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Jamee E. Comans
Acting Assistant Director, Office of Policy
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Re: Comment in Response to Interim Final Rule Titled "Appellate Procedures for the Board of Immigration Appeals," 91 Fed. Reg. 5267 (Feb. 6, 2026), EOIR Docket No. EOIR-26-AB37, RIN 1125-AB37

Dear Ms. Comans,

The Immigrant Legal Resource Center (ILRC) writes to lodge our strong opposition to the interim final rule "Appellate Procedures for the Board of Immigration Appeals," (EOIR-26-AB37, RIN 1125-AB37). The rule as written would bar most respondents in immigration proceedings from an appeal, decimating their right to due process in their immigration proceedings. This is an egregious shift in policy that was done without informing the public and without regard for the detrimental effect for those in removal proceedings. The government's justifications for this rule are unfounded and arbitrary. The rule should be rescinded immediately.

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 issuance of this rule as an interim final rule violates the Administrative Procedure Act (APA).

Issuing this rule without proper notice and comment violates the plain intention of the APA. EOIR ("the agency") mischaracterizes this law as "procedural" and does not give adequate weight to the reliance interests of both individuals and the federal court system. A procedural rule is generally one that concerns the inner workings of an agency and does not have a substantial effect on the rights of the public. Here the agency contends that the rule is procedural because there is no substantive right to appeal to the Board of Immigration Appeals (BIA) and that the rule, when finalized, will only apply prospectively.[1] However, the rule does more than simply change the procedure at the agency; it removes an entire layer of appellate procedure and, ostensibly, protection for respondents from incorrect or erroneous judgments, which constitutes a substantive (and substantial) right. The removal of this protection will result in valid claims being dismissed and individuals removed from the United States when they were eligible for relief.[2] The rights of the individual in these cases, and the high likelihood that eligible individuals will be removed from the country in error, outweighs the agency's interest in efficiency.

The government further improperly relies on the foreign affairs exception to the APA. In asserting the exception, the government contends that the rule will increase the efficiency of EOIR proceedings, which will allow it to better work with other governments to address migration issues.[3] They argue that the long delay in adjudication processes at EOIR is a pull factor that incentivizes migration.[4] These justifications are too broad and the connections too tenuous to accurately assert the foreign affairs exception.[5] Given that the availability of Federal Circuit Court of Appeals processes to parties appealing the decisions of immigration judges and given the already-overloaded dockets the federal courts are facing, it is unlikely that this rule will have the desired effect of streamlining the appeals process overall. Unless the government intends to remove individuals before they are able to appeal to the federal courts – which would violate the law and any sense of decency, fairness, and justice – or until a stay of removal can be granted, the IFR will not make EOIR processes or removals more efficient and will have the added effect of further clogging the federal judicial system.

Finally, the agency argues that there is no right to appeal to the BIA and that there is "no evidence that either DHS or [a noncitizen] bases their choices in immigration proceedings on the future prospect of an appeal to the Board."[6] Separately, as discussed in the previous paragraph, the agency argues that the long wait times are an incentive for noncitizens to travel to the United States. The agency cannot have it both ways. The rule is either procedural to the point where dismissing most appeals will not affect migration, or it is necessary to fast track it to keep people from taking advantage of the delays in the system. Given the confusing and contradictory arguments, it is clear that the agency's invocation of the various exceptions is improper and not grounded in reality and are disingenuous and made in bad faith.

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[1] 91 FR 5267 at 5274.

[2] The agency's use of temporary immigration judges, removal of long-term immigration judges with deep immigration knowledge and experience, and directives for immigration judges to close cases quickly – all while court resources and staffing are scarce – can only create an environment where mistakes will be made and eligible individuals will be deported.

[3] 91 FR 5267 at 5275.

[4] Id.

[5] While Circuits are split on the correct test to assess where the foreign affairs exception applies to regulations, traditional examples of foreign affairs exceptions have included regulations having to do with international trade and visa issuance.

[6] 91 FR 5267 at 5274.

II. Summary Dismissal of Appeals to the BIA by Default Violates the Due Process Clause of the Fifth Amendment and the INA

The IFR would make summary dismissal of appeals the default, essentially rendering the right of a noncitizen to seek appeal of the immigration judge's decision and the BIA's role in it meaningless. The justification given by the agency for the complete diminution of the appellate process is that it will make the BIA more "efficient," and that there is no statutory requirement for an appellate process.[1] To the contrary, the proposed rule would only shift the workload of the appellate process from the BIA to the federal circuit courts and the agency itself. Such a shift would be less efficient and more costly overall. Most importantly, the rule ignores the noncitizen's statutory and constitutional rights to seek review of an immigration judge's decision.

Under the proposed rule, the deadline to file a Notice of Appeal (Form EOIR-26) is shortened from thirty days to ten days, a nearly impossible timeline for most pro se noncitizens to meet. For those few noncitizens who are able to file a timely appeal under the ten-day deadline, their appeal will likely be summarily dismissed. Under the IFR, any appeal received by the BIA will be summarily dismissed unless a majority of board members en banc determine within a period of ten days that the appeal should be accepted for review on the merits. This means that the vast majority of appeals filed with the BIA will be summarily dismissed and the decision of the immigration judge will become the final order. The agency summarizes this change as procedural, affecting only the form or method of review used by the BIA.[2] To the contrary, under the IFR there will be no meaningful review of the noncitizen's claim. The rule will turn the BIA into an intermediary whose sole role is to collect a fee and rubber stamp a form. Noncitizens seeking to appeal an immigration judge's erroneous decision will have no recourse to appeal that decision. Such a process would deprive noncitizens of their right to obtain meaningful review of their claims in violation of the due process clause of the Fifth Amendment.

The agency brushes off concerns that the rule will curtail a noncitizen's ability to seek review of the immigration judge's decision by pointing to the federal circuit courts as where noncitizens can seek review of immigration judge decisions. However, the role of the federal circuit court of appeals is to "review a final order of removal only if the alien has exhausted all administrative remedies available to the alien as of right."[3] As Congress has made clear in various provisions of the Immigration & Nationality Act (INA), noncitizens have the right to seek an administrative appeal before the BIA, not just the right to petition for review before the federal circuit courts.

Support for the right to an administrative appeal can be found throughout the INA. First, the INA clarifies that a removal order is not considered "final" until the BIA issues a determination affirming the order or until the time to seek review of such order by the BIA has expired.[4] Second, the INA repeatedly refers to administrative appeals or appeal proceedings before the Attorney General.[5] For example, noncitizens have the right to counsel at their own expense in "any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings."[6] Moreover, immigration judges are statutorily required to inform noncitizens of their "right to appeal" an order of removal.[7] These provisions in the INA would make little sense if noncitizens did not have a right to appeal an immigration judge's decision to the BIA.

Beyond the INA, current EOIR regulations provide for administrative appellate review of immigration judge decisions.[8] These regulations make clear that summary dismissal is appropriate in certain, limited situations.[9] However, the regulations at issue would be meaningless under the IFR, where summary dismissal becomes the norm and not a tool to be used in certain, limited circumstances, such as when a noncitizen files an untimely appeal or knowingly waived their right to appeal.

III. The Proposed Rule Would Eliminate Transcripts and Further Restrict a Noncitizen's Ability to Seek Review of the Immigration Judge's Decision

The IFR would limit the creation of transcripts to only cases accepted by the BIA for review on the merits.[10] As a general rule, the BIA does not create transcripts for cases that are summarily dismissed.[11] Under the new rule, when a noncitizen's appeal is summarily dismissed under the new rule, no transcript will be created or issued to the parties. In a system where the majority of decisions are issued orally, this means that noncitizens and their representatives will not have access to a written copy of the immigration judge's decision to review. It also means that the administrative record will not contain a transcript of the underlying proceedings or the immigration judge's decision, if it was issued orally. This will make it difficult for both parties to prepare their written and oral arguments before the federal court. It will also make it nearly impossible for federal circuit courts to review the record and the basis for the order of removal.

Digital audio recordings of the underlying proceedings may be available to the parties in some cases. However, unrepresented noncitizens, particularly those who are detained, often do not have the computer and internet access required to download and listen to these recordings. It is unclear whether federal circuit courts will have access to the digital audio recordings since the statute limits their review to the "typewritten record."[12] The new rule's elimination of the transcript in most cases will further limit the noncitizen's ability to seek review of the immigration judge's decision and further tie the hands of the courts that could provide any review of that decision.

IV. The Proposed 8 CFR § 1003.3(c) Simultaneous Briefing and Elimination of Reply Brief Would Impede Fairness and Efficiency.

The IFR would eliminate consecutive briefing in non-detained appeals and set a 20-day simultaneous briefing deadline for appeals, with reply briefs only permitted if invited or ordered by the Board. These proposed changes to 8 CFR § 1003.3(c) would prioritize haste over justice.

In appellate courts in the United States, consecutive briefing is nearly universal—the appellant files an opening brief and then the appellee files a responsive brief addressing the arguments raised in the opening brief. For example, Federal Rule of Appellate Procedure 28 sets forth the rules regarding the appellant's brief, the appellee's brief, and the appellant's optional reply brief and California Rule of Court 8.200(a) sets forth that the appellant must file an opening brief, the respondent must file a response brief, and the appellant may then file a reply brief. Similarly, Federal Rule of Appellate Procedure 26 permits the United States Courts of Appeal to "extend time" "[f]or good cause" and California Rule of Court 8.882(b) permits the parties to stipulate to 30-day extensions of each briefing deadline, as well as permitting the parties to apply to the judge for an extension of time for good cause. Not only do the proposed rule changes prejudice all appellees before the BIA, but also, they reduce the efficiency of adjudications by the Board.

First, regarding simultaneous briefing, the prejudice in the IFR to the appellee, who will not know what argument to focus on in their brief, far outweighs any efficiency that EOIR purports to achieve. In many cases, an appellant may include multiple issues in their Notice of Appeal but, after receipt of the transcript of proceeding, elect to only brief the most salient issues. This is true regardless of whether the DHS or the respondent has appealed; the appellee party cannot know which issues will be briefed on appeal until receiving the appellant's brief. With simultaneous briefing, the appellee would have to address every issue raised in the Notice of Appeal, even if those issues are not ultimately briefed, resulting in unnecessary briefing and, likely, an increase in requests to exceed the briefing page limit. This would be unfair to the appellee and would result in overburdened counsel for both respondents and DHS having to brief issues that will never be considered by the BIA.

Second, although EOIR has transitioned to EOIR Courts & Appeals System (ECAS) in cases initiated after February 2022, many cases pending in immigration court remain in paper format. In these cases, filings to the BIA must be submitted in person, by courier, or by mail, and therefore the proposal to only permit 20 days to file an appeal brief will functionally amount to a much shorter briefing timeline. Even for an attorney who represented the noncitizen before the immigration judge, it is generally not possible to begin writing the appellate brief before receiving the transcript, order, and briefing schedule. Particularly for the appellee, without knowing which arguments or issues the appellant will raise in their brief, it is impossible to write a competent, thorough brief that will actually aid the BIA in making a fair decision.

The proposed change will also inhibit previously unrepresented respondents from securing counsel in time to submit a timely appeal brief. The vast majority of noncitizens who appear in immigration court are unrepresented, and many do not speak English. Because IJs often issue their orders orally (and parties do not automatically receive a copy of the digital audio recording), pro se respondents generally do not have all the information necessary to secure counsel until the BIA issues the briefing schedule, transcript, and copy of the IJ's order. Without the possibility of obtaining a reasonable extension to review the record and prepare a quality brief, as discussed below, counsel would be unlikely to take on the case, thus leaving more respondents without counsel during an appellate process in which they are very unlikely to succeed on their own. This change would be particularly harmful to unrepresented detained respondents who rely on their custodians to deliver mail to them and face the additional delays of detention facility mail sorting on top of usual USPS delays, in addition to limited access to legal research tools and language assistance that may be necessary.

Third, the elimination of reply briefs except when invited or ordered by the BIA will deprive both parties of the opportunity to meaningfully respond to opposing arguments. Reply briefs are common practice in federal courts of appeals and state appellate bodies.[7] While the IFR states that reply briefs "rarely, if ever,

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[7] *See, e.g.* Fed. R. App. Proc. 28(c); California Rule of Court 8.200(a).

positively contribute to the arguments at issue,"[8] reply briefs are likely to be very useful, if not necessary, where the parties have submitted simultaneous opening briefs. As discussed above, an appellee who is forced to file a simultaneous opening brief will not know what the appellant will identify as errors below, so will be "flying blind" when drafting their opening brief. It is only after reviewing the appellant's opening brief that an appellee will be able to respond and inform the court of any countervailing arguments.

Similar provisions in the agency's 2020 rule were struck down by a federal court in Centro Legal de la Raza v. EOIR.[9] The agency also recognized all of these issues when it rescinded the 2020 rule in 2024 and restored the longstanding practice of consecutive briefing and permitting reply briefs.[10] The IFR's changes to the briefing schedule would result in a farcical appeal process in which neither party has a fair opportunity to challenge the decision below or their opponents' arguments. The agency's failure to take these considerations into account is tantamount to bad faith.

V. The Limited Briefing Extension Provisions Will Exacerbate Harms

The IFR also limits parties' ability to seek an extension of the very short briefing schedule to only cases of "exceptional circumstances," which specifically excludes "workload concerns, travel plans, or similar concerns within the control of either party, or their representatives." 91 Fed. Reg. 5273. This sets an extremely high standard compared to other extension requests before the agency and compared to common practice in federal and state appellate tribunals. See Fed. R. App. Proc. 26 (allowing federal courts of appeals to extend time for "good cause"); California Rule of Court 8.882(b) (permitting parties to stipulate to 30-day briefing extension or ask the judge for additional extensions for "good cause").

The IFR's carve-out specifically disregards the scenarios and hardships that will become even more common with the simultaneous briefing schedule under the IFR: inability to find counsel quickly enough to file the brief, and considerations of counsel's existing workload and own personal hardships, are specifically excluded. For example, under the IFR, a noncitizen who has long been represented by the same attorney would not be able to seek an extension if their attorney is hospitalized after being injured in a serious car accident. This scenario is undoubtedly exceptional and beyond the noncitizen's control, but the IFR would appear to preclude an extension under these facts. Unable to seek an extension, this individual would be forced to either find new counsel on a very short timeline, or proceed alone, drastically reducing their likelihood of success on appeal.

VI. The use of the term "alien" is derogatory.

Finally, we note with disdain the agency's insistence on using the term "alien" in lieu of "noncitizen" throughout this rule and in most other agency actions since the beginning of the second Trump administration. Acknowledging that various statutes use the term alien – including the Immigration and Nationality Act – the term has been widely denounced as inhumane and degrading and advocates have

[8] 90 Fed. Reg. at 5273.
[9] *Centro Legal de la Raza v. EOIR*, 524 F. Supp. 3d 919, 964-65 (N.D. Cal. 2021).
[10] 89 Fed. Reg. at 46743.

long pushed to eradicate its usage in the law, government documents and in public communications. However, the agency and the Trump administration as a whole have insisted in re-inserting the language wherever possible to continue to sow division and prop up racist propaganda. The insistence of using terms like “alien” and “illegal” belies the truth and motivation by the United States government to fear-monger and intimidate immigrant communities and to paint immigrants as lesser-than human. Given the exploding backlog of immigration cases, severe delays even in the face of the administration's efforts to hobble due process (as is evidenced by the IFR at issue), and an ever-dwindling federal workforce, the question begs itself: are there not more important things on which the agency should focus its efforts?

VII. Conclusion

If fully promulgated in its current form, the IFR will substantially trample on the rights of individuals in removal proceedings and exacerbate the harms of an overloaded, under-resourced system. The agency does not provide adequate justification of the IFR itself nor for its publication as an interim final rule. Even if the agency decides to alter its rulemaking and issue the rule under proper APA procedure, the rule will still be arbitrary and capricious, given the fact that the agency has provided no justification for this massive change, other than the fact that it is more efficient to reduce the rights of those in removal proceedings. The agency should rescind the IFR in full immediately.

Sincerely,
The Immigrant Legal Resource Center