an appellate immigration judge wishes to exercise their mandatory termination authority, the BIA should provide the parties with notice and an opportunity to respond. As described below, noncitizens may have compelling reasons to proceed with relief before the BIA and they should have both notice and an opportunity to be heard before the appellate immigration judge terminates. Implementing these parameters aligns with EOIR's duty to provide fundamentally fair removal proceedings.

NIPNLG further agrees that the BIA should terminate proceedings upon motion by the respondent pursuant to the discretionary authority in proposed 8 CFR §1003.1(m)(1)(ii) but has the same concern and suggestion as described above under the mandatory authority. NIPNLG is

[41] David Neil, EOIR Director's Memo, "Department of Homeland Security Enforcement Priorities and Prosecutorial Discretion Initiatives," at 4-5 (Sep. 28, 2023) https://www.justice.gov/d9/2023-10/dm-23-04_0.pdf.

concerned that, as written, the regulations appear to give the BIA authority to terminate proceedings as a matter of discretion, even over the respondent's objection. There are many reasons that a noncitizen might want to continue with their appeal before the BIA rather than have the case dismissed if they have one of the enumerated statuses in proposed 8 CFR §1003.1(m)(1)(ii). For example, proposed 8 CFR §1003.1(m)(1)(ii)(C) gives the BIA the discretion to terminate proceedings for the beneficiary of Temporary Protected Status (TPS). However, TPS is a temporary status, and an applicant with a strong argument for permanent relief, such as cancellation of removal or asylum, may wish to continue to pursue permanent relief. A person with a strong case for cancellation of removal or asylum might lose their opportunity to obtain permanent relief if the BIA unilaterally terminates their case because their qualifying relative might age out in the cancellation case, or a change in circumstances in the future could render the asylum seeker no longer eligible for asylum. Furthermore, NIPNLG is concerned that the preamble indicates that EOIR has discretionary authority to terminate cases "where alternative relief may be available to the noncitizen that would end the need for continued proceedings, thereby saving EOIR adjudicatory resources for other cases." 88 Fed. Reg. 62264. Given the extraordinary backlogs at USCIS in some categories of adjudication, such as affirmative asylum cases,[42] EOIR may conclude that the noncitizen can pursue relief with USCIS, but the noncitizen may have compelling reasons to pursue relief before EOIR instead. In asylum cases in particular, the noncitizen may be separated from family members who remain in harm's way abroad with no ability to come to the United States until relief is granted. Another compelling example is that of a DACA beneficiary who has a strong non-LPR cancellation of removal claim and wishes to pursue that avenue to permanent legal status instead of maintaining DACA, which is a temporary and precarious benefit. Given this background, NIPNLG therefore suggests that EOIR include a provision that requires the BIA to recognize the respondent's wishes and provide the respondent opportunity to pursue permanent relief before the BIA. EOIR could add this provision at 8 CFR §1003.1(m)(1)(ii): "In removal, deportation, or exclusion proceedings, the Board may, in the exercise of discretion, terminate the case where at least one of the requirements listed in paragraphs (m)(l)(ii) (A) through (G) of this section is met *and the respondent does not oppose termination*."

NIPNLG would also like to point out a potential drafting error at proposed 8 CFR § 1003.1(m)(1)(ii)(F), which allows the BIA to terminate if "[t]he parties have filed a motion to terminate" based on a pending T or U visa application. This ground of termination already exists under the cross-referenced regulations at 8 CFR §§ 214.11(d)(1)(i) or 214.14(c)(1)(i), each of which requires a joint motion from DHS. This provision of the proposed rule should therefore fall under the mandatory termination section in 8 CFR § 1003.1(m)(1)(i) rather than the discretionary section. We do suggest, however, that EOIR include an additional discretionary ground for termination based on the respondent's pending T visa application, U visa petition, VAWA self-petition, and SIJS petition, even if DHS does not file a joint motion to terminate.

[42] In recent stakeholder calls, USCIS has indicated that the affirmative asylum backlog now exceeds one million cases. It has also stated that asylum officers are primarily conducting credible fear interviews because of the "border surge." Thus, very few affirmative interviews are taking place and the backlog is growing every day rather than decreasing.

c. NIPNLG strongly supports EOIR's decision to remove AA96 language that would have allowed the BIA to take administrative notice of broad categories of extra-record information and supports the restoration of the BIA's remand authority for further fact-finding, if needed
(Proposed 8 CFR §1003.1(d)(3)(iv))

NIPNLG strongly opposed AA96's administrative notice provision because it contravened respondents' right to a fundamentally fair proceeding. AA96 stripped noncitizens of their ability to seek a remand when new material evidence arose in their cases, expanded the BIA's administrative notice authority to replace its remand authority, and added many exceptions under which DHS could present new evidence—material or otherwise—in support of a remand following identity, law enforcement, or security investigations.[43] Proposed 8 CFR §1003.1(d)(3)(iv) eliminates this unjust evidentiary regime.

Proposed 8 CFR § 1003.1(d)(3)(iv) removes damaging language from AA96 which would have permitted appellate immigration judges to engage in fact-finding beyond the record before them. NIPNLG fully agrees "that the AA96 Final Rule's provisions could invite impermissible factfinding in practice, in contravention of the Department's longstanding regulatory approach." 88 Fed. Reg. 62266. This danger is particularly strong as immigration has become more politicized and as attorneys general can seek to exert influence on EOIR adjudicators to reach policy outcomes desired by the administration. The current proposed rule sensibly restores the role of appellate immigration judges whose review is generally limited to the record before them, and the rule clearly explains that if further fact-finding is needed, the mechanism to do is through a motion to remand. By limiting appellate immigration judges to the record instead of forcing them to fact-find beyond the record, appellate immigration judges will exercise their appellate duties more efficiently and appropriately maintain their role as neutral arbiters. NIPNLG strongly supports this change. 88 Fed. Reg. 62248.

The proposed rule also rescinds AA96 language that would have restricted the BIA's ability to remand proceedings based on new evidence or intervening changes in the law. 88 Fed. Reg. 62267–68. NIPNLG strongly supports the restoration of this remand authority.[44] Importantly, the examples of reasons for remand highlighted in the preamble include not only forms of relief that the immigration judge can grant, but also relief that only USCIS can grant, such as Special Immigrant Juvenile Status, indicating that the BIA can remand for the immigration judge to terminate or administratively close proceedings in addition to remanding for further adjudication on an application pending before EOIR. 88 Fed. Reg. 62268. Proposed 8 CFR § 1003.1(d)(3)(iv) adds language that if "new evidence is submitted on appeal, that submission may be deemed a motion to remand and considered accordingly." With adjudication backlogs that can last years, it is common for significant changes to occur both factually (*e.g.*

[43] AA96's 8 CFR § 1003.1(d)(7)(v) (proposed Aug. 26, 2020) states that "nothing in the regulation prohibits the Board from remanding a case based on new evidence or information obtained after the date of the immigration judge's decision as a result of identity, law enforcement, or security investigations or examinations, *including investigations occurring separate from those required by 8 CFR 1003.47*." (emphasis added).

[44] NIPNLG applauds EOIR for recognizing the unfairness of the AA96 rule which permitted DHS to move to remand based on new evidence that would render a noncitizen ineligible for relief but would not allow a noncitizen to move to remand based on new eligibility for relief. 88 Fed. Reg. 62268.

changes in family composition, health status of family members, regime changes in countries of origin) and legally (*e.g.* binding precedential decisions, new regulations) that dramatically change the noncitizen's eligibility for relief. In turn, it is common for new material evidence to arise over time. Due process and fundamental fairness demand that EOIR consider the current and relevant facts and law when adjudicating cases and recognize the existence of new material evidence. NIPNLG supports reaffirming the BIA's remand authority.

NIPNLG also strongly supports EOIR's recission of the AA96 rule at 8 CFR § 1003.1(d)(3)(iv) which would have limited an immigration judge's authority on remand to consider only the issues outlined by the BIA's remand order. We appreciate that EOIR "does not believe that finality interests outweigh the fairness and efficiency concerns that the AA96 Final Rule's inflexible approach creates." 88 Fed. Reg. 62269. Once a case is remanded to the immigration judge, the judge should consider all issues that could affect the noncitizen's eligibility for relief. We also support EOIR's decision to rescind the AA96 rules at 8 CFR §§ 1003.1(d)(7)(ii), (iii), and (v), all of which severely limited the BIA's remand authority. As the preamble articulates, it is important that the BIA be able to "remand [when it] is warranted in other situations, including based on fairness or efficiency concerns." 88 Fed. Reg. 62269.

d. NIPNLG strongly supports EOIR's decision to restore the BIA's ability to remand cases for consideration of voluntary departure
(Proposed 8 CFR § 1003.1(d)(7)(ii))

Proposed 8 CFR § 1003.1(d)(7)(ii) retains some changes from the AA96 voluntary departure provisions but makes several significant changes. NIPNLG agrees that the BIA should not engage in fact-finding and supports the proposed rule's amendment that would allow the BIA to remand proceedings for fact-finding regarding voluntary departure eligibility in limited circumstances, such as where the immigration judge granted other relief, DHS appealed, and the BIA sustained DHS's appeal. As the preamble lays out, *see* 88 Fed. Reg. 62267, in those circumstances, the immigration judge may not have elicited facts concerning the application for voluntary departure so it would be appropriate and necessary for the BIA to remand the case for the immigration judge to develop the record. NIPNLG also supports the language at proposed 8 CFR § 1240.26(k)(1) which allows the BIA to consider the request for voluntary departure de novo and grant the relief if warranted.

Voluntary departure is an important alternative for some noncitizens who do not qualify for lawful status in the United States and who wish to avoid the penalties associated with a removal order. Proposed 8 CFR § 1003.1(d)(7)(ii) recognizes the importance of maintaining voluntary departure as an option for concitizens.

e. NIPNLG strongly supports EOIR's decision to remove AA96 language that would have required the BIA to deem an application abandoned if a noncitizen did not comply with biometrics within 90 days
(Proposed 8 CFR § 1003.1(d)(6)(iii))

Proposed 8 CFR § 1003.1(d)(6)(iii) correctly removes a punitive provision from AA96 that would have required the BIA to deem an application abandoned if a noncitizen was not able

to comply with biometrics requirements within 90 days of DHS issuing an instruction notice. The collection of biometrics is completely within the control of DHS and there have been substantial delays[45] with DHS scheduling appointments for noncitizens to complete biometrics collection—even when the noncitizen has fully complied with the procedure to initiate scheduling biometrics. The current proposed rule allows the BIA to keep cases on hold while the noncitizen complies with any required biometrics. Noncitizens should not be penalized for their inability to comply with a requirement that is beyond their control and proposed 8 CFR § 1003.1(d)(6)(iii) eliminates this unjust penalty.

f. NIPNLG supports EOIR's decisions to replace unrealistic internal timelines in AA96 with more reasonable ones
(Proposed 8 CFR § 1003.1(e)(1))

Proposed 8 CFR § 1003.1(e)(1) removes AA96's unrealistic 14-day timeline for the BIA to screen initial filings. Given the backlogs at the BIA and EOIR, the regulations should call for processing that is as expeditious as possible, but creating artificial and unmanageable deadlines may lead adjudicators to focus on speed over fairness in making important decisions concerning case adjudication and which cases warrant three-member review. NIPNLG does not express an opinion on the internal deadlines the BIA is setting for single member or three-member review following case assignment.

g. NIPNLG strongly supports EOIR's decision to rescind the requirement that the EOIR director issue decisions in delayed cases as well as the decision to rescind the EOIR director's adjudication authority
(Rescission of AA96's proposed 8 CFR § 1003.1(e)(8))

The proposed rule will remove the AA96 provision at 8 CFR § 1003.1(e)(8), which required the EOIR director to issue decisions in appeals where the BIA exceeded internal decision-making deadlines. EOIR now recognizes the EOIR director's "'role as EOIR's manager,' as opposed to an adjudicator, which is more properly the function of the immigration courts and the Board." 88 Fed. Reg. 62271. NIPNLG agrees with this assessment. The EOIR director is a political appointee and as such should not be taking over adjudication of delayed appeal decisions. Moreover, considering the historic backlogs and other operational challenges EOIR is facing, the EOIR director should use their time to run the courts and the BIA, and not be compelled to take valuable time away from operational issues to decide cases within a rigid timeframe. Indeed, it is difficult to understand how the EOIR director could both effectively oversee EOIR's management and fairly adjudicate appeals in a compressed timeframe.

[45] Rae Ann Varona, *DHS Urged to Fix Immigration Fingerprint Appointments*, LAW 360 (Nov. 18, 2022), https://www.law360.com/articles/1550985/dhs-urged-to-fix-immigration-fingerprint-appointments.

h. NIPNLG strongly supports EOIR's decision to rescind the AA96 "quality assurance" provision
(Rescission of AA96's proposed 8 CFR § 1003.1(k))

One of the most insidious parts of the AA96 regulations was a provision at 8 CFR § 1003.1(k) which would have allowed immigration judges to certify to the EOIR director cases that the BIA had remanded to them, if they disagreed with the result. Given that the EOIR director is a political appointee who may feel compelled to implement an administration's policy agenda, this provision would have implemented a "fox-guarding-the-hen-house" approach whereby immigration judges could bring decisions favorable to noncitizens to the attention of the EOIR director for further review. The rule would also have had a chilling effect on all appellate immigration judges, putting them on notice that their decisions would be subject to review, not only by U.S. courts of appeals, but also by the immigration judges themselves. Indeed, AA96's proposed 8 CFR § 1003.1(k) would have deprived appellate immigration judges of their appellate authority and give immigration judges appellate authority. This role reversal would have led to confusion within EOIR and at the U.S. courts of appeals that would, in turn, have forced both EOIR and the federal courts to expend more resources. Overall, it seems that the intention behind AA96's "quality assurance" provision was to allow immigration judges who agreed with an administration's policy agenda to overrule an appellate immigration judge whose decision did not comport with an administration's policy agenda. EOIR should not codify what is essentially the "political assurance" of a particular administration. Furthermore, AA96's "quality assurance" provision would have led to inefficiency because cases would have taken much longer to resolve and more EOIR resources.

NIPNLG knows about the inefficiency of this process from experience. NIPNLG represented an asylum seeker with a gender-based claim whose case began in 2016 through a motion to rescind and reopen. The immigration judge granted asylum on September 30, 2023. This case was not resolved sooner or with fewer resources because in 2018 the immigration judge disagreed with the BIA's remand and essentially informally certified the case back to the BIA through a written decision. That decision prompted more briefing before the BIA, a petition for review to the Fourth Circuit, and finally led to a two-day merits hearing before a new immigration judge. In addition to the resources that both EOIR and the Fourth Circuit expended, this procedure can cause irreparable harm to respondents. The immigration judge in this case sent the written decision to prior counsel. Since this occurred before EOIR Courts & Appeals System's (ECAS) implementation, had it not been for prior counsel sharing the decision with us, we would have likely missed the 30-day appeal deadline to the BIA. Of course, we were not expecting to be subject to any BIA deadlines since the BIA had remanded with instructions for the immigration judge to hold a merits hearing. Luckily, we represented the asylum seeker pro bono and therefore did not have to pass on to the client any costs of the additional resources that we were forced to expend. NIPNLG is relieved that EOIR is rescinding this inappropriate rule.

i. NIPNLG strongly supports EOIR's decision to restore the BIA's authority to reconsider or reopen proceedings *sua sponte* (Proposed 8 CFR § 1003.2(a))

Proposed 8 CFR § 1003.2(a) fully restores the BIA's authority to reopen proceedings *sua sponte*. The AA96 changes to the regulation limited BIA *sua sponte* authority to reopening on its own motion solely to correct ministerial errors.

Prior to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), immigration judges and appellate immigration judges could reopen a deportation order without being bound by time and number restrictions. Since then, the strict[46] reopening and reconsideration filing requirements introduced by IIRIRA have hampered noncitizens who could benefit from reconsideration or reopening. Under these harsh restrictions, many noncitizens have successfully obtained reconsideration or reopening of their cases solely because immigration judges and appellate immigration judges have been given the authority to exercise *sua sponte* authority to reconsider or reopen cases. This exercise of discretionary authority has led thousands of noncitizens to avoid removal and legalize their status in the United States. The preamble recognizes, "[t[he strong need for *sua sponte* authority in certain limited circumstances is underscored by the fact that, in promulgating prior regulations implementing statutory motions to reopen and reconsider, the Department specifically declined to add a good cause exception to the statutory time and number limits on such motions due to the availability of *sua sponte* reopening and reconsideration. *See* 61 FR at 18902." 88 Fed. Reg. 62266. NIPNLG therefore supports EOIR's decision to restore the BIA's authority to reconsider or reopen proceedings *sua sponte*. However, EOIR could take this rulemaking opportunity to provide the BIA and immigration judges further guidance on when it would be appropriate to exercise their *sua sponte* authority.

Currently, the BIA relies on its *sua sponte* power to reopen or reconsider in "exceptional circumstances,"[47] but does not define or provide examples of "exceptional circumstances." A list of per se "exceptional circumstances" would serve as a check list to appellate immigration judges when certain facts are present in *sua sponte* motions to reopen. Specific per se "exceptional circumstances" that merit the BIA's *sua sponte* authority would therefore lead to more efficient BIA adjudications. This approach of expressly authorizing *sua sponte* reopening in certain circumstances and preserving "exceptional circumstances" as the guiding principle would sufficiently capture the numerous scenarios that merit *sua sponte* reopening by appellate immigration judges. NIPNLG proposes that EOIR include the following non-exhaustive list of circumstances as per se "exceptional circumstances" that merit *sua sponte* reconsideration or reopening:

- where the respondent has a U.S. citizenship claim;[48]
- where the respondent has obtained a legal status;

[46] EOIR, Immigration Court Practice Manual, Chapter 5.3, https://www.justice.gov/eoir/reference-materials/ic/chapter-5/3 ("Time and number limits are strictly enforced.").
[47] *See Matter of G–D–,* 22 I&N Dec. 1132, 1133 (BIA 1999); *Matter of J–J–,* 21 I&N Dec. 976, 985 (BIA 1997).
[48] While INA § 240(c)(7) imposes time and number limits on motions to reopen filed by noncitizens and no time or number bars should therefore apply to U.S. citizens, those with U.S. citizenship claims seeking reopening of removal orders will likely file pursuant to the BIA's *sua sponte* authority.

- where the respondent is prima facie eligible for adjustment of status;
- where the respondent is no longer removable as charged or acquires eligibility for relief by virtue of a change in law;[49]
- where the respondent is no longer removable as charged or acquires eligibility for relief by virtue of the vacatur of a criminal conviction;
- where the respondent is no longer removable as charged or acquires eligibility for relief by virtue of a subject matter modification or amendment to a criminal conviction;
- where the respondent is no longer removable as charged or acquires eligibility for relief by virtue of a gubernatorial pardon; and
- where the respondent is no longer removable as charged or acquires eligibility for relief by virtue of a sentence modification.

At the same time, it is important that the regulations clarify that even where these factors are not present, adjudicators must assess *sua sponte* reopening based on the exceptional circumstances standard.

Additionally, while NIPNLG opposes most of the changes proposed by the AA96 final rule, NIPNLG recommends preserving one proposal that expressly recognizes a valid exception to the time and numerical limits on filing a motion to reopen. In exchange for eliminating EOIR's *sua sponte* authority, the prior administration suggested including one substantive exception to the time and number limitations. That proposal stated that EOIR could reopen cases where there is a change in fact or law post-dating the entry of a final order that vitiated the grounds for removal and the movant demonstrated diligence in pursuing the motion. NIPNLG recommends adding this exception to the above list of per se "exceptional circumstances" that merit *sua sponte* reconsideration or reopening. In other words, NIPNLG agrees that EOIR should maintain *sua sponte* authority, proposes a non-exhaustive list of circumstances as per se "exceptional circumstances" that merit EOIR's *sua sponte* authority, and recommends that EOIR add AA96's one substantive exception to motions to reopen to the proposed list of circumstances as per se "exceptional circumstances" that merit EOIR's *sua sponte* authority.

Recognizing the limitations of *sua sponte* authority, NIPNLG further urges EOIR to add language into the regulation codifying equitable tolling as a statutory exception to the number and time bars to motions to reconsider and motions to reopen. While EOIR,[50] the U.S. courts of appeals,[51] and the U.S. Supreme Court[52] recognize that the common law concept of equitable tolling applies in immigration proceedings, equitable tolling is found neither in the INA nor the

[49] *See Matter of X–G–W–,* 22 I&N Dec. 71 (BIA 1998) (holding that, in a specific circumstance, a fundamental change in asylum law that made the noncitizen eligible for relief warranted *sua sponte* reopening).
[50] *Matter of Morales-Morales*, 28 I&N Dec. 714 (BIA 2023) (recognizing the availability of equitable tolling in the context of a late-filed Notice of Appeal).
[51] *See, e.g., Lugo-Resendez v. Lynch*, 831 F.3d 337, 344 (5th Cir. 2016); *Kuusk v. Holder*, 732 F.3d 302, 305 (4th Cir. 2013); *Avila-Santoyo v. Att'y Gen.*, 713 F.3d 1357, 1364 (11th Cir. 2013) (per curiam); *Alzaarir v. Att'y Gen*., 639 F.3d 86, 90 (3d Cir. 2011) (per curiam); *Barry v. Mukasey*, 524 F.3d 721, 724 (6th Cir. 2008); *Gaberov v. Mukasey*, 516 F.3d 590, 594–597 (7th Cir. 2008); *Hernandez-Moran v. Gonzales*, 408 F.3d 496, 499–500 (8th Cir. 2005); *Riley v. INS*, 310 F.3d 1253, 1258 (10th Cir. 2002); *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1193 (9th Cir. 2001); *Iavorski v. INS*, 232 F.3d 124, 127 (2d Cir. 2000).
[52] *See Mata v. Lynch*, 576 U.S. 143 (2015); *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062 (2020).

regulations. For this reason, many practitioners overlook equitable tolling as an exception to the strict time and number restrictions of motions to reconsider and motions to reopen and instead argue only for *sua sponte* reconsideration or reopening. If the BIA declines to exercise its *sua sponte* authority, practitioners may not pursue a petition for review because U.S. courts of appeals have generally found that they lack jurisdiction to review motions to reopen that are based solely on EOIR's discretionary *sua sponte* authority. Therefore, EOIR should add an equitable tolling provision to this section of the regulation to alert practitioners and adjudicators of this valuable exception to the number and time bars to motions to reconsider and motions to reopen.

While the proposed rule does not seek to amend 8 CFR § 1003.2(c)(3), NIPNLG urges EOIR to consider adding language to 8 CFR § 1003.2(c)(3) that would treat affirmative non-opposition the same way that it treats a joint motion to reopen. With the high caseloads that DHS Office of the Principal Legal Advisor (OPLA) attorneys carry, it is often more practical for them to agree to non-oppose a motion than to draft or sign onto a joint motion. In fact, in other sections of this proposed rule, EOIR proposes treating DHS's affirmative expression of non-opposition identically to its joining a motion. *See* proposed 8 CFR § 1003.1(m)(1)(ii)(G). A regulatory change that would treat non-opposition identically to joining a motion to reopen for all purposes would mean that the time and number restrictions on motions to reopen would not apply if OPLA expressed their non-opposition to the motion. Furthermore, treating non-opposition identically to joining a motion to reopen for all purposes would also mean that the BIA would likely grant the unopposed motion.[53]

Proposed 8 CFR § 1003.1(c) allows the BIA to accept late-filed or defective notices of appeal through self-certification. NIPNLG strongly supports EOIR restoring this language to the regulations. The stakes for noncitizens facing removal are high yet the notice of appeal filing process is complex and pro se respondents often struggle with the requirements for filing a notice of appeal. If a pro se respondent misses one of the notice of appeal requirements or misses the 30-day deadline, they will be left with a final order of removal that ICE can enforce at any moment. The only meaningful way for a pro se respondent to obtain review from the BIA is the self-certification process. It is therefore important that, in particularly compelling circumstances, the BIA accept late-filed notices of appeal in its discretion despite a noncitizen's inability to comply with the ordinary requirements.

j. NIPNLG strongly supports EOIR's decision to restore consecutive briefing before the BIA for non-detained cases and urges the BIA to adopt a longer filing deadline for briefs
(Proposed 8 CFR § 1003.3(c)(1))

Proposed 8 CFR § 1003.3(c)(1) restores the longstanding BIA policy that, for non-detained cases, the appellant briefs the case first, followed by the brief by the appellee. The AA96 changes to the regulation required simultaneous briefing in all appeals. NIPNLG strongly supports consecutive briefing because it is more efficient for both the parties and the BIA if the appellee addresses only the contested issues rather than trying to guess the issues on which the

[53] David Neil, EOIR Director's Memo, *supra* at note 40.

appellant's brief may focus. It is usually impossible to know until later in the appeal process the specific issues in contention. Given that most immigration court decisions are issued orally, it is common for the Notice of Appeal to outline the proposed argument on appeal broadly. It is also common for different counsel to provide representation on the appeal from counsel before the immigration court and thus counsel may not become fully familiar with the case until the BIA produces the transcript with the briefing schedule. It is a much better use of limited resources both for the appellee to limit their briefing to issues in dispute, and for the BIA to not have to read lengthy briefs that include arguments on issues that are not being contested.

NIPNLG suggests that the BIA increase the initial briefing deadline beyond 21 days and set a 45-day briefing schedule instead. Most non-detained BIA appeals take several years to receive a briefing schedule. During that lengthy delay, counsel on a case may change, or even counsel familiar with the case may need to refamiliarize themselves with the issues. Moreover, since briefing schedules are issued unpredictably, and often after many months or years of waiting, it is impossible for counsel to set aside time in advance to brief these cases. Counsel may be in the midst of several other appeals, or several individual hearings, making it difficult to comply with such a short timeframe. For respondents who are unrepresented and seeking counsel, 21 days is an almost impossible timeframe to seek counsel, since most counsel will not agree to take on an appeal until they have a chance to review the transcript, which is produced at the same time the 21-day briefing schedule is issued and may be over 100 pages long. The 21-day deadline therefore prompts counsel to seek an extension of the 21-day filing deadline and may prevent pro se respondents from pursuing the appeal altogether (unless they are able to navigate the 21-day extension request on their own). Furthermore, since COVID-19, delays with mail delivery have grown, and new plans with the U.S. Postal Service to consolidate mail collection centers for mail carriers threaten to further increase delays in mail delivery.[54] Unfortunately, although EOIR has fully implemented ECAS, EOIR is unable to accept electronic filing in all cases thereby forcing practitioners to rely on the U.S. Postal Service to file documents with the immigration court or BIA.

It would be more efficient for the BIA and for the parties if the briefing schedule were longer to begin with, since giving a longer initial briefing schedule would likely lead to fewer requests for extensions, thus reducing the time BIA staff must spend in adjudicating those ministerial motions. However, if EOIR does not agree to lengthen the briefing schedule, we agree that restoring the procedure to 21 days is a significant improvement to the AA96 changes. NIPNLG also supports granting a full 21 days for filing a reply brief as proposed at 8 CFR § 1003.3(c)(1) and using the same 21 deadline for reply briefs in motions to reopen or reconsider at proposed 8 CFR § 1003.2(g)(3).

[54] Eric Katz, *USPS Faces Bipartisan Pushback As It Ramps Up Consolidation Efforts*, GOVERNMENT EXECUTIVE (Aug. 1, 2023), https://www.govexec.com/management/2023/08/usps-faces-bipartisan-pushback-it-ramps-consolidation-efforts/389038/.

k. NIPNLG strongly supports EOIR's decision to restore the rule permitting a briefing extension of up to 90 days
(Proposed 8 CFR § 1003.3(c)(2))

Proposed 8 CFR § 1003.3(c)(2) restores the longstanding BIA policy allowing litigants to seek an extension of the briefing schedule for up to 90 days. The AA96 regulation limited a briefing request to a single extension and only of up to 14 days. That rule was unreasonable, not accounting for exigent circumstances, or even ordinary grounds for extensions such as vacation, illness, or other deadlines. That rule was especially unreasonable because of the unpredictable timing of the BIA's briefing schedule notification. The current 90 day maximum for an extension is a reasonable period.

III. PROPOSALS SPECIFIC TO THE IMMIGRATION COURTS

a. NIPNLG strongly supports sections of the rule that restore and codify immigration judges' ability to manage their own dockets through tools including administrative closure
(Proposed 8 CFR § 1003.10(c))

Proposed 8 CFR § 1003.10(c) restores immigration judges' abilities to manage their dockets through administrative closure, termination, and dismissal of proceedings. NIPNLG strongly supports EOIR's decision to restore these docket management tools which the AA96 regulation sought to end. We note that the language at proposed 8 CFR § 1003.1(d)(1)(ii) and proposed 8 CFR § 1003.10(b) do not limit EOIR's docket management to the enumerated administrative closure, dismissal or termination but also permit EOIR to take "any action consistent with their authorities under the [INA] and regulations that is necessary or appropriate for the disposition or alternative resolution of such cases" and agree that this flexibility is important, so long as EOIR allow noncitizens to pursue relief before it when they choose to do so.

As discussed in Section II.a., *supra*, above concerning the BIA's authority to administratively close cases, immigration judges also should have this inherent authority to control their dockets and exercise discretion to remove cases from their active dockets, particularly when noncitizens are awaiting relief from another agency. Indeed, as discussed in the preamble to the proposed rule, all but one U.S. courts of appeals to consider the issue of whether an immigration judge has authority to administratively close cases have found that they do have such authority. 88 Fed. Reg. 62243. We also agree with EOIR's decision to "explicitly state" its authority to administratively close cases, 88 Fed. Reg. 62255, given efforts by politically appointed attorneys general to limit this authority through case adjudication. As the preamble recognizes, in some situations, noncitizens must wait a lengthy amount of time for USCIS to adjudicate a benefit.[55] If the immigration judge issues a removal order instead of

[55] NIPNLG opposes the inclusion of "the length of time that elapsed between when the case was administratively closed and when the noncitizen filed the petition, application, or other action" with another agency as a factor as to whether a motion to recalendar should be granted. *See* proposed 8 CFR § 1003.1(c)(3)(ii)(D). There are many reasons a noncitizen might not move forward immediately with a related application. NIPNLG advises that EOIR

postponing the case through administrative closure, the noncitizen could appeal the removal order to avoid a final order of removal. However, pro se noncitizens will have a difficult time navigating the appeals process. If the noncitizen does not have an appeal pending with the BIA once USCIS grants the noncitizen relief, the noncitizen will seek reopening. Both the appeals and the reopening process "creates additional procedural hurdles that increase the risk of removal" which are further exacerbated if the noncitizen is physically removed. 88 Fed. Reg. 62256. Furthermore, forcing noncitizens who are eligible for relief before USCIS into a removal process only increases EOIR's workload by triggering the need for an appeal or a motion to reopen.

The preamble asks for scenarios when administrative closure might be appropriate where there is no application for relief pending before USCIS. One such scenario is when a noncitizen has been placed in withholding-only proceedings, but is not a priority for removal from the United States. In that situation, the noncitizen may not wish to seek dismissal of proceedings since doing so would keep the reinstated removal order in place without a clear opportunity to seek protection from removal before being removed in the future. Regardless of the merits of the withholding application, a noncitizen may prefer to not adjudicate the withholding-only application and risk imminent removal, especially if there are humanitarian factors, such as having a child who is a U.S. citizen or who is eligible for permanent immigration status. Granting administrative closure can preserve EOIR resources for cases which DHS wishes to prioritize, but still protect noncitizens who would be at imminent risk of removal if the case was fully dismissed or terminated.[56]

Second, administrative closure in the absence of a benefits request pending with USCIS is appropriate in cases where the noncitizen believes that they are stateless. Stateless people are those who are not legally considered a citizen of any country and, according to the United Nations High Commissioner for Refugees (UNHCR), there are approximately 218,000 people residing in the United States who are potentially at risk of statelessness. This recognition of the special vulnerability of stateless people, as well as the futility of expending resources on obtaining removal orders that cannot be executed, aligns with DHS's recent guidance for stateless noncitizens in the United States that aims to protect these individuals. Allowing EOIR to issue removal orders against stateless people violates the spirit of DHS's efforts to protect this vulnerable population.

Finally, while EOIR and DHS often do not give significant weight to a noncitizen's ability to renew employment authorization documents (EADs), there could be especially

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strike this clause from the rule and instead focus on whether the application is pending at the time of the motion to recalendar.

[56] The preamble explains that termination may not provide adequate protections for those with reinstated orders who are in withholding-only proceedings if they are mentally incompetent and adequate safeguards cannot be provided. It explicitly states that in such circumstances, administrative closure may be appropriate to protect the noncitizen from having proceedings terminated which would leave them with an unexecuted order of removal against them. 88 Fed. Reg. 62265. NIPNLG strongly agrees with this reasoning and believes that this same reasoning should apply for other noncitizens with compelling equities who have been placed in withholding-only proceedings. Termination of proceedings leaves them potentially vulnerable to immediate removal, but at the same time, if they are not enforcement priorities, EOIR should not expend its resources adjudicating their withholding or Convention against Torture applications. In these situations, administrative closure is the best outcome for the noncitizen and the best way to preserve DHS and EOIR resources.

compelling scenarios where EOIR should take EAD eligibility into consideration. For example, a U.S. citizen child with special needs may rely on their parent's ability to work to pay for needed support. In such a situation maintaining a valid EAD based on a pending defensive application would weigh in favor of administrative closure.

NIPNLG agrees with the general concept in the preamble that EOIR is a "neutral arbiter" but does not always agree with the conclusion that EOIR's interests are "better served by devoting resources to those cases where DHS has expressed a continued interest in effectuating an order of removal." 88 Fed. Reg. 62261. NIPNLG believes that this statement places too much emphasis on DHS's interest in the case and implies that EOIR is not "neutral" but rather effectuating DHS's goals. EOIR has made a specific request for comment in the preamble stated as, the "Department seeks comments regarding whether the proposed rule should include any further protections for noncitizens who wish to have their cases adjudicated despite DHS's desire to seek administrative closure, including whether the rule, if finalized, should provide that, where one party opposes administrative closure, the primary consideration for the adjudicator is whether the party opposing closure has provided a persuasive reason for the case to proceed." *Id.* NIPNLG believes that the final rule should require the EOIR adjudicator to strongly weigh the noncitizen's desire to have their case adjudicated. Only EOIR can adjudicate certain types of cases, such as cancellation of removal, and administratively closing the case based on DHS's unilateral motion may ultimately strip the noncitizen of the opportunity to seek legal status through EOIR. Administratively closing these cases over the noncitizen's objection fails to consider that the qualifying relative may age out or pass away. In other words, granting the DHS unilateral motion for administrative closure may eliminate or render any future cancellation of removal case weaker. Therefore, NIPNLG urges EOIR to consider and prioritize an objection from the noncitizen before granting a unilateral DHS motion to administratively close. *See* Section I.b, *supra*.

b. NIPNLG strongly supports sections of the rule that restore and codify the immigration judge's ability to manage their own dockets through tools including dismissal and termination
(Proposed 8 CFR § 1003.10(d))

Proposed 8 CFR § 1003.10(d) restores immigration judges' ability to manage their dockets through terminating cases where appropriate. NIPNLG strongly supports EOIR's decision to restore this authority to immigration judges, which the AA96 regulation sought to remove.

As with our comment above under the BIA's authority to terminate cases,[57] *see* Section II.b, *supra*, NIPNLG believes that immigration judges should terminate proceedings upon motion by the respondent pursuant to the discretionary authority in proposed 8 CFR § 1003.10(d)(12)(ii) but is concerned that, as written, the regulations appear to give immigration judges authority to terminate proceedings as a matter of discretion, even over the respondent's objection. A noncitizen might want to continue to pursue their application for relief before the

[57] The preamble asks for comments specifically on the proposed definition of the term "termination" versus "dismissal." NIPNLG agrees with the distinction laid out at proposed rule 8 CFR § 1239.2(b).

immigration court for many reasons. For example, a noncitizen may have a temporary status such as TPS or deferred action, but also have a strong argument for permanent relief, such as cancellation of removal or asylum, and wish to continue to pursue permanent relief. Only EOIR can adjudicate cancellation of removal applications, and terminating or dismissing the removal proceedings based on DHS's motion strips the noncitizen of the opportunity to seek that legal status through EOIR. While EOIR may think that the noncitizen could simply pursue cancellation in the future, terminating or dismissing these cases over the noncitizen's objection fails to consider that the qualifying relative may age out or pass away. In other words, granting the DHS unilateral motion for termination or dismissal likely eliminates or renders any future cancellation of removal case weaker.

Additionally, noncitizens may have a compelling reason to have other forms of relief, such as asylum, which can be adjudicated by USCIS or EOIR, adjudicated by EOIR. The USCIS affirmative asylum backlog recently surpassed one million cases, and with most asylum officers prioritizing credible fear interviews for recently arrived noncitizens, affirmative asylum adjudications are taking many years. Asylum seekers who are separated from family members who may be in harm's way have compelling reasons to present their defensive asylum application sooner than waiting for USCIS to adjudicate it, even if DHS does not seem them as a priority for removal. Like cancellation applicants, delaying the adjudication of a strong asylum case may force the asylum seeker to present a weaker asylum claim in the future because of a change in country conditions. Therefore, because terminating or dismissing certain cases will leave noncitizens without any—or at least a weaker claim—for permanent legal status, NIPNLG urges EOIR to consider and prioritize an objection from the noncitizen before granting a unilateral DHS motion to terminate or dismiss. Similarly, NIPNLG strongly objects to *sua sponte* termination by EOIR, unless termination is required by law (e.g. the respondent is a U.S. citizen). Finally, recognizing that noncitizens may have compelling reasons to proceed with relief before the immigration judge, NIPNLG recommends that EOIR adopt the same due process-related parameters of notice and an opportunity respond discussed in Section II.b., *supra*, to immigration judges' authority to terminate proceedings. To the extent that EOIR cares about the finality, fairness, and efficiency of cases, allowing noncitizens the opportunity to seek permanent legal status arrives at that tri-part goal.

NIPNLG agrees with the removal of 8 CFR § 1239.2(f) from the regulations, which had in theory permitted a noncitizen to seek termination of removal proceedings if they were prima facie eligible for naturalization, since that scenario is now covered by proposed 8 CFR § 1003.1(m)(1)(ii)(B). In practice, NIPNG members report that immigration judges would sometimes not agree to termination under 8 CFR § 1239.2(f) absent proof from USCIS that the respondent was eligible to naturalize. However, USCIS would often reject naturalization applications based on the noncitizen being in removal proceedings, thus making it impossible for the noncitizen to obtain proof of prima facie eligibility. NIPNLG urges EOIR to interpret "prima facie eligible" to mean that the respondent can demonstrate to the immigration judges their eligibility for the USCIS benefit under existing law rather than forcing them to seek an affirmative prima facie eligibility determination from USCIS that USCIS never issues. Indeed removal of 8 CFR § 1239.2(f) will end a veritable "Catch 22" and unencumber the path to U.S. citizenship for those in removal proceedings who are eligible to naturalize.

NIPNLG appreciates the ability to respond to EOIR's request for comments specifically on the standards set forth for determining whether termination is appropriate. 88 Fed. Reg. 62265. As discussed above, NIPNLG believes that EOIR should only terminate proceedings on a party's motion and after the other party has had an opportunity to respond. EOIR should weigh the rights and priorities of both parties and should give special consideration to noncitizens who may only be able to pursue relief in immigration court and not terminate their cases even if DHS states its desire to terminate proceedings because they are not enforcement priorities. The only instance in which NIPNLG believes that EOIR should terminate proceedings without a motion by a party is where EOIR lacks jurisdiction, such as where the respondent is a U.S. citizen. In cases where the respondent is pro se, and the case appears to be appropriate for termination, the immigration judge should clearly explain the legal ramifications of termination and ask for the respondent's position before terminating the case. If the respondent opposes termination, the immigration judge should not terminate, unless the facts fall within the mandatory termination ground.

c. NIPNLG strongly supports EOIR's decision to restore the immigration judge's authority to reconsider or reopen proceedings *sua sponte* (Proposed 8 CFR § 1003.23(b)(1))

Proposed 8 CFR § 1003.23(b)(1) fully restores the immigration judge's authority to reopen proceedings *sua sponte.* The AA96 changes to the regulation limited the immigration judge's *sua sponte* authority to reopening on its own motion solely to correct ministerial errors.

While proposed 8 CFR §1003.23(a) states that a motion shall be deemed unopposed if an opposition is not filed, NIPLNG urges EOIR to consider adding language to 8 CFR § 1003.23(b) that would treat affirmative non-opposition the same way that it treats a joint motion to reopen. EOIR could make this clear by updating the heading of 8 CFR § 10023(b)(4)(iv) to read as "jointly filed or unopposed motions" and the content to state "[t]he time and numerical limitations set forth in paragraph (b)(1) of this section shall not apply to a motion to reopen agreed upon by all parties and jointly filed *or filed as unopposed*." In fact, in other sections of this proposed rule, EOIR proposes treating DHS's affirmative expression of non-opposition identically to its joining a motion. *See* proposed 8 CFR § 1003.1(m)(1)(ii)(G). A regulatory change that would treat non-opposition identically to joining a motion to reopen for all purposes would mean that the time and number restrictions on motions to reopen would not apply if OPLA expressed their non-opposition to the motion. Furthermore, treating non-opposition identically to joining a motion to reopen for all purposes would also mean that immigration judges would likely grant the unopposed motion.[58]

Indeed, NIPNLG members have reported instances of immigration judges denying unopposed motions to reopen thus triggering a laborious process for the noncitizen's legal representative and increasing the burden for both immigration courts and OPLA. With the high caseloads that OPLA attorneys carry, it is often more practical for them to agree to non-oppose a motion than to draft or sign onto a joint motion. Yet denials of unopposed motions to reopen force legal representatives to explore a joint motion, which is yet another request that the OPLA

[58] David Neil, EOIR Director's Memo, *supra* at note 40.

office must field. Alternatively, legal representatives will file a unilateral motion to reopen arguing all possible statutory exceptions, including equitable tolling, and *sua sponte* authority. Such unilateral motions to reopen are lengthy and include much documentary supporting evidence. If the cases are not eligible for ECAS online filing, this means that immigration courts and OPLA must organize and store even more paper. If the immigration court misplaces the motion to reopen thereby delaying a decision from the immigration judge, the legal representative will call the immigration court—sometimes multiple times—to ask about the status of the motion to reopen. Therefore, denial of an unopposed motion to reopen will unnecessarily burden both the immigration courts and OPLA.

d. NIPNLG urges EOIR to amend the language that requires the noncitizen to be statutorily eligible for cancellation of removal to reflect the current legal landscape concerning defective notices to appear
(Proposed 8 CFR § 1003.23(b)(3))

Proposed 8 CFR § 1003.23(b)(3) states that motions to reopen to pursue cancellation of removal "may be granted only upon demonstration that the noncitizen was statutorily eligible for such relief prior to the service of a Notice to Appear." This language is not new, but NIPNLG urges EOIR to update the language given the legal landscape following *Pereira v. Sessions*, 138 S. Ct. 2105 (2018) and *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021). Since *Pereira* and *Niz Chavez,* there is no question that only a complete Notice to Appear (NTA) that complies with INA 239(a) can stop the accumulation of physical presence or residence. However, the regulations do not reflect the U.S. Supreme Court's holdings in these cases. As such, EOIR must update its regulations to specify that if a noncitizen files a motion to reopen based on a defective NTA, the noncitizen cannot be required to have been statutorily eligible for cancellation at the time that DHS served the defective NTA: if the NTA was legally unable to stop-time at the time of service, there is no reason the noncitizen could not continue to accrue both continuous physical presence or continuous residence and qualifying relatives following service of the defective NTA. It would be irrational to require the noncitizen to be statutorily eligible for cancellation at the time they are served with a defective NTA,[59] especially if the NTA does not serve the "essential function of a notice to appear." *Pereira v. Sessions*, 138 S. Ct. at 2115. NIPNLG therefore urges EOIR to remove this section of the rule. Should EOIR proceed with proposed 8 CFR § 1003.23(b)(3), it will likely subject itself to lawsuits based on the regulation being ultra vires.

IV. CONCLUSION

NIPNLG is hopeful that EOIR will incorporate our comments when finalizing this proposed rule. Overall, this proposed rule puts EOIR back on the path towards fulfilling its duty of providing fundamentally fair removal proceedings. However, rescinding AA96's harmful provisions alone is insufficient. There are many improvements that EOIR could undertake—many of which we have outlined in this comment—and we hope that EOIR takes this opportunity to implement those improvements.

[59] Further, in cancellation cases, precedent exists for examining equities from the date of the final decision. *Matter of Ortega-Cabrera*, 23 I&N Dec. 793 (BIA 2005) (assessing good moral character from the date of the final decision instead of from the time of NTA service).

Please do not hesitate to contact Michelle N. Méndez at michelle@nipnlg.org if you have any questions or need any further information. Thank you for your consideration.

Respectfully,

Michelle N. Méndez
Director of Legal Resources and Training
National Immigration Project
1200 18th Street NW Suite 700
Washington DC 20036
(202) 742-4447