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Submitted via www.regulations.gov

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RE: RIN 1125-AB01; EOIR Docket No. 18-0503; Dir. Order No. 01-2021, Public Comment Opposing Proposed Rules on Motions to Reopen and Reconsider; Effect of Departure; Stay of Removal

To Whom it May Concern:

We write on behalf of the National Immigration Project of the National Lawyers Guild (NIPNLG), in response to the above-referenced Proposed Rule published in the Federal Register on November 27, 2020. We write to express our strong opposition to this proposed rule, and to urge its repeal.

The NIPNLG is a national nonprofit organization that provides support, referrals, and legal and technical assistance to attorneys, community organizations, families, and advocates seeking to advance the rights of noncitizens. NIPNLG focuses especially on the immigration consequences of criminal convictions, and its mission is to fight for justice and fairness for noncitizens who have contact with the criminal legal system.

Our organization submits this comment urging the Department of Justice (DOJ) to withdraw these proposed rules and instead adopt standards that are more consistent with the circumstances of respondents in removal proceedings. The Notice of Proposed Rulemaking (NPRM) proposes changes that would strip important due process rights from respondents filing motions before the immigration courts and Board of Immigration Appeals (BIA or Board). The Supreme Court has recognized that "[t]he motion to reopen is an 'important safeguard' intended 'to ensure a proper and lawful disposition' of immigration proceedings."[1] Yet these proposed regulations significantly undermine respondents' ability to reopen their proceedings and make it significantly more likely that they will be unlawfully and improperly removed from the United States. In addition, the rule erects substantial barriers to obtaining a stay of removal, which will inevitably lead to an increase in unjust removals, including of U.S. citizens wrongfully detained. DOJ should ensure that every respondent has a full and fair opportunity to pursue their statutory rights. We thus urge you to withdraw these proposed rules.

[1] *Kucana v. Holder*, 558 U.S. 233, 242 (2010) (quoting *Dada v. Mukasey*, 554 U.S. 1 (2008)).

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I. The Agency Failed to Give the Public and Affected Parties Adequate Opportunity to Comment on the Proposed Rule.

At the outset, NIPNLG opposes the proposed rule on the grounds that DOJ has not allowed the public sufficient opportunity to comment on this rule. Typically, the government allows a comment period of *at least* 60 days following publication of the proposed rulemaking to provide the public a meaningful opportunity to comment.[2] When the agency last proposed a rule addressing claims of ineffective assistance of counsel in 2016, it provided 60 days to comment.[3] Here, despite the sweep and complexity of this new rule, which includes new standards for ineffective assistance claims among a raft of other changes, DHS has afforded the public only 30 days to comment. The proposed regulations would dramatically alter motions practice before the immigration courts and the BIA. If implemented, the rule as a whole would limit the ability of noncitizens to access justice before their removal. DOJ issued the NPRM on the Friday immediately following the Thanksgiving holiday, and the shortened comment period closes just after the Christmas holiday. While this time of year is always busy, this year the shortened comment period presents exceptional challenges given that the United States continues to be in the midst of an unprecedented pandemic, forcing many members of the public to work from home and balance childcare with work activities.

In addition, this proposed rule by DOJ follows on the heels of a separate proposed rule that would bring sweeping changes to long-established rules and policies regarding appellate and motions practice.[4] Significant agency revisions to established practice should be cogent and allow the public the opportunity to fully comment. Instead, DOJ and other executive agencies have used the last months of the current administration to rush through proposed rules that would radically alter procedures that have been in place for decades and deprive tens of thousands of respondents, including U.S. citizens wrongfully charged with removal, recourse to rectify errors in adjudication of their claims. For these reasons, we urge the administration to rescind the proposed rule. If the agency wishes to reissue the proposed regulations, it should grant the public at least 60 days to provide comprehensive comments.

The comment period here does not permit sufficient time for completing a full analysis of this rule. Nevertheless, NIPNLG attempts to address the many issues of concern to immigrant communities and their advocates, but strongly believes the Proposed Rule requires an extended comment period.

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[2] *See, e.g.*, Executive Order 12866 (Oct. 4, 1993) (requiring that the public generally be given 60 days to comment on a proposed rule); Executive Order 13563 (Jan. 18, 2011) (to provide the public an opportunity to participate in the regulatory process, comment period shall be at least 60 days).

[3] *See* Motions to Reopen Removal, Deportation, or Exclusion Proceedings Based Upon a Claim of Ineffective Assistance of Counsel, 81 Fed. Reg. 49556 (July 28, 2016).

[4] *See* Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 81588 (Dec. 16, 2020).

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II. The proposed definition of departure in proposed 8 C.F.R. § 1001.1(cc) is *ultra vires*, wrongly overrules *Matter of Arrabally and Yerrabelly*, and its retroactive application fails to account for reliance on the decision by thousands of noncitizens.

We urge the agency to retain the rule announced in *Matter of Arrabally and Yerrabelly*, that leaving the United States pursuant to a grant of advanced parole is not a "departure" for purposes of INA § 212(a)(9)(B)(i)(II).[5] In the NPRM, DOJ overrules the agency's prior interpretation of the statute as excluding from unlawful presence those who entered with permission such as advance parole, and "departures by people who stray across the border by accident, are induced to cross the border by deception or threat, or are kidnapped outright and spirited across the border against their will."[6] The NPRM instead adopts a "voluntariness" requirement that conflicts with the statutory language.[7] INA § 212(a)(9)(B)(i)(II) states that:

> For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.[8]

The NPRM adopts a rigid and overbroad definition of "departure" that fails to account for both its common usage and the statutory exception, recognized in *Matter of Arrabally*, for those who entered with parole:

> The terms depart or departure, unless otherwise specified, refer to the physical departure of an alien from the United States to a foreign location. A departure shall not include the physical removal, deportation, or exclusion of an alien from the United States under the auspices or direction of DHS or a return to contiguous foreign territory by DHS in accordance with section 235(b)(2)(C) of the Act, but shall include any other departure from the United States….[9]

Moreover, we object to the agency's apparent plans to retroactively apply the new rule to those who have traveled on advance parole prior to its effective date. Thousands of noncitizens have relied on the rule announced in *Matter of Arrabally* when adjusting to lawful permanent residence.[10] DOJ

[5] *Matter of Arrabally and Yerrabelly*, 25 I & N Dec. 771, 775 (BIA 2012).
[6] Id.
[7] 85 Fed. Reg. at 75947.
[8] INA § 212(a)(9)(B)(i)(II).
[9] 85 Fed. Reg. at 75955.
[10] *See Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020) (holding that rescission of the DACA program was arbitrary and capricious and failed to adequately account for reliance interests of program recipients).

should not apply this new statutory interpretation to any person who traveled on advance parole prior to the effective date of the rule.[11]

III. DOJ should rescind the proposed volitional withdrawal provision and instead eliminate the departure bar outright.

NIPNLG opposes the replacement of the departure bar at 8 C.F.R. §§ 1003.2(d) and 1003.23(b)(1) with a provision that would deem the motion withdrawn if a respondent leaves the United States without being forcibly removed by DHS. DOJ correctly points out that every circuit court to have considered the issue has held that the departure bar "clearly conflicts" with the Immigration and Nationality Act (INA) or "impermissibly restricts" the BIA's jurisdiction.[12] The agency therefore rightly proposes eliminating the departure bar from the regulations. In doing so, however, DOJ introduces the wholly unnecessary and *ultra vires* concept of "volitional" departure to divest the EOIR and BIA of jurisdiction over motions to reopen.

DOJ should not replace the departure bar with a narrower withdrawal provision that applies where a noncitizen "voluntarily" or "volitionally" departs from the United States while the motion is pending. Binding Supreme Court and circuit court precedent requires EOIR to exercise its congressionally-delegated jurisdiction even if a respondent leaves the United States while awaiting the adjudication of their motion.[13] Moreover, DOJ disregards the plain language of the immigration statute by deeming a motion to reopen withdrawn simply because a respondent "volitionally" leaves the United States while the motion remains pending. The plain language of the statute contains no geographic limitation on who can file a motion, and the agency may not artificially create one—even for the smaller subset of individuals who leave the United States while their motion remains pending.[14]

The agency's justification that a motion "functions similarly" to an appeal is unpersuasive.[15] The statutory right to file a motion to reopen makes it different than an appeal. There is no statutory

[11] *See Matter of Z-R-Z-C-*, Adopted Decision 2020-02 at 9 (AAO Aug. 20, 2020) ("We acknowledge the Applicant's reasonable reliance on the agencies' erroneous past practice, and conclude that the statutory construction announced in this decision should not apply to her application based on such reliance.").
[12] *Toor v. Lynch*, 789 F. 3d 1055, 1057 n.1 (9th Cir. 2015) (enumerating the decisions of other circuit courts on this issue).
[13] *See Union Pacific R.R. v. Brotherhood of Locomotive Engineers*, 130 S. Ct. 584 (2009) (prohibiting an agency from narrowing its own jurisdiction); *Luna v. Holder*, 637 F.3d 85, 101-02 (2d Cir. 2011) ("Nor has Congress indicated since it enacted IIRIRA that an [noncitizen's] departure after filing a motion to reopen should be a jurisdictional bar . . . The BIA must exercise its full jurisdiction to adjudicate a statutory motion to reopen by a [noncitizen] who is removed *or otherwise departs* the United States *before or after* filing the motion." (emphasis added) (internal citations omitted)).
[14] *E.g.*, *Luna v. Holder*, 637 F.3d at 101 (highlighting that when Congress amended the statute to provide relief from the motion to reopen filing deadline for victims of domestic violence, it "explicitly required presence only 'at the time of filing the motion,' not thereafter, and did not include any requirement of physical presence elsewhere in Section 1229a(c)(7). Congress's choice to include this limitation in only one small subsection makes significant its decision to omit such a requirement from the rest of the law. . .").
[15] 85 Fed. Reg. at 75946.

right to an appeal. Thus, even if the agency could limit a noncitizen's right to file an appeal through a similar withdrawal provision, it may not defy Congress by imposing a "volitional" withdrawal provision in the motions context. For these reasons, DOJ should rescind the proposed rule, and instead adopt a position across the agency that accords with the weight of authority recognizing that jurisdiction over motions to reopen does not evaporate with the departure of a respondent from the United States.

IV. DOJ should rescind the proposed adoption of the "fugitive disentitlement doctrine" to bar motions to reopen, and the requirement that movants include a statement whether they have complied with their duty to surrender for removal.

We strongly urge DOJ to rescind the importation of the "fugitive disentitlement doctrine" into administrative proceedings. The proposed requirement that motions to reopen made by noncitizens with removal orders include a statement declaring whether DHS has notified them to surrender (a "bag-and-baggage letter"), and whether they complied, is unnecessary, impractical, and prejudicial.[16] The attachment of unfavorable discretion to the mere failure to surrender is inconsistent with the equitable doctrine of fugitive disentitlement. Moreover, the agency ignores the possibility that a respondent may not have received a notice to surrender due to DHS or postal service error. The failure of the proposed rule to provide for countervailing equities leaves application of this discretionary doctrine subject to abuse by DHS and adjudicators and ignores important policy considerations.

First, courts have found the fugitive disentitlement doctrine to be an "extreme sanction" that should not be lightly imposed.[17] The identification of a noncitizen as a "fugitive" is only one factor to be considered. As the Second Circuit noted, "once a court has determined that a party is a fugitive from justice, the decision on whether to dismiss the appeal should be informed by the reasons for the doctrine and the equities of the case."[18] These include the explanation provided, "'the extent to which a party has truly evaded the law,' and the merits of the appeal."[19] In declining to impose the doctrine on a noncitizen who had failed to surrender to his "bag-and-baggage letter," the court noted that:

> We think that using the fugitive disentitlement doctrine as a sanction for his noncompliance in [this case] would conflate disobedience of an executive command with that of a court order. Doing that ultimately weakens rather than protects the court's unique dignity, which is, after all, the doctrine's focus.[20]

[16] Proposed 8 C.F.R. § 1003.48(c)
[17] *See Hassan v. Gonzales*, 484 F.3d 513, 516 (8th Cir. 2007) (describing the doctrine as "an extreme sanction"); *Gutierrez-Almazan v. Gonzales*, 453 F.3d 956, 957 (7th Cir. 2006) ("[t]he Supreme Court cautioned against frequent use of fugitive dismissal, stating that it is too blunt an instrument for deterring other petitioners from absconding and for preserving the court's authority and dignity.").
[18] *Wu v. Holder*, 646 F.3d 133, 136 (2d Cir. 2011) (quotation omitted)
[19] Id. at 135.
[20] Id.

Moreover, in that case, the noncitizen had been served with a bag-and-baggage letter while his petition for review was pending, and a stay was in place. The government knew his whereabouts, only fourteen months had elapsed, and there was no indication that the noncitizen would flee if his petition were denied.[21]

Nevertheless, DOJ would apply this doctrine in nearly all cases in which an individual has not complied with a notice to surrender. The proposed regulations instruct adjudicators to apply this draconian sanction bluntly, with little analysis or consideration for the circumstances in which respondents learn of their removal orders and surrender obligations. For example, respondents frequently do not receive proper notice of their obligation to surrender. DHS has sent bag-and-baggage letters to the wrong address, or only to the bond obligor (who may not pass the message on to the respondent). Courts have cautioned against applying the fugitive disentitlement doctrine when the government repeatedly sends critical documents to the wrong address.[22] Given the frequency of misaddressed or misdelivered notices from DHS, it is foreseeable that this requirement would result in wrongful denials of motions and unjust deportations.

This is underscored by the arbitrary and unpredictable issuance of notices to surrender by DHS. A respondent who was ordered removed cannot reasonably anticipate that DHS will issue a them a bag-and-baggage letter in a particular time frame. Given the uncertainty of when DHS will employ this practice, it is manifestly unjust to base the viability of a motion to reopen on whether DHS has issued such a letter. Moreover, the proposed rule would empower DHS to defeat an otherwise meritorious motion by issuing a notice to surrender. Such an outcome undermines the principles of equitable authority and transforms the fugitive disentitlement doctrine into a weapon to be wielded capriciously by those seeking to divest adjudicators of oversight. The proposed rule thus ignores multiple important policy considerations and should be rescinded.

We therefore strongly urge DOJ to eliminate the proposed requirement that motions include a statement concerning whether the noncitizen has complied with their duty to surrender for removal, and the weighting of a noncitizen's failure to comply against them.

V. DOJ should rescind the heightened and inflexible filing requirements for motions to reopen based on ineffective assistance of counsel and adopt the prevailing interpretation of prejudice in removal proceedings, rather than imposing the higher *Strickland* standard.

We strongly urge the DOJ to rescind the proposed rule that would codify *Matter of Lozada* and heighten its requirements. The proposed rule would impose inflexible, unnecessary, and burdensome

[21] Id. at 136.
[22] *See Bhasin v. Gonzales*, 423 F.3d 977, 988-89 (9th Cir. 2005).

requirements for the filing of motions to reopen based on ineffective assistance of counsel. These requirements fail to protect respondents from unscrupulous or incompetent advocates, legal counsel from improper or unfounded allegations, and the integrity of immigration proceedings. Instead, these proposed requirements serve as additional barriers to respondents achieving fair adjudication of their claims. Although we agree that noncitizens should be able to bring claims of ineffective assistance against non-attorneys engaged in the unauthorized practice of law, we believe that the regulation as a whole is must be rescinded and that the agency should instead adopt the flexible approach of the majority of the circuits that have considered the existing framework.

A. The inflexible procedural filing requirements for motions to reopen should be rescinded.

At the outset, we refute the need for inflexible and restrictive procedural filing requirements for claims of ineffective assistance of counsel. In this proposed rule, DOJ purports to codify the framework set forth in *Matter of Lozada*, but fails to consider the reasoning of the majority of circuits holding that strict compliance is not required.[23] As noted in the NPRM, the Second, Third, Fourth, Ninth, and Eleventh Circuits have all concluded that strict compliance with *Matter of Lozada* is not necessary for a finding that ineffective assistance of counsel requires proceedings to be reopened.[24] Only four circuits currently require strict compliance.[25] The remaining circuits have rejected claims for ineffective assistance where the petitioners did not substantially comply, but declined to rule that strict compliance was necessary in all cases.[26] The important policy considerations recognized by the majority of circuits include "the inherent dangers…in applying a strict, formulaic interpretation of *Lozada*."[27] So long as the policy goals underlying the *Lozada* framework are met, most courts of appeal that have considered whether strict compliance is required have determined that it does not.

The requirements outlined in *Matter of Lozada* are the following: (1) an affidavit explaining the agreement with former counsel and what prior counsel represented to the respondent; (2) documentation that prior counsel has been informed of the allegations of ineffective assistance of counsel and allowed an opportunity to respond; and (3) the filing of a complaint with the appropriate disciplinary authority regarding counsel's conduct, or, if a complaint was not filed, an explanation for not filing one.[28] The policy goals achieved by the *Lozada* framework include deterrence of meritless claims for ineffective representation, preservation of high standards of representation in light of the significant outcome of removal, and the provision of sufficient information from which an adjudicator may determine that ineffective assistance occurred.[29] None of these goals are achieved by the rigid

[23] *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988).
[24] 85 Fed. Reg. at 75944.
[25] Id. (citing cases from the Fifth, Sixth, Seventh, and Tenth Circuits) (citations omitted).
[26] Id. (citing the First and Eighth Circuits) (citations omitted).
[27] Id. (quoting *Rranci v. Att'y Gen*., 540 F.3d 165, 173-74 (3d Cir. 2008)).
[28] *Matter of Lozada*, 19 I&N Dec. at 639.
[29] Id. at 639-40.

procedural framework proposed in this rule. The NPRM recognizes the rulings of higher courts in disagreement but fails to provide a reasoned explanation for disregarding their long-held conclusions. As a more restrictive framework than *Lozada* even requires, the proposed rule would impose a significant change of policy without basis. DOJ fails to provide any data or studies in the NPRM that demonstrate a need for strict compliance with *Lozada*, or additional requirements.

Specifically, the proposed rule requires that two separate complaints be filed in all ineffective assistance of counsel cases, except where prior counsel is deceased: one to state disciplinary authorities and one to EOIR disciplinary counsel. This requirement is duplicative and onerous. This regulation explicitly, but without any justification, states that a bar complaint must be filed even where an attorney has already been disbarred or suspended from the practice of law. In these circumstances, it is not even clear that the state disciplinary authorities would accept or have the capacity to review such a complaint. Moreover, this requirement does not serve to protect the public because state authorities have already prohibited the disbarred attorney from practicing law. Additionally, the rule does not account for the myriad other reasons why a bar complaint might not be filed in a particular case, including but not limited to: 1) the statute of limitations for filing an attorney grievance with state disciplinary authorities has already passed,[30] 2) counsel acknowledges the ineffectiveness and makes every effort to remedy the situation.[31]

B. The adoption of the *Strickland* standard for evaluating prejudice in removal proceedings is an arbitrary and capricious change in policy.

The proposed rule would also raise the standard of prejudice required to demonstrate that ineffective assistance occurred far beyond that currently required. Seven courts of appeal, which comprise the majority of circuits, currently interpret *Lozada* as requiring only a showing that "a reasonable probability that the error impacted the outcome of the proceeding."[32] Two *additional* courts of appeal find that an even lower standard of prejudice is required.[33] According to the DOJ's own NPRM, only the Second Circuit requires a higher showing of harm, such that where an application for relief is presented, a respondent must demonstrate that they "could have made a strong showing in support of [their] application."[34] The proposed rule, in contrast, adopts a completely new standard. Although unlike in criminal proceedings, respondents in removal proceedings are not guaranteed a Sixth Amendment right to counsel, DOJ would incorporate the standard announced in *Strickland v. Washington*, whereby to prevail on a motion to reopen that is predicated on ineffective assistance, the

[30] *See, e.g.*, State Bar of Georgia Rule 4-222 (establishing a four-year statute of limitations for filing an attorney grievance).
[31] *See Fadiga v. Att'y Gen.*, 488 F.3d 142, 156-58 (3d Cir. 2007) (explaining that all of the policy objectives of *Lozada* are served in this situation).
[32] 85 Fed. Reg. at 75944 (noting that the First, Third, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits all hold this view) (citations omitted).
[33] Id. (noting that the Seventh and Ninth Circuits require only that "the error may have affected the outcome of the proceeding.") (citations omitted).
[34] Id. at 79545 (citation omitted).

respondent must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[35] Thus a respondent would need to establish that particularized prejudice "does in fact exist," in order to reopen their proceedings.[36]

Although as the NPRM notes, cross-applying a standard used in criminal proceedings should ordinarily result in greater protections for those in removal proceedings, here it does the opposite. Perversely, the adoption of the *Strickland* standard makes it harder for respondents who already lack a right to guaranteed counsel and are therefore at greater risk of harm from unscrupulous and predatory actors to demonstrate injury resulting from their egregious harm. As noted above, the NPRM does not contain any data or studies to support the need for a higher standard of prejudice to prevail on motions to reopen for ineffective assistance. Nor does it acknowledge the widespread concern over unauthorized practice of law in the immigration law practice.

The proposed rule purports to establish uniformity in the standards used to evaluate claims of ineffective assistance but fails to acknowledge the near uniformity that already exists in favor of substantial compliance and a lower standard of prejudice. By requiring strict compliance in all cases, additional filings, and an additional showing of prejudice in fact, the DOJ significantly alters the longstanding application of *Lozada*. As an alternative to the proposed new requirements, we urge consideration of the comment submitted by NIPNLG and the American Immigration Council to the 2016 NPRM, which proposed a framework for evaluating claims for ineffective assistance that reflected the circumstances and challenges faced by respondents and counsel in removal proceedings.[37]

VI. DOJ should rescind the alarming barriers to obtaining a stay of removal contained in the proposed rule.

We oppose in the strongest possible terms the significant new impediments to obtaining a stay of removal in the proposed rule and urge the agency to completely rescind it. The separate and combined effects of the additional requirements, including and especially the forced delays imposed by the proposed rule, erect multiple barriers to relief from wrongful removal. The proposed rule delegates extraordinary power to DHS to determine whether a stay should be adjudicated and when, undermining the urgent nature of a request to stay removal. Finally, the proposed rule's codification of the *Nken* factors is inappropriate for administrative proceedings and compounds the harm caused to respondents by the continued absence of an enforceable mechanism for the return of those wrongfully removed.[38] For the following reasons, we urge DOJ to rescind this provision in full.

[35] *Strickland v. Washington*, 466 U.S. 668, 694 (1984).
[36] 85 Fed. Reg. at 75951 n.18 (citation omitted).
[37] 81 Fed. Reg. 49556.
[38] *Nken v. Holder*, 556 U.S. 418 (2009).

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A. The additional procedural hurdles imposed by the proposed rule are unfair, burdensome and *ultra vires*.

First, the proposed rule imposes an unnecessary and costly barrier to relief by requiring respondents to submit a stay request on form I-246 with DHS and allowing five days to pass without response before filing a motion for a stay with EOIR or the BIA. The proposed regulation makes the granting of a stay contingent on whether a respondent can afford the non-waivable $155 fee for filing a stay request with DHS (and the additional costs associated with passport application fees). Although DOJ does not charge a fee for stay requests,[39] by conditioning the authority of EOIR and BIA to grant a stay of removal on the noncitizen having first filed a stay request with DHS, DOJ effectively imposes a cost of at least $155 for filing a stay request. This cost is out of reach for many indigent respondents.

Moreover, the proposed rule imposes a potentially disastrous temporal delay on detained persons seeking to reopen their proceedings. Many respondents never learn of the errors in their underlying proceedings, or that a recourse exists in the form of a motion to reopen, until they are detained. Once in detention, the clock is ticking on their forcible removal unless they can urge the court or Board to review their claims. In the initial days of their detention, all respondents fear their imminent removal. Moreover, DHS – the agency that is responsible for their detention – may use the travel documents required to be submitted with the I-246 stay request to actually facilitate their removal. Imposing a waiting period of five business days before a motion to stay can be filed may allow DHS to accomplish a respondent's wrongful removal before the merits of their claims can be considered.

The proposed rule also improperly allows DHS to control the ultimate decision of the Board or EOIR concerning a stay of removal. Subsection (vi)(A) states that a discretionary stay cannot be granted unless the opposing party: (1) joins or affirmatively consents, or (2) does not respond after 3 business days. Based on this proposed regulatory language, the adjudicator may not grant a stay request if the opposing party affirmatively opposes the stay request. This proposed regulation consequently allows DHS to single-handedly quash a noncitizen's ability to obtain a stay of removal simply by registering its opposition without even providing an explanation. Providing one litigant—DHS—such unbridled power is fundamentally unfair.[40]

[39] DOJ has separately proposed regulations significantly increasing the fees appeals and motions to reopen and reconsider. *See* Executive Office for Immigration Review; Fee Review 85 Fed. Reg. 11866 (proposed Feb. 28, 2020). These substantial fees, in combination with the new requirement that a noncitizen seeking a stay of removal pay the $155 fee for filing a stay request with DHS before even being permitted to file a stay request with EOIR and the BIA, will effectively bar many indigent respondents from filing motions to reopen or reconsider along with stay requests.

[40] *Cf. Perez Santana v. Holder*, 731 F.3d 50, 60 (1st Cir. 2013) (rejecting the Government's argument that even where a noncitizen "did everything right" by assiduously seeking relief and timely requesting reopening, the Government can still use its "exercise of its wholly discretionary authority to remove him from the United State" to "unilaterally preclude" the noncitizen from vindicating his rights).

Further, we oppose the regulatory requirement that the stay motion include a complete case history, all relevant facts, a copy of the stay motion filed with DHS, and a copy of the order of removal or description of the order. As noted above, stay motions often must be filed on an emergency basis, before counsel has received a copy of the complete record of proceedings. This has been especially true during the on-going COVID-19 pandemic. In these circumstances, it is sometimes impossible to provide a complete case history when a stay motion must be filed to prevent a respondent's imminent removal. Instead, counsel must put together the case history as best as possible with the limited information available, and then seek to supplement it later when the remaining records become available. The agency should not deny a stay motion merely because the agency itself has made it impossible to obtain records.

Finally, we oppose the additional requirement that the respondent demonstrate reasonable diligence in seeking a stay and filing a motion to reopen or reconsider.[41] First, this requirement contravenes the statute when applied to many types of motions to reopen. Notably, the statute contains no diligence requirement for:

- motions timely filed within 90 days (or 30 days in the case of motions to reconsider);[42]
- motions filed pursuant to changed country conditions, for which "there is no time limit" per INA § 240(c)(7)(C)(ii);
- motions filed under the special rule for battered spouses children and parents at INA § 240(c)(7)(C)(iv);
- motions to rescind and reopen based on extraordinary circumstances timely filed within 180 days,[43]; and
- motions to rescind and reopen based on lack of notice, which may be filed "at any time" per INA § 240(b)(5)(C)(ii).

A finding of diligence is only relevant where the respondent seeks to equitably toll the normally applicable filing deadline. It is not relevant where the noncitizen files within the period granted by statute for filing the motion. The agency's addition of a regulatory requirement that a respondent always show diligence goes beyond the authority granted to the agency by Congress, and therefore DOJ should rescind this proposed regulatory change.

B. The proposed rule's identical service and filing requirement is unnecessary, ineffective, and further delays access to justice.

We also oppose the requirement that service of a motion for a discretionary stay on an opposing party be simultaneous and be by the same method by which the stay motion is filed with the

[41] *See* proposed subsection 1003.48(k)(iv).
[42] *See* INA § 240(c)(6)(B), (c)(7)(C)(i).
[43] *See* INA § 240(b)(5)(C)(i).

immigration court or the BIA. This requirement will cause respondents to unnecessarily incur additional costs for mail, delivery services, or courier services to send their stay motions to DHS because they will be forced to use the same method to serve DHS as they use to send their motion to the BIA or Immigration Court, even though DHS is already equipped for electronic service (which is nearly instantaneous, secure, reliable, and free), whereas EOIR continues to struggle to implement electronic filing. Further, this requirement does not serve its intended goal of ensuring fairness, and particularly in light of EOIR's continued delay in implementing an electronic filing system nationwide, will increase mail or courier costs to respondents.

Further, DOJ's justification, offered in the preamble to the rule, that this requirement is for reasons of fairness, is unpersuasive. Certainly the Board should not rule on a motion where the opposing party has not received timely notification of its filing. The proposed regulatory language, however, is clumsy and ineffective attempt to ensure timely notification to the opposing party. Notably, the proposed rule would require the adjudicator to deny a motion even if DHS received notice of the motion *before* the BIA or Immigration Court received the motion. For example, if a respondent had *first* served DHS and only later filed the stay motion with the Immigration Court or the BIA, the regulatory language would require denial of the motion.

Similarly, the proposed regulation would require denial of the stay motion if counsel electronically served the motion on DHS (which allows for nearly instantaneous receipt of the motion by DHS), but used mail or courier to send the stay request to the BIA or Immigration Court. Respondents often cannot electronically file a stay motion with the Immigration Court or the BIA because of the exceedingly slow rollout of its electronic filing system—the EOIR Courts and Appeals System (ECAS). In addition, counsel might be able to hand deliver a copy of the motion to DHS counsel, but be required to mail a stay motion to the BIA due to the physical location of the BIA in Falls Church, Virginia. In this scenario, DHS again would receive the motion before the BIA, yet under the proposed regulation, the BIA would be empowered to deny the motion simply because the identical method of service was not used. The use of such a nonsensical and unnecessary procedural requirement to bar consideration of egregious errors leading to manifest justice is untenable.

C. DOJ should not apply the *Nken* factors to determinations made in the administrative context or endorse reliance by the Immigration Court or BIA on the reasoning of the *Nken* Court to deny that wrongful removal constitutes irreparable injury.

Finally, our organization opposes the regulatory codification of the *Nken* factors for determining whether to grant an administrative stay of removal.[44] First, the four-factor test announced in *Nken* for U.S. courts of appeal assumes the agency has already reviewed and rejected the underlying claim on the merits. The *Nken* test is not appropriate when the agency has not yet considered the facts, arguments, and evidence supporting the claims.

[44] *Nken v. Holder*, 556 U.S. 418.

Second, incorporation of *Nken* to evaluate the irreparable injury resulting from a wrongful removal amplifies the misrepresentation made by the government in that case – that effective return procedures exist. As has become clear since *Nken* was argued, the Attorney General lacks the capability to return respondents who are removed before they prevail on their motions. The return policy that was later developed by ICE is non-binding, vague, and discretionary. It also does not, by its terms, apply to U.S. citizens, who are among the respondents fighting their imminent removal. The *Nken* Court's belief in the actuality of effective return procedures arose from a claim that the Solicitor General (SG) made in its brief that it later retracted.[45]

In fact, no formalized "policy and practice" then existed. The SG subsequently informed the Supreme Court that it was "not confident that the process for returning removed aliens, either at the time the brief was filed or during the intervening three years, was as consistently effective as the statement in its brief in *Nken* implied."[46] In his letter, the SG acknowledged the "absence of a written, standardized process for facilitating return" and the "the lack of clear or publicly accessible information for removed aliens to use in seeking to return if they received favorable judicial rulings."[47]

On February 24, 2012, U.S. Immigration and Customs Enforcement (ICE), a subagency of DHS, issued a general policy directive regarding returns for a limited set of cases.[48] ICE's facilitated return policy does not, by its terms, apply to U.S. citizens. If a respondent prevails on their motion by establishing that they are a U.S. citizen, they would no longer be under the jurisdiction of ICE, and ICE could potentially decline to facilitate their return.[49] Moreover, ICE asserts that its return policy is not binding and "is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter."[50] ICE did not promulgate the policy through notice and comment procedures, and it can be retracted or replaced at any time.

Moreover, ICE's return policy does not adequately protect the interests of all respondents who prevail on their motions to reopen their removal proceedings. Under the policy, ICE facilitates *only* the return of persons who were previously lawful permanent residents or whose "presence is necessary for

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[45] Id. at 435 (citing Resp. Br. at 44, *Nken v. Holder*, 556 U.S. 418, No. 08-861 (Jan. 2009)).

[46] Ltr. From Michael R. Dreeben, Deputy Solicitor General, to William K. Suter, Clerk of the Supreme Court, at 4 (Apr. 24, 2012) (SG Letter), https://nipnlg.org/PDFs/practitioners/our_lit/foia_dhs_return/2012_24Apr_osg-ltr-supct.pdf.

[47] Id. at 3–4.

[48] *See* ICE Policy Directive Number 11061.1: Facilitating the Return to the United States of Certain Lawfully Removed Aliens (ICE Policy Directive), https://www.ice.gov/doclib/foia/dro_policy_memos/11061.1_current_policy_facilitating_return.pdf

[49] *See Poole v. Mukasey*, 522 F.3d 259, 264 (2d Cir. 2008) (noting that "[t]he Executive Branch may remove certain [noncitizens] but has no authority to remove citizens" and remanding for consideration of petitioner's derivative citizenship claim).

[50] *Supra* n. 48, ¶ 8.

continued administrative removal proceedings," and, within those groups, only those who can afford to pay.[51] In sum, ICE's return policy provides no assurance that the harm of deportation could ever be repaired. For these reasons, the BIA and Immigration Courts should evaluate the irreparable harm of deportation without regard to the discussion of this factor in *Nken*, and the proposed rule should be rescinded.

Conclusion

The proposed rule rewrites many aspects of long-established motions practice and would deter respondents from filing motions to reopen and reconsider by erecting new barriers that Congress did not intend, including burdensome procedural requirements and financial impediments. The agency should have given the public at least 60 days to respond to these far-reaching changes and should rescind the rulemaking on this basis alone. Substantively, may provisions of the proposed rule will erect significant and unnecessary barriers to reopening and reconsideration by making it more difficult for noncitizens to successfully reopen proceedings, significantly undermining the very purpose of motions—"'to ensure a proper and lawful disposition' of immigration proceedings."[52]

In addition, the proposed rule makes it nearly impossible to obtain a stay of removal where removal is imminent, all but guaranteeing that countless respondents will be unjustly removed from the United States, including those with colorable claims of U.S. citizenship. These unjust and unnecessary removals will result in family separations and in many cases, torture or even death. If published in its current form, the proposed rule will further erode due process in immigration court and BIA proceedings. For the foregoing reasons, we urge you to rescind the proposed rule.

We request that the agency consider this comment on the proposed rule. Please do not hesitate to contact Cristina Velez at cristina@nipnlg.org if you have any questions or need any further information. Thank you for your consideration.

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[51] *Id*. at ¶¶ 2, 3.1
[52] *Kucana v. Holder*, 558 U.S. 233, 242 (2010) (quoting *Dada v. Mukasey*, 554 U.S. 1 (2008)).