NATIONAL IMMIGRATION PROJECT

Lawyers for the Movement

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Re: Appellate Procedures for the Board of Immigration Appeals, Docket No. EOIR-26-AB37; Dir. Order No. 02-2026; RIN 1125-AB37

Director Margolin and Acting Assistant Director Comans:

The National Immigration Project[1] and 38 immigration legal services, social services, and advocacy organizations submit the following comment in response to the Executive Office for Immigration Review's (EOIR) interim final rule (IFR) published in the Federal Register on February 6, 2026. The undersigned organizations strongly oppose EOIR's IFR which will strip noncitizens of their right to due process and fairness in the immigration court system. The IFR will lead to thousands of noncitizens being removed without ever having a fair adjudication of their claim to remain in the United States.

On March 8, 2026, the District of Columbia District Court issued a decision vacating certain sections of the IFR. *Amica Center For Immigrant Rights, et al., v. Executive Office For*

[1] The author of this comment is National Immigration Project Supervising Attorney, Victoria Neilson with input from National Immigration Project Director of Advocacy Caitlin Bellis. The National Immigration Project is a national nonprofit membership organization that provides support, referrals, and legal and technical assistance to attorneys, community organizations, families, and advocates seeking to advance the rights of noncitizens.

Immigration Review, et al., --F.Supp. 3d --, No. CV 26-696 (RDM), 2026 WL 662494, at *1 (D.D.C. Mar. 8, 2026). Nonetheless, the IFR remains open for comments and some portions of the rule are now in effect. Since it is unclear what the final result of the litigation will be and whether EOIR will appeal the District Court's decision and/or engage in further rulemaking seeking to implement the vacated portions of the rule, this comment will address the entire IFR.

Through this comment, we express our strong opposition to the IFR, which will leave many noncitizens with no meaningful appellate review of immigration court decisions. These regulations will create the biggest change in EOIR procedures in decades, yet with little justification, EOIR is issuing these regulations as an IFR rather than a Notice of Proposed Rulemaking (NPRM). As discussed below, the IFR would eviscerate agency appellate review. Changes to decades of established procedure such as this should not be implemented through an IFR, but rather should go through a robust notice and comment process. Even with proper regulatory procedures, however, the proposed rule violates the Immigration and Nationality Act, noncitizens' rights to due process, and fundamental fairness.

I. The Undersigned Organizations Objects to the Process by Which This Rule Was Issued

A. The Undersigned Organizations Object to EOIR Issuing This Rule as an IFR

EOIR's decision to issue this rule, which radically alters the role of the Board of Immigration Appeals (BIA or Board) as an IFR is improper. The preamble to the IFR states, "The Board cannot—and does not need to—adjudicate every case on the merits." 91 Federal Register 5267, 5270 (Feb. 6, 2026). This complete shift in the purpose of the Board cannot be squared with the preamble's justification for issuing this rule as an IFR, claiming that this rule "merely" makes mechanical procedural changes, "even if they have 'impacts on outcomes.'" 91 Fed. Reg. 5274. This characterization grossly misstates the significance of the rule. This rule is not about increasing "efficiency"; it fully eliminates administrative appeals in almost all cases. It alters noncitizens' expectations that their cases will be fully reviewed by EOIR and eliminates important oversight of immigration judge (IJ) decision-making. Moreover, the rule will flood federal courts of appeals with thousands more petitions for review than they currently adjudicate. Changes to the immigration adjudication system that are as sweeping as these should not be implemented through an IFR.

The IFR further alleges that EOIR is exempt from notice and comment rulemaking because the rule affects the ''foreign affairs function of the United States." 91 Fed. Reg. 5274. Under EOIR's reasoning any rule that affects immigration in any way would be exempt from notice and comment rulemaking. Such a broad invocation of this exemption runs counter to decades of established regulatory practice, and fails to account for the important constitutional rights at stake with this IFR—surely, violating our own Fifth Amendment cannot be good foreign policy. Moreover, on February 23, 2026, the Department of Homeland Security issued an NPRM concerning employment authorization documents for asylum seekers. 93 Fed. Reg. 8616 (Mar. 23, 2026). It is arbitrary for the federal government to exempt one immigration-related rule from notice and comment and not another if it has concluded that all immigration-related rules fall under the 5 U.S.C. § 553(a)(1) foreign affairs exception.

Furthermore, EOIR advances a deterrence theory both for the need for this rule and for why it falls under the foreign affairs NPRM exceptions, stating, "[i]mproving the efficiency of EOIR proceedings will, in turn, create disincentives for [noncitizens] to enter the United States unlawfully in the future as they will no longer be able to rely on an expectation of significant delays in their proceedings, at least at the administrative appellate level." 91 Fed. Reg. 5274. EOIR offers no evidence to support its theory that any noncitizen entered the United States based on an expectation that there would be delays at the BIA. Even if this theory were supportable, however, the BIA is an appellate adjudicatory body and should ensure that the procedures it establishes afford noncitizens due process in their adjudications; if the BIA sees its role as deterrence, it is no longer an impartial decisionmaker. In adjudications that require individualized decision-making, it is unlawful to apply a blanket policy that is justified by deterrence of future migration to the United States. *See R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 191 (D.D.C. 2015) (finding that the Department of Homeland Security's (DHS) no-release from detention policy for families was likely unlawful where its justification was deterrence.)

Further, even under the IFR's own tortured reasoning, the justification for the foreign affairs exception does not make sense. According to EOIR, "this IFR is one part of this administration's efforts to reduce illegal immigration to the United States." 91 Fed. Reg. 5275. The IFR then reasons that because immigration is a shared responsibility among multiple countries, delays in the U.S. appellate adjudication process, "delaying implementation of measures like this IFR to combat and deter illegal migration could create migratory challenges for foreign partners." *Id.* Even assuming arguendo that the IFR is correct about this shared responsibility, it is difficult to see how delaying the removal of noncitizens to other countries would create migratory challenges for the other countries; logically the extraordinary change of speeding up the finality of all immigration cases would more likely create challenges for the countries which would be receiving a higher number of removed noncitizens at a faster rate. This reasoning does not make sense and cannot form the basis for an exception to going through notice and comment rulemaking on the important issues raised by these changes to BIA procedures.

B. The IFR Fails to Address Its Direct Costs as Required by Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 require agencies to consider the costs and benefits of the rule as well as alternative options. Here, EOIR makes the unsupported claim that the IFR, "will provide significant benefits to adjudicators, *the parties*, the U.S. immigration system overall, and the broader public, which outweigh the potential costs." 91 Fed. Reg. 5276 (emphasis added). However, as discussed more fully below, there is no "benefit" to noncitizens through this rule—they will almost uniformly have their appeals summarily dismissed with no substantive consideration by the BIA. In footnote 22 the IFR acknowledges "there may be hypothetical or speculative situations in which the IFR will have some cost" but nonetheless determines "any such costs— if they even exist beyond the realm of the hypothetical—are far outweighed by the benefits of the IFR." *Id.* As discussed below, the cost of this IFR to noncitizens, both financially and in terms of their lost access to due process before the agency will be enormous. Noncitizens

must currently pay $1030 to appeal an IJ's decision to the BIA.[2] Pursuant to this rule, in almost all cases, that cost will yield a summary dismissal by the BIA.

As discussed more fully below, this rule will force noncitizens to pay not only $1030 for a BIA filing fee, but also an additional $600 filing fee in federal court in most cases. While the IFR states that it is not a "major rule" because it will not have an effect on the economy of $100 million or more, the IFR provides no breakdown whatsoever of the cost of this rule. 91 Fed. Reg. 5276. The IFR states that at the end of fiscal year 2025 there were 202,946 pending BIA appeals. 91 Fed. Reg. 5270. If every noncitizen whose case is in the BIA backlog were to appeal to the federal court of appeals, the cost in court fees alone would be $121,767,600, thereby exceeding the $100 million threshold. That figure is only for the filing fee in federal court, but noncitizens who pursue federal court appeal in the absence of meaningful agency appellate review are likely to spend thousands of dollars per case in legal fees as well. Of course, this IFR does not apply to cases in which the IJ issued a decision before March 9, 2026, but there are no statistics in the IFR about the number of appeals being filed per month since this administration took office. As immigration court "pretermissions" have skyrocketed, preventing noncitizens from ever having the opportunity to present their case, it is likely that appeals have increased as well. But without EOIR providing any analysis of the cost of the IFR, it is impossible to tell what the cost will be. In any event, the IFR should have engaged in an analysis of the costs of the rule and failed to do so.

II. The Undersigned Organizations Strongly Oppose the Substance of This Rule

The IFR will deny noncitizens meaningful agency appellate review. The shortened deadlines and bifurcated deadline system will make it more difficult for noncitizens to timely file their appeals with the BIA, and for those who do timely file appeals, the default response by the BIA will be summary dismissal of the appeal. Noncitizens will be forced to pay at least $1030[3] to receive essentially no review. They will have to provide legal briefing in their cases through a Notice of Appeal (NOA) because they will generally not receive a briefing schedule, and they must take all these steps within days of losing in immigration court and without the benefit of a written transcript. Furthermore, the rule implements a shortened briefing schedule, 20 days, and requires simultaneous briefing between the parties, which will inefficiently result in briefs that address issues that the other party has waived. The IFR also unfairly makes it nearly impossible for counsel to obtain an extension of a briefing schedule. This rule eviscerates due process and must be rescinded in full.

A. The Filing Deadlines in the IFR Are Unfair

Under the new rule, the filing deadline to submit an NOA will be accelerated from 30 days to 10 days in all cases except for asylum denials on the merits. Proposed 8 CFR § 1003.18(b). This extremely short time frame to file an appeal, coupled with different time frames for different types of appeals, will likely lead to many noncitizens missing their filing deadline before the BIA

[2] EOIR, EOIR Payment Portal, https://epay.eoir.justice.gov/index.
[3] The cost of BIA appeals increases on an annual basis under Public Law No. 119-21 (07/04/2025), codified at 8 U.S.C. § 1801 et seq.

and thus forfeiting their right to appeal. The undersigned organizations strongly oppose changing the appeal filing deadline from the longstanding 30-day rule.

a. The IFR's General 10-Day Filing Deadline for Notices of Appeal Is Unjustified and Unfair

Ten days does not give respondents adequate time to file an appeal.[4] In many cases, respondents appear pro se at their removal proceedings and seek counsel after they have been ordered removed. Getting an appointment with an attorney and having that attorney fully evaluate a case for appeal, which may include listening to the Digital Audio Recording (DAR), and file an NOA will be impossible in many cases. The effect of this accelerated timeline will be especially harsh given that the BIA's new default to summarily dismiss appeals means that to preserve issues for circuit court review, the noncitizen will need to articulate all legal and factual issues on appeal in the NOA. Under current practice, almost all appeals receive a briefing schedule, allowing noncitizens to flesh out legal and factual arguments *after* receiving a written transcript of the IJ's decision and of the proceedings.

The IFR preamble cites INA § 208(d)(5)(a)(iv) as the ground for giving those whose asylum applications are denied on the merits 30 days to file an NOA. That section of the statute states, "(iv) any administrative appeal shall be filed within 30 days of a decision granting or denying asylum, or within 30 days of the completion of removal proceedings before an immigration judge under section 240 of this title, whichever is later." There is no carve-out in the statute for the 30-day appeal deadline based on the IJ's reasoning in an asylum denial. Whether an IJ finds no exception to the one-year filing deadline or pretermits pursuant to the so-called asylum cooperative agreements, the result for the asylum seeker is the same—they are not granted protection from being removed to the country where they fear harm. The reasoning in footnote 15, 91 Fed. Reg. 5272, of the preamble, that asylum seekers whose applications are barred under INA § 208(a)(2) are not subject to the 30-day appeal deadline has no support in the text of the statute. Furthermore, EOIR's novel deadline theory completely ignores the second half of the statutory language, "*or within 30 days of the completion of removal proceedings. . .whichever is later.*" [Emphasis added]. *Id.* If Congress had intended a different appeal deadline for applications denied under INA § 208(a)(2), it could have specificed those deadlines in the INA but it did not do so here, choosing instead to require a 30-day clock in all asylum cases.

In addition to the effect this rule will have on asylum seekers, which is discussed below, the 10-day rule will be the default in other cases before the IJ—including whether DHS has met its burden to prove removability; complex determinations about the legal effect of certain criminal convictions; whether an applicant meets the legal standard for cancellation of removal; whether an applicant should be granted adjustment of status; and whether an applicant qualifies for a waiver. Even if the respondent had counsel before the IJ, it will be difficult for counsel to brief these complicated issues on a very short timeframe in the NOA, especially considering the

[4] This portion of the IFR was vacated by *Amica Center For Immigrant Rights, et al., v. Executive Office For Immigration Review, et al.,* --F.Supp. 3d --, No. CV 26-696 (RDM), 2026 WL 662494, at *1 (D.D.C. Mar. 8, 2026). We address it nonetheless to make the record about why EOIR should fully rescind this IFR.

ongoing docket shuffling at EOIR[5] which makes docket management for respondents' counsel very challenging. Counsel will need to address errors of law and erroneous fact finding by the IJ when, in many cases, there will be no written decision available for review. For respondents seeking new counsel, new counsel will not have access to the electronic record to review the case prior to making a decision whether to appear as counsel.

For noncitizens who do not have counsel, it will be nearly impossible to provide high quality legal arguments in the NOA. For such noncitizens, even if they ultimately manage to file a petition for review after the BIA summarily dismisses their appeal, it is likely they will not have preserved all of the potential legal arguments, given the curtailed timeframe. Other than EOIR's stated desire to handle cases expeditiously, it offers no justification for changing the filing date to this impossibly short window.

i. Noncitizens Whose Cases Have Been Pretermitted Have Already Been Denied a Day in Court, and Now Will Also Be Denied an Appeal

The IFR specifies that all appeals, other than asylum merits appeals, must be filed within 10 days of the IJ's decision. Among the appeals covered by this extreme new rule are appeals of an IJ decision to pretermit the respondent's application for asylum. Since the start of this administration, the BIA has issued three draconian decisions which have paved the way for massive immigration court "pretermissions" of claims and prevented asylum seekers from ever having a day in court on their claim of persecution or torture. After the BIA issued *Matter of C-A-R-R-*, 29 I&N Dec. 13 (BIA 2025), IJs began to look for minute defects in the asylum seeker's I-589, such as a failure to list the number of days spent in a country en route to the United States, and seize on that omission to pretermit the application as "incomplete."[6] The BIA subsequently issued *Matter of H-A-A-V-*, 29 I&N Dec. 233 (BIA 2025), which IJs use as a vehicle to deny asylum seekers a day in court by determining there are "no facts in dispute," when often these pretermissions occur early in proceedings with no prior warning that evidence is due and before the deadlines established by the Immigration Court Procedures Manual.

And finally, the BIA issued *Matter of C-I-G-M- & L-V-S-G-,* 29 I&N Dec. 291 (BIA 2025), which encourages IJs to grant DHS pretermission motions pursuant to so-called Asylum Cooperative Agreements (ACAs). Since the BIA issued these decisions, asylum seekers have had to fight to even have their protection claims adjudicated in immigration court. In some immigration courts, 80% of asylum seekers must now defend against motions to pretermit, rather than move forward with a hearing on their claims for protection.[7] As a result of these large-scale

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[5] Ximena Bustillo, Immigration courts fast-track hearings for Somali asylum claims, NPR, Feb. 9. 2026 https://www.npr.org/2026/02/09/nx-s1-5707217/somali-asylum-cases-rescheduled.

[6] These pretermissions contradict the clear language of 8 C.F.R. § 1208.3(c)(3), which says that an incomplete application must be returned to the asylum seeker, and that if it is not returned within 30 days of filing it will be accepted as complete.

[7] *See* Joseph Gunther and Brandon Marrow, No Hearing Necessary, February 18, 2026, https://bklg.org/blog/pretermission-02-26/?utm_source=bento&utm_medium=email&utm_campaign=broadcast&bento_uuid=55b5429c-39fe-4128-9b54-ae29e74344c3.

pretermissions, vast numbers of EOIR "decisions" are made before any substantive record is developed in the case. Likewise, in cases pretermitted pursuant to *Matter of C-I-G-M- & L-V-S-G-,* there is generally no evidentiary record concerning the noncitizen's actual asylum and protection claims as to their country of origin. Instead, the limited analysis performed by the IJ is only about the potential persecution an asylum seeker would face in a so-called "third country" to which DHS seeks to remove them. In fact, the BIA encouraged IJs to dispose of all protection claims in ACA cases without a full hearing: "an Immigration Judge should typically be able to resolve the applicability of the safe third country bar without conducting a full evidentiary hearing. Instead, it will generally be appropriate for the Immigration Judge to conduct an abbreviated hearing, typically in a master calendar setting, that includes consideration of any documentary evidence submitted by the respondent." 29 I&N Dec. at 296.

Finally, since H.R.1[8] went into effect on July 4, 2025, there has been significant confusion and difficulty for many EOIR respondents, particularly asylum seekers, to pay newly established EOIR fees. In some instances, where respondents have been unable to pay asylum fees, IJs have pretermitted their asylum applications based on alleged nonpayment of the new initial or annual asylum fees,[9] leading to erroneous removal orders. In practice, IJs have been providing limited and inconsistent notice—sometimes as little as two days' notice—regarding the deadlines for payment.[10] As a result, asylum seekers with otherwise meritorious claims risk having their applications improperly dismissed without a full hearing on the merits, simply because they lacked adequate notice that the fees were due. Compounding these harms, IJs have in some cases improperly terminated applications for statutory withholding of removal and protection under the Convention Against Torture[11]—forms of protection that are not subject to either the initial asylum fee or the annual asylum fee[12]—further depriving applicants of important protections against persecution and torture. By restricting appellate procedures and limiting opportunities for review, the rule will exacerbate these errors, leaving asylum seekers and others seeking safety, with little recourse to correct unlawful pretermission decisions and increasing the likelihood of wrongful removals. Indeed, in ongoing litigation defending EOIR's implementation of the annual asylum fee, the government has pointed to the availability of BIA review as a cure for

[8] H.R.1, ext available at https://www.congress.gov/bill/119th-congress/house-bill/1/text.

[9] 8 U.S.C. § 1802(e) (imposing a $100 fee to apply for asylum); *id.* § 1808(a) (imposing an annual $102 fee for every year that an asylum application remains pending).

[10] *See Asylum Seeker Advoc. Project v. U.S. Citizenship and Immigr. Servs.*, No. SAG-25-03299, 2026 WL 262552, at *3, *6–7 (D. Md. Feb. 2, 2026) (noting examples of IJs giving respondents only two days' notice of the deadline to pay the annual asylum fee).

[11] *See id.* at *8 (noting examples of IJs and immigration courts denying applications for withholding of removal and protection under the Convention Against Torture for failure to pay the initial and annual asylum fees).

[12] *See, e.g.*, 8 U.S.C. § 1802(e) (requiring collection of a fee from any noncitizen "who files *an application for asylum under section 1158*" (emphasis added)); *id.* § 1808(a) (requiring collection of a fee for every year a noncitizen's "*application for asylum* remains pending" (emphasis added)); *Asylum Seeker Advoc. Project*, 2026 WL 262552, at *8 (noting that USCIS and EOIR "previously represented that failure to pay the [annual asylum fee] would not subject applicants to denial of these other forms of relief").

exactly these problems.[13] That position is directly contrary to the severe restrictions on BIA review in the IFR.

The IFR doubly deprives asylum seekers subject to pretermission of their claims to due process. Not only will many (and if trends continue, most) asylum seekers never get to present their claim before an immigration judge, many will find it impossible to meet the 10-day filing deadline for an appeal before the BIA. As a result of this rule, federal courts of appeals will not only will be flooded with petitions for review, they will be flooded with petitions for review with virtually no evidentiary record and little or no substantive analysis from the agency. Congress cannot have intended for the second highest level federal courts in the country to be assessing immigration cases that have not been developed at all by the agency it entrusted to adjudicate these claims.

ii. The Effect of the IFR on Pro Se Respondents Will Be Enormous—Asylum Seekers Never Get a Forum for Their Case

The impact of the IFR, especially for pro se asylum seekers whose claims have been pretermitted, will be devastating. Pro se asylum seekers attend court dates expecting that they will need to explain to an impartial judge what events caused them to flee their countries, and why they fear returning. Instead, they are increasingly met by motions by DHS to send them to countries they know little to nothing about and, theoretically, pursue their claims for protection in those countries. It will be difficult, if not impossible, for many pro se asylum seekers to explain in an NOA, which will ultimately become the basis of a federal circuit court appeal, why the application of a particular ACA to them was not lawful.

EOIR's passing acknowledgement of the burden the 10-day rule puts on noncitizens is disingenuous at best. First, it only addresses this central problem with the rule in a footnote, not seeing fit to include this issue in the text of the preamble. Footnote 16 says that EOIR, "acknowledges that some [noncitizens] proceed pro se before the Immigration Judge and *may* seek counsel after an adverse decision and that in those circumstances changing the deadline from 30 to 10 days, except for asylum appeals by [noncitizens] not barred from applying, *may* impact their ability to obtain counsel to file a Notice of Appeal." 91 Fed. Reg. 5272, n. 16 (emphasis in original.). It is unclear why EOIR chose to emphasize the word "may" in this sentence, seemingly implying that it is not likely that the shortened deadline would actually prevent pro se asylum seekers from securing counsel. The footnote continues, stating that pro se noncitizens can file pro se NOAs—but does not acknowledge that under this new framework where summary dismissals are the default, the NOA itself will become the only legal briefing before the BIA in the case. Twice in this footnote, EOIR states that it has considered that the 10-

[13] *See Asylum Seeker Advoc. Project v. U.S. Citizenship and Immigr. Servs.*, No. 1:25-cv-03299 (D. Md. Feb. 17, 2026), Dkt. No. ECF 99, Defendants' Mot. to Dismiss & Mem. in Supp. at 3–4, 7 (arguing that asylum applicants "have an 'adequate remedy'" to challenge erroneous "orders in individual cases by appealing to the BIA and then to a court of appeals"); Dkt. No. ECF 88, Tr. of Mots. Jan. 28, 2026 Hr'g at 10:15-10–1111:6 (arguing that an asylum applicant who believes "they were wrongly required to pay the AAF [Annual Asylum Fee] twice" can always "seek reconsideration or they can file a motion to reopen" and "[i]f that doesn't work, they can appeal to the BIA").

day rule may affect noncitizens' ability to obtain counsel, but it does not analyze how the lack of counsel is likely to affect the results of the appeal.

As prior studies have shown, there is no single factor that is more likely to affect the outcome of a noncitizen's case than if the noncitizen is represented by counsel. Following the deluge of federal circuit courts with immigration cases after the BIA began to affirm cases without opinion in the early 2000s, then Chief Judge Robert Katzmann of the Second Circuit convened a study group on the issue of immigration representation. As Judge Katzmann wrote:

> For low-income immigrants, having an attorney is the difference between being allowed to stay in this country and suffering catastrophic deportation. The statistics are staggering: undetained asylum-seeking immigrants without a lawyer prevailed in only 13 percent of their cases, while those with a lawyer prevailed in 74 percent of their cases; detained immigrants without lawyers prevailed in only 3 percent of their cases, while 18 percent prevailed with lawyers. In other words, unrepresented immigrants are being deported not because they did not have a legal right to remain but . . .because they could not vindicate that right without a lawyer.[14]

Instead the IFR preamble just summarily concludes, "[t]he Department believes that the benefits of the reforms in this rule outweigh that potential impact, especially given that such [noncitizens] would have had time prior to the removal order to seek the assistance of counsel." 91 Fed. Reg. 5272, n. 16. Since the only benefit of the 10-day deadline is increasing the speed of summary dismissal, it is hard to imagine how that benefit outweighs the considerable interest noncitizens have in securing counsel. As a result of this unreasonable deadline, it is likely that many pro se asylum seekers will be removed pursuant to ACAs to countries they know little to nothing about, without ever having a fair adjudication of their fear claims.

b. The IFR's "Asylum Merits" Exception, with a 30-Day Appeal Deadline, Will Cause Mass Confusion

The only exception to the 10-day filing rule under the IFR, is for asylum denials on the merits of the case, as opposed to pretermission for ACAs, the one year filing deadline, or filing multiple asylum applications. Thus, in order for a noncitizen to know whether they must file their NOA within 10 days or within 30 days, they will have to understand the basis for the IJ denying their claim. As justification for this change to decades of practice, the preamble states that imposing a 10-day filing deadline will "harmonize" appeal deadlines between removal proceedings and a completely unrelated type of case that the BIA considers, "review of an Administrative Law Judge's final order in certain categories of cases adjudicated by EOIR's Office of the Chief Administrative Hearing Office" 91 Fed. Reg. 5272. Yet EOIR does not address that the most common types of appeal before the BIA, appeals of asylum decisions, will now have two separate filing deadlines that are not "harmonized." Nor does the IFR acknowledge the multiple ways IJs are pretermitting cases and that the 10-day deadline would only apply to ACA pretermissions, thus creating "disharmony" even among pretermission deadlines. Under this rule pretermitted asylum cases would have different appeal deadlines based on whether the IJ

[14] Robert A. Katzmann, Study Group on Immigrant Representation: The First Decade, 87 Fordham L. Rev. 485, 486 (2018).

pretermitted for allegedly not adequately completing the application for, allegedly not stating that facts are in dispute, or allegedly not paying the fee (30 days) versus ACA-based pretermissions.

Notably the IFR also does not discuss how the BIA will treat appeals if the denial is on multiple grounds. For example, the IJ may hold a hearing on the merits, which includes an argument about the one-year filing deadline in the case. If the IJ finds no one-year exception and, in the alternative, finds that the asylum seeker did not demonstrate a well-founded fear of future persecution, it is not clear which filing deadline would apply. The most cautious approach would be to file within 10 days, which may mean that the statutory right to a 30-day appeal period will be largely erased by the 10-day default rule.

c. The Clock on Filing Deadlines Is Unfair

As previously discussed, the 10-day appeal clock is so short that many noncitizens will have difficulty meeting the deadline, especially since the NOA may be the only substantive filing before the BIA. Making this extraordinarily short time frame even more challenging is the fact that this 10-day start begins to run when the IJ *issues* the decision, but to comply with the regulation, the BIA must *receive* the NOA by the deadline. This non-proportional rule is unfair to noncitizens.

The IFR states that the 10-day (or 30-day) clock begins to run either on the date of the oral decision, the date the decision is uploaded electronically, or the date the immigration court *mails* a written decision. In any of these circumstances, the respondent is prejudiced by the 10-day rule.

i. The Respondent Will Be Prejudiced If the Decision Is Oral

If the IJ issues an oral decision, the respondent will not have a written decision to analyze in crafting the NOA. Instead, counsel will need to listen to the DAR, and transcribe the written decision, during the short timeframe available to write the full NOA. If the noncitizen is unrepresented, they do not have any way to access the DAR, and, in any event, the IJ's oral decision will be in English.

While some unrepresented noncitizens may be able to access their records electronically through the Respondent Access Portal, unless they are enrolled prior to the IJ issuing the decision, they would not have time to complete the lengthy, multi-step enrollment process before the NOA would be due.[15] To enroll in this portal, pro se respondents must sign up online, then await receipt of a document mailed through the postal service, and then visit an immigration court in person with identification to complete registration.[16] Furthermore, the portal is only available to adult noncitizens whose cases are not consolidated with any other noncitizens.[17] Most importantly, even for those noncitizens who have enrolled in the portal before the IJ issues the decision, the Respondent Access Portal does not grant access to the DAR to unrepresented

[15] EOIR, Respondent Access Portal Frequently Asked Questions, updated Jan. 7, 2026, https://www.justice.gov/eoir/respondent-access-portal-frequently-asked-questions.
[16] *Id.*
[17] *Id.*

respondents.[18] Therefore unrepresented respondents will need to file a NOA with no access to the oral decision they are appealing.

And, similarly, if a respondent is able to secure new counsel, counsel will either have to enter an appearance without having heard the oral decision, and thus not have been able to assess the merits of the case, or will need to write an NOA without access to the decision. Given that the BIA intends to summarily dismiss appeals as a default, it will be extremely difficult for new counsel to preserve all legal arguments in an NOA on this accelerated timeframe and without access to the record.

In some cases, the IJ will signal an intention to rule a particular way from the bench but will expand on their reasoning through a written decision that is later mailed or uploaded. *Matter of Iskandarani*, 29 I&N Dec. 26 (BIA 2025) held that if the IJ issues an oral decision that is later memorialized in writing, the appeal deadline clock begins to run on the date of the oral decision. *Iskandarani* does not address a situation where the IJ gives greater detail in a written decision than the oral decision. Moreover, *Iskandarani* was issued when the NOA filing deadline was 30 days. Since respondents will have to write an NOA, which will generally be their only communication with the BIA, within 10 days, the filing deadline should not start to run with the issuance of the oral decision.

ii. The Respondent Will Be Prejudiced If the Decision Is Electronic

As discussed above, most pro se respondents do not have access to the Respondent Access Portal. Therefore, if a respondent is unrepresented, and the IJ uploads the decision to the Portal, the respondent would not have a way to access the decision. Moreover, even if a respondent has been able to sign up for this Portal, they may not have reliable access to a computer or to the internet to regularly check the site for the IJ's upload. If an unrepresented noncitizen is detained, they will generally have no internet access, making it impossible to access electronic records.

iii. The Respondent Will Be Prejudiced If the Decision Is Mailed

The IFR gives the same deadline, 10 days as the default, and 30 days in some asylum cases, for written decisions which are mailed by the immigration court. IJs typically issue written decisions, rather than oral decisions, in cases with complex legal issues that require further research by the IJ, prior to issuance. Yet respondents will have even less time to draft an NOA in cases where the IJ issues a written decision.

The IFR contains no additional time to account for the time it takes from the IJ issuing the decision, to the decision being physically mailed by court personnel, to the decision being received by the respondent. The U.S. Postal Service website states that First Class Mail is generally delivered in "1-5 business days (not guaranteed)."[19] While the IFR does state that if the

[18] *Id.*

[19] U.S. Postal Service, How Can We Help?, updated March 31, 2025, https://faq.usps.com/s/article/Delayed-Mail-and-

NOA is due on a weekend or holiday, the filing date is extended to the next business day, it in no way accounts for the delays in mail delivery occasioned by weekends or holidays. Indeed, the Post Office does not even guarantee delivery within 5 business days. Respondents who are detained will likely face even further delays in receiving a mailed decision, as detention facilities often take several additional days to process and deliver mail, even legal mail, to the people detained there.

Making matters worse, while the 10-day clock starts running on the date the immigration court mails it, the respondent's NOA must be *received* prior to the filing deadline. 8 CFR § 1003.3(g)(6)(iii) specifies, "Service of paper filings. If electronic filing is not being used in a particular case, the party filing with the Board must serve a copy of the filing on the opposing party and include a certificate of service showing service on the opposing party with their filing." Given how long it may take for respondents to receive mailed, written decisions, and given that they must nonetheless file the NOA so that it is *received* before the 10-day deadline, many noncitizens will miss their filing deadline. For those who receive the mailed IJ decision, they will have only a couple of days to draft an NOA and will likely be forced to pay expensive fees for overnight delivery or in-person courier services. Detained respondents may see their 10-day period elapse entirely before they even receive a written decision, and likely do not have access to speedier mail processes to submit their NOA. Forcing noncitizens to pay for timely delivery through expensive private services when the government simply sends decisions by regular mail is fundamentally unfair.

d. As a Practical Matter, the 10-Day Rule Eliminates the Ability to Seek Reconsideration Before the IJ

Immigration and Nationality Act (INA) section 240 (c)(6) provides the noncitizen 30 days to seek reconsideration of a removal order. The regulations further specify, in a section titled, "Reopening or reconsideration before the immigration court" that a noncitizen may move the IJ to reconsider their decision if there was an error of fact or law. 8 CFR § 1003.23. The new 10-day notice of appeal deadline in most cases will render the right to file a motion to reconsider with the IJ a nullity. Filing a motion to reconsider does not toll the deadline to file an appeal with the BIA. Immigration Court Practice Manual § 4.8(g). Yet it would be nearly impossible to write a well-reasoned motion to reconsider, file it, and receive a ruling by the IJ all sufficiently before the 10-day appeal filing deadline for the respondent to then write an NOA that will be received by the BIA by the 10-day filing deadline.

Stripping noncitizens of a meaningful opportunity to seek reconsideration before the IJ is especially significant given that pursuant to the IFR most appeals will be summarily dismissed. Notably, the regulations provide no guidelines for the types of cases that will be summarily dismissed, stating only that the BIA wants to preserve its resources to focus on issues of that are "novel or complex." 91 Fed. Reg. 5271. Thus in cases where the IJ makes a clear mistake—such as finding that the respondent is ineligible for cancellation of removal because they lack the statutorily required years of residence—noncitizens may have no recourse other than a federal circuit appeal. In this scenario, a noncitizen could file a motion to reconsider with the IJ, a

Packages#:~:text=Table_content:%20header:%20%7C%20MAIL%20CLASS%20%7C%20DELIVERY,STANDARD:%202%2D8%20business%20days*%20(not%20guaranteed)%20%7C.

motion that now carries a fee of $1065.[20] But the respondent would have to simultaneously prepare the arguments for appeal in the NOA, and if they have not received a response from the IJ within a couple of days, abandon the motion to reconsider so that they do not forfeit their right to further appeal by missing the BIA filing deadline. As discussed above, if the case happens to have a paper record of proceedings, the time it would take to mail a paper motion, await a mailed paper decision, and mail a paper NOA, would essentially eliminate filing a motion to reconsider as an option.

The 10-day appeal filing deadline clearly undermines Congress's intent that noncitizens have the ability to file a motion to reconsider before the IJ, and is therefore ultra vires.

B. The BIA's Determination That Almost All Appeals Will Be Summarily Dismissed Is a Radical Departure from Existing Rules and Will Deny Noncitizens Due Process

a. A Single Board Member Will Review Decisions and Summary Dismissal Will Become the Default

The IFR radically changes the purpose of the BIA. By making summary dismissal the default rule, the BIA will no longer function as an appellate body in the vast majority of appeals that are filed with the Board. Instead, only when a single BIA member[21] who reviews a decision seeks approval from a majority of the en banc Board members, will the BIA issue a decision. In fact, the preamble to the IFR states that an advantage of summarily dismissing virtually all newly filed appeals will be that the BIA can focus on issuing precedential decisions.

Already the BIA under this administration has issued a record number of decisions. Out of 78 decisions issued by the BIA or attorney general through mid-February, fully 77 have gone against the noncitizen.[22] If a primary goal of the IFR is to issue more precedential decisions, it is statistically highly likely that those decisions will go against the noncitizen. Many of the BIA precedents from the last year have upended settled practice, including decisions barring noncitizens from seeking bond in immigration court and decisions preventing asylum seekers from having a hearing on their protection claims.

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[20] EOIR, EOIR Payment Portal, https://epay.eoir.justice.gov/index.

[21] While the EOIR website refers to BIA adjudicators as "Appellate Immigration Judges," EOIR, Board of Immigration Appeals (updated Jan. 28, 2026) https://www.justice.gov/eoir/board-of-immigration-appeals#board, the IFR and proposed rule use the term "Board member," *see e.g.* proposed 8 CFR § 1003.1(d)(2) ("he Board shall summarily dismiss the appeal unless a majority of the permanent Board members vote en banc to accept the appeal for adjudication on the merits."). This comment will therefore use the term "Board member" or "BIA member" throughout.

[22] National Immigration Project, The BIA and AG's Systemic Destruction of Noncitizens' Rights in Removal Proceedings (Feb. 19, 2026) https://nipnlg.org/work/resources/bia-and-ags-systemic-destruction-noncitizens-rights-removal-proceedings. *See also,* Ximena Bustillo and Rahul Mukherjee, An immigration court few have heard of is quietly shaping policy behind the scenes. NPR, March 20, 2026, https://www.npr.org/2026/03/20/nx-s1-5707535/trump-immigration-detention-appeals-board-deportation.

Given the many immigration judges who have been fired without cause since this administration took office, seemingly because of their backgrounds in the defense bar and/or their relatively higher relief grant rates,[23] those IJs who remain on the bench will have further incentive to deny cases because they will know that the BIA will provide no meaningful review of their decisions. While respondents can still seek review before the federal courts of appeals, many respondents will not have the financial resources to pay counsel for this more complex litigation, and will not be able to do so pro se. As a result, IJs will have very few checks and balances on how they are deciding cases, whether they are following the law, or even whether they are interacting fairly with respondents.

b. Since Most Appeals Will Not Receive a Briefing Schedule, Counsel Must Preserve Every Legal and Factual Issue in the NOA

While the IFR sets forth the new default system to summarily dismiss most appeals without ever sending counsel a briefing schedule, nowhere in the preamble does EOIR discuss the enormous change this will create in filing NOAs. Under current BIA rules and procedure, it is possible to file a short NOA, check the box indicating that counsel will file a legal brief, and then receive a briefing schedule at which point counsel can fully develop the legal arguments. One of the reasons this procedure makes sense is that at the time the NOA is filed, counsel generally does not have access to a written IJ decision or to the record of proceedings.

Under the IFR, counsel will still not have access to the IJ decision or record of proceedings, but under the new rule the default will be summary dismissal within 10 days of filing the NOA with a written order issued within 15 days, *see* proposed 8 CFR 1003.1 (d)(2)(ii) and no briefing before the BIA. That change means that in order for the noncitizen to preserve issues for appeal to the court of appeals, they will need to do so in the NOA. Thus, not only does this IFR accelerate the NOA deadline from 30 days to 10 days in most cases—it all also requires the noncitizen to set forth every legal argument in a cogent form, which will serve as the basis for federal court appeal; any issue not raised in the NOA is deemed waived. Proposed 8 CFR 1003.38(b)(3). Moreover, counsel will need to file a full appellate brief in the form of a NOA, without having access to the record of proceedings. The preamble discusses the possibility of a Petition for Review (PFR) if the appeal is summarily dismissed, 91 Fed. Reg. 5272, n. 16., but does not acknowledge the substantial burden the new rule places on noncitizens, to not only *file* their NOA within 10 days, but to also fully brief the issues that a court of appeals may later consider within this abbreviated timeframe.

[23] Anusha Mathur and Ximena Bustillo, U.S. has a quarter fewer immigration judges than it did a year ago. Here's why, NPR, Feb. 23, 2026, https://www.npr.org/2026/02/23/g-s1-110911/trump-immigration-judges-dismissals-numbers. ("'You are telling every other judge that is left that they better not be following the law or their conscience; that they need to apply the law as you are interpreting it,' said Arwen Swink, a former immigration judge fired from a San Francisco court in December. 'You lose a little piece of justice. You lose some fundamental fairness, and understandably, you undermine confidence in the proceedings.'")

c. A Transcript Will Not Be Created in Most Cases

One of the most substantial changes wrought by this rule is that in the vast majority of cases, no transcript of proceedings will be created at all. The failure of the agency to provide transcripts is deeply problematic for several reasons.

The current version of 8 CFR § 1003.5(a) contains the following language, "[w]here transcription of an oral decision is required, the immigration judge shall review the transcript and approve the decision within 14 days of receipt, or within 7 days after the immigration judge returns to their duty station if the immigration judge was on leave or detailed to another location." But the new version eliminates this language and replaces it merely with "[f]or all appeals not summarily dismissed, the record shall be forwarded to the Board as promptly as possible upon receipt of the appeal." Proposed 8 CFR § 1003.5(a); *see also,* "For appeals of orders by an Immigration Judge in which no transcript is warranted. . ." 8 CFR § 1003.3(c). The IJ will no longer have an opportunity to correct errors in the transcription of their decision. 91 Fed. Reg. 5273. Thus, in cases where the BIA does not order a transcript, the transcript will be produced only if a PFR is filed, and seen in the first instance by federal judges on the court of appeals during PFR adjudication. If there are significant gaps in the transcript due to recording issues, the federal court will have to remand the case to the agency for further proceedings. In these situations, the noncitizen will have to pay $1030 to the BIA for summary dismissal, and an additional $600 to the federal court, only to learn of technological problems before the IJ. There is no mechanism for the noncitizen to have these fees refunded.

Under the new regulations, a single BIA member must decide almost immediately whether to forward the case to the en banc Board for a potential written decision. If the single BIA member does not forward the case, it will be summarily dismissed. Not only are there are no requirements in the IFR that the single Board member assigned the case actually reviews the record—there are no requirements that the Board member even reads and assesses the NOA. Nothing in the IFR prevents the BIA from interpreting the "shall summarily dismiss the appeal" mandate to preclude review altogether. Likewise, the BIA could choose to only review appeals of IJ grants by DHS and summarily dismiss all NOAs by noncitizens. Given its current denial of rate over 97% in published decisions, this possibility does not seem farfetched.[24]

If the Board member forwards an appeal to the en banc Board, a majority of the en banc Board must decide within 10 days of receipt of the NOA whether or not to accept the appeal. If the Board does not accept it, or does not hold an en banc vote within 10 days of the request the appeal shall be summarily dismissed and the single Board member must issue a written order summarily dismissing the appeal within 15 days of the NOA being filed. Proposed 8 CFR § 1003.1(d)(2)(ii).

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[24] *See* National Immigration Project, The BIA and AG's Systemic Destruction of Noncitizens' Rights in Removal Proceedings (Feb. 19, 2026) https://nipnlg.org/work/resources/bia-and-ags-systemic-destruction-noncitizens-rights-removal-proceedings; *See also,* Ximena Bustillo and Rahul Mukherjee, An immigration court few have heard of is quietly shaping policy behind the scenes. NPR, March 20, 2026, https://www.npr.org/2026/03/20/nx-s1-5707535/trump-immigration-detention-appeals-board-deportation.

With the elimination of the regulation that requires transcription of the record—or even of the IJ's oral decision—it is not clear what the Board member or the en banc Board will review during this extremely accelerated timeframe. It is possible that the BIA member could listen to the DAR, but listening to a recording takes considerably longer than reading a written decision, and throughout the preamble to the IFR, EOIR emphasizes the need for speed in adjudication.

Therefore, it is possible that the BIA member will review the NOA and summarily dismiss appeals based on the issues raised in the NOAs. If that is the envisioned procedure, it would not comport with appellate norms. There may be cases where the IJ utterly misapplied the law or failed to meaningfully develop the record, but unless the NOA lays out those problems clearly, the Board member would never know about the problems. In cases where the respondent is pro se, and therefore not an expert in immigration law, it is especially likely that the NOA would not raise a clear error that the IJ may have made.

Pursuant to the IFR, when a Board member summarily dismisses an appeal, they are concluding that the IJ decision represents the final agency decision on the case. "When an appeal is summarily dismissed under this paragraph (d)(2)(ii), the Immigration Judge's decision is adopted by the Board and articulates the rationale for removal that is subject to judicial review." Proposed 8 CFR § 1003.1(d)(2)(ii). To the extent that the BIA is thus affirming that the IJ rendered a proper decision that the Department of Justice (DOJ) should defend in the federal court of appeals, it would seem that the BIA member would, at minimum, have to read or listen to the IJ decision as well as review the transcript of proceedings. The IFR does not address how a Board member would accomplish this review in the timeframe provided, especially since the IFR indicates that there will not be a transcript created in most cases.

Furthermore, proposed 8 CFR § 1003.1(d)(2)(iii) states that the "[t]he Board's case management screening plan shall promptly identify cases that are subject to summary dismissal pursuant to this paragraph (d)(2)(iii)." It is therefore not clear whether an actual BIA member will review IJ decisions prior to issuing a summary dismissal order at all.

d. There Is No Mechanism to Oppose a DHS NOA

A single Board member will decide, based solely on the NOA, whether or not to refer a case to the Board for an en banc decision. Thus the appellant has the opportunity to frame the issue in a way that may lead the Board to accept the appeal for en banc review, but the appellee has no opportunity to respond to the appellant's framing, unless the en banc Board chooses to issue a briefing schedule in the case. This system will give disproportionate power to DHS, who will be able frame certain cases as requiring clarity from the Board and therefore be more likely to result in decisions that narrow the rights of noncitizens. Already the BIA has chosen to publish decisions that almost exclusively favor DHS; this procedure will make it even easier for DHS to highlight cases that the Board can use to narrow noncitizens' rights.[25]

[25] National Immigration Project, The BIA and AG's Systemic Destruction of Noncitizens' Rights in Removal Proceedings (Feb. 19, 2026) https://nipnlg.org/work/resources/bia-and-ags-systemic-destruction-noncitizens-rights-removal-proceedings. *See also*, Jayashri Srikantiah and Rajan Lukose, The Board of Immigration Appeals Under the Second Trump Administration an Empirical Analysis of Grant Rates and DHS Appellate Behavior, at 2, Stanford, (March 25,

C. Simultaneous Briefing Creates More Work for Practitioners and Means Appellees Must Write Longer Briefs, Addressing Issues That Are Not Addressed in the Appellant's Brief

The IFR's simultaneous briefing schedule is inefficient and unfair to counsel. Since one claimed reason for summarily dismissing most cases is to allow the Board to focus its resources on complex cases, 91 Fed. Reg. 5271, it is irrational for the BIA to do away with consecutive briefing. Consecutive briefing allows the appellant to develop the issues on appeal and the appellee to respond only to the issues raised by the appellant in briefing. With simultaneous briefing, each side has to discuss every potential legal issue in the case. With a 30-page brief limit, BIA Practice Manual § 3.6(b), that means counsel may spend significant space addressing an issue that the other side does not dispute. As a result, if there is a specific legal issue in which the Board is interested, the issue may be less developed in briefing because of the simultaneous briefing.

The preamble claims that since the BIA already employs simultaneous briefing in detained cases, it should do so in all cases calling the different procedures in detained cases and non-detained cases "a hodgepodge of briefing schedules with different time limits, depending on whether the case involves a detained [noncitizen] and whether an extension is granted." 91 Fed. Reg. 5273. But there is no "hodgepodge," there are simply two tracks, and the expedited track for detained noncitizens is justified by the substantial liberty interest that anyone whose freedom is restricted has in the fastest possible resolution of their cases. Here EOIR states that it "no longer believes that expeditious resolution should be limited to detained cases." *Id.* However, EOIR does not explain why detained cases are no longer a priority or why "finality" in all cases outweighs the need for well-reasoned briefing that succinctly addresses the arguments made by the opposing party.

In addition to requiring simultaneous briefing, the BIA is eliminating reply briefs, unless the BIA specifically requests such briefing. The combination of simultaneous briefing and no reply briefs means that the appellant's counsel will not have an opportunity to respond to arguments made in the appellee's brief. Thus even in the small number of cases the en banc Board chooses to not summarily dismiss, it will not allow the appealing party a full opportunity to brief the issues. The preamble to the IFR states, "in the Board's experience, such reply briefs rarely, if ever, positively contribute to the arguments at issue." 91 Fed. Reg. 5273. However, the IFR does not address the fact that all briefing will now be simultaneous, making reply briefs more important than they would have been when issues were briefed consecutively. The IFR also does not acknowledge that reply briefs are an important part of briefing in other appellate bodies, including federal courts of appeals. The blanket statement that such briefs before the BIA "rarely, if ever" matter is not supported by any data about outcomes in cases with reply briefs filed versus those without.

D. The Proposed Rule's Change to Briefing Extensions Is Unreasonable

The proposed regulations make clear that most appeals will be summarily dismissed, stating "for all appeals of any decision issued on or after March 9, 2026, the Board shall summarily dismiss

2026) https://law.stanford.edu/documents/research-on-bia-decision-making/. (Noting that DHS has already increased its rate of appeals by over 300% under this administration.)

the appeal unless a majority of the permanent Board members vote en banc to accept the appeal for adjudication on the merits." Proposed 8 CFR § 1003.1(d)(2)(ii). Thus in most cases, practitioners can correctly assume that there will not be a need to write a brief in the case. However, in the small number of cases where the Board decides to hear the appeal, in cases "in which no transcript is warranted" briefs will be due "in no case more than 35 days after the appeal was filed." Proposed 8 CFR § 1003.3(c). Briefs are due simultaneously within 20 days of the Board issuing a scheduling order. *Id.* Similarly, in cases where a transcript is "warranted," the Board will issue a 20-day simultaneous briefing schedule.

Under the new rule, it will be virtually impossible for counsel to obtain a briefing extension, even though briefing will only be ordered in cases that present "novel or complex legal issues." 91 Fed. Reg. 5271. Nonetheless, counsel can only obtain an extension based on "exceptional circumstances" as defined at INA § 240(e)(1). This definition has only previously been applied in the context of motions to reopen, not for briefing extensions, which are an ordinary and accepted part of legal practice. Under this rule counsel will only be able to receive a briefing extension in "circumstances such as battery or extreme cruelty to the [noncitizen] or any child or parent of the [noncitizens, serious illness of the[noncitizen], or serious illness or death of the spouse, child, or parent of the [noncitizen], but not including less compelling circumstances." 91 Fed. Reg. 5273. The regulation itself states at proposed 8 CFR § 1003.3(c), "[f]or purposes of this paragraph (c)(1), workload concerns, travel plans, or similar concerns within the control of either party, or their representatives, do not constitute exceptional circumstances." The rule does not consider the fact that many immigration attorneys are solo practitioners, nor does it account for the common docket shuffling that EOIR engages in, speeding up cases for individual hearings that counsel had thought would not be heard for many months or years. Furthermore, in many cases the file will be paper, meaning that the scheduling notice will be mailed to the practitioner. Thus, it is possible a practitioner could be out of the country on a two-week vacation, return to the office and have only a couple of days to write a brief on an issue which would, pursuant to this rule, be "novel" or "complex."

Likewise, immigration practitioners are often subject to immigration court scheduling that is completely beyond their control. For example, in February, without warning or explanation, EOIR began fast-tracking immigration court hearings for Somalis, moving cases scheduled months or years in the future to immediate hearings, and leaving counsel almost no preparation time.[26] In state and federal court, it is common practice for judges to confirm availability with counsel for both sides before setting trial dates. But IJs frequently schedule individual hearings without regard to the schedule of the noncitizen or their counsel. Pursuant to the IFR "workload concerns" will not be grounds to extend the briefing schedule, which will make it difficult for counsel to file BIA appeals without the fear of running afoul of ethical obligations to provide complete and competent representation to their clients.

[26] Francia Garcia Hernandez, Immigration Judge Fast-Tracks Asylum Hearings For Local Somali Asylum-Seekers, BLOCK CLUB CHICAGO, Feb. 18, 2026, https://blockclubchicago.org/2026/02/18/immigration-judge-fast-tracks-asylum-hearings-for-local-somali-asylum-seekers/.

E. The Rule Will Mean That Noncitizens in Withholding-Only Proceedings Generally Receive No Appellate Review of IJ Decisions

In *Riley v. Bondi,* 606 U.S. 259 (2025), the Supreme Court determined that the deadline to file a PFR for noncitizens in withholding-only proceedings is within 30 days of the prior removal order being reinstated. Thus, to obtain federal court review in most withholding-only cases, a noncitizen must file a PFR shortly after re-entering the United States or shortly after being arrested in the interior and having an old order re-instated. Most noncitizens are not able to locate counsel to file a federal appeal in that timeframe, and, in any event, until a noncitizen has retained counsel, it is not logical to assume that they would wish to preserve their right to appeal a withholding or Convention against Torture (CAT) decision before they have even filed for that protection (and in many instances before they have even received a Reasonable Fear Interview placing their claims before an immigration judge.) Noncitizens in withholding-only proceedings, are not exempt from the default summary removal procedure. As a result, both withholding protection under INA § 241(b)(3) and CAT protection claims will be decided by IJs with no substantive appellate review available. While the BIA will continue to hear appeals in other matters where federal court review is not available, including bond appeals and appeals of DHS visa decisions, 91 Fed. Reg. 5270, n. 11, there is no similar provision to hear appeals in withholding-only proceedings. This prohibition on review does not make sense in the context of protection claims that are specifically designed to evaluate eligibility for mandatory forms of protection and comply with international human rights laws.

F. The IFR Ignores and Misstates Evidence in Its Analysis

The analysis provided in the preamble is deeply flawed and results-oriented. For example, one justification for the IFR is that the BIA rarely sustains appeals by either party. The preamble asserts, in footnote 8, "Between October 1, 2023, and September 15, 2025, the Board sustained only 123 out of 55,065 case appeals (excluding interlocutory appeals, bond appeals, and appeals of motion to reopen decisions) on the merits." 91 Fed. Reg. 5270, n. 8. Yet that figure is deeply flawed because it does not include remands to the IJ—and in virtually all cases where a party (either the noncitizen or DHS) prevails, the case is remanded to the IJ for further proceedings. The first sentence of footnote 8 states, "Although the Board may remand a case for many reasons (e.g. to update background checks or in response to an [noncitizen's] request for a remand to seek a new form of relief), it rarely sustains a party's appeal on the merits." *Id.* Yet, unfathomably, EOIR does not acknowledge in this footnote that chief among the "many reasons" to remand the case to the IJ is for further proceedings following a decision by the BIA that the IJ's factual or legal findings were erroneous.

In the next footnote, EOIR claims, "The Department believes that the benefits of this rule's streamlining efforts for the Government and for those with meritorious claims outweigh the potential for costs to those with non-meritorious claims who would have benefitted from the delay and whose appeals may be subject to summary dismissal under this IFR." *Id*, n. 9. This reasoning fails to account in any way for the many cases in which IJs erroneously apply the law or make a clear error in fact-finding. Under the IFR, the default is for the BIA to summarily dismiss cases and reserve the time of BIA members "going forward, on selecting decisions for review that present novel issues warranting the Board's attention." 91 Fed. Reg. 5270. The IFR

preamble language makes explicit its bias—if a noncitizen appeals, the only purpose can be delay. There is no longer any mechanism for the BIA to right a clear error made by an IJ, unless the case presents a "novel issue." In fact, EOIR admits that under this rule it will not provide meaningful review until it has cleared its entire backlog of cases, stating explicitly "once [the backlog] is clear, [the Board will focus] on providing meaningful review in cases requiring Board intervention." *Id.* Depriving noncitizens who find themselves in this backlog of meaningful review of their cases is arbitrary; it is not the fault of these noncitizens that the timing of their appeal landed them in this rush job period. There is no reason to provide closer review to the cases of noncitizens that happen to be filed after the BIA clears its backlog—whenever that may be.

The only reason EOIR gives for the backlog of cases at the BIA is "mismanagement." 91 Fed. Reg. 5271, n. 13. There is no analysis whatsoever of the increased number of cases before the immigration court, increased numbers of noncitizens in the United States, increased enforcement under this administration, or increased complexity of immigration law. Without accounting for these myriad other reasons for the growing backlog, it is irrational for EOIR to fault "mismanagement" as the only reason for the growth of the BIA backlog.[27] Moreover, the cost of correcting this "mismanagement" should not land on noncitizen appellants or appellees, who are not at fault, and who simply have the misfortune of their case timelines coinciding with this administration's prioritization of speed over fairness.

a. The IFR Misstates the Burden It Is Shifting onto Federal Courts

The preamble claims that the rule is unlikely to have a significant impact on the federal courts. This claim is clearly false. When the BIA moved to a system of affirmances without opinion in the early 2000s, the rate of appeals to federal courts rose astronomically. As a contemporaneous law review article explained:

> As one would expect, the volume of petitions for review reaching the federal courts began to rise almost immediately. . . But rather than simply doubling in proportion to the increase in BIA decisions, the increase in petitions for review was about five-fold. That means that there are not only more BIA decisions potentially subject to challenge, but also a larger proportion of these decisions are actually being challenged. Whereas about 7% of the BIA's decisions were challenged nationwide before March 2002, about 25% are now being challenged . . . For BIA decisions arising within the Second and Ninth Circuits, the appeal rate has now surpassed 40%.[28]

Nonetheless, in footnote 14 of the preamble, EOIR claims, "The Department also does not expect this change to cause a significant increase in petitions for review filed with Federal Courts

[27] In any event, if EOIR is correct that "mismanagement" plays a role in the BIA backlog, it is unclear why the attorney general would name Gary Malphrus, who has been on the Board since 2008 and presumably involved in the Board's "mismanagement," as Chief Appellate Immigration Judge. EOIR, Board of Immigration Appeals, https://www.justice.gov/eoir/board-of-immigration-appeals#board.

[28] John R.B. Palmer, Seeking Review: Immigration Law and Federal Court Jurisdiction, 51 N.Y.L. Sch. L. Rev. 13 (2006-2007).

of Appeals, and there is no logical reason to expect this IFR to change parties' behavior in that regard." 91 Fed. Reg. 5271, n. 14. In reaching this unsupportable conclusion, and burying it in a footnote, the preamble does not cite to the numerous studies finding a large increase in PFRs previously when the BIA implemented affirmances without opinion. It defies logic that the IFR preamble could conclude that the elimination of BIA review would not affect appeal rates in the federal courts.

With the sea changes in procedure wrought by this rule, not only will the federal courts be flooded with cases, but they will also receive cases in a less developed form. In the preamble, EOIR calls Congress's decision to allow noncitizens to file PFRs, but not DHS, "a peculiar asymmetry." 91 Fed. Reg. 5271. In making this statement, EOIR seems to misapprehend that the role of the government in PFRs is to defend the agency decision—not to seek to remove the noncitizen. It is precisely because DOJ's role in federal court is to defend the agency's decision-making that the BIA's determination to summarily dismiss appeals as a default is so surprising.

Instead of recognizing DOJ's role in ensuring due process at EOIR and defending the decisions of its sub-agency before federal courts, the preamble rehashes anti-immigrant rhetoric common in this administration, claiming that the rule will "ensur[e] that [noncitizens] do not amplify any procedural advantages they have over the Government with additional opportunities to necessarily bring meritless appeals with attendant delays." *Id.*

The IFR does not account for the fact that in a majority of cases, the agency will not even have produced a transcript of proceedings while the case is on appeal before the BIA. Moreover, in the vast majority of cases, there will not have been substantive briefing before the BIA; the Board will summarily dismiss on the NOA alone. As a result, the federal courts of appeals will be thrust into the role of administrative judges, reviewing a record at the same time as counsel for both sides, and reviewing an IJ's decision, generally issued orally after an exhausting hearing, for the first time. Congress did not intend federal circuit court judges to play this role in immigration appeals.

In footnote 16, EOIR minimizes the effect of the 10-day NOA filing deadline for pro se noncitizens who would want to seek counsel. That footnote states, if the noncitizen's "appeal is summarily dismissed, they may proceed to file a petition for review with a Federal court within 30 days of that dismissal, see INA 242(b)(1), 8 U.S.C. 1252(b)(1), providing them up to 55 days to obtain counsel." 91 Fed. Reg. 5272, n. 16. Throughout this footnote, EOIR treats a pro se noncitizen's inability to secure counsel as if that is a choice they freely made, without acknowledging that most nonprofit legal service organizations are overwhelmed, in large part as a result of this administration's radical changes to immigration law, that many nonprofit legal service providers have had their federal funding stripped by this administration,[29] and that this administration has just issued an NPRM which would make it impossible for almost all asylum seekers to obtain an employment authorization document while their asylum case is pending. 91 Fed. Reg. 8616. With no ability to work in the future, it will be even less likely noncitizens can pay private attorneys, which will leave noncitizens with fewer options for counsel. Furthermore,

[29] Laura Romero, Trump administration halts funding for legal aid for migrant children, ABC NEWS, March 21, 2025, https://abcnews.com/US/trump-administration-halts-funding-legal-aid-migrant-children/story?id=120033078.

nonprofit attorneys will be more likely to have to file PFRs for existing clients, which will mean they will have fewer resources to take on new clients, given how many hours go into federal court briefing and oral arguments.

The IFR also does not acknowledge the significant role that DOJ accredited representatives play in providing legal services to noncitizens. While they can appear before EOIR, they cannot provide legal representation on PFRs. EOIR's own website describes the role DOJ accredited representatives play as, "aim[ing] to increase the availability of competent immigration legal representation for low-income and indigent persons, thereby promoting the effective and efficient administration of justice."[30] It is illogical that a stated primary goal of the IFR is to increase efficiency, yet by redistributing the work of appellate review from the agency to the federal courts of appeals, EOIR is eliminating an entire category of representatives who would otherwise be able to provide representation on appeal before the BIA.

b. The IFR's Conclusion That Firing Qualified Judges Makes It More Efficient Is Irrational and Unsupported by Evidence

One stated goal of the IFR is backlog reduction. 91 Fed. Reg. 5275. Indeed, it is clear that this goal far outweighs the goal of fair adjudication, which is also purportedly central to EOIR's mission.[31] Since this administration took office, it has fired nine BIA members, all of whom were hired under the Biden administration.[32] The preamble concludes that having more BIA members does not mean that it can adjudicate more cases. 91 Fed. Reg. 5270. This conclusion defies logic, especially in the context of single member review of cases.

Further, while there are currently 15 permanent Board members, there are also four temporary members.[33] If the BIA functioned best with 15 members, there would be no need to add temporary members. Each of the four temporary judges has a background as a prosecutor, either

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[30] EOIR, Recognition & Accreditation (R&A) Program (Updated Jan. 22, 2026) https://www.justice.gov/eoir/recognition-and-accreditation-program.

[31] EOIR, EOIR Mission, (Updated May 29, 2025) https://www.justice.gov/eoir/about-office#:~:text=The%20Executive%20Office%20for%20Immigration%20Review%20(EOIR)%20was%20created%20on,former%20Immigration%20and%20Naturalization%20Service%20(. ("The primary mission of the Executive Office for Immigration Review (EOIR) is to *adjudicate immigration cases by fairly*, expeditiously, and uniformly interpreting and administering the Nation's immigration laws." [Emphasis added.]).

[32] American Immigration Council, DOJ Moves to End Administrative Immigration Appeals to Speed Up Mass Deportations, (Feb. 13, 2026) https://www.americanimmigrationcouncil.org/blog/justice-departments-end-immigration-appeals-deportations/#:~:text=The%20Department%20of%20Justice%20(DOJ,keeping%20more%20people%20detained%20unnecessarily. ("[The administration] has fired more than 100 immigration judges, reduced the BIA from 28 members to 15, and dismissed nine BIA members appointed by the Biden administration.")

[33] EOIR, Board of Immigration Appeals (Updated Jan. 28, 2026) https://www.justice.gov/eoir/board-of-immigration-appeals#board.

with Immigration and Customs Enforcement, criminal prosecution, or both.[34] The purpose of keeping the BIA to 15 permanent members therefore appears to be controlling the ideological background of Board members, not ensuring expeditious case adjudication.

c. The IFR Ignores the Substantial Interests at Stake in Immigration Court Proceedings and the Noncitizen's Right to Due Process

Throughout the preamble to the IFR, EOIR focuses on backlog elimination as a goal that is more important than any other function of the BIA. The words "due process" appear only once, in the context of a federal court quotation finding that the noncitizen's due process rights were not violated in a particular case. 91 Fed. Reg. 5268. The preamble explicitly states that the BIA will no longer allow itself to "becom[e] bogged down in mine-run or straightforward cases that may already be subject to being affirmed without an opinion or summarily affirmed." 91 Fed. Reg. 5271. Through its choice of the word "may" EOIR is acknowledging that there are "mine-run" cases that would not be summarily affirmed under regulations; the word choice also seems to acknowledge the Board's own uncertainty in what "straightforward" issues it may miss. Meanwhile, noncitizens who present "mine-run" errors by IJs rather than "novel issues" will have to find the resources for a federal court appeal to right the IJ's straightforward errors.

G. The BIA Is Being Unjustly Enriched by Exorbitant Fees Which Do Not Comport with Actual Adjudication Expenses

Last summer Congress raised the fee on appeals from $100 to its current amount of $1030.[35] It is fundamentally unfair to force noncitizens to pay this exorbitant fee in cases where the BIA will summarily dismiss the appeal with minimal or no review. Fees should correspond to the actual costs of adjudication, not be a means to fund the government.

Indeed, in prior rulemaking by the BIA, EOIR attempted to justify a proposed fee increase by setting forth the approximate cost of each appellate adjudication. 85 Fed. Reg. 11866 (Feb. 28, 2020). In 2020, when EOIR proposed increasing the fee for a BIA appeal to $975, it meticulously broke down the anticipated cost of adjudicating an appeal based on staff type and hours involved in the adjudication, *id.* at 11873:

[34] *Id.*

[35] 8 U.S.C. § 1812(d); *see also* EOIR Payment Portal, https://epay.eoir.justice.gov/index.

6. EOIR–26, Notice of Appeal From a Decision of an Immigration Judge

Staff level	Total cost, by staff level
Legal Assistant (GS–05/06/07)	$5.42
Legal Assistant (GS–08/09)	66.64
Admin Staff (GS–08/09)	198.23
Paralegal	83.12
Attorney	537.52
Board Member	76.38
Digital Image Processor	7.75
Total	975.05

Process category	Total cost, by process category
Initial Processing	$140.68
Case Screening/Preparation	116.44
Decision and Adjudication	647.22
Final Processing	70.71
Total	975.05

Significantly, by far the most costly portion of adjudicating a BIA appeal is "decision and *adjudication*." Under the IFR, the default will be summary dismissal. In fact, as discussed above, it is not clear how or whether BIA members will even review the IJ decision, the record of hearing, or the NOA where the default will be no transcript. In the current IFR, there is no such analysis of what a noncitizen is getting from the $1030 they must pay. By way of contrast, DHS pays no fee for appeals, putting a significant financial burden on noncitizens that DHS does not bear.

Further, if the BIA summarily dismisses the appeal, the noncitizen will be forced to pay an additional $600 to pursue a petition for review in federal court. The IFR in no way accounts for this significant money, in fees alone, that noncitizens will have to expend. Of course, for noncitizens who are represented by private counsel, each step of the proceedings, particularly the increased need for PFRs in federal court, will cost noncitizens significantly more in legal fees.

It is also not clear with the 10-day filing deadline what will happen if a respondent seeks a fee waiver that is denied. The IFR does not alter 8 CFR 1003.8(a)(3), which says, "[i]f the fee waiver request does not establish the inability to pay the required fee, the appeal or motion will not be deemed properly filed, provided the Board grants 15 days to re-file the rejected document with the filing fee or new fee waiver request and tolls any applicable filing deadline during the 15-day cure period." Presumably then, noncitizens who file for a fee waiver that is not granted, will still receive an additional 15 days to file the NOA with a fee, but it is not clear how the Board will construe this regulation in light of the general 10-day filing deadline.

H. The Undersigned Organizations Strongly Oppose Amending Regulatory Language to Replace the Word "Noncitizen" with "Alien"

While the preamble states that the reason to change the wording in existing regulations from "noncitizen" to "alien" and from "unaccompanied child" to "unaccompanied alien child" is to conform the regulatory language to that of the statute, 91 Fed. Reg. 5274, that reasoning is belied by the anti-immigrant rhetoric of this administration generally[36] and this IFR specifically. 91 Fed. Reg. 5275. ("This rule's efforts to reduce inefficiencies, the appeal backlog, and the related perverse incentives for aliens to seek to come to the United States illegally will enable the United States to better achieve the total and efficient enforcement of U.S. immigration law.")

The purpose of the word "alien" is to dehumanize people who are not citizens of the United States. The word is offensive and should not be reintroduced into new regulations. Scholars,[37] jurists,[38] and the prior administration[39] have rejected the term. There is no reason to reintroduce it now other than to demonstrate this administration's animus towards noncitizens.

Conclusion

In closing, the undersigned organizations strongly opposes this IFR, which radically re-envisions the purpose of the BIA and will leave thousands of noncitizens with no meaningful review of erroneous IJ decisions. We urge EOIR to to rescind this IFR in its entirety and leave the existing regulations in place. Please do not hesitate to contact Victoria Neilson at victoria@nipnlg.org if

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[36] *See*, for example, The White House, Fact Sheet: President Donald J. Trump Establishes Project Homecoming (May 9, 2025) https://www.whitehouse.gov/fact-sheets/2025/05/fact-sheet-president-donald-j-trump-establishes-project-homecoming/#:~:text=Trump%20Establishes%20Project%20Homecoming,-The%20White%20House&text=ESTABLISHING%20PROJECT%20HOMECOMING:%20Today%2C%20President,who%20do%20not%20depart%20voluntarily (using the term "alien" 17 times on a single webpage.)

[37] Laura M. Hartwell, *On the Linguistic Argument for the Adoption of the Library Subject Heading Noncitizen,* 50 Int'l J. Legal Info. 37, 41 (2022) ("The outdated term 'illegal alien' is not privileged by US legal experts in the highest sphere. . . Finally, as confirmed in this empirical corpus study, the single term 'alien' also retains a substantial ideological weight, absent for the term 'noncitizen'".)

[38] Keith Cunningham-Parmeter, *Alien Language: Immigration Metaphors and the Jurisprudence of Otherness*, 79 Fordham L. Rev. 1545, 1570 (2011) (finding that when the Supreme Court used the term "alien" the outcome was more likely to be unfavorable to noncitizens). *See also,* Alisa Wiersema, *Why Justice Sotomayor Chooses Her Words Carefully*, ABC News, June 22, 2014, https://abcnews.go.com/blogs/politics/2014/06/why-justice-sotomayor-chooses-her-words-carefully.

[39] *See* 89 Fed. Reg. 46742, 46778 (May 29, 2024).

you have any questions or need any further information. Thank you for your consideration.

Respectfully,

National Immigration Project

Advocates for Immigrant Rights
American Friends Service Committee (AFSC)
Apoyo IPT
Asian Americans Advancing Justice Southern California (AJSOCAL)
ASISTA Immigration Assistance
Asylum Program of Arizona
Center for Safety & Change
Central American Legal Assistance
Central American Resource Center of Northern California - CARECEN SF
Church World Service
Co-Counsel NYC
Community Legal Services in East Palo Alto
Episcopal Diocese of New York
Her Justice
Houston Immigration Legal Services Collaborative
Immigrant Defenders Law Center (ImmDef)
Immigration Equality
Immigration Services and Legal Advocacy (ISLA)
International Refugee Assistance Project
Jesuit Refugee Service USA
Jewish Family Service of Western Massachusetts (JFSWM)
Las Americas Immigrant Advocacy Center
Massachusetts Immigrant and Refugee Advocacy Coalition
New York Law School Asylum Clinic
Northwest Immigrant Rights Project
Oasis Legal Services
Open Doors for Refugees
Open Immigration Legal Services
Oregon Justice Resource Center
Phoenix Legal Action Network
RISE for Immigrants
Rockland Immigration Coalition
Rocky Mountain Immigrant Advocacy Network
Safe Passage Project
Texas A&M University School of Law
The Ark at Congregation Beit Simchat Torah
UnidosUS
VECINA