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Raechel Horowitz, Chief
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Submitted via http://www.regulations.gov

Re: Comment in Response to EOIR's Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure
RIN 1125–AB18, EOIR Docket No. 021–0410

Dear Ms. Horowitz,

The Immigrant Legal Resource Center (ILRC) submits this comment on the proposed rule, issued by the U.S. Department of Justice, entitled "Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure." 88 Fed. Reg. 62,242-83. The ILRC commends a majority of the provisions contained in the proposed rule, which would largely return EOIR to longstanding policies and procedures in place before promulgation of the AA96 Final Rule in December 2020. In addition, the ILRC seeks some revisions to the proposed regulations that would further the interests of administrative efficiency and fairness. The ILRC further shares its recommendations in response to the Department's invitation for comments regarding specific legal matters.

The ILRC is a national non-profit organization that works to advance immigrant rights through advocacy, educational materials, and legal trainings. Since 1979, the ILRC's mission has been to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. We serve the individuals and community of organizations that are most impacted by this rule. The ILRC builds the capacity of immigration advocates to assist immigrants in their removal defense cases in order to provide more immigrants with a meaningful chance at justice. We support immigration legal service providers nationwide, serving hundreds of organizations and practitioners that work with immigrants. The ILRC provides technical assistance on immigration court procedures through our webinars and our Attorney of the Day service, in which we work with advocates on their specific cases and questions. As experts in the field, the ILRC publishes *Removal Defense: Defending Immigrants in Immigration Court*, a manual that provides a thorough guide to the immigration court process with practice tips.

I. The ILRC Commends the Proposed Recission of the Unlawful and Unfair Provisions of the AA96 Final Rule and Supports Many of the New Provisions Proposed in the NPRM.

The ILRC largely approves of the NPRM's proposed regulatory changes, particularly the recission of many aspects of the AA96 Final Rule. A majority of the provisions contained in the AA96 Final Rule significantly curbed immigration judges' authority to manage cases, curtailed the efficiency of the immigration courts, undermined the appellate process, and drastically restricted due process for immigrants. The ILRC especially commends the Department for seeking to rescind certain AA96 provisions in favor of restoring longstanding practices and procedures of the immigration courts and the Board of Immigration Appeals (BIA), including:

- A return to consecutive 21-day briefing schedules for non-detained individuals (proposed 8 C.F.R. § 1003.3(c)(1)).
- Recission of the AA96 Final Rule's removal of EOIR's authority to administratively close cases. 88 Fed. Reg. 62,255.
- A return to longstanding timelines and flexibility for initial screening, summary dismissal, and final adjudication of matters before the BIA (proposed 8 C.F.R. § 1003.1(e)). Reverting to the pre-AA96 framework will continue to give adjudicators flexibility to issue decisions with both efficiency and fairness.
- A return to the agency's historic understanding of the role of the EOIR Director as that of a manager, not adjudicator (88 Fed. Reg. 62,271; proposed 8 C.F.R. § 1003.1(e)(8)(ii)). This is an important step in preserving the integrity of EOIR's appellate process.
- Removal of language from the AA96 Final Rule background check regulations that would have deemed a noncitizen's failure to comply with background check requirements as an automatic abandonment of their claim. 88 Fed. Reg. 2,270. This language in the AA96 Final Rule would have created challenges to *pro se* litigants who may have had trouble understanding the notice requirements in their native language.
- Reinstatement of regulations that permit the BIA to remand for consideration of new evidence or changes in law, including for the purpose of determining voluntary departure eligibility (proposed 8 C.F.R. § 1003.1(d)(7)). As an appellate body, the BIA should not engage in fact-finding in the first instance, particularly where respondents have not been given an opportunity to develop the record on a particular issue. By restoring the right to remand, the BIA provides the necessary opportunity to develop the record on key issues before the agency and importantly provides a venue to gather evidence related to new prima facie eligibility for relief. This tool is necessary to ensure fairness in proceedings and ensure that respondents have an opportunity to present any evidence and arguments that support their defense from removal.
- Reinstatement of the requirements for immigration judges to review their oral decision transcripts and approve them within specified timeframes (proposed 8 C.F.R. 1003.5(a)).

The ILRC also welcomes the introduction of new procedures, which will provide increased clarity and uniformity in immigration adjudications, as well as definitional changes, including:

- The codification of EOIR's administrative closure authority and a definition of the term "administrative closure" (proposed 8 C.F.R. §§ 1003.1(d)(1)(ii), 1003.1(l), 1003.10(b), 1003.18(c)).
- The replacement of the phrases "necessary and appropriate" and "disposition" with "necessary or appropriate" and "disposition or alternative resolution," respectively, in the context of EOIR's authority to enter a decision in a case (proposed 8 C.F.R. §§ 1003.1(d)(1)(ii), 1003.10(b)).
- Requirement that EOIR adjudicators grant joint and unopposed motions for administrative closure (proposed 8 C.F.R. §§ 1003.1(l)(3), 1003.18(c)(3)).
- Requirement that EOIR adjudicators consider the totality of the circumstances in adjudicating motions for administrative closure (proposed 8 C.F.R. §§ 1003.1(l)(3), 1003.18(c)(3)).
- Clarification of the difference between dismissal and termination of proceedings, as well as identification of circumstances where termination would be mandatory and others where termination would be discretionary (proposed 8 C.F.R. §§ 1003.1(m)(1)).
- Definition of the terms "noncitizen" and "unaccompanied child" to be synonymous with the outdated and xenophobic terms "alien" and "unaccompanied alien child" (proposed 8 C.F.R. §§ 1001.1(gg), (hh)).
- Replacement of gendered language throughout the agency's regulations to gender-neutral language, to be more inclusive and align with present-day convention (proposed in various sections of C.F.R. §§ 1003 and 1240.26).
- Expansion of the "rare circumstances" in which the BIA may hold cases that could be impacted by an impending legal, policy, or other change (proposed 8 C.F.R. § 1003.1(e)(8)(iii)). The language in the NPRM acknowledges the possibility that non-legal forces, such as national or global events, may impact cases, and the BIA must have flexibility to assess these impacts and adjudicate cases fairly and consistently.
- The addition of language making it clear that a noncitizen will only be found responsible for failure to complete background checks, "after receiving instructions from DHS" (proposed to 8 C.F.R. 1003.1(d)(6)(iii)). It is important that the regulations emphasize the service of instructions to noncitizens to protect their basic due process rights.

The following comments address aspects of the NPRM that the ILRC believes would benefit from clarification or modification, and additionally are in response to the Department's requests for input regarding certain specific provisions.

II. The BIA Should Not Be Limited to Extending Briefing Deadlines by Only 90 Days.

While the ILRC commends the Department for restoring consecutive 21-day briefing schedules for non-detained individuals, we do not see a legitimate basis for limiting the BIA's authority to grant briefing extension requests for "up to" 90 days (proposed 8 C.F.R. § 1003.3(c)(1)). Administrative efficiency is an

important goal of the Department. However, setting a 90-day limit on the BIA's authority to extend briefing deadlines is arbitrary and additionally ignores the fact that good cause may exist for briefing extensions beyond 90 days. For example, an attorney for a respondent may have a medical emergency or even a scheduled medical procedure that requires a longer recovery time. Illness or death of family members, natural disasters, and as the Department recognizes, "unaccounted-for future issues, similar to the COVID-19 pandemic," are other examples of situations in which counsel may require longer briefing extensions. 88 Fed. Reg. 62,254. By limiting the BIA's authority to extend briefing deadlines to 90 days, the Department invites cases to potentially linger on the BIA's docket in the form of subsequent motions to reopen – a result contrary to the goal of administrative efficiency. The proposed rule further ignores the fact that good cause may, in some cases, exist for extending briefing deadlines by over 90 days (even if rare).

The ILRC recommends that in the interest of balancing both the goals of administrative efficiency and fairness, the regulations clarify that the BIA may extend a briefing deadline by 90 days, but with the discretion to grant additional briefing extensions in 90-day increments. Such a rule would not remove the BIA's discretion in deciding whether to grant extension requests or to determine whether the "good cause" standard has been met. It would also not prevent the Department from providing guidelines to the BIA on what constitutes "good cause" in situations where parties seek extensions beyond 90 days. Finally, it would ensure that noncitizens are not deprived of the right to appellate legal representation where a representative has good cause for requesting a briefing extension beyond 90 days, which as the Department recognizes, is one of the most important "rights under the Act." 88 Fed. Reg. 62,254.

III. The ILRC Largely Commends the Explicit Addition of Administrative Closure, but Recommends a Few Revisions and Responds to the NPRM's Invitation to Comment on Specific Aspects.

The ILRC supports the Department's inclusion of a non-exhaustive list of factors that an adjudicator should consider in determining whether to grant a request for administrative closure (proposed 8 C.F.R. §§ 1003.1(l)(3)(i), 1003.18(c)(3)(i)). In response to the Department's specific request for comments, the ILRC has the following response. 88 Fed. Reg. 62,262.

a. <u>Clarify that requirement that a case be administratively closed for a separate adjudication is not a prerequisite for administrative closure.</u>

While the third factor – any requirement that a case be administratively closed for a petition or application to be adjudicated – is a legitimate consideration, the ILRC's concern is that this factor may be given undue weight by some adjudicators. There are certain types of petitions and applications, such as for U and T visas, which do not require administrative closure. But administrative closure in many of these cases is the most efficient and fair result for the parties. To clarify that the requirement of administrative closure is not the main factor in deciding whether to administratively close a case (in other words, where there are non-mandatory bases for administrative closure), the provision should add that "such a requirement that a case be administratively closed is not a prerequisite to [the immigration judge or the Board] granting a request for administrative closure."

b. Clarify that the likelihood that a noncitizen will succeed on an action can be demonstrated by filing for relief or having a plan in place.

The fourth factor - the likelihood that a noncitizen will succeed on a petition, application, or other action - should be modified as a factor because EOIR adjudicators oftentimes do not have training or experience in determining, particularly in the context of up-to-date USCIS policies and procedures, whether a case is likely to succeed before USCIS. Many types of cases, such as U visa, T visa, SIJS, and TPS petitions and applications, involve matters within USCIS' expertise and policy objectives. For example, in adjudicating T visas, USCIS officers are trained to follow "a victim-centered approach [which] means applying a trauma-informed, survivor-informed, and culturally competent approach," which is specific to victims of trafficking. 3 USCIS-PM B.7.A. The Policy Manual also gives adjudicators the ability to issue a Request for Evidence and Notice of Intent to Deny, in order to give applicants the ability to submit further evidence of eligibility. *Id.* at B.7.D. So what an EOIR adjudicator might see as the "filing" may not consist of all (or even most) of the evidence that USCIS will ultimately consider. Other petitions and applications before USCIS also require USCIS expertise on specific topics and utilize RFEs to gather additional evidence. *See*, *e.g.*, 3 USCIS-PM C.7 (U visa); 6 USCIS-PM J.4 (SIJS). Additionally, determining whether such cases have a likelihood of success would involve a fact-specific inquiry into the details of the underlying case, which would defeat one of the main purposes of administrative closure – "administrative efficiency." 88 Fed. 62,256.

Instead, the ILRC recommends that the fourth listed factor should be modified to include whether the noncitizen has already filed the relevant petition, application, or other action, and if not, when the noncitizen anticipates filing it. This will allow adjudicators to still ensure that the noncitizen has (or will) pursue a good faith avenue for immigration relief, which would be a relevant factor to consider. At the same time, such an approach would not impose an undue burden on respondents to prove their likelihood of success or on EOIR adjudicators to consider the facts already before another agency with expertise and resources to consider the merits of a particular type of case.

The Department also seeks comment on whether the new rule should specify that administrative closure will generally be granted as long as the noncitizen demonstrates a reasonable likelihood of success on the merits, and that the noncitizen has been reasonably diligent in pursuing relief. 88 Fed. Reg. 62,262. As mentioned above, determining the likelihood of success on the merits of the pending petition or application should not be a burden placed on the EOIR adjudicator, especially as a primary consideration in deciding whether to administratively close a case. Instead, the more relevant and practical inquiry is whether a petition or application has been filed, and if not, the anticipated filing date. This should be one factor, along with others (including reasonable diligence), in determining whether administrative closure is appropriate.

c. The NPRM should not add further examples of other scenarios in which administrative closure may be appropriate.

In response to the question of whether the NPRM should give examples of other scenarios, in which administrative closure may be appropriate, the ILRC recommends that the fourth factor clarify that "if

the request is based on reasons other than a noncitizen's intent to pursue a petition, application, or other action with DHS, a consideration of such reasons should be a factor in determining whether to administratively close a case."

d. EOIR adjudicators should grant joint and unopposed motions for administrative closure or recalendaring of cases.

The regulations should not contain an exception to the requirement that EOIR adjudicators "shall grant a motion to administratively close or recalendar filed jointly by both parties, or filed by one party where the other party has affirmatively indicated its non-opposition." 88 Fed. Reg. 62,259. As proposed, the regulations would allow adjudicators to deny jointly-filed and unopposed motions if they articulate "unusual, clearly identified, and supported reasons for denying the motion" (proposed 8 C.F.R. §§ 1003.1(l)(3), 1003.18(c)(3)).

Although the NPRM states such an exception would apply only in "rare circumstances," 88 Fed. Reg. 62,260, the ILRC opposes the inclusion of the exception due to the potential for misuse or misunderstanding of its purpose by adjudicators. Removal proceedings are adversarial in nature, and it is appropriate for adjudicators to defer to the litigation positions of the parties, including statements in support, or in response, to motions. There is no legitimate reason, no matter how clearly articulated, for an EOIR adjudicator to deny joint and unopposed motions where each party has given due consideration to how they wish to proceed with a case.

e. Eliminate *sua sponte* authority to administratively close a case.

The ILRC would not support EOIR's *sua sponte* authority to administratively close a case. Oftentimes, immigration judges and the BIA are not aware of facts and circumstances present outside of what is evident in a respondent's Record of Proceeding. Administratively closing a case without at least being notified by the parties regarding their positions could entirely derail a noncitizen's ability to contest removability, pursue relief, or follow the best strategy in their case. At a minimum, any such *sua sponte* authority should be limited by a requirement that the immigration judge or the BIA give the parties an opportunity to submit evidence and state their positions with regard to administrative closure in each case, with particular weight to be given to the noncitizen's response.

IV. The ILRC Largely Supports the Addition of Termination and Dismissal of Proceedings, but Recommends Specific Amendments and Responds to the Agency's Invitation to Comment on Specific Aspects.

The ILRC largely approves of the proposed changes to the regulations regarding dismissal and termination of proceedings, as well as the differentiation between circumstances requiring termination and circumstances allowing EOIR adjudicators to exercise discretion in deciding whether to terminate a case. The following additional comments are in response to the Department's invitation to address specific issues concerning the termination of proceedings. 88 Fed. Reg. 62,265.

a. Specify that EOIR may accept "any credible evidence."

The regulations should specify that EOIR may accept "any credible evidence" in deciding whether to exercise its discretionary authority to terminate proceedings pending before it. As the Department has explained in the preamble to the proposed regulations, the purpose of codifying EOIR's discretion to terminate proceedings is to "promote efficiency and fairness and help immigration judges and Appellate Immigration Judges better manage their calendars and dockets," while providing them with "sufficient flexibility" in doing so. 88 Fed. Reg. 62,262, 62,264. Requiring parties, particularly noncitizen respondents, to provide specific types of evidence in support of termination will curtail these very goals. For example, requiring proof of filing a petition or application with DHS can take several months while the respondent prepares the application and DHS generates a receipt, while other credible evidence such as an attorney's representation of filing or DHS' independent verification that an application was received, may be sufficient grounds for termination in the judgment of a specific EOIR adjudicator.

b. Do not specify that termination should generally be without prejudice.

The regulations should not specify that termination should generally be without prejudice. The common law doctrine of claim preclusion (*res judicata*) generally applies to immigration proceedings and "the presumption at common law," as well as "the INA's structure, counsel in favor of resolving removal proceedings with prejudice." *Arangure v. Garland*, No. 19-4025, 2022 WL 539224, at *4 (6th Cir. Feb. 23, 2022) (vacating *Matter of Jasso Arangure*, 2019 WL 7168754, at *1 (BIA Oct. 2, 2019)); *see also Matter of Arangure*, 27 I&N Dec. 178, 178 (BIA 2017), *vacated by Arangure v. Whitaker*, 911 F.3d 333 (6th Cir. 2018); *Bravo-Pedroza v. Gonzales*, 475 F.3d 1358, 1358 (9th Cir. 2007). Specifying that, as a general rule, termination orders would be deemed to have been entered "without prejudice," would violate the doctrine of claim preclusion and the structure of the INA, under which termination of proceedings should generally be considered to be "with prejudice" to DHS' ability to re-initiate removal proceedings based on the same facts it "could have presented in the first case." *Bravo-Pedroza*, 475 F.3d at 1359.

c. Eliminate authority to terminate proceedings *sua sponte*.

Finally, the ILRC has the same concerns with regulations that would allow EOIR adjudicators to terminate proceedings *sua sponte*, as expressed above in the context of *sua sponte* administrative closure. Because immigration judges and the BIA are often unaware of the cumulative facts and circumstances present beyond the record, termination of a case could derail a noncitizen's ability to contest removability, pursue relief, or follow the best strategy in their case. At a minimum, any such *sua sponte* authority should be limited by a requirement that the immigration judge or the BIA give the parties an opportunity to submit evidence and state their positions with regard to termination in each case, with particular weight given to the noncitizen's response given the far reaching consequences that termination can have on a noncitizen's access to immigration benefits and due process.

d. EOIR adjudicators should grant joint and unopposed motions to terminate proceedings.

The ILRC does not support the inclusion of an exception to the proposed regulations that require EOIR adjudicators to grant joint and unopposed motions to terminate (proposed 8 C.F.R. §§ 1003.1(m)(1)(i)(G), 1003.18(d)(1)(i)(G)). As with the above comments regarding the identical provision in the context of motions for administrative closure and recalendaring, the ILRC does not believe there are

any legitimate reasons, in the context of adversarial proceedings where parties state their well-considered litigation positions, for an EOIR adjudicator to reject the parties' positions – no matter how well-articulated or "rare" the circumstances. 88 Fed. Reg. at 62,263. Because the potential for misuse and misunderstanding of any such exception far exceeds a legitimate administrative purpose, the ILRC opposes any exception to the requirement that EOIR adjudicators "shall" grant joint and unopposed motions to terminate proceedings.

V. The Department Should Further Limit the Circumstances Under Which the BIA Employs Summary Dismissal.

Although the ILRC commends the removal of the rapid, mandatory timeframes for summary dismissals introduced by the AA96 Final Rule, the ILRC believes that this NPRM offers an opportunity to further reduce the risk of improper summary dismissals. For example, summary dismissals prior to completion of the record could be limited to appeals that are (1) filed on a form of relief already granted to the appealing party; (2) facially improper due to lack of jurisdiction; (3) untimely without a statement of exceptional circumstances, *see Matter of Morales-Morales*, 28 I&N Dec. 714 (BIA 2023); or (4) specifically prohibited by statute or regulation. *See* 8 C.F.R. §§ 1003.1(d)(2)(i)(C), (F), (G), (H). Limiting summary dismissal to these circumstances would protect *pro se* litigants, for example, who may be filing their Notice of Appeal without advice from counsel, or who may be filing their appeal while detained by ICE and thus lacking access to adequate research or translation tools. A more limited list of grounds for summary dismissal would still enhance the BIA's efficiency while also ensuring that cases are not dismissed based on insufficient information.

VI. The ILRC Recommends Adding a Good Cause Exception Regarding Background Checks and Responds to the Department's Invitation to Comment on Specific Aspects.

The ILRC is concerned about the language in paragraph (d)(6)(iii) of 8 C.F.R. § 1003.1, which would only allow remand to the immigration judge for consideration of whether to deny relief following a noncitizen's failure to complete background checks upon a motion from DHS. We believe there should be more of an opportunity for the noncitizen to show good cause for failure to complete background checks. A remand to the immigration judge following a noncitizen's failure to complete background checks provides the best way to ensure that the noncitizen's due process rights are protected. An immigration judge is in the best position to conduct fact-finding and consider whether a noncitizen had good cause for not completing background checks.

The ILRC recommends that EOIR amend the rule to allow the BIA to remand to the immigration judge for the consideration of a noncitizen's failure to complete background checks without requiring a motion from DHS. We believe this will allow for the protection of noncitizen's due process rights, especially in cases of pro se litigants. As the court in *Centro Legal de la Raza v. Exec. Off. for Immigr. Rev*., 524 F. Supp. 3d 919 (N.D. Cal. 2021), emphasized, many noncitizens have meritorious claims for humanitarian relief, and it would be contrary to Congress's intent to deny their claims without providing them an opportunity to explain possible good cause for not completing the background checks. Therefore, we

ask that the Department include language allowing the BIA to remand to the immigration judge where the noncitizen did not complete background checks. We also recommend the addition of language to paragraph (d)(6)(iii) of this section, which would require the immigration judge to consider whether the noncitizen had good cause in not completing the background checks.

VII. *Matter of Thomas & Thompson* Should Not Be Applied Retroactively and in Applying *Matter of Thomas & Thompson* and *Matter of Pickering* to State Court Orders, EOIR Should Defer to Each State's Legal Interpretation and Findings of Fact Regarding the Basis for a Conviction's Vacatur or Modification.

The Department has requested comment on whether *Matter of Thomas & Thompson,* 27 I&N Dec. 674 (A.G. 2019), can be applied retroactively, and what types of state orders EOIR will recognize as vacating a sentence under *Matter of Thomas & Thompson* and *Matter of Pickering.* 23 I&N Dec. 621 (BIA 2003) *rev'd on other grounds Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006). 88 Fed. Reg. at 62,273. We urge the Department not to apply *Matter of Thomas & Thompson* retroactively, and address these issues below.

We recognize that the Department considers the approach in *Matter of Thomas & Thompson* and in *Matter of Pickering* as being beyond the scope of this rulemaking. However, as a threshold matter, we urge the Department to review and to reconsider both *Matter of Pickering* and *Matter of Thomas & Thompson* as these decisions are fundamentally flawed and out of line with the current Administration's commitment to rooting out systemic racism and to instituting a "fair and orderly immigration system that welcomes immigrants [and] keeps families together."[1] We believe that it is in line with this Administration's interest in racial fairness and equity and in line with the Administration's interest in keeping immigrant families, to revisit these decisions.

a. *Matter of Thomas & Thompson* is a significant change in the law and as a matter of fundamental fairness should not be applied retroactively.

Matter of Thomas & Thompson should not be applied retroactively to any sentence modifications, clarifications, or any form of state post-conviction relief, that were entered on or before October 25, 2019, the date of publication of the decision. Any other interpretation is incompatible with the well-established principle that the courts generally disfavor the retroactive application of new laws or significant changes in legal interpretation, due to its inherently unfair impact on individuals who relied on a pre-existing law or interpretation.

To date, two federal circuits have addressed the retroactivity of *Thomas & Thompson*. The Eleventh Circuit held that the decision is retroactive but failed to give a reasoned analysis behind its decision. *Edwards v. U.S. Att'y Gen*., 56 F.4th 951 (11th Cir. 2022). The court simply held that "the BIA did not retroactively apply a new law but instead applied the Attorney General's determination of what the law

[1] *See The Biden-Harris Administration Immediate Priorities* https://www.whitehouse.gov/priorities/#:~:text=The%20Biden%20Administration%20will%20create,by%20no%20later%20than%202050 (last viewed Oct. 26, 2023).

had *always* meant." *Id.* At 962 (emphasis in original). This conclusory decision is seriously flawed. Notably, from 1982 until 2019, EOIR had recognized sentence modifications for purposes of altering a state court sentence in immigration proceedings. Rather than clarifying what the law "had *always* meant," the Attorney General in issuing *Matter of Thomas & Thompson,* changed the law, which had actually "always" recognized state sentence modifications as effective for immigration purposes. EOIR should not adopt the Eleventh Circuit's position as it is based on the false premise that *Matter of Thomas & Thompson* did not represent a departure from prior interpretations of state sentence modifications.

By contrast, the Seventh Circuit engaged in a robust retroactivity analysis and held that *Matter of Thomas & Thompson* should not apply to sentence modifications or clarifications entered before October 25, 2019. *Zaragoza v. Garland*, 52 F.4th 1006 (7th Cir. 2022). The Seventh Circuit reviewed the retroactivity questions independently using the framework outlined in *Velasquez-Garcia v.* Holder, 760 F.3d 571, 581 (7th Cir. 2014). The Seventh Circuit recognized that "when an agency interprets a statute as an incident of its adjudicatory function, it may permissibly apply the new interpretation in the case announced. But a retrospective application can properly be withheld in other cases when to apply the new rule to past conduct or prior events would work a manifest injustice." *Zaragoza*, 52 F.4th at 1006 (internal quotations and citations omitted). The Seventh Circuit found that failure to recognize a state sentence modification entered before the Attorney General's decision in *Matter of Thomas & Thompson* would result in manifest injustice to the noncitizen. We urge EOIR to adopt the Seventh Circuit's position.

The Department has requested comments on four specific aspects of *Matter of Thomas & Thompson's* retroactive application. Following are the ILRC's comments in response.

1. The appropriate reference point for the retroactivity analysis

The appropriate reference point for this analysis is any conviction entered on or before October 25, 2019, the date that *Matter of Thomas & Thompson* was published. Any state or federal court order modifying a sentence regarding a conviction entered on or before October 25, 2019, should be recognized in accordance with long-standing BIA precedent. This is important because while pleading to a conviction, the noncitizen may have taken a plea in full reliance on the possibility of sentence modification.

2. The extent to which individuals reasonably relied on prior Board decisions

The Attorney General in *Matter of Thomas & Thompson* overturned decades of published BIA decisions relied on by noncitizens. As far back as 1982, the BIA recognized the efficacy of state court sentence modifications in eliminating the immigration consequences of a state conviction. *Matter of Martin*, 18 I&N Dec. 226 (BIA 1982) (recognizing a Colorado court's modification in the interests of justice of a sentence from twelve years' imprisonment to three months' imprisonment and five years of probation). Since the enactment of IIRIRA, the BIA has published at least three decisions recognizing a state court sentence modification or clarification.

In 2001, the BIA recognized the efficacy of a sentence reduction where the state court reduced the sentence in a criminal case to 360 days *nunc pro tunc*. *Matter of Song*, 23 I&N Dec. 173, 174 (BIA 2001) (recognizing a Maryland court's reduction of a sentence *nunc pro tunc* from one year to 360 days). In 2005, two years after the publication of *Matter of Pickering*, the BIA explicitly held that *Pickering* did not apply to sentence modifications. The Board held that "in the absence of a congressional directive to the contrary, we will follow *Matter of Song*, *supra*, and give full faith and credit to the decision of the California Superior Court modifying the respondent's sentence, *nunc pro tunc*, from 365 days to 240 days." *Matter of Cota-Vargas*, 23 I&N Dec. 849, 852 (BIA 2005). Then in 2016, the Board recognized a sentence clarification order from a Georgia state court. *Matter of H. Estrada*, 26 I&N Dec. 749 (BIA 2016) (recognizing a Georgia court's clarification order of a criminal sentence from twelve months of imprisonment to twelve months of probation).

From 1982 through October 25, 2019, noncitizens, criminal defense attorneys, and immigration attorneys reasonably relied on settled BIA precedent that the BIA would recognize a sentence modification, clarification, or any form of post-conviction relief for purposes of determining the criminal sentence under federal immigration law. To apply *Matter of Thomas & Thompson* retroactively would result in manifest injustice to immigrant communities that reasonably relied on decades-long legal precedent and practices.

Noncitizens, immigration advocates, and criminal defense attorneys are highly cognizant of circuit case law and BIA case law when negotiating pleas for immigrants or seeking post-conviction relief. In fact, the fact pattern in *Khatkarh v. Becerra*, 442 F.Supp.3d 1277 (E.D. Cal. 2020) (cited in the request for comments by EOIR), illustrates the extent to which a vulnerable noncitizen with serious mental health issues reasonably relied on the BIA's prior decisions. Narinder Khatkarh was originally convicted of assault with a deadly weapon. On April 24, 2009, the state court sentenced him to one year in jail and three years' probation. In August 2009, he filed a motion to modify his sentence. The motion was prompted by the fact that when he was in jail, he was subject to an immigration hold, and an immigration attorney informed him that if his sentence were modified to 364 days, he would have a good chance of not being deported. *Khatkarh*, 442 F.Supp. 3d at 1284. On August 21, 2009, the state court granted his motion to modify his sentence and reduced the jail term to 364 days. *Id.* On April 2, 2010, his probation was revoked and he was sentenced to three years in state prison. *Id.* On June 21, 2019, the Superior Court granted Mr. Khatkarh's motion to vacate the 2010 conviction for violation of probation and the three-year prison sentence, pursuant to California Penal Code § 1473.7. *Id.* at 1285.

On June 24, 2019, Mr. Khatkarh filed a motion to reopen and to terminate proceedings arguing that the 2010 conviction was vacated and that his total sentence was 364 days. *Id.* After the Attorney General's decision in *Matter of Thomas & Thompson*, the BIA in an unpublished decision recognized 1473.7 vacatur for the violation of probation, but not the sentence modification. *Matter of Narinder Singh a.k.a. Narinder Khatkarh*, No. A043 928 987 (BIA Feb. 13, 2020). The Board specifically cited *Matter of Thomas & Thompson* for the proposition that a sentence modification was not effective for immigration

purposes. Mr. Khatkarh then filed a writ of habeas corpus in District Court, to have the original sentence vacated for ineffective assistance of counsel. He filed a second motion to reopen to terminate proceedings in light of the District Court's vacatur. On August 6, 2020, the BIA granted his motion to reopen and terminated proceedings. *In re Narinder Singh*, No. A043 928 987 (BIA Aug. 6, 2020).

In filing his 1473.7 motion, Mr. Khatkarh had reasonably only sought a vacatur for violation of probation and relief on the 2009 sentence modification to keep his sentence under 365 days, in order to avoid the immigration consequences of a conviction for an aggravated felony. He had reasonably relied on the BIA's prior decisions in *Matter of Martin*, *Matter of Song*, *Matter of Cota-Vargas*, and *Matter of H. Estrada* recognizing the efficacy of a sentence modification for immigration purposes. Mr. Khatkarh reasonably relied on precedent from 1982 that was reaffirmed three times after the passage of IIRIRA and twice after the decision in *Matter of Pickering.*

3. The burden that retroactive application would impose

Mr. Khatkarh's case illustrates the high burden that the retroactive application of *Matter of Thomas & Thompson* imposes on a party. First, Mr. Khatkarh had to retain an immigration attorney so that he could fully understand the immigration consequences of his plea. Then he had to retain a criminal defense attorney to get his criminal sentence modified from one year to 364 days so that he could avoid removal from his adopted home and could remain with his family. Then after a violation of probation he had to retain a criminal defense attorney to vacate the violation of probation under 1473.7 and had to retain an immigration attorney to file a motion to reopen with EOIR. Before the enactment of 1473.7, Mr. Khatkarh filed petitions for writ of habeas corpus with the California courts, all of which were denied. *Khatkarh*, 442 F.Supp.3d at 1287-88. While the motion to reopen was pending before the BIA, the Attorney General issued a new decision that no longer recognized sentence modifications. Mr. Khatkarh was once again required to hire a criminal defense attorney to go to the Federal District Court on a habeas petition to get his original conviction vacated for ineffective assistance of counsel. Once the conviction was vacated in federal district court, Mr. Khatkarh again had to retain an immigration attorney to file a second motion to reopen in order to ultimately seek termination of proceedings. The financial and emotional toll these proceedings must have placed on Mr. Khatkarh and his family are not difficult to imagine. More importantly, individuals without the same level of access to resources would have had to accept the retroactive application of *Thomas & Thompson* and the resulting removal order, despite their reliance on well-settled principles that were in place for almost 30 years.

Noncitizens who took pleas on or before October 25, 2019, with the belief that EOIR and DHS would recognize sentence modification are at risk of deportation, and in many cases, permanent separation from their families in the United States. Even in cases where a noncitizen is "lucky" enough to have time to seek other post-conviction relief, retaining an attorney to file for these forms of relief can be costly and beyond the means of many noncitizens. The public defenders' offices which are handling a great many post-conviction relief cases are already overwhelmed. The burden of applying *Matter of Thomas & Thompson* retroactively on noncitizens and public resources is significant and untenable.

4. The interests in applying *Matter of Thomas & Thompson* retroactively

It is in neither in the government's nor the public's interest to apply *Matter of Thomas & Thompson* retroactively. As explained above, this rule harms vulnerable noncitizens, their families, and their communities. And it does not serve the U.S. government's interests in any way. First, the government will have to relitigate in federal court the previously settled issue that EOIR recognizes sentence modifications for convictions entered on or before October 25, 2019. Second, the government will have to address a burgeoning circuit split on this issue that may go up to the Supreme Court, taking up precious prosecutorial and judicial resources. Finally, applying this decision retroactively conflicts with the Biden-Harris Administration's stated goals of racial equity and a fair and orderly immigration system. Accordingly, *Matter of Thomas & Thompson* should not be applied retroactively.

b. How *Matter of Thomas & Thompson* and *Matter of Pickering* apply to particular types of state court orders such as those referenced in *Matter of Sotelo*, *Khatkarh v. Becerra*, and *Talamentes-Enriquez.*

The Department requests comments on how *Matter of Thomas & Thompson* and *Matter of Pickering* apply to various state post-conviction relief vehicles. We note that any criminal post-conviction relief that results in the vacatur of a conviction due to procedural or substantive defect in the underlying criminal proceeding is recognized under *Thomas & Thompson* and *Pickering*. Below, we comment on two of the three different types of orders referred to in the note: California Penal Code § 1473.7 and California Penal Code § 1203.43. The Department should also continue to recognize other California vehicles for post-conviction relief not listed in the NPRM.

We are not commenting specifically regarding sentence modifications under Georgia law as it is beyond the scope of the ILRC's expertise. We instead wish to defer to the comments submitted by the City of Atlanta's Office of the Public Defender regarding sentence modification and sentence clarifications under Georgia law.

1. California Penal Code § 1473.7

EOIR has recognized that a conviction vacated under Cal. Penal Code § 1473.7 is vacated due to procedural or substantive defect as outlined in *Matter of Pickering*. Accordingly, a sentence that is vacated under 1473.7 should also be recognized as no longer valid for immigration purposes under *Matter of Thomas & Thompson*. Section 1473.7 recognizes three grounds for relief: (1) The conviction or sentence is legally invalid due to prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a conviction or sentence. A finding of legal invalidity may, but need not, include a finding of ineffective assistance of counsel; (2) Newly discovered evidence of actual innocence exists that requires vacatur of the conviction or sentence as a matter of law or in the interests of justice; or (3) A conviction or sentence was sought, obtained, or imposed on the basis of race, ethnicity, or national origin. None of these grounds for relief is for immigration or rehabilitative purposes. Moreover, the BIA has repeatedly recognized that a conviction vacated under 1473.7 is no longer a conviction for

immigration purposes. *See* ILRC Case Chart – BIA Cases Citing to 1473.7 and Motions to Vacate (https://www.ilrc.org/sites/default/files/resources/bia_1473.7_case_chart_.pdf (last viewed Oct. 26, 2023)).

In the two cases cited in the NPRM, both cases recognized that a sentence or a conviction vacated under section 1473.7 is no longer a "conviction" or "sentence" under INA § 101(a)(48). In *Khatkharh* the BIA recognized that the criminal court's June 21, 2019, order under 1473.7 that vacated the probation violation and three-year sentence was based on a defect in the underlying criminal proceeding. *Matter of Narinder Singh a.k.a. Narinder Khatkarh*, slip op. at *2.

Similarly in *Matter of Sotelo*, the BIA recognized that a conviction vacated under section 1473.7 no longer remains valid for immigration purposes. *Matter of Sotelo*, 2019 WL 8197756 slip op. at *3 (BIA Dec. 23, 2019). There is no argument that a sentence that has been vacated under section 1473.7 is still a sentence for immigration purposes.

2. California Penal Code § 1203.43

The BIA's other finding in *Matter of Sotelo* - that a vacatur entered pursuant to Cal. Penal Code § 1203.43 was not related to a legal defect in the underlying conviction – is incorrect, apparently based on a misapprehension of the very purpose of § 1203.43.

A vacatur entered under Cal. Penal Code § 1203.43 corrects a substantive or procedural defect related to misinformation about the immigration consequences of a noncitizen's plea. Section 1203.43 of the California Penal Code provides in relevant part as follows:

> (a)(1) The Legislature finds and declares that the statement in Section 1000.4, that "successful completion of a deferred entry of judgment program shall not, without the defendant's consent, be used in any way that could result in the denial of any employment, benefit, license, or certificate" constitutes misinformation about the actual consequences of making a plea in the case of some defendants, including all noncitizen defendants, because the disposition of the case may cause adverse consequences, including adverse immigration consequences.
>
> (2) Accordingly, the Legislature finds and declares that based on this misinformation and the potential harm, the defendant's prior plea is invalid.

The statute itself explicitly provides that the pleading language in the statute for deferred entry of judgment in controlled substance cases, Cal. Penal Code § 1000.4, "constitutes misinformation about the actual consequences of making a plea. . . . Accordingly, the Legislature finds and declares that based on this information, and the potential harm, the defendant's prior plea is invalid." The language of Cal. Penal Code § 1203.43 meets the standard of procedural or substantive defect in the underlying criminal proceeding required for a vacatur under *Matter of Pickering*.

In two unpublished decisions, the BIA recognized that a conviction vacated under Cal. Penal Code § 1203.43 is vacated due to a substantive defect in the plea. *Matter of Suazo-Suazo*, A077 074 203, slip op. at *2 (BIA Feb. 9, 2017); *see also Matter of Abraham Uribe*, A200 505 536 (BIA Feb. 19, 2019). Because

the noncitizens were misinformed about the adverse immigration consequences of their guilty pleas to first-time minor drug offenses, the misinformation qualified as a substantive defect in the criminal proceedings.

3. California Penal Code § 17(b)

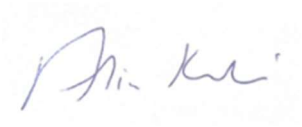
While none of the cases referred to in the proposed regulation address § 17(b), California's "wobbler" statute, the ILRC urges the Department to recognize findings that a state offense is a misdemeanor rather than a felony. A "wobbler" can either be classified as a felony or as a misdemeanor. "A wobbler offense is treated as a misdemeanor "[a]fter a judgment [imposes] a punishment other than imprisonment in a state prison. Cal. Penal Code § 17(b)(1). *Imposition* of a sentence other than imprisonment in the state prison automatically converts a felony to a misdemeanor." *Garcia-Lopez v. Ashcroft*, 334 F.3d 840, 844 (9th Cir. 2003) *overruled on other grounds Ceron v. Holder*, 747 F.3d 773 (9th Cir. 2014) (en banc) (internal citations omitted). *See also Velasquez-Rios v. Wilkinson*, 988 F.3d 1081, 1088 (9th Cir. 2021) (petition for rehearing denied) (recognizing *Garcia-Lopez* as giving immigration effect to a § 17(b)(3) reduction).

Matter of Thomas & Thompson considers the narrow issue of a sentence reduction of a specific term of imprisonment; it does not address the different issue of reclassification of a crime from a felony to a misdemeanor. Practitioners have reported that DHS tries to use the language in *Thomas & Thompson* to argue that a "wobbler," where the person has been convicted of a misdemeanor (with a maximum potential sentence of 364 days), should not be recognized by EOIR. We are asking the Department to clarify that *Matter of Thomas & Thompson* does not apply to wobblers under Cal. Penal Code § 17(b).

VIII. Conclusion

The ILRC applauds the Department for overhauling the AA96 Final Rule and for its recognition that EOIR policies and procedures should comport with the principles of fair process and equal access to justice. We further appreciate the Department's consideration of the ILRC's and other commenters' ideas regarding further improvements that should be made to EOIR regulations, and the Department's invitation for comments on other related matters. Please feel free to contact us if we can provide further comments or can assist in any other way.

Sincerely,



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