KIND
KIDS IN NEED OF DEFENSE

September 25, 2020

Ms. Lauren Alder Reid
Assistant Director, Office of Policy
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 2600
Falls Church, Virginia 22041

RE: EOIR Docket No. 19-0022; A.G. Order No.4800-2020, RIN 1125-AA96: Executive Office for Immigration Review, Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure.

Dear Ms. Alder Reid:

Kids in Need of Defense (KIND) respectfully submits this comment on the above Notice of Proposed Rulemaking (NPRM) issued August 26, 2020 (the Proposed Rule) by the Executive Office for Immigration Review (EOIR).[1] The Proposed Rule's stated purpose is to improve the "consistency, efficiency, and quality of [EOIR's] adjudications," as well as to uniformly limit the authority of Immigration Judges and the Board of Immigration Appeals (the BIA, or Board) to administratively close cases,[2] but the proposed changes will have a contrary effect on the adjudications process. Instead, when read as a whole, the proposed amendments to procedures governing EOIR decision-making, motions practice, and administrative management reduce the authority and independence of judges and Board Members, concentrate power in the hands of the Director of EOIR, and make it far more difficult for individuals in immigration proceedings to obtain fair and just results, particularly when their cases involve complex fact patterns, traumatic events, and exceptional circumstances that warrant nuanced consideration and may drive the development of the law.

The Proposed Rule will negatively impact many respondents, but for the unaccompanied children whom KIND serves, the changes could be catastrophic given the many ways in which good judgment and flexibility are stripped from the rules—qualities of case adjudications that are especially critical in addressing the claims of children. Rather than encouraging adjudicators to use their discretion and expertise to evaluate the needs of the parties in an individual case, the Proposed Rule further erodes trust in the quality of the immigration adjudication and appellate processes. Given these important considerations, many of the specific changes discussed below would reduce rather than enhance the

[1] Executive Office for Immigration Review; Appellate Proceedings and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 52491 (August 26, 2020).
[2] *Id.* at 52491.

likelihood that children are treated fairly before the immigration court or the Board, with the potential to impair the record available if judicial review is even possible.

KIND is a national nonprofit organization dedicated to providing free legal representation and protection to unaccompanied immigrant and refugee children in removal proceedings. Since January 2009, KIND has received referrals for more than 21,000 children from 77 countries. KIND has field offices in ten cities: Los Angeles, San Francisco, Atlanta, Baltimore, Boston, Houston, Newark, New York City, Seattle, and Washington, DC. Legal services professionals who serve children through KIND provide defense in removal proceedings and pursue immigration benefits and relief for which their clients may be eligible. KIND also employs social services coordinators throughout the country, providing unaccompanied children with the support they need outside of the courtroom. KIND promotes protection of children in countries of origin and transit countries and works to address the root causes of child migration from Central America. KIND also advocates for laws, policies, and practices to improve the protection of unaccompanied children. The comments that follow will focus primarily on the Proposed Rule's impact on children, particularly unaccompanied children, although many of the issues we identify reflect a deleterious effect on other respondents appearing before EOIR, particularly asylum-seekers, victims of crime or trafficking, and survivors of violence.

As a threshold matter, the effective date and retroactivity provisions of the Proposed Rule are alarming, in that they may violate respondents' due process rights and appear to be in violation of the Administrative Procedure Act (APA). EOIR proposes that most changes be effective for "appeals filed on or after the effective date of publication," while those concerning administrative closure, *sua sponte* authority to reopen or reconsider, and the new immigration judge certification authority would "be effective on the date of publication." Proposed Rule at 52498. Applying most of the changes only to prospective *appellate* filings conceals the ways that they could have retroactive effect insofar as changes in appellate procedure could influence what filings or decisions an applicant makes before the immigration judge. The new rules limiting the ability to present new evidence to the BIA even in exceptional circumstances, for example, could affect whether an applicant would have sought to supplement the record or move to reconsider before the immigration court rather than take a matter up to the Board. For the three categories of provisions that would be immediately effective, it is unclear on what basis EOIR believes it is satisfying the requirement of the APA that substantive rules be delayed at least 30 days from publication; certainly EOIR has not provided an indication of what its statement of "good cause found" for violating the 30-day provision will be.[3]

Even assuming that the agency is empowered to issue regulations with retroactive effect on these topics, pursuant to basic retroactivity principles, EOIR needs to consider at a minimum "the potential unfairness of retroactive application" of these rules and "determine[] that it is an acceptable price to pay for the countervailing benefits."[4] There is no indication in the Proposed Rule that the agency has

[3] *See* 5 U.S.C. § 533(d).
[4] *INS v. St. Cyr*, 533 U.S. 289, 316 (2001) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 272-73 (1994)).

undertaken an appropriate review of the costs to petitioners of the retroactive elements of the Proposed Rule.

I. The Proposed Rule would place constraints on appeals and motion practice, which are essential processes for the full and fair consideration of unaccompanied children's cases.

Many of KIND's clients have fled severe violence and threats to their lives in their countries of origin and may be eligible for asylum, Special Immigrant Juvenile Status, or other forms of humanitarian protection. The majority of the children we serve arrive in the United States as unaccompanied children, while others are members of families separated at the border whose cases may ultimately be joined with those of their parents. For clients whose cases are denied at the immigration court level, the right to appeal or in some cases move to reopen their claims serves as a significant check on errors in adjudication and a critical safeguard of due process. Yet the Proposed Rule erects significant barriers to effective administrative review—and therefore, barriers to subsequent access to judicial review—of unaccompanied children's cases. Some of these barriers include truncated and simultaneous briefing deadlines, constraints on consideration of motions to reopen and the receipt of new evidence, and the virtual elimination of administrative closure. More troubling still, these changes come on the heels of EOIR's proposed fee rule, which would dramatically increase filing fees for appeals and motions to reopen or reconsider, and assess an unprecedented fee for most asylum applications.[5] Collectively, these changes threaten to deprive thousands of unaccompanied children of full and fair consideration of their cases for protection and as a consequence place them at risk of return to life-threatening danger.

The substantive issues raised in immigration court by KIND clients are often on the cutting edge of protection issues, involving definitions of particular social groups for asylum claims, the nature of persecution based on sexual- and gender-based violence, the status of children in particular societies, or the role of criminal and gang violence in forcing children to flee their homes. Such issues are complex, novel, and often matters of first impression before the immigration courts, and they may not be correctly resolved in the first instance. In our experience, some cases involve not only appeals but remands back to the immigration court and ultimately a grant of asylum to a child whose case was initially denied. The potential consequences of these cases for children are far from theoretical. Without meaningful access to administrative or judicial review, the erroneous denial of a child's claim for protection may result in a child's return to harm, or worse.

Changes in asylum and immigration law, country conditions, and circumstances affecting a child's safety and well-being may occur while appeals are pending, making motion practice or the submission of new evidence essential to the correct resolution of the case. In one case that highlights the importance of the adjudicator's independent judgment and latitude, a child suffered severe injuries while his case was on appeal to the Board, requiring motions to reopen and remand based on the new circumstances.

[5] EOIR, Fee Review, 85 Fed. Reg. 11866 (Feb. 28, 2020).

Rapidly changing administrative policies may also lead to the need for such motions. One such example is the processing of families including children at the border pursuant to the Migrant Protection Protocols (MPP)—a policy under which certain asylum seekers are made to wait in Mexico for proceedings in their U.S. asylum cases. KIND has served children who were placed into MPP with their families but were forced to return to the U.S. to request protection as unaccompanied children following a parent's disappearance or as a result of life-threatening conditions along the Mexican border. In such cases, children are at risk of being unknowingly ordered removed *in absentia* in the MPP case, even while in the custody of the Office of Refugee Resettlement.[6] Remedying these circumstances, which threaten the child's deportation without consideration of their claim for protection, frequently requires motion practice or appeals. Under the Proposed Rule's narrowed procedures, however, motions could be denied on the basis of time or numerical limits and new evidence could be barred from consideration on appeal or remand.

II. The Proposed Rule will not achieve the promised efficiencies but will instead reduce the immigration courts' and BIA's ability to discharge their responsibilities fairly.

The new procedures described in the Proposed Rule have been offered as remedies to streamline and improve efficiencies in adjudications, but are unlikely to meet the described goal. The increased volume of pending cases before EOIR merits attention, and a careful analysis of processing procedures and innovative ways to address them are welcome. The Proposed Rule, however, rarely takes this approach, substituting normative restrictions on the actions the BIA may take without explaining how or why changing the rules, rather than increasing personnel or resources, or allocating more discretion to grant relief early in a case, is the appropriate answer. In some cases, the proposed changes represent adaptation to new technology (modifications based on adoption of digital files for the official record) or eliminating an unnecessary step in completing cases (e.g., by requiring the Board to hold cases awaiting completion of a security check rather than remanding, Proposed Rule at 52499). Such changes are welcome because they provide a benefit to all participants. Many purported efficiencies, however, offer no benefit to respondents, and reduce the overall authority of adjudicators to use their best judgment in handling unusual equities. Such provisions of the Proposed Rule should be rescinded.

A. Concurrent briefing and other timing requirements

The Proposed Rule attempts to reduce the backlog by shortening the available time for briefing issues to the BIA, placing burdens on both the parties and the adjudicators to meet shortened submission and completion deadlines. Proposed § 1003.3, for instance, would require both parties to submit briefs concurrently, on the theory that this practice works well in the case of detained respondents, and thus there is no reason not to use it for all respondents. Proposed Rule at 52498-99, proposed 8 C.F.R. § 1003.3(c)(1). The decision to require simultaneous filing of briefs for those who are detained is a

[6] *See, e.g.*, *A.D.R.S. v. Barr*, No. 20-cv-3685 (S.D.N.Y.), Dkt. #38, at 29-31 (government brief arguing in favor of BIA review of a motion to reopen MPP proceedings, rather than institution of section 240 proceedings, as appropriate way to address an unaccompanied child's claim for protection following an *in absentia* MPP removal order).

compromise, alongside other administrative practices within the court, to limit the amount of time an individual must spend in detention; there is no good reason to extend those tradeoffs to non-detained cases, where an additional few weeks between filing and outcome is not material to an individual's liberty interests. The adversarial nature of immigration court proceedings and the appellate process requires a dialogue that takes place between the parties through the serial submission of arguments; simultaneous submission particularly disfavors the appellee, who is left to guess at the content of the appellant's argument based on an often skeletal notice of appeal.

This proposed change is guaranteed to reduce rather than increase the Board's efficiency, as the appellee will be forced to brief points that may not actually be in contention, thereby diverting attention from actual points of controversy where the Board would benefit from more thorough briefing. And it is particularly unfair to the respondent, whether as appellee or appellant, given the vast resources at the government's disposal. Similarly, the difficulties of obtaining counsel and the complexity and novelty of many of the arguments raised by unaccompanied children sometimes require extensions of the briefing schedule up to the full 90 days currently allotted by regulation, whereas the new provision reduces permissible extensions to no more than 14 days. This is particularly problematic for individual respondents because counsel who appeared before the immigration court may not continue the representation before the Board for a variety of reasons such as unavailability, limits on expertise, a conflict of interest, or the client's finances —a problem exacerbated by EOIR's proposal to raise most BIA filing fees by 300 to 900%,[7] an interaction that the Proposed Rule arbitrarily fails to address. Moreover, the effects of these aspects of the Proposed Rule are amplified by their interaction with existing BIA practice limiting party briefs to 25 pages, and with a precedent decision announced on the evening on September 24, 2020 that further underscores the importance of parties having a meaningful opportunity for briefing, as "DHS's decision not to expressly challenge a particular element of an asylum claim [will] not relieve the Board from its need to review the immigration judge's determination as to that element." *Matter of A-C-A-A-,* 28 I.&N. Dec. 84, 88 (A.G. 2020). There is no evidence to suggest that the Proposed Rule's "time-saving" measures will actually increase the Board's productivity and they seem to be little more than an attempt to further reduce the opportunity to make a full and complete case before the Board.

B. Elimination of adjudicators' *sua sponte* authority to reopen or reconsider

Further, the Proposed Rule limits the BIA's authority to reopen or reconsider cases *sua sponte* where necessary in the interest of justice and due process by narrowing such consideration to "limited circumstances evincing a need to correct typographical errors or defective service." Proposed Rule at 52492. In KIND's experience, although *sua sponte* authority is typically used sparingly, it can be of critical importance in unaccompanied children's cases.

[7] *See* Fee Review, *supra* note 5.

Many unaccompanied children have survived severe trauma and may require time to develop trust with attorneys, caregivers, and other professionals and to process and disclose painful experiences that may be at the base of their legal cases.[8] Trauma and its effects do not follow a precise timeline, and critical details and information regarding a child's protection needs may emerge over time, including even after a case has been adjudicated or is on appeal. *Sua sponte* reopening serves as a vital procedural safeguard in such cases, ensuring that a child's protection needs will not be disregarded were a motion to be otherwise deemed untimely or in excess of the numerical limits. Reopening outside of those regulatory limits may also be necessary in cases in which ineffective assistance of counsel or a child's *pro* se appearance before the immigration court impeded the full presentation of a child's case for protection, or in the case of procedural complexities and delays resulting from government policies and initiatives, as in the case of unaccompanied children affected by the Migrant Protection Protocols discussed *supra*.

While finality and timeliness are important goals both for the efficiency of the immigration system as well as stability for protection seekers, they must not be used to justify dispensing with reopening or reconsideration of a child's case if the result would be a child's return to harm or danger. Instead, adjudicators must retain the discretion to respond to the circumstances before them as due process—and, indeed, compliance with *non-refoulement* obligations under the Refugee Protocol and implementing legislation—may require. The critical procedural protections for unaccompanied children set forth in the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA)—from exemption from the one-year filing deadline and safe third country bars to asylum to requirements that the specialized needs of unaccompanied children be taken into account[9]—would mean little if adjudicators were required to prioritize the rapid conclusion of a child's case above the child's very safety and protection.

C. Foreclosing consideration of new evidence post-decision except as to jurisdiction

Under the Proposed Rule, the BIA, which ordinarily does not consider new evidence on appeal, would further be prohibited from remanding or considering a motion to remand to permit the immigration

[8] *See Finding Keys: A Systematic Review of Barriers and Facilitators for Refugee Children's Disclosure of Their Life Stories*, E. C. C. van Os, A. E. Zijlstra, et. al, *Trauma, Violence, and Abuse 2020*, Vol. 21(2) 242-260, at 255 ("Although asylum hearings could endure for several hours, not much time is invested in softening feelings of mistrust (Connolly, 2015; Crawley, 2010). In some sense, this seems to be a 'mission impossible,' since in the clinical context, disclosure of refugee's experiences is a long, dialogical process and not a single event (De Haene et al., 2012; Reitsema & Grietens, 2015), while an asylum hearing is usually a once-only opportunity (UNHCR, 2014, p. 106). Ehntholt and Yule (2006) even state that it can be too difficult for young refugees to share their most painful memories when they still feel the threat that they could be deported. On the other hand, it may be precisely these 'most painful memories' that reflect the reason why a child is in need of refugee protection and these should therefore be disclosed to those who decide upon the asylum request within the time constraints of the asylum procedure.").

[9] *See, e.g.,* INA § 208(a)(2)(E); TVPRA § 235(d)(7); TVPRA § 235(d)(8) ("Applications for asylum and other forms of relief from removal in which an unaccompanied alien child is the principal applicant shall be governed by regulations which take into account the specialized needs of unaccompanied alien children and which address both procedural and substantive aspects of handling unaccompanied alien children's cases.").

judge to consider new evidence, subject to narrow exceptions. Proposed § 1003.1(d)(7)(v). The stated aim is to prevent "gamesmanship on appeal—e.g., a respondent whose application is denied might seek additional evidence to present on appeal . . . even though such evidence should have been presented in the first instance." Proposed Rule at 52501. Whatever the merits of this aim, the blunt instrument of the Proposed Rule may also foreclose a child's only practical opportunity for a full and fair hearing of his or her claim. For example, the BIA would be unable to entertain a motion to remand for consideration of evidence that existed at the time the immigration judge heard the case, yet was inaccessible to the child respondent, possibly due to resource limitations, lack of effective counsel, or countervailing interests of adults on whom the child was dependent. Such obstacles are routinely present for respondents seeking protection as unaccompanied children. The hardship will become all the more acute with trends toward limiting the availability of continuances while seeking relief,[10] the elimination of administrative closure (discussed *infra*), and accelerated timelines for appeals (discussed *supra*). Children's development and capacities vary with age and may be impacted by traumatic experiences, at times posing barriers to a child's ability to disclose facts material to her or his claim while inhibiting the ability of practitioners to identify and seek out potentially important evidence. Where children are *pro se*, the difficulties will be exacerbated still further. Instead of a wholesale bar to the ability to offer new evidence, EOIR should withdraw this provision of the Proposed Rule and ensure that the Board can continue to consider whether these and related factors warrant remand in an appropriate case.

Adding insult to injury, the Proposed Rule *invites* the Board to consider new evidence bearing on "EOIR's authority vis-à-vis DHS regarding an application for immigration benefits," such as USCIS's statutory initial jurisdiction over unaccompanied children's claims. Proposed Rule at 52500. Echoing imbalanced procedures elsewhere in the Proposed Rule, the proposed changes would deprive applicants such as unaccompanied children of the ability to provide their own important new evidence bearing on relief, while inviting the government to provide new evidence on a government appeal, such as after-the-fact documentation that a child was once reunified with a parent or legal guardian, to disrupt a grant of asylum or other relief. The government's mischief with respect to these after-the-fact efforts to "de-designate" unaccompanied children is the subject of active litigation where KIND is counsel for a proposed class of unaccompanied children.[11] It is inappropriate for EOIR to exacerbate the confusion it has created by attempting to interfere in USCIS's jurisdiction to determine its own jurisdiction over unaccompanied children's cases[12] with such supplemental factfinding.

[10] *See Matter of Mayen*, 27 I.&N. Dec. 755 (BIA 2020).
[11] *See J.O.P. v. U.S. Dep't of Homeland Sec.*, No. 19-cv-1944, 2020 U.S. Dist. LEXIS 97515 at *26-27 (D. Md. June 3, 2020) (describing interference of immigration judge's factual findings in USCIS adjudication of an unaccompanied child's asylum application).
[12] *See Matter of M-A-C-O*, 27 I.&N. Dec. 477 (BIA 2018), *cited in* Proposed Rule at 52500 (BIA decision directing immigration judges to interfere in ongoing UAC cases at the USCIS Asylum Office by making independent determinations about the applicant's age at the time of application).

D. The EOIR Director's ability to displace the Board

The Proposed Rule alters the relationship between the EOIR Director—a career administrative employee subject to reassignment at the whim of the Attorney General—and members of the Board, who enjoy appropriate employment protections to promote impartiality, by "referring appeals pending beyond [335 days] to the EOIR Director for adjudication." Proposed Rule at 52508. While this is not the first effort by the Attorney General to politicize the immigration courts by shifting power from adjudicators to the Director,[13] it marks a substantial and inappropriate interference in the delegation of quasi-judicial power within the immigration system. Under existing regulations, absent an express delegation of authority, "[t]he Director shall have no authority to adjudicate cases arising under the Act or regulations or to direct the result of an adjudication"[14]; the Proposed Rule turns this relationship between the Director and EOIR's adjudicative personnel on its head.

The EOIR Director is not subject to the ethics and professionalism guidelines applicable to Board members, such as the expectation that a Board member "act impartially and . . . not give preferential treatment to any organization or individual when adjudicating the merits of a particular case."[15] The Director's decisions cannot be remedied through EOIR's procedure for addressing complaints against EOIR adjudicators.[16] It is not even clear the Director would be bound by the Board's Practice Manual after seizing control of a case in this manner. The Proposed Rule does not place the Director under the obligation that "Board members shall exercise their independent judgment and discretion in considering and determining the case coming before the Board[.]"[17] While there are preexisting authorities for *the* Chairman of the BIA to refer a case to the Director for decision, the Proposed Rule is a radical departure in creating in the Director an all-purpose layer of decision-making above the BIA triggered merely by the mechanical passage of time, rather than a certification by a properly seated adjudicative official.

The Proposed Rule's efforts to justify this creation of adjudicative authority in what has generally been a non-adjudicative role are meager at best and illogical at worst. The only circumstance in which the rule recognizes that long appellate delays may be warranted—when "there is a regulatory or policy basis for delay"—are not ones where the Director's intervention should be needed. Proposed Rule at 52508. The Proposed Rule also fails to engage with other good reasons for the Board to delay, such as when a case on certiorari to the Supreme Court, or argued and submitted for decision in the relevant court of appeals, promises to resolve an issue without the Board's expending further effort. Allowing the

[13] *See, e.g.*, Statement of Judge A. Ashley Tabaddor, U.S. House of Reps., Comm. on the Judiciary, "The State of Judicial Independence and Due Process in U.S. Immigration Courts" (Jan. 20, 2020), *at* https://docs.house.gov/meetings/JU/JU01/20200129/110402/HHRG-116-JU01-Wstate-TabaddorA-20200129.pdf.
[14] 8 C.F.R. § 1003.0(c).
[15] Ethics And Professionalism Guide For Members Of The Board Of Immigration Appeals (May 4, 2011), https://www.justice.gov/eoir/page/file/992726/download, at 2.
[16] *See* Summary of EOIR Procedure for Handling Complaints Concerning EOIR Adjudicators (Oct. 15, 2018), at 1 (listing the Office of the Chief Immigration Judge, the BIA, and the Office of the Chief Administrative Hearing Officer as the "adjudicating components" subject to the complaint process).
[17] 8 C.F.R. § 1003.1(d)(1)(ii).

Director to scoop up and resolve all such cases presents a serious risk of politicized decision-making by an official not subject to appropriate ethical and impartiality standards.

E. Immigration judge "certification" to the Director

Additional provisions in the Proposed Rule would unduly expand the roles of both immigration judges and the Director by empowering judges to certify BIA decisions for Director review. Although the NPRM suggests that the new process is intended to correct legal errors and is "not a mechanism solely to express disagreements with Board decisions or to lodge objections to particular legal interpretations," Proposed Rule at 52503, the sweeping criteria for certifications would enable judges to forward BIA decisions for Director reconsideration for nearly any reason. Far from improving the quality and consistency of adjudications, the proposed provisions undermine independent appellate review and finality, and subject cases to increasingly politicized decision-making.

Indeed, the Proposed Rule makes clear that in certified cases, the Director can not only issue precedent decisions, but "refer the case to the Attorney General for review, either on the Director's own or at the direction of the Attorney General." Proposed 8 CFR § 1003.1(k)(3). In recent years, Attorneys General have used self-referral authority—a power seldom used by predecessors—to recast critical aspects of immigration law and procedure. From commentary intended to narrow the kind of particular social groups that give rise to asylum protection to constraining the discretion of judges to order administrative closure or termination, these decisions reflect the potential for certification authority to be used to make sweeping policy changes with profound impacts for those appearing before EOIR. If used similarly, the new procedures would destabilize expectations for the orderly development of the law and risk further politicization of EOIR's decision-making in ways that could deprive unaccompanied children and others of full and fair consideration of their legal cases and risk their return to harm.

Additionally, in stark contrast to the agency's purportedly "strong interest in finality" and efficiency,[18] the proposed certification process would introduce new inefficiencies into the immigration system at a time when it is experiencing historic backlogs. Instead of being considered by immigration judges on remand, cases could begin a potentially winding trajectory to the Director and possibly the Attorney General before again returning to the immigration judge for further action. Importantly, this process is initiated of the immigration judge's own accord, rather than at the behest of the parties, who may ultimately bear the burden of indefinite delays and prolonged uncertainty in their cases. Yet the Proposed Rule gives short shrift to the impacts on those whose cases might be subject to this process, including unaccompanied children, for whom stability is particularly critical. The NPRM instead states,

[18] *See, e.g.,* 85 FR at 52505 & 52507 (citing a "strong interest in finality" in justifying proposed changes); *id.* at 52491 ("The Department proposes multiple changes to the processing of appeals to ensure the consistency, efficiency, and quality of its adjudications."); *id.* at 52493 ("The Department also proposes to make changes to the BIA to improve its internal consistency in decision-making and its adjudicatory efficiency"); *id.* at 52509 ("[T]he rule would have no apparent impact on the public but would substantially improve both the quality and efficiency of BIA appellate adjudications."). Curiously, at the same time the Proposed Rule empowers immigration judges to seek review of BIA decisions, it withdraws the authority of the BIA to certify decisions to itself, citing among the reasons "the lack of clear governing standards, … the overall potential for inconsistent application and abuse of this authority, and the strong interest in finality." 85 FR 52507.

without support, that "[o]verall, an immigration judge is in the best position to identify an error made by the BIA and to seek to remedy it expeditiously without needlessly placing additional burdens on the parties"[19]—mischaracterizing the nature and purpose of appellate review and disregarding the burdens that may in fact result from the process.

III. Excluding administrative closure from the powers of the immigration judges and Board is inimical to both the efficiency and quality of adjudication results.

By codifying a controversial 2018 Attorney General decision, the Proposed Rule would expressly exclude the authority to administratively close a pending case from the broad powers granted to both immigration judges and the Board by regulation. Proposed § 1003.1(d)(1)(ii) (limiting the Board's exercise of administrative closure to instances authorized by EOIR regulations or judicially approved settlements); Proposed § 1003.10(b) (same, as to immigration judges).

A. EOIR's rationales for codifying the *Castro-Tum* rule are infirm

In the roughly two years since the Attorney General certified the Board's decision in the case of a pro se respondent (placed in proceedings as an unaccompanied minor) to hold that no statute or regulation grants EOIR adjudicators the general authority to administratively close proceedings, *Matter of Castro-Tum*,[20] both of the federal appeals courts to review that conclusion have rejected it in thoroughly reasoned decisions.[21] In the wake of those decisions, the Proposed Rule would codify the *Castro-Tum* holding "to eliminate any residual confusion," Proposed Rule at 52503, and proffers a series of justifications, several of which are fallacious and none of which compels the conclusion that administrative closure is unauthorized.

First, discussion in the NPRM focuses selectively and repeatedly (Proposed Rule at 52496, 52503) on language in the sections to be amended which provides that both immigration judges and the Board are authorized to "take any action consistent with their authorities under the Act and the regulations as is appropriate and necessary for the disposition of the case.'' 8 CFR §§ 1003.1(d)(1)(ii); 1003.10(b) (same, as to immigration judges). EOIR even acknowledges "[t]he *broad sweep* of this language" (Proposed Rule at 52493, emphasis added), yet never explains why the breadth of "any action" cannot include a reasoned decision to remove a case from the active docket to reserve space there for other cases ripe for resolution.[22] The same regulatory sections further require the Board and immigration judges to "exercise their independent judgment and discretion,"[23]—yet the NPRM never engages with this language nor offers justification for an incursion on that authority through the proposed prohibition against administrative closure. More simply put, the immigration judge's authority to conduct

[19] 85 FR at 52502.
[20] 27 I. & N. Dec. 271 (A.G. 2018).
[21] *Romero v. Barr*, 937 F.3d 282, 289 (4th Cir. 2019); *Morales v. Barr*, 963 F.3d 629 (7th Cir. 2020).
[22] See *Romero*, 937 F.3d at 292-93 (citing cases recognizing the expansiveness of "any" and the "capaciousness" of "appropriate and necessary").
[23] 8 CFR §§ 1003.1(d)(1)(ii); 1003.10(b); *Matter of Avetisyan*, 25 I. & N. Dec. 688, 691 (B.I.A. 2012).

proceedings for deciding inadmissibility or deportability, INA § 240(a)(1), must entail the authority to determine when a matter is ripe for decision and to schedule such proceedings accordingly.

Second, in a long footnote, EOIR inaccurately asserts that existing regulations provide "that *only* the Director, the Chief Appellate Immigration Judge, and the Chief Immigration Judge—and not line appellate immigration judges or line immigration judges—have authority to defer adjudication of cases," Proposed Rule at 52497 n.13 (emphasis added), citing 8 CFR 1003.0(b)(1)(ii), 1003.1(a)(2)(i)(C), 1003.9(b)(3). In reality, the first of the provisions relied upon states: "The Director shall have the authority to . . . direct that the adjudication of certain cases be deferred." These existing regulations do not ascribe the power only, solely, or exclusively to the Director, Chief Appellate Immigration Judge, or Chief Immigration Judge. *Id.* The word "only" is to be added by Proposed §§ 1003.1(d)(ii), which would provide: "Only the Director or Chief Appellate Immigration Judge may direct the deferral of adjudication of any case . . ."; see also 1003.10(b) (same as to immigration judges). Assuming arguendo that deferral of adjudication means no less and no more than administrative closure, it is most curious that EOIR defends amending its regulations to make this deferral authority exclusive by claiming that the existing regulations already make the authority exclusive to three leadership roles. Proposed Rule at 52497 n.13. To prop up this reasoning, the NPRM finds "evident superfluousness" in the three regulatory provisions "if all appellate immigration judges and immigration judges already possess that authority." Proposed Rule at 52503. But a nonexclusive grant of authority to "EOIR leadership" does not compel a conclusion that all similar powers must be withheld from individual Board members or immigration judges. And of course it was the Attorney General who affirmed that immigration judges do already possess the authority to defer an adjudication, in *Castro-Tum* itself.[24]

Third, and even more perplexing, the Proposed Rule states repeatedly and disapprovingly that immigration judges who have administratively closed cases have acted "unilaterally," as if to suggest that independent action by a neutral arbiter is somehow suspect. Proposed Rule at 52496, 52497, 52503, 52504.[25]

Fourth, the Proposed Rule recasts administrative closure as "placing the immigration judge in the role of the prosecutor and determining which immigration cases should be adjudicated and which ones should not." Proposed Rule at 53503, 52496. This ignores the reasoning of the 2012 Board precedent (*Avetisyan*, overturned by *Castro-Tum*), where the Board had reasoned that "[i]n general, administrative closure may be appropriate to await an action or event that is relevant to immigration proceedings but is outside the control of the parties or the court and may not occur for a significant or undetermined period of time."[26] The Proposed Rule instead criticizes *Avetisyan* for empowering adjudicators to "unilaterally determine which cases should not be adjudicated by administratively closing cases over the

[24] *Castro-Tum*, 27 I. & N. Dec. at 292 ("[F]or cases that truly warrant a brief pause, the regulations expressly provide for continuances.").
[25] *Cf., e.g.*, *Aguilar-Solis v. INS*, 168 F.3d 565, 569 (1st Cir. 1999) (immigration judges must "function as neutral and impartial arbiters" and "must assiduously refrain from becoming advocates for either party.").
[26] *Avetisyan*, 25 I. & N. Dec. at 692.

objections of one or both parties." Proposed Rule at 52503. It is in the nature of adversarial proceedings that most motions will be opposed by one party or the other, and by deciding a contested motion, an immigration judge does not usurp a prosecutor's duties. Administrative closure does not raise the question of whether EOIR adjudicators are "empowered to review the wisdom of the INS in instituting the proceedings," despite the Proposed Rule's invocation of *Lopez-Telles v. INS*, a case that affirmed denial not of a request for administrative closure, but to terminate proceedings solely for humanitarian reasons.[27] Proposed Rule at 52496-97.

Elsewhere, the Proposed Rule summons other general case law principles to shore up the idea that administrative closure is somehow inimical to justice. For instance, the proposal leans on a 1969 Board opinion holding that regulations "require[] that in deportation proceedings an order be entered which will result in the proceedings being processed to a final conclusion" by deportation, termination of proceedings, or a grant of relief. Proposed Rule at 52496, citing *Matter of Chamizo*.[28] But this reliance is misplaced for two reasons. First, *Chamizo* discussed not administrative closure, but an immigration judge's order of voluntary departure found facially deficient under applicable regulations. *Id*. Second, as illustrated in, e.g., *Avetisyan*, *Romero*, and *Morales*, an order of administrative closure in no way precludes "proceedings being processed to a final conclusion."

Equally fallacious, EOIR claims that "by definition, administrative closure lengthens and delays proceedings because it defers disposition of a case until an unknown and unpredictable date," and "does not reduce the overall pending caseload." Proposed Rule 52504. The Fourth Circuit correctly identified the flaw in this logic:

> Although one of [*Castro-Tum*'s] purported concerns is efficient and timely administration of immigration proceedings, it would in fact serve to lengthen and delay many of these proceedings by: (1) depriving IJs and the BIA of flexible docketing measures sometimes required for adjudication of an immigration proceeding, as illustrated by *Avetisyan*, and (2) leading to the reopening of over 330,000 cases upon the motion of either party, straining the burden on immigration courts that *Castro-Tum* purports to alleviate.[29]

Instead of responding to the results of federal court review of the Attorney General's decision, the Proposed Rule presents a caricature of administrative closure to justify its elimination.

[27] 564 F.2d 1302, 1304 (9th Cir. 1977).
[28] 13 I. & N. Dec. 435, 437 (BIA 1969).
[29] *Romero*, 937 F.3d at 297.

B. Revoking authority for administrative closure will jeopardize the fair and efficient resolution of unaccompanied children's proceedings

Allowing adjudicators the latitude to use administrative closure would promote the regulatory goal of "assist[ing] in the expeditious, fair, and proper resolution of matters coming before Immigration Judges." 8 C.F.R. § 1003.12. There is no clearer example of the efficacy of flexible use of administrative closure than cases of respondents placed in removal proceedings as "unaccompanied alien children" (UAC).[30] This is because a large proportion of UAC have compelling defenses to removal, yet stand at a marked disadvantage in an adversarial system for which they are poorly resourced. UACs and others seeking humanitarian relief need and merit appropriate allowances of time to prepare for dispositive hearings in their cases.

Administrative closure has proven valuable in UAC cases where a history of harm supports entitlement to relief but inhibits navigation of removal proceedings.[31] Because USCIS has initial or exclusive jurisdiction over most forms of relief commonly requested by or on behalf of UACs, often in reliance on input from state courts or agencies, the immigration judge will not often have a direct role in assessing the merits of a child's request for protection.[32] Denying a child sufficient time for these adjudication processes will result in a child otherwise eligible for relief being returned to harm or separated from caregivers. In KIND's experience, other procedural tools have not compensated for the Attorney General's withdrawal of administrative closure. Dismissal, 8 C.F.R. § 1239.2(c), and termination, 8 C.F.R. § 1239.2(f), would effectively free space on the court's docket while a child pursues relief, but are generally resisted by DHS. A series of continuances can provide sufficient time, 8 C.F.R. §§ 1003.29, but will also generate superfluous hearings, especially where the date when the case will be ripe for the immigration judge's attention is not clearly predictable. If administrative closure were restored, the entire system—the immigration court, DHS, the Board in the event of an appeal, and the child along with his or her caregiver and legal team—could realize efficiency gains from eliminating unnecessary hearings.

Administrative closure was and can be a flexible tool for managing the course of proceedings in such cases. As one example, every approved petition for special immigrant juvenile status (SIJS) represents a child conclusively established to have a history of parental abuse, abandonment, neglect, or similar

[30] An "unaccompanied alien child" (UAC) is defined by statute as a child under age 18, having no lawful immigration status, and having no parent present in the US or no parent available to provide care and physical custody. 6 U.S.C. § 279(g)(2) (2008).

[31] A study of unaccompanied child migrants by the United Nations High Commissioner for Refugees (UNHCR) "demonstrate[d] unequivocally that many of these displaced children faced grave danger and hardship in their countries of origin" and found that a clear majority of their cases raised international protection concerns. UNCHR, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection* (2016), www.unhcr.org/en-us/about-us/background/56fc266f4/children-on-the-run-full-report.html, at 11.

[32] See Transactional Records Access Clearinghouse (TRAC), Syracuse University, New Data on Unaccompanied Children in Immigration Court, available at: https://trac.syr.edu/immigration/reports/359/ ("Most of the time, whether these special forms of relief are granted is determined by some other government agency and not directly by an Immigration Judge.").

circumstances, and whose interests would be impaired by removal. INA § 101(a)(27)(J). But the time needed to complete state court proceedings that establish prerequisites for SIJS can vary unpredictably in duration, e.g., due to wait times for available hearing dates, residency periods required under state law, the demands of affording due process to the child's absent parent(s), the child's needs for support to overcome the consequence of past harms, among other reasons – all of them outside the control of the child and the immigration court. Administrative closure, when available, can accommodate the variability inherent in the state court process, freeing time on the docket of the immigration judge or the Board until the parties are ready to proceed. Similarly, administrative closure could conserve court resources during asylum office adjudication of a UAC asylum application. The time needed for USCIS to schedule an interview, review the claim, and issue its decision varies. While the asylum claim is pending before USCIS, the parties are unlikely to require the intervention of the immigration court or the Board, making administrative closure an ideal solution – were it generally available.

In addition, claims for humanitarian relief are labor-intensive, placing demands on children that they may be unequipped to meet in the short term. Administrative closure has been and could be used to mitigate the hardships that are inherent in UAC cases, and further the interests of fairness and due process for children. Congress has recognized "a special obligation to ensure that these children are treated humanely and fairly," recognizing the violence and trauma that many have fled.[33] The just resolution of a child's removal proceedings requires adequate time, not only for adjudication of relief applications alluded to above, but also because building the child's case is labor- and time-intensive. Children are held to the same high bars for humanitarian relief as other litigants, yet limits are inherent in children's capacities and ongoing development. As advised in USCIS's asylum officer training materials, "[t]he needs of child asylum seekers are best understood if the applicant is regarded as a child first and an asylum seeker second."[34] The USCIS training materials review a number of factors in child development, and incorporate the principle that "children's needs are different from adults' due to their developmental needs, their dependence, including in legal matters, and their vulnerability to harm" so that governmental actions toward children must be tailored accordingly.[35]

In sum, a child may indeed be able to satisfy the high bar for legal relief, but may not be able to do so on a rapid timeframe. Children who lack prior experience of the adversarial system need time to develop an understanding of the process and trust in the professionals who advocate for them. As a principal drafter of the TVPRA explained, a child "usually knows nothing about US courts or immigration policies and frequently does not speak English . . . . The majority of these children have been forced to struggle through an immigration system designed for adults."[36] A child's opportunity to participate meaningfully

[33] 154 Cong. Rec. S10886 (daily ed. Dec. 10, 2008) (Sen. Feinstein, re the William Wilberforce Trafficking Victims Protection Reauthorization Act).
[34] USCIS, RAIO Combined Training Program, Children's Claims at 21 (Dec. 20, 2019), https://www.uscis.gov/sites/default/files/document/foia/Childrens_Claims_LP_RAIO.pdf.
[35] *Id.* at 15.
[36] 154 Cong. Rec. S10886 (daily ed. Dec. 10, 2008).

in his or her immigration proceedings depends upon the adjudicator affording adequate time for the process, in keeping with the child's developmental stage, capacities, and well-being. Trauma and a history of violence exacerbate the gap that a child must bridge to participate in preparing a legal defense, and forcing the confrontation of traumatic facts is likely to be counterproductive.[37]

Attending immigration court places demands not only the child respondent, but also on the adult(s) on whom the child depends for financial support and care. As children miss school, adults may miss work, often forfeiting pay and perhaps jeopardizing job security. Transportation costs to attend court can be significant for low-income families. Some UAC do not enjoy the care of close relatives, and their caregivers may feel unable to justify the burden of supporting the child's case, a lack of investment that is well beyond the child's control. Many children and their supporters, especially those with traumatic histories or fear for their future safety, experience the court date as a traumatic event, fearing that deportation or other sanctions are imminent. For example, a child who is a principal or derivative applicant for a U visa has suffered "substantial physical or mental abuse" as a result of criminal activity, and the child or parent has assisted law enforcement in the investigation or prosecution of the crime. Negative associations from that process may also attach to immigration court hearings. All of these various costs are excessive when a scheduled hearing does not advance the case substantively.

The Proposed Rule would also cause the burdens of unnecessary hearings to fall on the court and DHS in the form of wasted time and resources for scheduling, preparing, documenting, interpretation, and the displacement of other cases needing the court's attention. Barring the use of administrative closure virtually guarantees unnecessary court appearances that will be at best burdensome and at worst counterproductive. EOIR's own guidelines on juveniles in court specify that judges should limit the number of times that children must be brought to court.[38] Administrative closure would meet that objective, while also balancing DHS's interest in the ability to address a material change in circumstances by moving to recalendar the proceedings.

Administrative closure has often been appropriately used to avoid these negative impacts, and should be restored. The amendments on administrative closure in the Proposed Rule should be withdrawn. If any amendment is offered, it should confirm the availability of administrative closure as a flexible docket management tool for both the immigration court and the Board.

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[37] *See, e.g.*, H. Comm. on the Judiciary, 109th Cong., Dep't of Justice Appropriation Authorization Act, Fiscal Years 2006-2009, H.R. Rep. No. 109-233, at 116-117 (discussing provision enacted and codified at 8 U.S.C. § 1154) (provision "allows child abuse victims time to escape their abusive homes, secure their safety, access services and support that they may need and address the trauma of their abuse."); United States Conference of Catholic Bishops, *Care for Trafficked Children* (April 2006) at 4, available at: http://www.usccb.org/about/children-and-migration/upload/care-for-trafficked-children.pdf (describing impediments to capacity to trust in child trafficking victims).

[38] EOIR, Operating Policies and Procedures Memorandum 17-03: Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children (Dec. 20, 2017) at 6.

The Proposed Rule addresses some genuine problems with inadequate, misguided, illogical, and politicized means. It should be withdrawn or very substantially revised.

Sincerely,

/s/

Maria Odom
Vice President for Legal Programs
Kids in Need of Defense