

December 28, 2020

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

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Re: Comments in Response to Department of Justice Executive Office for Immigration Review Notice of Proposed Rulemaking (NPRM): *Good Cause for a Continuance in Immigration Proceedings*, EOIR Docket No. 19-0410; RIN 1125-AB03

The Tahirih Justice Center¹ (Tahirih) submits the following comments to the Executive Office of Immigration Review (EOIR) in response to the above-referenced NPRM published on November 27, 2020.² See EOIR, *Good Cause for a Continuance in Immigration Proceedings*, 85 Fed. Reg. 75,925 (Nov. 27, 2020). Tahirih opposes the rule as a matter of public policy, and because it violates due process and numerous laws, including the Immigration & Nationality Act (INA), the Administrative Procedure Act (APA), and the international obligations of the United States as a State party to the United Nations (UN) Convention Relating to the Status of Refugees and 1967 Protocol (collectively, the Convention). See generally UNHCR, *The 1951 Refugee Convention*.³

I. Introduction

Tahirih is a national, nonpartisan policy and direct services organization that has answered calls for help from nearly 29,000 survivors of gender-based violence and their families since its inception twenty-three years ago. Our clients are primarily women and girls who endure horrific human rights abuses such as domestic violence, rape and sexual torture, forced marriage, human trafficking, widow rituals, female genital mutilation/cutting (FGM/C), and “honor” crimes.⁴

¹ <https://www.tahirih.org/>. We note that although these comments are the official comments of Tahirih as an organization, individual Tahirih employees may also have submitted comments on the NPRM in their personal capacities. The agencies must, of course, also consider those individual comments.

² All sources cited in this comment—including, but not limited to, court opinions, legislative history, and secondary sources—are to be considered part of the administrative record.

³ <https://www.unhcr.org/1951-refugee-convention.html>.

⁴ For background information on these types of gender-based violence, see, e.g., UNHCR, *Guidelines on the Protection of Refugee Women* 17, <https://www.unhcr.org/3d4f915e4.html>; UN Women, *Defining “honour” crimes and “honour” killings*, <https://endvawnow.org/en/articles/731-defining-honourcrimes-and-honour-killings.html>;

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Tahirih provides free legal and social services to help our clients find safety and justice as they engage in the daunting, courageous, and rewarding work of rebuilding their lives and contributing to their communities as illustrated by our clients' stories. Since its founding, Tahirih has also served as an expert resource for the media, Congress, policymakers, and others on immigration remedies for survivors fleeing gender-based violence (GBV). *See, e.g.,* Tahirih Justice Center, *Tahirih in the News*;⁵ Tahirih Justice Center, *Congressional Testimony*;⁶ Tahirih Justice Center, *Comments*.⁷ In light of our relevant experience and expertise, these comments focus on the harm the rule will inflict on survivors of gender-based violence including asylum seekers, petitioners for U and T visas, and Self-Petitioners under the Violence Against Women Act.

Among the clients we have served are Mariam*⁸ from Mali, who recounts:

“The day after my 16th birthday, my father circled a date on the calendar: August 28. He told me this was the day that I would be married. My soon-to-be-husband was a wealthy man from Mali. He was older than my father! I begged my father to stop the marriage, but he insisted it was final. In that moment, I felt like my life was over. My mom learned that my fiancé had AIDS. Villagers said his first wife died of the disease.

“Desperate for a way out, I told my uncles I was no longer a virgin. They beat me so badly that I thought I would die. Then, they locked me in a room used to store crops. There was no bathroom or windows, just a hole in the wall for food. I couldn't tell if it was night or day, and I knew that if my life ended, they would not care.

“Eight months passed before my mom rescued me. My uncles went away on a business trip, and she broke through the bolt on the door. With the help of my sister I escaped to the United States and applied for asylum. I'll never forget the day I received my asylum approval. I am free! I can live my life without fear of being forced back to Mali, where my uncles would kill me.

“Very soon, I will graduate from college with a degree in agribusiness. I hope to get a job in banking or at a government agency and then pursue an MBA. And I want to get married and start a family, at my own pace.”

Another client, Koumba* from Benin, began her fight for justice when she was raped at the age of 11 by a man from her father's village. Four years later, she was raped a second time by a different man. She then learned that she had been promised to this man in marriage. Koumba* suffered for a long time with shame from the rapes, but she tried her best to establish as normal a life as possible. Koumba* eventually attended university, earned her degree, and worked as a human resources professional for an insurance company. A decade passed, and she fell in love with a man from her

https://en.wikipedia.org/wiki/Female_genital_mutilation;

https://en.wikipedia.org/wiki/Forced_marriage; <https://www.widowsrights.org/>.

⁵ <https://www.tahirih.org/news-media/latest-updates/?tab=tahirih-in-the-news>.

⁶ https://www.tahirih.org/pubs/?qmt%5Bpub_cat%5D%5B%5D=131.

⁷ https://www.tahirih.org/pubs/?qmt%5Bpub_cat%5D%5B%5D=261.

⁸ Names followed by an asterisk are pseudonyms.

church and married him. Koumba* put her past abuse behind her and built a happy new life with her husband.

In 2010, Koumba*'s world was violently upended when the rapist to whom she had been promised in her teens passed away. To her shock and dismay, this man and his family had never forgotten that Koumba* had been promised to him like property. Now, upon the rapist's death, his brother "inherited" Koumba*. At his direction, members of a sect from his village kidnapped her. Koumba* was forced to perform widow rituals, which included washing the dead man's body as well as her own intimate parts with the same water. She was then forced to spend the night lying next to the corpse of her rapist. She knew she would get no help from the local police, so at the first opportunity, she fled to another town.

Unfortunately, her safety was temporary. A few months later, Koumba* was kidnapped again. This time, the dead man's brother kept her in a dark hut with her arms and legs tied to a bed and raped her every day. Once again she escaped, this time the night before their formal marriage ceremony was to take place. Because she knew that she could no longer live in Benin in safety, she gave up her career and everything she had worked for in her native land and fled to the United States. After facing additional hardship here, she was finally able to apply for and win asylum.

As survivors of gender-based violence, our clients are severely traumatized and uniquely vulnerable. In addition to the abuses they endure, they face searing social stigmas and ostracization from family members and their communities if they dare to come forward and report abuse. They are often disbelieved and internalize shame particularly in the case of rape and sexual assault. As a result, they are isolated and cut off from family and community resources that they desperately need. And abusers and traffickers who target women within the United States use threats of violence to keep them in a chronic state of fear, economic dependence, and social isolation. Ultimately, as further explained below, the nature of gender-based violence itself serves as an obstacle for survivors to expeditiously prepare their cases - even under the most forgiving of circumstances. The formidable challenges survivors already face have only been amplified by the global pandemic. *See, e.g.,* Rená Cutlip-Mason, *For Immigrant Survivors, the Coronavirus Pandemic is Life-Threatening in Other Ways*, Ms. Magazine (Apr. 14, 2020);⁹ Tahirih Justice Center, *The Impact of COVID-19 on Immigrant Survivors of Gender-Based Violence* (Mar. 23, 2020).¹⁰

II. Comments on the NPRM as a Whole

The entirety of the NPRM is invalid for at least seven reasons.

A. Pretext

As an initial matter, the NPRM is nothing more than a pretext for lowering representation rates in immigration court and speeding deportations. The Supreme Court recently made clear that

⁹ <https://msmagazine.com/2020/04/14/for-immigrant-survivors-the-coronavirus-pandemic-is-life-threatening-in-other-ways/>.

¹⁰ https://www.tahirih.org/wp-content/uploads/2020/03/Impact-of-Social-Distancing-on-Immigrant-Survivors-of-Gender-Based-Violence_Final-March-23-2020.pdf.

“[t]he reasoned explanation requirement of administrative law ... is meant to ensure that agencies offer genuine justifications for important decisions.” *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019). To that end, agencies’ actual reasoning must be provided so that it “can be scrutinized by courts and the interested public.” *Id.* at 2576. And as part of disclosing their “actual reasoning,” administrative agencies “must ‘disclose the basis’” of their actions. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) (quoting *Phelps Dodge Corp. v. Labor Bd.*, 313 U.S. 177, 197 (1941)). The provision of “contrived reasons would defeat the purpose of the enterprise.” *Dep’t of Commerce*, 139 S. Ct. at 2576.

Here, the agency’s rationales are, as shown in detail below, entirely implausible. That fact, standing alone, gives rise to a strong inference that the agencies’ stated reasoning is pretextual rather than “genuine.” *Dep’t of Commerce*, 139 S. Ct. at 2575.

That inference is further supported by the fact that the NPRM does not once mention the realities faced by asylum seekers, either in their home countries or after they arrive in the United States. It is also supported by the fact that, in the six sets of proposed or final regulations issued solely or jointly by EOIR in the last year that directly affect asylum applicants, there is not so much as a single major provision, or single legal change, that can fairly be construed as working in favor of the applicant. *See also* EOIR, *Fee Review*, 85 Fed. Reg. 82,750 (Dec. 18, 2020); EOIR, *Procedures for Asylum and Withholding of Removal*, 85 Fed. Reg. 81,698 (Dec. 16, 2020); EOIR, *Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure*, 85 Fed. Reg. 81,588 (Dec. 16, 2020); EOIR & USCIS, *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 80,274 (Dec. 11, 2020); EOIR, *Motions to Reopen or Reconsider; Effect of Departure; Stay of Removal*, 85 Fed. Reg. 75,942 (Nov. 27, 2020); EOIR & USCIS, *Procedures for Asylum and Bars to Asylum Eligibility*, 85 Fed. Reg. 67,202 (Oct. 21, 2020). And it is supported by the fact that, in this rule and its other proposed rules, EOIR has routinely accused asylum seekers and their counsel of misconduct without a shred of supporting evidence. *See, e.g.*, 85 Fed. Reg. at 36,283 (claiming, contrary to all available evidence, that those who arrive at the southern border misuse the asylum system); *id.* at 36,273 (claiming, contrary to all available evidence, that baseless asylum applications are a significant problem); *id.* at 52,501 (claiming, contrary to all available evidence, that respondents deliberately withhold evidence from the immigration judge); *see also* Sections II.B, III.A, & III.E, *infra*.

The inference of pretext also finds support in the statements of those who influenced the rule. To start at the top, President Donald J. Trump has stated that immigrants attempting to cross the southern border of the United States should be shot. Eugene Scott, *Trump’s most insulting—and violent—language is often reserved for immigrants*, Wash. Post (Oct. 2, 2019).¹¹ He has suggested that the border should include an “electrified” wall with “spikes on top that could pierce human flesh.” *Id.* He has referred to immigrants as “animals” who “infest” the United States. Juan Escalante, *It’s not just rhetoric: Trump’s policies treat immigrants like me as “animals,”* Vox (May 19, 2018);¹² Brian Resnick, *Donald Trump and the disturbing power of dehumanizing language*, Vox (Aug. 14,

¹¹ <https://www.washingtonpost.com/politics/2019/10/02/trumps-most-insulting-violent-language-is-often-reserved-immigrants/>.

¹² <https://www.vox.com/first-person/2018/5/18/17369044/trump-ms-13-gang-animals-immigrants>.

2018).¹³ And he has, without citing to any evidence, both associated immigrants generally with “[d]rugs, gangs, and violence” (Dara Lind, *Trump just delivered the most chilling speech of his presidency*, Vox (June 28, 2017)),¹⁴ and said that Mexican immigrants “bring[] drugs,” “bring[] crime,” and are “rapists.” Scott, *supra*.

More specifically, President Trump has referred to asylum seekers as “invas[ing]” and “infest[ing]” the United States. Donald J. Trump (@realDonaldTrump), Twitter (June 19, 2018, 6:52 AM);¹⁵ Donald J. Trump (@realDonaldTrump), Twitter (June 24, 2018, 8:02 AM).¹⁶ He has claimed without evidence that support for asylum seekers is equivalent to support for “crime,” “drugs,” and “human trafficking.” *Remarks: Donald Trump Meets With Representatives of Law Enforcement* (Sept. 26, 2019).¹⁷ And he has made clear his view that all asylum seekers should “IMMEDIATELY” be deported without any legal process whatsoever, in clear contravention of the INA and international law. Donald J. Trump (@realDonaldTrump), Twitter (June 30, 2018, 3:44 PM).¹⁸

President Trump has also repeatedly claimed that the asylum system routinely grants relief to people without legitimate claims. He has, for instance, claimed that there is routine “abuse” of the asylum process. Exec. Order No. 13,767, *Border Security and Immigration Enforcement* (Jan. 25, 2017). He has referred to the lawful asylum process as a “loophole” exploited by those with “fraudulent or meritless” claims. *Remarks by Pres. Trump on the Illegal Immigration Crisis and Border Security* (Nov. 1, 2018).¹⁹ He has referred to asylum as a “hoax” and a “scam” and claimed, in clear contravention of U.S. and international law, that “we’re not taking [asylum seekers] anymore.” *Trump on Asylum Seekers: ‘It’s a Scam, It’s a Hoax’*, Daily Beast (Apr. 5, 2019).²⁰ He has expressed the unelaborated view that “asylum procedures are ridiculous” and that “you have to get rid of [immigration] judges” to get the outcomes he prefers. *Remarks by President Trump and NATO Secretary General Jens Stoltenberg Before Bilateral Meeting* (April 2, 2019).²¹ He has claimed that asylum laws are “horrible” and “unfair” (*Remarks by President Trump on the National Security and Humanitarian Crisis on our Southern Border* (Mar. 15, 2019))²² and that asylum claims are “frivolous” and “bogus” (*Remarks: President Trump Signs Taxpayer First Act in the Oval Office*

¹³ <https://www.vox.com/science-and-health/2018/5/17/17364562/trump-dog-omarosa-dehumanization-psychology>.

¹⁴ <https://www.vox.com/policy-and-politics/2017/7/28/16059486/trump-speech-police-hand>.

¹⁵ <https://twitter.com/realDonaldTrump/status/1009071403918864385>.

¹⁶ <https://perma.cc/35AQ-NSDH>.

¹⁷ <https://factba.se/transcript/donald-trump-remarks-law-enforcement-september-26-2019>.

¹⁸ <https://twitter.com/realDonaldTrump/status/1013146187510243328?s=20>.

¹⁹ <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-illegal-immigration-crisis-border-security/>.

²⁰ <https://www.thedailybeast.com/trump-on-asylum-seekers-its-a-scam-its-a-hoax>.

²¹ <https://perma.cc/5ZKY-P53D>.

²² <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-national-security-humanitarian-crisis-southern-border-2/>.

(July 1, 2019)).²³ None of these statements were supported by so much as a shred of evidence, and no supporting evidence exists for any of them.

These views constitute just a small sample of President Trump’s anti-immigrant, and anti-asylum seeker, statements.

Attorney General William Barr likewise has a long history of statements that, at the time of his confirmation, led to the accurate prediction that he would “be a loyal foot soldier for Trump’s aggressive immigration agenda.” Dara Lind, *William Barr hearing: attorney general nominee’s immigration record aligns with Trump’s*, Vox (Jan. 16, 2019).²⁴ For instance, in 1992, when the acquittal of the white Los Angeles police officers who savagely beat Rodney King led to violence, Barr made the astonishing claim that “[t]he problem of immigration enforcement” was in part responsible for the violence. Ronald J. Ostrow, *William Barr: A “Caretaker” Attorney General Proves Agenda-Setting Conservative*, L.A. Times (Jun 21, 1992).²⁵ Like Trump, Barr has long believed—without a shred of supporting evidence—that large numbers of asylum seekers present “patently phony claims.” *Asylum and inspections reform: Hearing before the Subcommittee on International Law, Immigration, and Refugees of the Committee on the Judiciary, House of Representatives* (Apr. 27, 1993).²⁶ And more recently, while criticizing so-called “sanctuary” policies, Barr baselessly referred to all undocumented people as “criminal aliens.” *E.g.*, Justine Coleman, *Barr announces ‘significant escalation’ against ‘sanctuary’ localities*, The Hill (Feb. 10, 2020).²⁷

In short, the NPRM itself, and the statements of those who directed its creation, clearly demonstrate that the NPRM’s stated goals are a mere pretext for imposing further restrictions on immigrants seeking relief under our laws. It is therefore arbitrary and capricious in its entirety. And for the same reasons, the NPRM violates the constitutional guarantee of equal protection by implementing the animus that high-ranking administration officials have repeatedly expressed about keeping non-white immigrants from places as disparate as Central America, Haiti, Mexico, the Middle East, and Nigeria out of the country.

B. Arbitrary Justification

The basis for the NPRM is arbitrary. The agency contends that “improper uses of continuances lead to unnecessary case delays that do not benefit a respondent with a valid claim, DHS, or EOIR.” 85 Fed. Reg. at 75,928. But the primary source that the NPRM cites makes clear that continuances are only a subsidiary cause of delays. *See GAO, Immigration Courts: Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges 27* (July 2017) (“GAO Report”), at <https://www.gao.gov/assets/690/685022.pdf>. Further, EOIR has not implemented the chief recommendation of the report—*i.e.*, that EOIR should “analyz[e] the use of continuances,” especially continuances resulting from operational issues, “on a systematic basis.” *Id.* at 70. Rather,

²³ <https://factba.se/transcript/donald-trump-remarks-bill-signing-taxpayer-act-july-1-2019>.

²⁴ <https://www.vox.com/2018/12/7/18128926/barr-confirmation-senate-immigration-trump>.

²⁵ <https://www.latimes.com/archives/la-xpm-1992-06-21-op-1236-story.html>.

²⁶ https://archive.org/stream/asyluminspection00unit/asyluminspection00unit_djvu.txt.

²⁷ <https://thehill.com/regulation/court-battles/482425-barr-announces-significant-escalation-against-sanctuary-cities>.

EOIR has closed its eyes to analysis and simply assumed, on the basis of no evidence whatsoever, that continuances are frequently caused by respondents lacking a meritorious claim. In the face of the GAO report and its accompanying data, that assumption is flatly arbitrary.

C. Failure to Consider Effects of the Proposals

In addition, EOIR has failed to meaningfully consider the effects of its proposals on respondents and counsel. There is no analysis whatsoever of the effect that the new restrictions on continuances to find counsel will have on representation rates—much less about the inevitable consequences of lower representation rates, including the denial of meritorious claims and *refoulement*. And the purported “analysis” of the effects of other provisions never rises above the level of unsupported, speculative assertions unbacked by reasoning or evidence. This failure of analysis also renders the entire rule arbitrary under the APA.

D. Impermissible Retroactivity

The NPRM does not state whether its provisions would apply to pending cases. That silence cannot stand, because the application of the NPRM to cases pending at the time its provisions take effect would be flatly illegal. A regulation may not be applied retroactively unless Congress has included a clear statement that the agencies may promulgate regulations with that effect. *E.g.*, *INS v. St. Cyr*, 533 U.S. 289, 316-17 (2001). There is no statute that authorizes either DOJ to retroactively apply new rules for cases pending in immigration court.

The application of the NPRM’s proposals to pending cases would therefore be illegal if that application would qualify as “retroactive.” It would. “The inquiry into whether a statute operates retroactively demands a commonsense, functional judgment about ‘whether the new provision attaches new legal consequences to events completed before its enactment.’” *St. Cyr*, 533 U.S. at 317 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994)). The phrase “new legal consequences” encompasses any provision that would “take[] away or impair[] vested rights acquired under existing laws” or that would “create[] a new obligation, impose[] a new duty, or attach[] a new disability, in respect to transactions or considerations already past.” *Id.* at 321 (quoting *Landgraf*, 511 U.S. at 269)). Each provision of the NPRM that restricts continuances requested by respondents or their counsel would alter the legal consequences attached to the filing of applications and the retention of counsel. Those provisions accordingly may not be applied to cases pending on the effective date of the rule.

E. Impermissible Staggered Rulemaking

EOIR has also deprived interested parties of a meaningful chance to comment by engaging in multiple rulemakings and other policy changes that are interrelated without ever considering the combined effect of those rules on respondents and those who represent them. This NPRM interacts directly with, at a minimum, (i) EOIR, *Organization of the Executive Office for Immigration Review*, 85 Fed. Reg. 69,465 (Nov. 3, 2020); (ii) EOIR, *Procedures for Asylum and Withholding of Removal*, 85 Fed. Reg. 81,698 (Dec. 16, 2020); (iii) EOIR, *Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure*, 85 Fed. Reg. 81,588 (Dec. 16, 2020); (iv) James R. McHenry III, Memorandum, *Enhanced Case Flow Processing in Removal Proceedings* (Nov. 30, 2020) (“McHenry Memo”); and (v) the contemporaneously issued EOIR, *Motions to Reopen or Reconsider; Effect of Departure; Stay of Removal*, 85 Fed. Reg. 75,942 (Nov. 27, 2020). Yet of these

closely related policy changes, only the administrative closure rule is so much as mentioned in the NPRM—and then only in a footnote to the subsequent case history of a citation. Needless to say, that glancing reference to the administrative closure rule does not even touch on the combined effect that severely limiting continuances and abolishing the general practice of administrative closure will have on respondents, particularly those with pending applications for relief before USCIS. EOIR’s failure to acknowledge, much less reasonably explain, the combined effects of its policies provides yet another reason why the NPRM is categorically arbitrary.

F. Issued by an Official Lacking Authority

The NPRM is signed by James R. McHenry III, the Director of EOIR. 85 Fed. Reg. at 75,941. The EOIR Director, however, does not have the statutory or regulatory authority to promulgate proposed or final regulations; only the Attorney General does. *See* 8 U.S.C. § 1103(g)(2); 8 C.F.R. § 1003.0(b)(1); 28 C.F.R. § 0.115. The Attorney General may delegate additional authority to the EOIR Director. 8 C.F.R. § 1003.0(b)(1)(ix). The NPRM, however, contains no delegation of authority from Attorney General William Barr to McHenry. And we are unaware of any other preexisting delegation of authority that would allow McHenry to issue the NPRM. For this reason, too, the NPRM must be withdrawn in its entirety.

G. Insufficient Time for Public Comment

Finally, EOIR has provided insufficient time for public comment, and it has done so without any attempted justification. The NPRM proposes drastic and sweeping changes to the asylum process—but the public has been given a mere 30 days to respond. Worse still, EOIR released *two* proposed rules effecting changes to immigration court proceedings on the same day and set a 30-day comment period for both. That is a recipe for minimizing both the number of comments received and the time available for interested organizations and practitioners to respond. The only possible justification for EOIR’s action—rushing through rules before the administration changes in January 2021—is arbitrary.

Even under normal circumstances, at least 60 days would be needed for the public to submit thorough, considered comments on a rule with such sweeping consequences. And these are not normal circumstances: The public is at an even greater disadvantage now due to the COVID-19 pandemic. The 30-day period has also proven insufficient in practice, as our experience highlights. At Tahirih all employees continue to perform mandatory telework, many while simultaneously caring for babies, toddlers, and/or school-age children. As a result, full-time Tahirih employees were expected to work no more than 32 hours per week during the comment period, with the expectations for part-time employees—one of whom were crucial to the drafting of these comments—reduced proportionally.

Worse still, EOIR released this rule contemporaneously with another rule that also severely affects respondents and their representatives. It also released numerous final rules that apply to many respondents in the days before and after the NPRM. EOIR’s view is therefore apparently that practitioners and other interested parties who are being inundated with uniformly negative (and illegal) policy changes can reasonably be expected to comment on two other far-reaching sets of rules changes in the middle of a pandemic. That is laughable.

Unsurprisingly, then, these comments do not—and cannot—represent Tahirih’s full response to the rule. Among other things, the agency’s actions have prevented us from (1) seeking or analyzing

any evidence of which we were not already in possession that relates to the subject-matter of the rule; (2) researching or analyzing case law or secondary sources relevant to the subject matter of the rule; (3) reading most of the authorities cited by EOIR; (4) seeking meaningful input from our attorneys and accredited representatives, who would be directly affected by the NPRM’s proposals; or (5) providing full comments on any provision of the rule. The effect on other comments is doubtless similar. For this reason, too, the entire NPRM must be withdrawn.

III. Comments on Individual Proposals in the NPRM

The individual proposals in the NPRM are, without exception, contrary to law, arbitrary, and/or lacking any legitimate purpose.

A. Proposed 8 C.F.R. § 1003.29(a): “Good Cause”

The NPRM states that it provides a “clear standard by which to determine whether a continuance is warranted based on good cause.” 85 Fed. Reg. at 75,929; *see also id.* (“clearer, more uniform standard”). But it does no such thing. Rather, it does no more than provide a partial, non-exhaustive list of factors that it claims are relevant to whether the movant has shown “a particular and justifiable need for a continuance.” *See id.* at 75,940. Thus, instead of stating a “clear standard,” the NPRM states a fuzzy, totality-of-the-circumstances test that invites inconsistent adjudication across cases and across immigration judges. The NPRM therefore cannot even plausibly be said to achieve its goal. It is, as a result, arbitrary.

The general analysis of “good cause” in the NPRM would remain arbitrary even if it did set out a “clear standard.” As an initial matter, the agency has not plausibly explained why such a standard is necessary. The NPRM claims that there are “unnecessary delays caused by the improper use of continuances” (85 Fed. Reg. at 75,929), but despite having access to substantial data about the use of continuances in immigration court (*see* GAO Report), EOIR has failed to cite even a single example of an abusive continuance. Nor does the opinion in *Matter of L-A-B-R-*, 27 I. & N. Dec. 405 (AG 2018), cite any such example. The assumption that abusive continuances *must* exist in significant numbers is nothing more than another manifestation of the anti-immigrant animus that permeates all of EOIR’s recent rules. *See* Section II.A, *supra*. Basing a rule on such animus is, of course, patently arbitrary.

The NPRM also asserts that there have been “past misinterpretations and misapplications of the ‘good cause’ standard with respect to continuances.” 85 Fed. Reg. at 75,929. Again, however, despite the fact that it holds all of the relevant information, EOIR has failed to cite a single example—and so, too, does *Matter of L-A-B-R-*. This, too, is therefore an assertion unsupported by so much as a shred of evidence. And EOIR’s propensity for imagining harms caused by respondents is again an insufficient basis on which to erect a restrictive rule.

Finally, the NPRM states that the “good cause” standard imposes a limit on discretion. 85 Fed. Reg. at 75,929. But that truism does not, and cannot, even begin to suggest that *any* description of “good cause” is necessary in regulations—much less support any of the specific proposals in the NPRM.

The NPRM next claims that the general definition of “good cause” as supported by a “particular and justifiable need” provides “immigration judges and the BIA with a clear standard.” 85

Fed. Reg. at 75,929. That statement is undercut by the rest of the NPRM itself. If EOIR believes that the “particular and justifiable need” definition is clear, none of the myriad specific proposals in the NPRM is necessary. To the contrary, the NPRM can, and should, end there. But EOIR did not even consider that alternative, notwithstanding the fact that the general definition satisfies the sole goal of the NPRM. Instead, it has proposed so many more specific rules that the general definition of “good cause” will almost never be applied. Worse still, those more specific rules are, as shown at various places below, inconsistent with the general definition of “good cause.”

As for the requirement that a continuance have a “particular” reason, the NPRM asserts that “a requesting party must be able to offer a particular reason for [the] request.” 85 Fed. Reg. at 75,930. The NPRM, however, also states that the notion of “particularity” inheres in the very notion of “good cause.” *Id.* Either particularity inheres in good cause or it does not—and either way, the NPRM is arbitrary. Assuming, *arguendo*, that particularity does inhere in “good cause,” the NPRM has failed to state any reason why the “particular” requirement is needed. After all, something “contemplated by the existing good cause framework” in 8 C.F.R. § 1003.29 does not need to be “codified.” 85 Fed. Reg. at 75,930. It already *is* codified.

But there is also no reason to believe that “particularity” inheres in “good cause,” because the NPRM provides no basis for such a conclusion. In particular, *Matter of Sibrun*, 18 I. & N. Dec. 354 (1983), cannot support that conclusion, because it says nothing at all about the granting of a continuance in the first instance. Rather, the portion of *Sibrun* to which the NPRM cites (85 Fed. Reg. at 75,930) holds only that a respondent seeking to overturn the denial of a continuance sought to provide additional evidence must show prejudice and harm—and, therefore, the particular facts or evidence at issue. 18 I. & N. Dec. at 356-57.

The NPRM concedes that the term “justifiable” does not set a clear standard, by noting that what is “justifiable” will “depend on the specific fairness and efficiency considerations at issue in the particular context.” 85 Fed. Reg. at 75,930. Different judges will obviously weigh those considerations differently—with the inescapable consequence that EOIR’s claims of “clarity” are nothing more than a mirage. The discussion of “justifiable” continuances also gives away EOIR’s overarching game. Fully one-third of continuances are, as the GAO found, (i) caused by EOIR, (ii) requested by DHS, or (iii) sought jointly by both parties. GAO Report 130. Yet the NPRM’s discussion of the term “justifiable”—like almost everything that follows—proceeds as if these continuances do not exist. Rather, it assumes that continuances are always sought by the respondent to the detriment of the court and DHS. 85 Fed. Reg. at 75,930.

B. Proposed 8 C.F.R. § 1003.29(b)(1): Assertedly Relevant Factors

The NPRM includes a list of five items that, by the plain terms of the proposed rule, are always relevant to good cause: “[t]he amount of time the movant has had to prepare for the hearing,” “[t]he length and purpose of the requested continuance,” “[w]hether the motion is opposed and the basis for the opposition,” “[i]mplications for administrative efficiency,” and “[a]ny other relevant factors.” 85 Fed. Reg. at 75,940. The NPRM, however, never even attempts to justify the use of any of these factors in an across-the-board fashion. Rather, the preamble—unlike the plain text of the proposed regulations—treats these factors as relevant only where a continuance request is based on an

application for collateral relief. *Id.* at 75,931. This mismatch between the text of the proposal and EOIR’s purported justification renders the list of factors entirely arbitrary.²⁸

Furthermore, there is no rational, general justification for the specific entries on the list. Those factors are either not relevant to, or simply duplicate, the statement that a request for a continuance must be particular and justifiable. The amount of time to prepare for a hearing is unrelated to the reasons behind many requests for a continuance—and is meaningless where a respondent is proceeding *pro se*, given that, to prepare, such respondents would be required to face the impossible task of understanding a highly complex area of law most often in a foreign language. The length of a continuance is often (as in cases where a respondent has a pending application for relief) out of a party’s control and has nothing to do with whether a request is for a particular and justifiable purpose. The existence *vel non* of an opposition is likewise irrelevant; a continuance is particular and justified if it is particular and justified, irrespective of the opposing party’s wishes. The phrase “implications for administrative efficiency” contains no meaningful standard and will only serve to weigh against continuances—including those that are particular and justified—in all cases, given that EOIR has adopted the position that all continuances harm efficiency. And the phrase “purpose of the requested continuance” simply repeats that there must be a “particular and justifiable need” for the continuance. It is therefore clear that EOIR has not attempted to justify its enumerated factors on a universal basis because no rational justification exists.

C. Proposed 8 C.F.R. § 1003.29(b)(2): Exclusions from “Good Cause”

The next proposal in the NPRM lists three situations in which “good cause” purportedly cannot be present: (i) “when the continuance would not materially affect the outcome of removal proceedings or, for a continuance based on a collateral matter, when the [respondent] has not demonstrated by clear and convincing evidence a likelihood of obtaining relief on a collateral matter”; (ii) where a continuance is sought “to seek parole, deferred action, or the exercise of prosecutorial discretion from DHS”; and (iii) where a request “would cause an immigration court to exceed a statutory or regulatory adjudication deadline . . . unless the request meets the standard of any statutory or regulatory exception to the deadline.” 85 Fed. Reg. at 75,940. None of these exclusions can be maintained because none is consistent with the good cause standard. Rather, in proposing these exclusions, EOIR has arbitrarily carved out certain particular and justifiable requests from the definition of good cause—without even acknowledging as much.

The exclusions also fail individually on their own terms. The exclusion for continuances that would “not materially affect the outcome of removal proceedings” is overly broad on its face. That rule would, for example, forbid parties from seeking continuances based on operational concerns. It would also force respondents to show, as a prerequisite to receiving a continuance, that they would not (say) prevail without counsel but would prevail with counsel, or that a particular piece of evidence not yet received from the respondent’s home country is of dispositive significance. Yet it is beyond doubt that *all* bona fide continuances for counsel or to receive probative evidence from a home country are for particular, justifiable needs. This exclusion is therefore at odds with the overarching standard stated in the NPRM itself and would result in the routine denial of continuances based on particular and justifiable grounds.

²⁸ To the extent possible in the time provided, we discuss those factors in the context of collateral applications for relief in Section III.D, *infra*.

Furthermore, as with the factors in proposed § 1003.29(b)(1), the NPRM never even attempts to justify the uniform application of the “materially affects” standard. Neither do any of the authorities on which the NPRM purportedly rests. The inclusion of that standard as a general rule is therefore manifestly arbitrary.

The requirement that continuance requests based on collateral applications for relief be accompanied by “clear and convincing evidence” that the application will be granted is equally arbitrary—and contrary to the INA. Clear and convincing evidence of a likelihood of collateral relief is clear and convincing evidence that the application for such relief is meritorious. But in many cases, immigration judges have no jurisdiction or authority to adjudicate the merits of those applications—with the result that the NPRM demands that immigration judges perform impermissible, extra-statutory backseat adjudications.²⁹ And that result is not only illegal but directly contrary to judicial efficiency: Requiring the merits adjudication of a petition in order to determine whether a continuance is warranted vastly expands the time and resources that immigration judges must spend on continuance motions.³⁰

Worse still, because applications for relief generally do not require clear and convincing evidence, the NPRM requires respondents to meet a higher standard of proof in immigration court than to receive relief in the first instance. This aspect of the NPRM is especially pernicious and contrary to law in the context of humanitarian survivor-based relief such as T and U nonimmigrant status and relief under the Violence Against Women Act (“VAWA”), as these remedies are adjudicated under the “any credible evidence” standard of the INA. Given that immigration judges are entirely unfamiliar with that standard, the NPRM essentially requires applicants for such relief to satisfy a higher standard of proof with different evidence to receive a continuance. But the “any credible evidence” standard exists because Congress recognized that survivors who seek these types of relief typically lack access to documentary evidence and may require additional time to otherwise prepare their cases for a variety of reasons. Traffickers and abusers notoriously confiscate survivors’ documents ranging from passports to personal correspondence, and prevent them from holding bank accounts, purchasing bus passes, or even obtaining library cards. Doing so allows perpetrators to further manipulate, isolate, punish, and block survivors from escaping or seeking help. A survivor might have to risk her safety trying to retain or regain control over her own documents and other belongings that could serve as key evidence for her case. Post-traumatic stress disorder can also severely interfere with survivors’ ability to carry out even basic administrative tasks needed to obtain evidence. Survivors also need sufficient time to begin healing from trauma and to establish trust with counsel before they can fully disclose and ultimately testify in detail about the facts needed to support their claims. UNHCR aptly notes in its guidelines for considering refugee claims involving gender-based persecution that survivors of sexual trauma in particular may need “second and subsequent interviews...in order to establish trust and to obtain all necessary information.”³¹ *See, e.g.*, 8 U.S.C. § 1154(a)(1)(J); H.R. Rep. 109-233, at 114 (2005); Memorandum from Paul Virtue, General Counsel,

²⁹ The same is true of the proposed requirement that an immigration judge find “clear and convincing evidence ... that a marriage was entered into in good faith” in certain circumstances. 85 Fed. Reg. at 75,940.

³⁰ Unnecessary deportation is also inefficient and will cause the government to incur additional expenses such as processing additional waivers (USCIS), conducting additional interviews and review of visa applications (DOS), and conducting additional screenings at ports of entry (CBP).

³¹ <https://www.unhcr.org/3d58ddef4.pdf> at 8.

Immigration & Naturalization Service (Oct. 16, 1998);³² Anne L. Ganley, *Health Resource Manual* 16 (2008); Rachel Louise Snyder, *No Visible Bruises: What We Don't Know About Domestic Violence Can Kill Us* (2019); Zlatka Rakovec-Felser, *Domestic Violence and Abuse in Intimate Relationships from Public Health Perspective*, 2:1821 *Health Psych. Research* 62 (2014); Margaret E. Adams & Jacquelyn Campbell, *Being Undocumented & Intimate Partner Violence (IPV): Multiple Vulnerabilities Through the Lens of Feminist Intersectionality*, 11 *Women's Health & Urb. Life* 15 (2012); Misty Wilson Borkowski, *Battered, Broken, Bruised, or Abandoned: Domestic Strife Presents Foreign Nationals Access to Immigration Relief*, 31 *U. Ark. Little Rock L.Rev* 567 (2009); Nat'l Domestic Violence Hotline, *Abuse and Immigrants*,³³ Edna Erez et al., *Intersection of Immigration and Domestic Violence: Voices of Battered Immigrant Women*, 4 *Feminist Criminology* 32 (2009). The NPRM also puts these adjudications in the hands of immigration judges who lack USCIS's qualifications in assessing trauma—and who therefore are unqualified to make, as well as legally barred from making, shadow adjudications on the merits of survivors' petitions. *See, e.g.*, H.R. Rep. 109-233, at 112 (2005); Memorandum from INS Office of Programs to Regional Directors, District Directors, Officers-in-Charge and Service Center Directors (May 6, 1997), at 2, 7.³⁴

For asylum seekers, corroborative evidence is largely elusive regardless of the type of persecution given the desperate circumstances under which they flee their homes in pursuit of safe haven. Further, even those aware of potential evidence in their countries of origin face extreme difficulty when attempting to obtain it for use in a U.S. asylum proceeding. The process of having such documents sent to the U.S. after a survivor has arrived is, even in the best-case scenario, long and involved. But under the NPRM, even survivors exercising extraordinary diligence in trying to secure key evidence from abroad would be forced to proceed with their cases without it. The rule's effect would be to prevent consideration of relevant evidence survivors were genuinely unable to locate and receive before their hearing. Their cases will be prejudiced, with justice and due process denied.

The NPRM makes no attempt at all to justify these disconnects. In fact, it fails even to recognize them or their effect on vulnerable applicants. It also fails to reckon with the inescapable fact that a bona fide application for relief from removal *always* provides a particular and justifiable reason for continuing removal proceedings. After all, the application would—if and when granted—prevent removal. Further, in all cases where the application is eventually approved, a continuance unquestionably saves EOIR's resources by preventing needless adjudications. The NPRM's imposition of a “clear and convincing evidence” standard is therefore arbitrary as well as contrary to law.

Furthermore, the cursory justification for the “clear and convincing evidence” standard hidden in a footnote in the NPRM fails to survive even minimal scrutiny. The footnote notes a decision implying that the existence of a “prima facie” approvable application for collateral relief is not sufficient, standing alone, to justify a continuance. 85 Fed. Reg. at 75,931 n.8 (citing *Matter of L-N-Y-*, 27 I. & N. Dec. 755, 757-58 (BIA 2020)). But that decision—even if correct—holds only that

³² <https://asistahelp.org/wp-content/uploads/2018/10/Virtue-Memo-on-Any-Credible-Evidence-Standard-and-Extreme-Hardship.pdf>.

³³ <https://www.thehotline.org/is-this-abuse/abuse-and-immigrants-2>.

³⁴ <https://asistahelp.org/wp-content/uploads/2018/10/DOJ-Memorandum-Supplemental-Guidance-on-Battered-Alien-Self-Petitioning-Process-and-Related-Issues.pdf>.

other factors besides the merits of the underlying petition are also relevant. *See Matter of L-N-Y-*, 27 I. & N. Dec. at 757. It provides no basis at all for assessing the merits of pending applications under a different evidentiary standard. And the fact that the clear and convincing standard might be “consistent” with the standard for “one” type of collateral relief (85 Fed. Reg. at 75,931 n.8) provides no basis at all for applying the standard to other types of relief.

The NPRM’s attempt to exclude continuances for “collateral relief” in the form of “parole, deferred action, or prosecutorial discretion” (85 Fed. Reg. at 75,931) is also arbitrary. Like other types of collateral relief, these actions will often prevent an individual’s removal from the United States. Pending requests for such relief—including relief under the Deferred Action for Childhood Arrivals program—provide as particular and justifiable a ground for a continuance in removal proceedings as other applications for collateral relief. And many types of collateral relief are “within the purview of DHS and beyond the authority of the immigration judge to grant” and can be “granted by DHS at any time regardless of whether immigration proceedings are pending.” 85 Fed. Reg. at 75,931. There is no justification for treating any such types of relief from removal as unworthy of continuances, much less for singling out some types of relief for especially negative treatment.

The exclusion for situations in which a continuance “would cause an immigration court to exceed a statutory or regulatory adjudication deadline” (85 Fed. Reg. at 75,940) is equally arbitrary. In fact, that exclusion is entirely unexplained. Among other things, the NPRM never explains why a continuance for good cause cannot itself constitute an exceptional circumstance triggering an exception from the statutory deadline for adjudicating asylum claims in 8 U.S.C. § 1185(d)(5)(A)(iii). Nor does the NPRM explain why that deadline, which is purely hortatory (*see id.* § 1158(d)(7)) and has been routinely disregarded by EOIR for decades, should now foreclose continuances for good cause.

D. Proposed 8 C.F.R. § 1003.29(b)(3): Restrictions on Continuances Based on Collateral Relief

The NPRM’s next proposal involves even greater strictures on continuances based on pending applications for collateral relief. The requirements include that (i) non-immigrant visas “vitate all grounds of removability”; (ii) visas be granted within six months; and (iii) deferred action and other relief short of the final visa is insufficient. These restrictions are uniformly arbitrary.

These restrictions again conflict directly with the NPRM’s own definition of “good cause” as present wherever a continuance is particular and justifiable. A continuance for a bona fide application that could lead to relief from removal, for instance, is always particular and justifiable. Moreover, given that USCIS routinely delays more than six months in acting on visa applications, a continuance based on an application with a longer wait is no less justifiable than one based on an application with a shorter wait. After all, the only difference involves DHS’s failure to process applications in a timely manner. By the same token, Congress’s failure to provide sufficient numbers of certain types of visas does not render a continuance less justifiable, because the respondent would have prompt relief from removal but for errors not of their own making. And there is no basis whatsoever for barring continuance for respondents whose applications are eligible for interim, temporary approval such as deferred action; after all, deferred action of this sort is often (as with the waiting list for U nonimmigrant status) a mechanism to address the government’s own shortcomings in processing and providing the ultimate visa.

In addition, the NPRM provides no basis at all for applying the 6-month rule outside the context of adjustment of status applications. That limit is therefore arbitrary by definition as applied to all other types of visas. In particular, the NPRM bases its time limit on the “recognition that an application for adjustment of status generally requires an immediately available visa at the time an application is filed.” 85 Fed. Reg. at 75,932. That is not true of many other types of visas. Similarly, many visas do not have priority dates published by the State Department. *See id.* The entire rationale for the 6-month rule is therefore inapplicable to T visas, U visas, applications for SIJS, and many other types of collateral relief. Further requiring a respondent such as a U visa petitioner to show that her visa will “vitate all grounds of removability” is similarly arbitrary. U visa petitioners are permitted by statute to request waivers of inadmissibility in conjunction with their visa petitions. It is not the U visa itself that ultimately vitiates all grounds of removability under these circumstances – rather, it is the waiver that does so. Yet, this requirement seems to bar U visa petitioners requesting waivers from obtaining continuances. This distinction is arbitrary and inexplicably punitive. And, absent a strong justification, the NPRM’s proposal to remove individuals who are unquestionably eligible for relief from removal is flatly arbitrary.³⁵

Worse still, for some applicants—including T-visa applicants—the 6-month rule threatens to result in deportation *and* the forfeiture of the collateral application. USCIS currently takes between 18.5 and 29 months to adjudicate a T visa application. *See* USCIS, Processing Times.³⁶ It is therefore entirely possible that a promptly filed T visa application will not be resolved within six months of the date a continuance motion is filed in immigration court. And if the applicant is ordered removed, and actually removed from the United States, that person is no longer eligible for a T visa—even if their application was meritorious. The NPRM therefore—without so much as an acknowledgement—requires the permanent removal of individuals entitled to remain in the United States solely because USCIS has failed in its duty to timely process applications.³⁷ For trafficking survivors, particularly those who have tried to help law enforcement hold their traffickers accountable, return home could lead to re-trafficking at best, and at worst –violent retaliation including death to the survivor or her family members.

³⁵ Furthermore, continuances for applications outside of EOIR’s jurisdiction are not, as the NPRM baldly asserts, tantamount to overriding prosecutorial discretion. 85 Fed. Reg. at 75,933. Rather, doing so recognizes that expending scarce judicial resources on cases in which the applicant is likely entitled to remain in the United States is counterproductive, is contrary to the purpose of the immigration laws, and places many respondents in needless danger. Whatever EOIR’s feelings on the matter, Congress did not intend for the immigration courts to be deportation machines.

³⁶ <https://egov.uscis.gov/processing-times/>.

³⁷ It is no answer to cite the time consumed by an appeal. 85 Fed. Reg. at 75,934 at n.12. Given the apparently limitless increase in delays at USCIS, many applications—including all U-visa applications—will remain pending even after an appeal is decided. Further, the benefits described above of continuances in this circumstance are not “minimal” (*id.* at 75,934), and EOIR can only describe them as such by completely ignoring the upheaval, mental harm, and potential physical harm caused by threatened and actual deportation. It beggars belief that EOIR would suggest respondents use the BIA’s scarce time and resources as a way to remain in the United States while DHS adjudicates applications—especially when the same result can be achieved with a minimum of EOIR time by continuances or administrative closure. Finally, a purely discretionary stay of removal from DHS (*id.*)—an action granted exceedingly rarely, not subject to any meaningful review, and rife with the potential for error—cannot even plausibly be seen as a reasonable substitute for continuances.

EOIR’s assertion in a different context that applications that can be pursued outside the United States cannot provide good cause for a continuance (85 Fed. Reg. at 75,930) is also flatly false. Many applicants would face persecution or violence while awaiting adjudication in their home country; many others functionally have no “home” country except the United States; others will never receive notice of the favorable adjudication of their applications; and still others would lack the means or opportunity to return to the United States. And all such individuals would have their lives upended for no reason whatsoever other than EOIR’s apparent desire to deport as many people as possible. Survivors of gender-based violence are particularly vulnerable upon deportation, without access at home to various services needed to maintain safety and independence from an abuser. Additional trauma including family or community ostracization of survivors can lead to homelessness and revictimization. A flat bar on continuances for survivors while their applications for relief are pending would therefore inflict unnecessary suffering in blatant disregard of Congressional intent to 1) protect survivors; 2) thwart abusers’ exploitation of our immigration system to perpetuate abuse; and 3) help law enforcement investigate and prosecute crimes. Such a bar would also needlessly squander scarce government resources across the board— ICE will have to expend resources to remove petitioners, USCIS will have to adjudicate additional waivers of inadmissibility and coordinate with the Department of State (DOS), the DOS will in turn have to conduct visa interviews and process visa applications, and Customs and Border Protection (CBP) will have to conduct additional screenings at Ports of Entry.

The NPRM’s sole rationale for the restriction on continuances based on deferred action and other relief is that such continuances would be “based on relief that is speculative.” 85 Fed. Reg. at 75,933; *see also id.* at 75,935. That, too, is false: A U visa applicant, for instance, is placed on the regulatory waiting list—and granted deferred action as a result—*only* when USCIS determines that the application is approvable and that the individual would be entitled to a U visa but for the annual statutory cap on such visas. In that circumstance, there is nothing at all “speculative” about the applicant’s ultimate right to relief; to the contrary, an ultimate grant of relief is all but guaranteed.

Finally, the NPRM proposes limits on continuances related to “discrete collateral non-visa adjudications by DHS,” such as adjudications of asylum applications filed by unaccompanied minors and applications for Temporary Protected Status. 85 Fed. Reg. 75,935. In those situations, the NPRM would allow a continuance only if, among other things, the application is “prima facie eligib[le] for the underlying benefit” and the respondent has “no other applications pending before the immigration judge.” *Id.* at 75,940. The first of these restrictions is contrary to law, because it requires EOIR adjudicators to (literally) pre-judge the applications, even though USCIS has jurisdiction over the applications. In the case of unaccompanied minors, this flatly violates 8 U.S.C. § 1158(b)(3)(C). The second restriction, meanwhile, is arbitrary, because it penalizes those who are *also* eligible for asylum or other relief available in immigration court by requiring them to proceed with removal proceedings even while their collateral applications are pending. Moreover, the NPRM makes no attempt to justify either restriction. Both must accordingly be revoked.

E. Proposed 8 C.F.R. § 1003.29(b)(4): Restrictions on Continuances Related to Counsel

The next provisions of the NPRM severely limit continuances for respondents to find counsel and for counsel to prepare. *See* 85 Fed. Reg. at 75,941. But the limitations are again inconsistent with the NPRM’s own definition of “good cause.” More than one continuance to find a lawyer can be

particular and justified, as can a continuance beyond 30 days. So, too, can continuances for lawyer preparation of more than 14 days or after the respondent has pled to the “allegations and charges in the Notice to Appear.” *Id.* And nothing in the NPRM even begins to plausibly support a contrary position.

Further, the NPRM’s justifications for these limitations are again nothing more than wafer-thin pretexts for driving down representation rates and speeding deportations. EOIR claims that the rule is justified because, in its view, 90% of asylum respondents are represented in immigration court. *See* 85 Fed. Reg. at 75,935. That bare statement is patently insufficient for at least five reasons: *First*, the statement is based on internal EOIR data, which is untrustworthy and unreliable. *See, e.g.,* TRAC, *Incomplete and Garbled Immigration Court Data Suggest Lack of Commitment to Accuracy*;³⁸ TRAC, *After EOIR Fixes Most Egregious Data Errors, TRAC Releases New Asylum Data—But With a Warning*.³⁹ *Second*, it is out of step with historical representation rates, which hover around 80% for asylum seekers. *See* TRAC, *Asylum Decisions*.⁴⁰ *Third*, it fails to note that only about half of *detained* asylum seekers are represented (*id.*), in part because DHS holds those individuals in prisons in remote areas that have exceedingly few lawyers. *Fourth*, even if the 90% claim were unimpeachably accurate and not misleading, the statement would nevertheless be of excessively limited value, because it says nothing about *how soon* lawyers appeared for individuals. It therefore provides no reason at all to believe that the NPRM’s continuances will allow similar representation rates going forward. And in our experience, they are entirely insufficient. And *fifth*, the statement fails to account for the fact that, because the NPRM’s proposals will lower representation rates, they will inevitably result in the denial of meritorious claims and *refoulement* of asylum seekers. *See id.*

Worse still, the NPRM says that the purported 90% representation rate it discusses means that “representation should not undermine the orderly procedure of the immigration courts” or be a “hindrance to fair and timely adjudications.” 85 Fed. Reg. at 75,935. That statement is offensive and contrary to the core principles upon which DOJ previously operated. Representation is not a *hindrance* to “fair and timely adjudications”; rather, it is a *prerequisite* to fair and timely adjudications. That is especially true in putative courtrooms in which, absent representation, traumatized individuals who speak no English and know no U.S. law must navigate byzantine substantive and procedural provisions riddled with traps for the unwary and face deportation—often to persecution, violence, and/or death—if relief is denied. And representation can be said to “undermine the orderly procedure of the immigration courts” only if EOIR’s view of “orderly procedure” involves the authoritarian impulse to ensure as smooth and speedy a deportation as possible in all cases.

The NPRM’s claim that respondents “manipulate [their] right to counsel ... to subvert the administration of justice” is equally offensive. 85 Fed. Reg. at 75,935. That remark is—like every other claim of malfeasance that EOIR has recently lobbed in the direction of asylum seekers (*see* Section II.A, *supra*)—utterly unsupported by so much as a shred of evidence. Given that EOIR has access to all relevant data, the fact that it can cite no such evidence means that no such evidence exists. And EOIR’s claim is outlandish on its face, because it is directly contrary to the clear incentives that respondents face: Respondents seek counsel because—as commonsense suggests—counsel

³⁸ <https://trac.syr.edu/immigration/reports/580/>.

³⁹ <https://trac.syr.edu/immigration/reports/624/>.

⁴⁰ <https://trac.syr.edu/phptools/immigration/asylum/>.

significantly increase the chance that the respondent will receive relief. See TRAC, *Asylum Decisions*; Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Penn. L. Rev. 1, 48-58 (2015). The claim of “manipulation” is thus, like so much of EOIR’s recent work product, nothing more than the expression of pernicious and deep-seated institutional prejudices against asylum seekers. Because the new limits on continuances for representation have no other general basis, they are arbitrary.⁴¹

Survivors of gender-based violence in particular are in desperate need of counsel. Even the most straightforward asylum cases, for example, require technical legal analysis to ensure meaningful access to the asylum process—yet cases involving gender-based persecution are notoriously complex. *Matter of A-B-*, 27 I. & N. Dec. 227 (AG 2018), provides a striking example, as Immigration judges frequently misinterpret the case to mandate the denial of all claims involving domestic violence putting survivors at grave risk upon denial and deportation. Compounding this challenge is that survivors are mostly indigent, with close to 100% of those experiencing intimate partner violence suffering economic abuse; 75% of women report staying in abusive relationships due to economic barriers. It is therefore highly unrealistic to expect survivors to secure counsel, *pro bono* or otherwise quickly enough without a continuance. In our experience, it can take over three months to match a *pro bono* team with a case, plus an additional month to run conflicts checks and sign retainers. Survivors in removal proceedings and who are detained are even less likely to be able to retain counsel quickly.

The agency’s attempts to provide more tailored justifications for specific provisions are equally implausible. The statement that the 10-day period in 8 U.S.C. § 1229(b) is “reasonable” and generally sufficient for finding counsel (85 Fed. Reg. at 75,935) is an evidence-free *ipse dixit* at odds with the experience of anyone who has set foot in an immigration courtroom. And even assuming *arguendo* that § 1229(b) allows EOIR to proceed whether or not a respondent has found counsel after 10 days (*id.* at 75,936), the agency’s ability under the statute to do so does not provide a non-arbitrary justification for the proposed rules. Simply put, EOIR’s asserted ability to do something consistent with the statute does not mean that EOIR has a non-arbitrary justification for doing so.

The NPRM then returns to the realm of prejudice, insinuating that respondents who cannot find counsel are simply not “diligent” in doing so. 85 Fed. Reg. at 75,936. That assertion is again evidence-free. It is also farcical. We invite Director McHenry and others involved in promulgating this NPRM to put aside the vast majority of their worldly belongings and enter detention in a foreign country where they do not speak the language and where they face unremitting hostility from their jailers and, once there, to attempt to seek counsel who specializes in a highly technical area of the law, who charges nothing, or next to nothing, for representation, and who is not already overburdened with clients. Diligence or not, you would fail at the task within 30 days, 60 days, or 90 days—and that is before we account for the facts that you were not fleeing violence, not coping with severe trauma, not simultaneously caring for children, and doubtless took relatively fast, luxurious, and safe transportation to your destination. The rule is, in other words, in no way “reasonable” or “realistic”

⁴¹ The agencies suggest in a footnote that they find comfort in a pre-1986 regulation concerning continuances. 85 Fed. Reg. at 75,935-36 n.15. That point might have at least minimal force had immigration law and procedures remained in its pre-1986 state. But given the subsequent rise in the imprisonment of immigrants for the act of daring to seek asylum, and the myriad other changes since 1986, any reliance on experiences under that regulation—and, to be clear, the agency cites no evidence of those experiences—is frivolous.

(*id.*)—and EOIR has no evidence at all that even begins to suggest otherwise. EOIR likewise has no evidence that individuals even know how to go about finding counsel in advance of their first hearing.⁴²

The NPRM’s proposal to limit continuances for preparation is equally unrealistic. As EOIR well knows, immigration judges routinely reschedule cases at the last minute, and the BIA waits many months to issue briefing schedules and then expects briefs to be filed quickly and with a minimal continuance. EOIR itself therefore ensures that practitioners *must* routinely ask for continuances related to preparation. Given that undeniable fact, there is no way for practitioners to meaningfully judge how many cases “they can handle” at a given time. 85 Fed. Reg. at 75,936. The proposed restriction is therefore nothing but a pretextual attempt to lower representation rates in immigration court—and thereby reduce the percentage of individuals who receive relief.

The agency’s justification for the bar on multiple continuances for preparation, meanwhile, studiously ignores its own recent actions. EOIR claims that “a significant amount of preparation time is already built into immigration hearings, especially between a master calendar hearing and an individual merits hearing.” 85 Fed. Reg. at 75,936. But EOIR ignores the fact that it has recently moved to greatly reduce that time—and to provide a sizeable proportion of asylum seekers only 15 days in which to file an application for relief. *See* EOIR, *Procedures for Asylum and Withholding of Removal*, 85 Fed. Reg. 81,698 (Dec. 16, 2020). EOIR ignores the fact that it has recently eliminated master calendar hearings in most represented cases. *See* McHenry Memo. And EOIR ignores the fact that it will routinely provide as little as 45 days after a vacated hearing date to file *all* evidence—even evidence that must travel thousands of miles from an asylum seeker’s home country. *See id.* EOIR, in other words, ignores the fact that its own actions have made its position on this point entirely untenable.

EOIR then claims that respondents’ representatives are bad actors by claiming, once again without a shred of evidence, that many continuances for preparation are somehow fraudulent. 85 Fed. Reg. at 75,937. Given EOIR’s perpetual habit of last-minute rescheduling, that insinuation is as implausible as it is insulting.

EOIR next claims that continuances for preparation are frequently used where respondents have “withh[eld] ... information” from their lawyers and suggests that such continuances should be eliminated. 85 Fed. Reg. at 75,937. But the two examples that EOIR is able to cite from decades of experience adjudicating cases under the INA do not show a pattern. More importantly, EOIR utterly fails to reckon with the well-established fact that respondents fleeing violence and persecution are not willfully “withholding” evidence but instead dealing with post-traumatic stress disorder and related aftereffects of trauma that render it functionally impossible for them to freely discuss their trauma, much less tell a linear story, especially where they do not have an established relationship of trust with their interlocutor. *See, e.g.,* Tahirih Justice Center, *Prekarious Protection: How Unsettled Policy*

⁴² Similarly, there is no evidence that even begins to suggest that unrepresented asylum seekers have weaker cases than represented asylum seekers. 85 Fed. Reg. at 75,936 n.16. And even assuming that consistency across judges is a worthwhile goal (*id.* at n.19), that goal provides no support for the particular proposals EOIR has chosen.

and *Current Laws Harm Women and Girls Fleeing Persecution* (Oct. 2009);⁴³ Deborah Davis & William C. Follette, *Foibles of Witness Memory for Traumatic/High Profile Events*, 66 J. Air L. & Com. 1421 (2001); Sexual Assault Incident Reports: Investigative Strategies, Int'l Ass'n of Chiefs of Police 3 (Aug. 8, 2018);⁴⁴ Juliet Cohen, *Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers*, 13 Int'l J. Refugee L. 293 (2001); U.S. Dep't of Health and Human Servs., Substance Abuse and Mental Health Servs. Admin., *Trauma-Informed Care in Behavioral Health Services* (2014);⁴⁵ David S. Gangsei & Ana C. Deutsch, *Psychological evaluation of asylum seekers as a therapeutic process*, 17 Torture 79 (2007); Stephen Paskey, *Telling Refugee Stories: Trauma, Credibility, and the Adversarial Adjudication of Claims for Asylum*, 56 Santa Clara L. Rev. 457 (2016); Alana Mosley, *Re-Victimization and the Asylum Process: Jimenez Ferreira v. Lynch: Re-Assessing the Weight Placed on Credible Fear Interviews in Determining Credibility*, 36 L. & Ineq. 315 (2018); Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 Geo. Immigr. L.J. 367 (2003).⁴⁶ EOIR's failure to acknowledge the role of trauma in development of testimony is also fundamentally at odds with the UNHCR's guidelines for adjudicating refugee claims involving gender-based persecution.⁴⁷

The proposed rules concerning conflicts with other court dates are also outlandish. Under the proposed rule, if a practitioner had a hearing scheduled in immigration court on behalf of a non-detained client and later received notice from the Supreme Court of the United States that her case was scheduled for oral argument at the same time, an immigration judge would categorically lack the authority to continue the hearing on the grounds of the Supreme Court argument. 85 Fed. Reg. at 75,937. EOIR's excuse for this is to cast more aspersions on counsel, claiming that "practitioners ... misleadingly inform the immigration judge that they do not have a conflict when scheduling a future hearing or take on cases in other courts after the immigration court hearing has been scheduled knowing that a conflict exists." *Id.* These antipathetic claims are, once again, not supported by a shred of evidence, despite the fact that all relevant evidence rests in EOIR's hands. And absent such evidence, EOIR's justification is entirely baseless.

F. Proposed 8 C.F.R. § 1003.29(b)(5) & (b)(6): Continuances on an Immigration Judge's Own Motion and of Merits Hearings

Finally, the NPRM proposes to severely limit the situations in which immigration judges may grant continuances *sua sponte* or continuances of merits hearings. Once again, the NPRM's limitations conflict with its own definition of good cause. In fact, EOIR admits that it believes *sua sponte* continuances should not be guided by the standard of a particular and justifiable need but should instead cover only cases "where it would be unreasonable or impossible for an immigration

⁴³ https://www.tahirih.org/wp-content/uploads/2009/10/Precarious-Protection_Tahirih-Justice-Center.pdf.

⁴⁴ <https://www.theiacp.org/resources/document/sexual-assault-incident-reports-investigative-strategies>.

⁴⁵ <https://store.samhsa.gov/sites/default/files/d7/priv/sma14-4816.pdf>.

⁴⁶ Footnote 20 of the NPRM, which repeats claims of ample time and the need for standardization (*see* 85 Fed. Reg. at 75,937 n.20), provides no justification for the proposal for the reasons discussed with respect to similar claims above. [*cross-cite*]

⁴⁷ *Id.* at 31.

judge to proceed with a hearing.” 85 Fed. Reg. at 75,938. Similarly, the NPRM dispenses entirely with good cause in the context of merits hearings in favor of the new standard that such continuances are “strongly disfavored” and should be granted only in the most exigent of circumstances. *Id.*

IV. The NPRM Inflicts Needless, Undue Harm on Survivors of Gender-based Violence, which Violates Congressional Intent in Enacting Survivor-Based Relief

Limiting continuances in proceedings for U visa, T visa, and VAWA-Self Petitioners not only furthers no legitimate government interest - it harms the government along with survivors by promoting inefficiency as explained above. And a bipartisan Congress did not create these remedies only to have those who implement them entirely ignore their stated purpose. The USCIS backlogs for adjudicating survivor-based relief itself causes the need for continuances in immigration court to allow sufficient time for adjudication. Punishing survivors as a result not only harms them but allows abusers to manipulate survivors with impunity. Survivors will now have good reason to believe their abusers when they threaten to have them deported. This is precisely the result Congress sought to avoid through these remedies.⁴⁸ In the T visa context, the statute itself contemplates that survivors of human trafficking should apply for a continuance in proceedings even if DHS denies a request for a stay of removal.⁴⁹ Nonetheless, survivors will be swiftly and arbitrarily removed while their petitions for relief are pending under the NPRM.

The NPRM also asserts that survivors can simply obtain a stay of removal from DHS to delay deportation. However, in practice, ICE commonly rejects such requests from respondents even for those who USCIS has deemed *prima facie* eligible for relief. One of our clients with a very strong U

⁴⁸ See 146 Cong. Rec. S10185 (2000) (statement of Sen. Patrick Leahy, stating that the U visa “ma[d]e it easier for abused women and their children to become lawful permanent residents” and ensured that “battered immigrant women should not have to choose to stay with their abusers in order to stay in the United States.”). See also 146 Cong. Rec. S8571 (2000) (statement of Sen. Paul Sarbanes likewise explaining that the Violence Against Women Act of 1994 “will also make it easier for battered immigrant women to leave their abusers without fear of deportation” (emphasis added). And in 2013, Sen. Amy Klobuchar noted the importance of U visas from her perspective as a former prosecutor, describing numerous cases where the perpetrator threatened to have the victim deported if she sought help from law enforcement. 159 Cong. Rec. S497, 498 (2013). Finally, Congress explained that “providing battered immigrant women and children who were experiencing domestic violence at home with protection against deportation . . . frees them to cooperate with law enforcement and prosecutors in criminal cases brought against their abusers.” Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1502(a)(1)(2) (Oct. 28, 2000). (emphasis added). See also New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. 53,014 (2007).

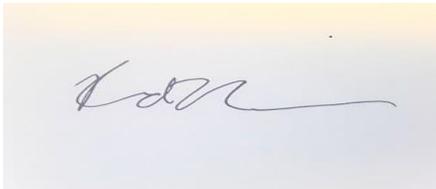
⁴⁹ See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044, (TVPRA); See INA § 237(d)(2). The statute also intends for “deferred action” to stop removal proceedings: “The denial of a request for an administrative stay of removal under this subsection shall not preclude the alien from applying for a stay of removal, *deferred action*, or a continuance or abeyance of removal proceedings under any other provision of the immigration laws of the United States.” *Id.* (emphasis added).

visa case was removed by ICE to Mexico and her abuser followed her there. She is constantly vigilant in case he finds her and is terrified that he will punish her with impunity for trying to escape. According to a 2019 ICE factsheet,⁵⁰ ICE's previous guidance governing stays of removal is no longer in effect, baselessly claiming that removing U visa petitioners would not impact law enforcement or the petitioner. That the NPRM justifies its restrictions on continuances because stays of removal are available to survivors is therefore false and arbitrary.

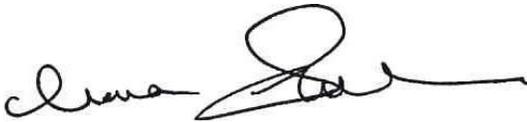
V. Conclusion

As explained in depth above, the NPRM is arbitrary, unlawful, and particularly harmful to survivors of gender-based violence such as our clients. The NPRM must be withdrawn in its entirety.

Sincerely,



Richard Caldarone
Litigation Counsel



Irena Sullivan
Senior Immigration Policy Counsel

⁵⁰ See *Revision of Stay of Removal Request Reviews for U Visa Petitioners*, United States Dep't of Homeland Security, Immigr. and Customs Enforcement (Aug. 2, 2019), <https://www.ice.gov/factsheets/revision-stay-removal-request-reviews-u-visa-petitioners#wcm-survey-target-id>