

Register as a proposed rule. EOIR has not yet announced whether it intends to appeal the court's ruling in the *Amica Center Decision*. But AHR assumes that if EOIR does not appeal, it will nonetheless attempt to convert—at least in some fashion—the vacated portions of the IFR as a proposed rule. AHR's February 20 Comments also indicated AHR's intention to provide supplemental substantive comments. We do so here, but for the reasons stated, we submit them as comments on a potentially forthcoming proposed rule not a rule that has been placed into effect. For convenience's sake, however, we refer throughout to the IFR.

As explained in more detail below, the changes proposed by the IFR are arbitrary and capricious and thus do not meet the requisite standards for agency action. Indeed, many of the same reasons the district court found that the IFR was in fact a substantive rule requiring prior notice and comment, as well as its findings on standing for the plaintiffs in the case, support the conclusion that the IFR was also arbitrary and capricious. *See, e.g., Amica Center Decision, supra*, at *2 (finding that IFR would “fundamentally curtail[] . . . meaningful administrative review of adverse immigration decisions”); *id.* at *15–19 (finding that the IFR would effectively deprive noncitizens of their right to counsel and deprive counsel of their right to take on representations of noncitizens in appeals). In reaching its conclusion that use of an IFR was unlawful, the district court found that the IFR would also violate international and domestic law, restricting due process and other legal rights of noncitizens in the U.S. immigration system. *Id.* at *22 (agreeing with Plaintiffs that the IFR would “deprive[] most individuals in removal proceedings of *any* meaningful administrative appeal”) (italics in original). That same conclusion not only supported the district court's decision vacating the IFR, but it would also make the vacated provisions of the IFR unlawful if adopted as a proposed rule.

As explained herein, AHR also notes that the IFR will violate U.S. obligations under international and domestic law related to human rights, including the right to due process and protections against return to persecution. The IFR's changes severely limiting timelines for filing appeals and all but eliminating meaningful review of such appeals by the BIA amount to violations of due process, which are contrary to the protections contained in the International Convention on Civil and Political Rights (ICCPR) and the Constitution. These restrictions are also contrary to the procedural guarantees in the Refugee Convention and the 1967 Protocol thereto. In particular, the Refugee Convention and Protocol require due process as crucial safeguards to ensure no person is refouled to face persecution. By limiting due process, the IFR violates these safeguards and will result in the U.S. returning people to face persecution in violation of its obligations under international and U.S. law. As such, AHR calls for the IFR to be withdrawn.

I. The changes the IFR implements are arbitrary and capricious.

The IFR is arbitrary and capricious and thus should be withdrawn because EOIR did not solicit in advance or consider any comments, EOIR does not have evidence to support the changes, the conclusions are illogical, unsupported, and unreasonable, and the changes do not consider important reliance interests.

An agency's rule will be struck down if it is arbitrary and capricious. Courts have offered many reasons why an agency's rule may be arbitrary and capricious. For example,

[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43 (1983).

The IFR here is arbitrary and capricious because, as discussed in AHR’s February 20 Comments, it does not allow the opportunity for prior notice and comment. Under the arbitrary-and-capricious standard, an agency “must show that it has ‘reasonably considered the relevant issues and reasonably explained the decision.’” *Chamber of Com. of the United States v. U.S. Sec. & Exch. Comm’n*, 85 F.4th 760, 774 (5th Cir. 2023) (quoting *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021)). In doing so, the agency must “consider all relevant factors raised by the public comments and provide a response to significant points within.” *Id.* Here, the IFR fundamentally changes the appeals process and the role of the BIA, yet the agency did not solicit in advance or consider any comments before implementing the rule because it did so through an IFR. The IFR itself notes that a notice of proposed rulemaking (“NPRM”) was used in the past to amend EOIR regulations relating to the BIA, and the IFR offers insufficient justification for why a NPRM process was not followed here. As noted in AHR’s February 20 Comments, and as the district court in *Amica Center* ruled, regular notice-and-comment procedures should have been followed, and it was unlawful to short-circuit the APA’s notice-and-comment procedures. The key features of the IFR have been vacated, and to the extent it has not already done so, EOIR should thus immediately withdraw nearly all of the IFR, including the portions vacated in the *Amica Center Decision*.

EOIR lacks evidence to support its IFR, which also renders it arbitrary and capricious. An “agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *State Farm*, 463 U.S. at 43. EOIR has not set forth any relevant data that supports the changes implemented in the IFR. For example, although EOIR alleges that the proposed scheme would deter noncitizens from entering the United States through improper procedures, the IFR offers no evidence that

supports that purely speculative statement. Appropriate border security measures are completely separate and distinct from the manner in which immigration courts and the BIA adjudicate immigration matters and conduct their proceedings, including with respect to the nature and timing of filings of appeals before the BIA. But even ignoring the disconnect between the IFR's stated goals and border security, its rationale for the asserted connection is entirely speculative.

Consider the implicit but dubious chain of suppositions purportedly supporting EOIR's conclusion that the IFR will deter unlawful immigration. Under the IFR's "rationale," EOIR supposes that an individual would plan in advance (1) to cross the border illegally, risking capture and danger, (2) either evade capture and hide or seek asylum, (3) plan to establish "credible fear" sufficient to warrant an asylum hearing, (4) assume the claim will be rejected, and (5) count on the fact that the immigrant will be able to remain in the United States, not permanently, but merely longer because the immigrant will be entitled to a merits decision by the BIA. Under similar circumstances, for example, the BIA itself has found such a "chain of suppositions" too speculative to justify relief under the Convention Against Torture (CAT). *Matter of J-F-F-*, 23 I&N Dec. 912, 917–18 (A.G. 2006); *see also Matter of J-C-A-G-*, 29 I&N Dec. 331 (BIA 2025).²

The IFR also fails to consider the negative impact of the changes it orders. For example, limiting the time to file an appeal to ten days effectively prohibits some individuals from taking

² To sustain a claim under Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "CAT"), the applicant must demonstrate that if returned to the country the applicant fled, that person would more likely than not face a risk of torture. But as the BIA has held, if the risk of torture rests on a chain of events, the applicant must prove that each event in the chain is likely to occur. The IFR similarly says that the changes it proposes in the appeal process *will* reduce unlawful migration. By the BIA's own logic, EOIR must similarly prove that *each* of the links in the chain of implicit assumptions about how individuals choose to risk becoming undocumented noncitizens must be shown to be more likely than not. Again, the speculative nature of the IFR's connection between appellate procedures and border security aside, putting in place appropriate border security measures to deter unlawful immigration has nothing to do with how immigration matters in the United States, including with respect to legal claims (*e.g.*, a fear of torture) asserted by noncitizens, should be adjudicated and resolved. The United States has ratified the CAT, and it has legal duties and obligations as a party to that convention.

an appeal at all. As stated in AHR’s February 20 Comments, The Advocates often cannot even reach noncitizens in detention for more than ten days. In addition, during this period, noncitizens have to comply with many requirements to appeal, including working with retained counsel, finding translation services, learning about their right to appeal and the requirements pertaining thereto, acquiring sufficient knowledge of complex immigration laws to present such an appeal if they are representing themselves *pro se*, finding new counsel if they are dissatisfied with their previous counsel or did not have counsel at their initial hearing, printing and copying items to submit their appeal, paying for the appeal fee or preparing and filing a waiver request, and ordering documents from the lower court so counsel and/or the applicant can properly review the record for the appeal. Nearly half of noncitizens in removal proceedings have no legal counsel, meaning they are navigating this process *pro se*. In order to obtain counsel, many people have to pay expensive or unaffordable attorney fees or try to obtain extremely limited but very valued *pro bono* support. Some have no access to a work permit—a situation that will be exacerbated by DHS’s new NPRM³—making paying for counsel or the fees for preparing an application extremely difficult or nearly impossible, to say nothing of doing so on a revised, 10-day timeline. The IFR does not reflect any consideration of these limitations and thus has failed its obligation under the APA to consider “*all relevant factors.*” *Home Box Off., Inc. v. FCC*, 567 F.2d 9, 35–26 (D.C. Cir. 1977); *see also State Farm*, 463 U.S. at 43 (holding that agency action is arbitrary and capricious where it has “entirely failed to consider an important aspect of the problem”).

Nor does EOIR offer reasoned analyses or logical conclusions that support implementing the changes in the IFR. “[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually

³ *See Employment Authorization Reform for Asylum Applicants*, 8 C.F.R. Parts 208, 274a (2026).

ignored[.]” *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970). If an agency does not offer such analysis, then the rule is arbitrary and capricious. Notwithstanding that the IFR does not offer evidence for its conclusions, the conclusions themselves are illogical.

A central feature of the IFR is EOIR’s conclusion that if it takes away the right to a remedy by the BIA—by making the BIA’s decision whether to consider an appeal wholly discretionary and by shortening the deadline to file an appeal—then the BIA backlog will decrease. Making consideration of appeals totally discretionary, by definition, *will* reduce any additional backlog that might develop in the future, but in the process, it will also curtail the rights of noncitizens, a factor that EOIR must take into consideration. Of course, while noncitizens must still *file* costly appeals to the BIA to preserve their right to judicial review under the IFR (even if the BIA chooses not to review them), the difficulty of doing so within ten days is an infringement on such rights and discourages noncitizens from taking appeals, including ones that would be meritorious if considered, from IJ decisions in the future. These factors, taken together, create a chilling effect on noncitizens’ right to appeal, which exacerbates the fact that the BIA is already curtailing the rights of noncitizens through other methods.⁴ In fact, the goal of the IFR appears not to be efficiency at all, but to eliminate or severely restrict legal rights and to deny potentially meritorious claims. *See* Bustillo & Mukherjee, *supra* note 4 (“An administrative court known as the Board of Immigration Appeals has published a body of immigration case law that significantly narrows the due process and relief from deportation available for noncitizens, an NPR analysis of its decisions shows. . . . Last year, [the BIA’s]

⁴ *See* Ximena Bustillo & Rahul Mukherjee, *An Immigration Court Few Have Heard of Is Quietly Shaping Policy Behind the Scenes*, NPR (Mar. 20, 2026), <https://www.npr.org/2026/03/20/nx-s1-5707535/trump-immigration-detention-appeals-board-deportation> (detailing how the BIA’s recent decisions have been increasing infringement on the rights of noncitizens); Compl. at 18–20, *Hines Immigr. L., PLLC v. Exec. Off. for Immigr. Rev.*, No. 26-cv-01018, Dkt. 1 (Mar. 24, 2026) (arguing that EOIR’s Somali Rocket Docket Policy violates the constitutional rights of noncitizens).

decisions backed Department of Homeland Security lawyers in 97% of publicly posted cases; that's at least 30 percentage points higher than the average from the last 16 years.”).

The problem with its conclusion is that EOIR has not accounted for the significant amount of harm the changes articulated by the IFR would cause, including to due process rights, access to counsel, the meritorious claims of noncitizens, and the orderly administration of justice. *See State Farm*, 463 U.S. at 43 (explaining a rule is arbitrary and capricious where the agency “entirely failed to consider an important aspect of the problem”). Here’s how the district court in the *Amica Center Decision* put it:

Whereas a party subject to an adverse order from an Immigration Judge currently has at least the hope of persuading the BIA that the Immigration Judge erred, as soon as the IFR takes effect, that same party will almost certainly lose his case before the BIA before it even begins; in the vast majority of cases, the case will be disposed of by summary dismissal. By most lawyers’ count, that is a loss.

Amica Center Decision, *supra*, at *25.

EOIR has also failed to consider whether, with the changes in the IFR, individuals can adequately prepare for an appeal, obtain legal representation, understand their legal rights, or obtain translation services within ten days of an adverse IJ decision. As discussed, *infra*, these are not abstract concerns, but real problems The Advocates has seen in its day-to-day work. EOIR has also failed to consider that eliminating mandatory appeals means that issues that are reviewable by the BIA but not by federal courts are lost, thus eliminating any opportunity for appellate review of any such issues for those individuals.⁵ Decreasing the future workload of a court or tribunal is not a sufficient rationale for depriving people of their rights, including to due process, to access counsel for advice and assistance, and to present meritorious claims.

⁵ *See also* Compl. at 21, 27, *Amica Ctr. For Immigrant Rts. v. Exec. Off. For Immigr. Rev.*, Dkt. 1 (D.D.C. Feb. 26, 2026) (detailing how arguments deemed waived by the IFR cut off the opportunity for otherwise Congressionally mandated judicial review).

As detailed further in Section III, *infra*, the IFR is also contrary to principles of international law that require due process for noncitizens and extra protection for asylum seekers. For example, article 3(1) of the CAT explicitly provides: “No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” Article 3(2) then states: “For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.” It takes considerable time to assemble and present evidence, especially as it relates to conditions in other countries.

Requiring individuals to file an appeal with no guarantee their appeal will be heard is also arbitrary and capricious and illogical where, as here, those individuals are required both to pay a fee upon filing their appeal (unless they can obtain a discretionary waiver of the filing fee) and to prepare and file the appeal in order to establish that they have exhausted their administrative remedies. Appellate courts may review final orders of removal only if the affected party “has exhausted all administrative remedies available . . . as of right.” 8 U.S.C. § 1252(d)(1); *see also Amica Center Decision, supra*, at *26 (noting that for detained or pro se individuals “the ten-day Notice of Appeal window may pose an insurmountable barrier to filing and who may forfeit their right to judicial review in the courts of appeals by failing to exhaust their BIA remedy as a result”).⁶ Even under the IFR, noncitizens have the *right* to appeal to the BIA, notwithstanding that the IFR would make that appeal essentially pointless in all but the few cases that can overcome the

⁶ As the Court in *Amica Center Decision* also noted, “even those who will be able to file some Notice of Appeal within the ten-day deadline will risk undermining any appeal that they might subsequently pursue in the appropriate Article III court; they will be required to prepare and file their BIA Notices of Appeal with little time or opportunity to evaluate potential arguments, yet may forego the ability to raise any claim or argument in subsequent proceedings that they fail to ‘exhaust’ before the Board.” *Amica Center Decision, supra*, at *26.

discretionary decision to hear the appeal. *See* AHR February 20 Comments at 8 (citing *Romero-Escobar v. Holder*, 601 F. App'x 484, 485 (9th Cir. 2015) (holding that by waiving his right to appeal to the BIA, the noncitizen had not exhausted his administrative remedies)).⁷

Requiring individuals to pay for a process that by its very design will normally be futile, *i.e.*, that won't even result in meaningful BIA review or a decision on the merits, is self-evidently arbitrary, capricious, and unreasonable. Subjecting individuals to such futile and costly filing fees and such a futile process knowing that they will then also have to pay a federal court appeals fee and legal fees for an elongated process also increases the likelihood of exploitation and trafficking amongst a population that will not have adequate resources to pay these increased costs.⁸ Indeed, The Advocates is well-aware of the vulnerability of noncitizens to trafficking and how increased expenses to obtain legal status contribute to those vulnerabilities.⁹ Such changes will also mean Spanish-speaking individuals are more likely to fall victim to notario fraud¹⁰ as they will desperately seek legal counsel and have reduced time with which to vet counsel or ensure proper filings.

Requiring individuals to file an appeal within ten days is also arbitrary, capricious, and illogical because it effectively prohibits certain individuals from appealing at all or in a

⁷ *See also Sswajje v. Ashcroft*, 350 F.3d 528, 532 (6th Cir. 2003) and cases cited therein (untimely appeals to BIA precluded subsequent judicial review). Tellingly, while the IFR shortens the time to do so, it still requires that a notice of appeal to the BIA “shall be filed directly with the Board within 10 calendar days of the Immigration Judge’s decision.” Proposed 8 C.F.R. § 1003.38(b)(1) (emphasis added).

⁸ The Department of State has emphasized the vulnerability of immigrants to trafficking. *See* U.S. Dep’t of State, *2025 Trafficking in Persons Report*, <https://www.state.gov/reports/2025-trafficking-in-persons-report/> (last visited Mar. 26, 2026) (“Foreign domestic workers are particularly vulnerable to abuse due to language and cultural barriers, as well as a lack of community ties. Some perpetrators use these types of conditions as part of their coercive schemes to compel the labor of domestic workers with little risk of detection.”).

⁹ *See* Advoc. for Hum. Rts., *The United States of America’s Compliance with the International Covenant on Civil and Political Rights: Non-discrimination, Human Trafficking and Forced Labor, Non-Refoulement and Immigration Enforcement and Detention*, U.N. Hum. Rts. Comm. (Sept. 12, 2023), <https://www.theadvocatesforhumanrights.org/Res/AHR%20Migrants%20Trafficking%20ICCPR%202023.pdf>.

¹⁰ In many Spanish-speaking countries, notarios are licensed officials authorized to file legal documents and represent clients. But in the United States, a person claiming to be a notario publico is a form of fraud targeting immigrants who mistakenly believe they would be hiring a lawyer.

customary and orderly fashion. For example, the truncated ten-day period to file an appeal does not take into account that the noncitizen may need a copy of the hearing transcript and to have it translated in order to prepare an adequate appeal, and it does not take into account that the transcript and/or translation services may not be available, much less available in sufficient time to review, before the appeal has to be filed. To fully understand what was said by an IJ, an applicant who does not speak English will often require translation services, without which the noncitizen will be unable to meaningful consult with counsel and participate in the immigration matter. Nor does the shortened period to appeal take into account that the noncitizen who has lost a case before an IJ may wish to switch lawyers or may *have* to switch lawyers because the lawyers who handled their cases before an IJ do not handle appeals. In other cases, individuals who were unrepresented at the immigration court may decide, depending on the availability of resources, to hire counsel for an appeal—especially as data shows individuals with counsel are three to five times more likely to win their case.¹¹ In any case, obtaining a new lawyer and getting that lawyer up-to-speed about the case is likely to eat up the entire ten-day appeal period, leaving no time for actual preparation of a strong appeal. And, those challenges are exacerbated for individuals who are detained, as they must compete with detention center phone, internet, and mail limitations while finding and communicating with counsel. These problems are discussed in a recent article:

Maria Chavez, an immigration attorney with the Partnership for the Advancement of New Americans, said the issue goes back to the Trump administration's changes to the system. She said the number of pending cases has grown in large part due to pressure on immigration judges to deny immigrants' requests to stay.

¹¹ See *Study: Detained Immigrants 5.5x More Likely to Prevail with Lawyer*, Nat'l Coal. for Civ. Rt. to Couns., https://civilrighttocounsel.org/major_developments/study-detained-immigrants-5-5x-more-likely-to-prevail-with-lawyer/ (last visited Mar. 4, 2026). While detained noncitizens are much more likely to prevail in their cases when represented by counsel, few noncitizens manage to secure representation. Research shows only thirty-seven percent (37%) of noncitizens overall and fourteen percent (14%) of detained noncitizens secure legal representation. See *Right to Counsel, Am. Immigr. Council*, <https://www.americanimmigrationcouncil.org/about-immigration/right-to-counsel/> (last visited Mar. 6, 2026).

“It’s essentially just eviscerating the BIA appellate process, and all of this is of the government’s own doing,” Chavez said. Before Friday, when an immigration judge issued a decision, each side had 30 days to decide whether to appeal the case. If the immigrant chose to appeal, the person would often have to find a new attorney for that process either because the person is dissatisfied with the first attorney or because the first attorney doesn’t do appeals, according to Gregg. The attorney would file a notice of appeal outlining the general reasons for appeal within the 30-day window to the Board of Immigration Appeals. Then the board would have the audio files from the immigration judge’s court proceedings transcribed and set a briefing schedule for each side to file more arguments. The attorney would use the transcription to write a more specific explanation for the board about what the lawyer believed had gone wrong in the initial decision and hearing. Then, the opposing side, in this case the government, would have time to file a response. Now, under the new rule, the person will have to find an attorney and get the notice of appeal submitted within 10 days. And, the notice of appeal must include the full explanation of the appeal so that the board can vote whether to hear the case or summarily dismiss it — even though the attorney does not yet have a transcript to work from. “It’s due process in name only in that there is a process,” Gregg said. “It’s not due, and it’s not fair.” Chavez said she often receives cases after an immigration judge has made a decision, and it takes time to piece together what happened during a case.

Kate Morrissey, *Sudden Rule Change Shortens the Time Immigrants Have to Appeal Their Cases to 10 Days*, Daylight San Diego (Feb. 10, 2026), <https://www.daylightsandiego.org/sudden-rule-change-shortens-the-time-immigrants-have-to-appeal-their-cases-to-10-days/>.

Beyond being illogical, the shortening of the time period to appeal creates an unsupported and arbitrary and capricious distinction between the deadlines for appeals of IJ rulings in *some* asylum cases (30 days) and all other cases involving orders of removal (10 days), including in cases that may involve meritorious claims of a fear of persecution and torture. The IFR preserves, as it must, the right of asylum applicants to seek appeal of adverse IJ decisions to the BIA within 30 days as expressly allowed under 8 U.S.C. § 1158(d)(5)(A)(iv). *See* 8 C.F.R. § 1003.38(b) (2). To be sure, an appellate judge has observed in dicta that the statutory 30-day rule governing appeals in asylum claims does not necessarily mean that the same time period for

filing appeals must apply in all other cases. *Liadov v. Mukasey*, 518 F.3d 1003, 1013 (8th Cir. 2008) (Colloton, J., concurring). But neither is EOIR free to set different timelines for appeals of other IJ decisions without explaining how, if at all, they are different. In fact, the IFR changes the regulations which set a *uniform* timeline for seeking BIA review. Those prior regulations were presumably predicated on a factual determination that *all* persons seeking to appeal immigration court rulings to the BIA—and not just asylum applicants entitled by statute to a 30-day appeal period—should have the same 30 days to prepare and file their notices of appeal. *See, e.g., FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (holding an agency is not acting on a “blank slate” where it rests on fact findings that contradict those underlying its prior policy.)

In civil cases in the United States, litigants have 30 days to file a notice of appeal after entry of the relevant judgment or order. Fed. R. App. P. 4(a)(1)(A). Even when responding to routine discovery requests, litigants ordinarily get 30 days to prepare their responses and objections. *See, e.g.,* Fed. R. Civ. P. 33(b)(2); Fed. R. Civ. P. 34(b)(2). A ten-day period, especially given the complexity and nature of immigration law, immigration matters, and immigration processes and procedures, is simply too short of a time frame, especially where matters of life or death may be concerned, as in CAT claims.

The IFR is also arbitrary, capricious, and illogical because it fails to consider important aspects of the problem by acknowledging only a narrow view of the purpose of appeals. The IFR states, “This change will allow the [BIA] to focus on appeals with particularly novel or complex legal questions without becoming bogged down in mine-run or straightforward cases that may already be subject to being affirmed without an opinion or summarily affirmed.” 91 FR at 5272. The purpose of appellate review, however, is not only to resolve novel or complex legal

questions.¹² In *C.M. Spring Drug Company v. United States*, the Eighth Circuit explained that the purpose of appellate review is to secure application of rules of procedure and practice “where the complainer has timely invoked their application and the trial court has refused to recognize his rights so brought to its attention.” 12 F.2d 852, 864 (1926). The rule change here would take away that right to have an appellate court correct a trial court even where the appellant has done everything right and filed an appeal, all because the BIA may not consider the issue “particularly novel or complex.” 91 FR at 5272. If an IJ errs, that error should be corrected, regardless of whether the error is obvious, plain, or “novel or complex.” Simply because a case may be decided without an opinion or with a short and simple opinion does not mean it is not worth deciding and certainly does not mean that depriving individuals of their right to be heard is justified.

For example, BIA appeals also serve the purpose of advancing uniformity in the application of immigration law and the preservation of fundamental rights, not just when the issues are novel or complex. Among other things, IJs are required by federal regulations to advise those appearing in immigration court of their right to retain counsel. *See* 8 C.F.R. 1240.10. Experienced counsel, of course, serve an important purpose in helping clients flag instances where an IJ departed from BIA precedent or a governing rule. Shortening the time to take an

¹² *See N. Brevard Cnty. Hosp. Dist. v. C.R. Bard, Inc.*, 162 F.4th 1268, 1279 (10th Cir. 2025) (Federico, J., concurring) (“The existential purpose of appellate courts is the duty to correct legal errors made by the district court.”); Charles E. Carpenter, Jr., *Having Faced the Circuit-Splitting Conundrum—What about More Judges, Less Staff?*, 15 J.L. & Pol. 531, 548 (1999) (identifying some traditional purposes behind appellate courts as: “1. To correct error in the trial court. 2. To declare law - both by enunciating law and harmonizing law. . . . 3. To do substantial justice. 4. To supervise the lower courts and add legitimacy to the process.”); Catherine Stone, *Preservation of Error: From Filing the Lawsuit Through Presentation of Evidence Foreword*, 30 St. Mary’s L.J. 993, 994 (1999) (“The function of appellate courts, however, is not merely abstract. In a very tangible way, appellate courts provide accountability for lower courts, assuring the correctness of decisions. Beyond mere correction of error, appellate courts provide lower courts with affirmation that their decisions are part of the greater whole of our legal system.”); Hon. Martha C. Warner & Steve Henley, *Is Big Bad? Timeliness and Consistency on Large State Appellate Courts*, 44 Judges’ J. 36, 37 (2005) (“The principal purposes of appellate courts are to correct harmful errors, presumably within a reasonable period of time, and in the process to bring clarity and consistency to the law of the jurisdiction.”).

appeal and making it discretionary is a double whammy to the preservation of this right. It reduces the likelihood that noncitizens will obtain counsel even if IJs remind them, *as required*, of their right to retain counsel. And, reducing the time to appeal and eliminating the guarantee of an appeal before the BIA will likely increase the number of incidents where the legal rights of noncitizens are violated, including when IJ rulings are at odds with BIA precedent or federal regulations. The right to counsel is fundamental to the immigration system, and a denial of the right to counsel should be promptly corrected on appeal regardless of whether any denial of that right is seen as “novel or complex.”

EOIR further fails to sufficiently consider the IFR’s impact on Article III courts, which conduct judicial review of the BIA’s rulings and decisions. To be sure, the IFR touches upon the judicial review process, but its discussion is internally contradictory. It acknowledges the concern that by essentially eliminating BIA appeals, the number of appeals to the federal courts will increase, but it dismisses this concern on grounds that it “does not expect this change to cause a significant increase in petitions for review filed with Federal Courts of Appeals[.]” 91 FR 5271, n.14. At the same time, EOIR “acknowledges that the IFR’s *goal* is to increase the number of appeal decisions issued per year, which will potentially lead to an increase in the number of petitions for review filed per year[.]” but it asserts that the burden on the appellate courts from this expected increase is outweighed by EOIR’s “significant interest in timely adjudications.” *Id.* (emphasis added). Then, having admitted its goal to shift the burden of reviewing immigration judge decisions from the BIA to the federal courts, it offers a complete *non-sequitur*—“cases that would have otherwise been decided by the Board in the [noncitizen’s] favor,” it says, “cannot be reviewed by Federal courts anyway; so, the dismissal of such appeals under this IFR will have no impact on Federal court filings.” *Id.* This last explanation is “as silly as it sounds.” *Air All. Hous.*

v. *EPA*, 906 F. 3d 1049, 1067 (D.C. Cir. 2018). If the BIA *would* have reversed an adverse immigration judge’s decision but will no longer review it, how does that obviate the need for the noncitizen’s right to appeal? If anything, it harms noncitizens who would have prevailed in a BIA decision, which would have then obviated the need for an appeal to the courts. Is this how EOIR measures efficiency? As has been widely reported, violations of existing immigration laws and procedures, including in the State of Minnesota where AHR works, have already resulted in federal district courts being inundated with the filing of many meritorious *habeas corpus* petitions.¹³

Accept for a moment EOIR’s expectation that its changes to the BIA appeal process will enable BIA dismissals to occur quickly, “allowing [noncitizens] to seek Federal court review expeditiously, rather than potentially waiting for years for a Board decision that in the vast majority of cases would affirm the underlying Immigration Judge decision.” 91 FR at 5270. In acknowledging that this will increase the workload of the appellate courts, it also implicitly acknowledges that it will likely be passing work from the BIA to the federal courts. But its claim of resulting efficiency amounts simply to passing the backlog on to the appellate courts. That was decidedly not the scheme intended by Congress.

EOIR also fails to consider or account for the fact that the changes skew the process and institutional bias further in favor of DHS while Board decisions already heavily favor DHS. Indeed, since January 2025, the BIA has issued fifty-one decisions, but only two of those has favored the noncitizen over DHS— a trend not seen prior to 2025.¹⁴ Instead of addressing that

¹³ See Paul Blume, *ICE Detainees Have Already Filed More Habeas Petitions than in All of 2025*, Fox 9 (Jan. 21, 2026), <https://www.fox9.com/news/ice-detainees-more-habeas-petitions-than-all-2025-jan-21> (reporting 260 *habeas corpus* petitions filed in the first three weeks of 2026); Richard Reeve, *Habeas Corpus Filings See 5x Increase in January 2026, Compared to Entirety of 2025*, KSTP (Feb. 5, 2026), <https://kstp.com/kstp-news/top-news/habeas-corpus-filings-see-5x-increase-in-january-2026-compared-to-entirety-of-2025/> (reporting 691 *habeas corpus* petitions filed between January 1 and February 5).

¹⁴ Nat’l Immigr. Project, *Trump 2.0 BIA/AG Precedent Decisions*, <https://nipnlg.org/sites/default/files/2026-02/BIA-Decisions-Trump-2.0.pdf> (last updated Feb. 18, 2026). Since the

bias, however, the IFR attempts to strengthen it by truncating and curtailing appellate rights for noncitizens. For example, the IFR says, “Further, the change would also help offset a peculiar asymmetry in immigration proceedings—i.e., aliens may seek Federal court review of Board decisions, but DHS cannot—by ensuring that aliens do not amplify any procedural advantages they have over the Government with additional opportunities to necessarily bring meritless appeals with attendant delays.” 91 FR at 5271. This structure is not a “peculiar asymmetry” at all. Rather, it is logical because the APA grants the right of judicial review to people adversely affected or aggrieved by arbitrary or unlawful agency action. *See* 5 U.S.C. § 702. This provision allows individuals to appeal decisions of the BIA to Article III courts. DHS and the BIA are both arms of the Executive Branch; the APA does not similarly recognize an agency’s rights against another agency because they are part of the same branch of government. This structure also mirrors the criminal system, where the government has a limited opportunity to appeal, compared to the individual who is afforded due process and other legal rights under the Constitution. *See, e.g.*, 18 U.S.C. § 3731 (identifying instances when the government can appeal an adverse criminal decision); *see also Dep’t of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 138 (2020) (holding that noncitizens are afforded due process rights under the Constitution).

A federal district court has previously found that a similar rule proposed by EOIR in 2020 was arbitrary and capricious because EOIR failed to consider many of the same

National Immigration Project study was last updated on February 18, 2026, one BIA decision has held in favor of the noncitizen, and that decision was simply to allow the noncitizen to withdraw their appeal. *L-S-C-R-*, 29 I&N Dec. 451 (BIA 2026). Since February 18, 2026, the BIA has held in favor of DHS thirteen times. *See F-B-A-*, 29 I&N Dec. 456 (BIA 2026); *Forjoe*, 29 I&N Dec. 463 (BIA 2026); *Ibarra-Vega*, 29 I&N Dec. 476 (BIA 2026); *D-J-L-*, 29 I&N Dec. 485 (BIA 2026); *R-B-E-*, 29 I&N Dec. 499 (BIA 2026); *Pinzon Rozo*, 29 I&N Dec. 507 (BIA 2026); *Z-N-L-*, 29 I&N Dec. 511 (BIA 2026); *Medina Madrid*, 29 I&N Dec. 514 (BIA 2026); *Arevalo-Vargas*, 29 I&N Dec. 519 (BIA 2026); *Z-R-C-N-*, 29 I&N Dec. 523 (BIA 2026); *Mercado-Martinez*, 29 I&N Dec. 529 (BIA 2026); *Lopez-Orellana*, 29 I&N Dec. 533 (BIA 2026); *Valenzuela Gallardo*, 29 I&N Dec. 536 (BIA 2026). *See generally* Compl. at 22, *Amica Ctr. For Immigrant Rts. v. Exec. Off. For Immigr. Rev.*, Dkt. 1 (D.D.C. Feb. 26, 2026) (arguing that the few cases the BIA does take will likely be DHS appeals or appeals that favor the government’s position).

implications of a shortened time for appeal that AHR has raised in these comments. *See Centro Legal de la Raza v. Exec. Off. for Immigr. Rev.*, 524 F. Supp. 3d 919 (N.D. Cal. 2021). For example, the court explained that in a study that EOIR itself commissioned, Booz Allen Hamilton recommended against the proposed changes, many of which are similar to the changes in the current IFR, finding that some of the proposed changes would actually contribute to inefficiencies in the BIA.¹⁵ *Id.* at 963. The court also found that EOIR failed to consider that many individuals before immigration courts appear *pro se* and do not speak English. *Id.* at 965. When actually considering all of these factors, the court found that the shortened period to appeal did not offer noncitizens sufficient time. *Id.* at 966. At a minimum, EOIR must grapple with those findings to satisfy its obligation to consider all relevant factors.

Finally, the IFR is arbitrary and capricious because individuals have come to rely on the prior rule and have developed serious reliance interests, which EOIR cannot ignore. “When an agency changes course, . . . it must ‘be cognizant that longstanding policies may have “engendered serious reliance interests that must be taken into account.”” *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 30 (2020). Sometimes an agency must “provide a more detailed justification than what would suffice for a new policy created on a blank slate . . . —when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

Here, EOIR is not simply writing the IFR on a “blank slate.” *Id.* Immigrants have relied on the existing right to appeal to the BIA for decades, and immigrant rights organizations like The Advocates have planned their budgets and priorities around the assumption both that (1)

¹⁵ *See also* Compl. at 19, *Amica Ctr. For Immigrant Rts. v. Exec. Off. For Immigr. Rev.*, Dkt. 1 (D.D.C. Feb. 26, 2026) (asserting the IFR should be overruled, as it is arbitrary and capricious).

BIA review would be a recourse for not infrequent legal errors by immigration judges and (2) they would have sufficient time to secure appellate counsel for their immigrant clients and to prepare an adequate appeal.

EOIR purports to address the reliance issue as follows:

The Department recognizes that this IFR represents a notable procedural change to how the Board has operated; however, in recognition of that point, this change will apply only prospectively and not to appeals pending when the rule becomes effective. Instead, it will apply only to decisions otherwise subject to appeal that are issued by either an Immigration Judge or DHS on or after the rule's effective date. Because there is no right to a merits adjudication of any appeal in the first instance, and because the rule does not change the process for aliens who submitted an appeal with the expectation of receiving a different process, this change will not undermine any reliance interests of either an alien or DHS. Indeed, there is no evidence that DHS initiates a case in immigration proceedings or an alien brings a claim for relief or protection from removal based on the availability of an appeal to the Board if they lose, nor is there any logical reason that either party would do so. And, to be clear, the change applies equally to appeals filed by both DHS and aliens, so neither side will be procedurally advantaged or disadvantaged by the change.

91 FR at 5272. This "explanation," however, is deeply flawed.

While EOIR recognizes, as it must, that those with appeals pending when the rule becomes effective have clear reliance interests, its decision to make the rule apply prospectively only to those with pending appeals falls far short of addressing the scope of reliance interests affected by the IFR. Indeed, it is almost certain to make the universe of cases protected by the prospective nature of the IFR much smaller. No judge likes being reversed. Their already heavy workload will give IJs a ready reason to delay ruling on many of their thousands of pending cases until after the IFR becomes effective, thereby making BIA review of any subsequent appeals purely discretionary. Simply by failing to rule before the IFR takes effect, an IJ could arbitrarily and capriciously cut off appellate rights and truncate the time for appeal.

EOIR’s argument that there is “no logical reason” that “any party” would have relied on the availability of an appeal falls short for two additional reasons. First, while it is likely true that no person “*brings* a claim for relief or protection from removal based on the availability of an appeal to the Board if they lose,” this misstates the reliance interest. Rather, their reliance interest is in having the *bona fide* appeal process that is contemplated by the regulation in those cases where they do lose before an immigration judge.¹⁶ Immigrants with cases before immigration courts have assumed that if they encounter mistakes or bias by immigration judges (or, for that matter, if they are denied their right to be informed of the right to retain counsel or other rights), they would have the right to have their arguments heard by a secondary and higher authority within the agency who could impose a check to protect against such mistakes or biases. By making review of appeals discretionary, the IFR takes away an immigrant’s automatic right to that protection.

Second, the reliance interest isn’t solely on the right to have an appeal *heard* by the BIA. There’s also a reliance interest in having *sufficient time* to prepare and take an appeal baked into the planning of organizations like AHR (and the plaintiffs challenging the IFR) and lawyers at private law firms, including those working on a *pro bono* basis with other heavy caseloads. Certainly, EOIR’s unsupported statement notwithstanding, those noncitizens with pending cases have assumed they would have more time to secure appellate counsel and to prepare their briefs for an appeal. At least as important, organizations like AHR, which help clients to secure counsel and translators to handle appeals, have relied on the 30 days they are currently accorded to help—an already very short time frame. For AHR, the truncated timeline in the IFR means it will have to pivot significant resources to meet rapid, unexpected appeal timelines for cases AHR has already accepted, placed with *pro bono* attorneys, and filed under anticipated timelines. *Pro bono*

¹⁶ 8 C.F.R. § 1003.3.

lawyers who took cases expecting prior deadlines might either be unable to meet new deadlines (resulting in AHR having to take the case or explain to clients that they'll have to find new counsel quickly for an appeal) or have to pivot *pro bono* resources to meet those deadlines within attorney ethics guidelines.¹⁷

But the IFR offers no consideration of that reliance by either noncitizens nor lawyers nor organizations like The Advocates. Instead, the IFR simply strips away the right for the asserted purpose of increasing the Department's efficiency. Even accepting that in future immigration cases noncitizens will not be relying on former appellate procedures, the IFR hasn't explained how, if at all, the agency has taken the reliance interests of those parties *currently* before the *immigration courts* into account. Indeed, the IFR did so little to consider the reliance that individuals have built on their right to appeal to the BIA that the IFR attempted to categorize the change as merely one of "procedure." Because the agency has issued its rule before ever asking about reliance interests, it is no surprise that it says nothing meaningful about those interests. Such a significant change that affects individuals' substantive rights without considering that it is a change must be categorized as arbitrary and capricious.

For all of the above reasons, the IFR is arbitrary and capricious, and it should be withdrawn.

II. The IFR violates United States Obligations Under International Law

The changes made to the appellate process by the IFR also raise serious concerns regarding the ability of the United States to meet its international obligations to provide procedural fairness and effective access to justice. In particular, the proposed rule brings the United States further out of compliance with the International Convention on Civil and Political Rights (the "ICCPR" or "Covenant") and the 1967 Protocol Relating to the Status of Refugees

¹⁷ See Compl. at 36–37, *Amica Ctr. for Immigrant Rts. v. Exec. Off. For Immigr. Rev.*, Dkt. 1 (D.D.C. Feb. 26, 2026).

implementing the Refugee Convention (the “Protocol”)—both of which the United States has ratified and with which is obliged to comply. The IFR denies due process, which the United States is required to provide under the ICCPR and the Protocol. Without affording adequate due process, the United States will violate the Refugee Convention and Refugee Act by failing to identify cases where a refugee will be sent to face persecution and torture.

A. The IFR Will Result in U.S. Violations of Obligations under the Refugee Convention, the 1967 Protocol thereto, and Refugee Act.

The United States acceded to the 1967 Protocol Relating to the Status of Refugees¹⁸ on November 1, 1968. The Protocol incorporates and expands core substantive provisions of the 1951 Convention Relating to the Status of Refugees (“Convention”). The United States officially codified its obligations under the Convention and Protocol into law with the Refugee Act of 1980¹⁹ which amended the Immigration and Nationality Act (“INA”) to include the international definition of a refugee: a person with a “well-founded fear of persecution” based on race, religion, nationality, political opinion, or social group.²⁰ The Convention, Protocol, and Refugee Act bar refoulement, the sending of refugees to face persecution. The U.S. Supreme Court has held that the Refugee Act must be interpreted in conformity with the Protocol.²¹

To help guard against refoulement, these legal texts emphasize that refugees have a right to an effective remedy and due process in any proceeding which could result in their expulsion.²² Authoritative UN interpretations have clarified that States must provide effective access to appeals and review mechanisms to ensure compliance with the Convention and Protocol.²³

¹⁸ Protocol Relating to the Status of Refugees, Jan. 31., 1967, 19 U.S.T. 6223; 606 U.N.T.S. 267 [hereinafter Protocol].

¹⁹ Pub. L. 96-212, 94 Stat. 107.

²⁰ INA § 101(a)(42)(A); 8 U.S.C. § 1101(a)(42)(A).

²¹ *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987); *accord in re Aguirre-Aguirre*, 526 U.S. 415, 427 (1999).

²² Protocol, Art. 32(2).

²³ U.N. High Comm’r for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol*, 15, U.N. Doc.

Article 32 of the Convention, incorporated by the Protocol, creates three obligations: (1) States shall not expel a refugee lawfully in their territory, except where national security and public order require it, (2) States must follow the due process of law in any decision to expel a refugee, and (3) States should allow refugees a reasonable period within which to seek legal admission into another country.²⁴ The IFR will result in the United States violating these obligations, as outlined in this comment. As such, the IFR should be withdrawn.

The IFR's proposed deadline of ten days to file an appeal violates Article 32's due process protections by preventing adequate preparation of claims, therefore increasing the likelihood of erroneous removals of people to face persecution in violation of international refugee protections and U.S. law.²⁵ The procedural and substantive components of due process require both that the law safeguard the right to a fair hearing and equality, *and* that a decision be based reasonably on law.²⁶ Treating refugee adjudications differently by, for instance, shrinking the deadline for appeals for those who are denied based on the 8 U.S.C. § 1158(a)(2) exceptions violates the guarantees of due process the U.S. is obliged to provide under Article 32(2).²⁷

Moreover, in practice and in order to be effective, the right to appeal under Article 32 includes the right to “be informed about the possibility of lodging an appeal as well as the formal

HCR/CLP/07/01 (Jan. 26, 2007) (recognizing that while the Protocol does not set procedures for determination of refugee status, states are generally required to grant individuals access to fair asylum procedures).

²⁴ *Convention Relating to the Status of Refugees* art. 32, July 28, 1951, 189 U.N.T.S. 137, as incorporated by the *Protocol Relating to the Status of Refugees*, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

²⁵ *Gonzalez-Julio v. INS*, 34 F.3d 820, 825 (9th Cir. 1994) (holding then ten-day deadline to file appeal with BIA did not meet “the essential standard of fairness under the Due Process Clause” (quoting *Landon v. Plasencia*, 459 U.S. 21, 35 (1982))).

²⁶ See generally U.N. High Comm’r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Feb. 2019) (providing guidance on substantive application of procedural due process in refugee status determinations); Human Rights Comm., General Comment No 32: Article 14 Right to Equality Before Courts and Tribunals and to a Fair Trial, ¶¶12-14, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007).

²⁷ *Convention Relating to the Status of Refugees* art. 32(2), July 28, 1951, 189 U.N.T.S. 137.

and substantial prerequisites for doing so.”²⁸ Under universal principles of human rights protection, a remedy that cannot be used in practice is not a remedy.²⁹ Appeals to the BIA are a remedy designed to ensure improper interpretations and implementation of the INA cannot lead to improper deportations.³⁰ Both the ten-day deadline and the summary dismissal procedure contained in the IFR render such appeals ineffective by failing to guarantee individuals will not be arbitrarily deported to situations in which they will face persecution.³¹

B. The IFR Violates U.S. Obligations under the International Covenant on Civil and Political Rights

In December of 1966, the United Nations General Assembly adopted the International Covenant on Civil and Political Rights.³² The Covenant obligates States to protect and preserve basic civil rights, including through administrative, judicial, and legislative action.³³ These rights include the right of noncitizens, lawfully present on the territory of a State Party, to only be expelled after a decision made in accordance with law and reviewed by a competent authority, and for everyone, regardless of status, to be entitled to trial by “a competent, independent and impartial tribunal established by law” in order to determine any of their rights and obligations.³⁴

The United States ratified the ICCPR in 1992.³⁵ Despite maintaining some Reservations, Understandings, and Declarations (RUDs) in that ratification, “an act of Congress ought never to

²⁸ Ulrike Davy & María-Teresa Gil-Bazo, Article 32, in *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* 1435, 1476 (Andreas Zimmermann, Terje Einarsen, & Franziska M. Hermann eds., 2d ed. 2024).

²⁹ European Court of Human Rights, *Aksoy v. Turkey*, No. 21987/93 (Eur. Ct. H.R. 1996) (requiring that a remedy be “effective in practice as well as in law,” 95).

³⁰ 8 C.F.R. § 1003.1(d)(1) (2026); 8 U.S.C. § 1101(a)(47).

³¹ *Gonzalez-Julio*, 34 F.3d at 825 (holding that ten days to appeal an order creates a substantial risk of erroneous deportation and arbitrary).

³² *International Covenant on Civil and Political Rights* [hereinafter ICCPR], Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); see also *S. Exec. Doc. No. E, 95-2*, 95th Cong., 2d Sess. (1978).

³³ *Id.* art. 2(3).

³⁴ *Id.* arts. 13, 14(1).

³⁵ Resolution of Ratification: Senate Consideration of Treaty Document 95-20 (April 2, 1992).

be construed to violate the law of nations if any other possible construction remains.”³⁶ This principle is true of the Constitution as well as government actions “necessary and proper to carry out the United States’ obligations under . . . [its] international agreements” are constitutionally valid unless they would “confer power on Congress, or on any other branch of Government, which is free from the restraints of the Constitution.”³⁷ With respect to the ICCPR specifically, the Senate made clear in its RUDs that obligations under the Covenant were to be interpreted in light of the Constitution: for instance, restrictions or limitations on freedom of expression permissible under the Covenant are not permissible for the United States given the strictures of the First Amendment.³⁸ Therefore, whenever there is an obligation under the ICCPR to respect a right that is also enumerated in the Constitution or other U.S. law, acts abridging that right will be a violation of both the domestic law of the United States and its international obligations.³⁹ Such a violation can occur whether or not the instrument is self-executing.⁴⁰

The IFR violates due process rights by limiting meaningful access to a fair appeal, which violates U.S. law, the Constitution, and, therefore, the obligations enshrined in the ICCPR. More precisely, the IFR will result in U.S. violations of provisions of the ICCPR, especially Article 14, which guarantees the right to a fair and public hearing, including adequate time to prepare a defense or an appeal. Due process applies to “any act or omission on the part of the State bodies

³⁶ *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804); see also *Nippon Steel Corp. v. U.S.*, 732 F.Supp.3d 1353, 1372 (Ct. Int’l Trade 2024) (interpreting *Charming Betsy* as creating presumption that “Congress did not intend to violate international law unless Congress says otherwise”).

³⁷ *Reid v. Covert*, 354 U.S. 1, 16 (1957); see also *id.* at 18 (noting accordance with holding from *Missouri v. Holland*, 252 U.S. 416 (1920) that treaties “not inconsistent with any specific provision of the Constitution” are enforceable under the Supremacy Clause).

³⁸ S. Exec. Rep. No. 102-23, at 19–20 (1992); Ash, *U.S. Rsrvs. to the ICCPR*, 3 Nw. J. Int’l Hum. Rts. at 10.

³⁹ *Cf. The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.”).

⁴⁰ See Restatement (Third) Foreign Relations Law of the United States § 111 cmt. h (Am. L. Inst. 2024) (noting there are “instances in which the United States Constitution, or previously enacted legislation, will be fully adequate to give effect to an apparently non-self-executing international agreement”).

in a proceeding, whether of an administrative, punitive, or jurisdictional nature.”⁴¹ Compliance with Article 14 requires States Party to ensure all persons, irrespective of migratory status, are able to exercise their rights and defend their interests “effectively and in full procedural equality with other defendants.”⁴² As such, the United States must acknowledge and remedy disadvantages that “impair or diminish” an individual’s ability to effectively defend their interests.⁴³ Limiting the filing period for an appeal to only ten days violates due process because it impairs, and possibly eliminates altogether, an individual’s ability to seek counsel, gather evidence, and sufficiently prepare an appeal, which violates the ICCPR and due process. Similarly, by summarily dismissing most appeals without a hearing or opportunity to present one’s claim, the IFR further impairs—and essentially eliminates—an individual’s right to access a fair appeals mechanism and obtain due process in their case.

The IFR further violates obligations under the ICCPR by creating discriminatory impacts. The changes made to the appeals process only target noncitizens, a group made vulnerable by their lack of the many of the constitutional protections afforded to citizens.⁴⁴ Migrants are a vulnerable population, often at the mercy of foreign governments to whom they have entrusted their lives.⁴⁵ The IFR will lead to discriminatory impacts based on “national, ethnic, or social origin” in violation of the principle of equality and non-discrimination under ICCPR Articles 2 and 26⁴⁶ by limiting access to due process and appeals in immigration court while providing

⁴¹ ICCPR art. 14.

⁴² *Rt. to Info. on Consular Assistance in the Framework of the Guars. of the Due Process of L.*, Advisory Opinion OC-16/99, Inter.-Am. Ct. H.R. (Ser. A) No. 16, ¶117 (Oct. 1, 1999).

⁴³ *Id.* at ¶119.

⁴⁴ *See, e.g., U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 265-66 (1990) (noting Constitution’s text suggests rights secured to “the People”, such as by First, Second, and Fourth Amendments, do not cover noncitizens); *see also Bluman v. FEC*, 800 F.Supp.2d 281, 287 (D.C. Cir. 2011) *aff’d*, 565 U.S. 1104 (2012) (recognizing “foreign citizens may be denied certain rights and privileges that U.S. citizens possess” under U.S. law including, *inter alia*, right to pursue certain careers and rights regarding freedom of expression).

⁴⁵ Advisory Opinion OC-18/03, (ser. A) No. 18, 113.

⁴⁶ *Jurid. Condition & Rts of Undocumented Migrants*, Advisory Opinion OC-18/03, Inter.-Am. Ct. H.R. (ser. A) No. 18, ¶101 (Sept. 17, 2003).

adequate appellate deadlines and fair review rather than summary dismissal in non-immigration court matters.

The principles of equality and nondiscrimination impose two obligations: States must (1) abstain from carrying out any action aimed at creating discrimination, and (2) act affirmatively to counteract discrimination that exists to the detriment of a particular group.⁴⁷ These obligations create a State responsibility to respect and ensure human rights, regardless of any circumstance, including a person's migratory status.⁴⁸ They are also so fundamental to the functioning of law and legal systems that no legal act in conflict with them can be considered valid or acceptable.⁴⁹ Accordingly, even if the United States were not a party to the ICCPR, implementing a rule contrary to the principle of equality and non-discrimination would be in violation of its constitutional obligation to respect the Law of Nations.⁵⁰

Further, States may not “subordinate or condition” the principle of equality and non-discrimination to achieve public policy goals, including migratory ones, for “any act or omission to the contrary.”⁵¹ Accordingly, slashing the deadline for appeals in order to address immigration court “backlogs” is not a public policy goal that States Party to the ICCPR may place above the principle of equality and non-discrimination. Reducing the deadline for appeals to an impossibly short ten days, after which that appeal will likely be forgone or summarily dismissed, is the very type of act that violates equal access to due process and effective remedy, and thus, breaches U.S. international human rights obligations.

The proposed changes exacerbate existing concerns about the United States' immigration policies. In 2014, the UN Human Rights Commission (the “HRC”) urged the United States to

⁴⁷ *Id.* ¶103-104.

⁴⁸ *Id.* ¶106.

⁴⁹ *Id.* ¶101.

⁵⁰ U.S. Const. art. § 8, cl. 10; *see also The Paquete Habana*, 175 U.S. (recognizing obligation of the United States to respect norms of customary international law).

⁵¹ Advisory Opinion OC-18/03 at ¶172.

strictly apply the absolute prohibition against refoulement under ICCPR Articles 6 and 7, the right to life, and the prohibition of torture⁵² in relation to its migration policies. In its 2023 observations, the HRC expressed a “grave concern” at the United States’ treatment of migrants, particularly on its adoption of the “Circumvention of Legal Pathways” rule and the “enhanced expedited removal” procedure.⁵³ The HRC has called on the U.S. to address regulations that “excessively restrict effective protection of the right to seek and enjoy asylum,” “compromise the quality of the assessment of individual protection needs,” and “increase the risk of breaches of the principle of non-refoulement”— implicating noncompliance with ICCPR Articles 2, 6, 7, 9, 13, 14, and 26.⁵⁴ The IFR threatens even greater noncompliance. Individual protection assessments cannot be appropriately made when the main appeals mechanism routinely dismisses cases without a hearing. Excessively short and unrealistic filing deadlines—particularly when noncitizens face the limitations as detailed herein—similarly compromise the quality of assessments made on protection claims. And, by limiting meaningful appeal and review, the IFR will restrict the right to seek and enjoy asylum. Because the IFR will result in violations of the ICCPR, it must be withdrawn.

C. In Conclusion, the IFR Places the United States in Violation of International Law, which It Is Obligated to Uphold

The IFR threatens procedural fairness and meaningful access to justice, particularly for vulnerable populations. Just as the HRC recommended in 2023 regarding similar regulatory changes, the United States must review the IFR for ICCPR compliance and “take all measures necessary to enhance the protection of migrants, refugees and asylum-seekers, without

⁵² UN Hum. Rts. Comm’n *Concluding Observations on the Fourth Periodic Report of the United States of America*, U.N. Doc. CCPR/C/USA/CO/4, 13 (23 Apr. 2014).

⁵³ UN Hum. Rts. Comm’n, *Concluding Observations on the Fifth Periodic Report of the United States of America*, U.N. Doc. CCPR/C/USA/CO/5, 54 (Dec. 7, 2023).

⁵⁴ *Id.*

discrimination.”⁵⁵ The international human rights treaties and conventions to which the United States is a party obligate it to ensure individuals subject to immigration proceedings can effectively exercise their right to appeal adverse decisions, particularly when such appeals help guard against refoulement to persecution or torture. This includes offering a reasonable time for which to file an appeal. A thirty-day appeal timeline, and ensuring discretion for meritorious requests for extension, allows adequate time to prepare a defense; yet, this IFR’s changes limits these protections by reducing the filing timelines and severely limiting discretion to accept late filings. A fair process, in line with international law, would also permit dismissals only after a full review of the issues presented to ensure fairness to the most vulnerable populations. By weakening the appeals process through the instant IFR, the United States is failing to uphold fundamental principles and obligations in both domestic and international law.

III. At a minimum, EOIR should remove the requirement to file an appeal with the BIA to accomplish administrative exhaustion.

As noted above, AHR opposes the changes EOIR has proposed to make to the BIA appeal process. But if EOIR nonetheless chooses to go forward with the IFR notwithstanding public comments filed in response thereto and the legal challenges brought and confirmed in court,⁵⁶ AHR urges it to make other changes consistent with the rule’s stated purpose. While EOIR claims that its rule will expedite the appeal process, it has not eliminated the requirement that parties who lose their cases before immigration judges must still first file appeals with the BIA if they wish to preserve their right to judicial review. See AHR February 20 Comments at 8 (and cases cited therein). Maintaining the requirement to appeal to the BIA to exhaust administrative remedies while effectively taking away the right to an appellate decision by the

⁵⁵ *Id.* 55.

⁵⁶ See *Amica Center Decision*, *supra*.

BIA could jeopardize the *statutory* right for judicial review of the immigration process as well. *See* 5 U.S.C. § 702 (providing the right to judicial review of agency action). Although EOIR states that the IFR would “promote finality in proceedings[,]” 91 FR at 5273, this change could cause much confusion in the appeals and later judicial review process.

If EOIR is truly interested in expediting the process it should revise the IFR to make appeals to BIA entirely optional. That change would make clear that unless parties losing their cases before an immigration judge *voluntarily* seek BIA review, they will have exhausted their administrative remedies and may proceed directly to federal court to seek appellate review. Requiring individuals to file costly and time-consuming appeals solely to exhaust their administrative remedies when BIA consideration of that appeal is entirely discretionary is fundamentally unfair. That unfairness is compounded by the fact that affected individuals and parties will now only have ten days to prepare their costly and almost certainly futile appeals. It is also compounded by the fact that the scheme created by the IFR will mean individuals must not only pay the fee to appeal to the BIA and expend costly time and resources in preparing that BIA appeal, but then pay the fee for a federal court filing. While waivers of appeals fees are currently available at the Agency’s discretion, there is no guarantee that they remain so or that a waiver will be granted.

IV. Conclusion

In sum, the IFR should be withdrawn as it violates U.S. and international law and will create extreme harm. The IFR fails the arbitrary-and-capricious standard in several respects. EOIR did not consider or account for comments before implementing it. The IFR does not offer evidence to support its contentions that the changes will improve the immigration appeals

process. To the contrary, the IFR is illogical because it effectively deprives noncitizens of their right to appeal, in the apparent name of efficiency. In offering its illogical and unreasonable conclusions, the IFR also fails to consider several important aspects of the situation, including the legal rights of noncitizens. EOIR also fails to recognize the serious reliance interest that noncitizens, attorneys, and organizations like AHR have developed with respect to the BIA to allow them an opportunity to prepare and to be heard and to appeal incorrect rulings or judgments. Appellate courts, including the BIA, serve as a check on lower courts by correcting mistakes those courts have made, whether big or small, factual or legal, or with respect to a mixed question of fact and law. Regardless of whether an error is novel or routine, the immigration system, including the BIA, should ensure that such errors are corrected and that everyone has a meaningful opportunity to access counsel and the fair application of justice and the letter of the law. By limiting the BIA's appellate power and appellants' opportunities to appeal, the IFR eliminates that protection without justification or even taking the time to listen to comments on it. In so doing, the IFR also violates U.S. obligations under international law. The IFR's limits on appeals violate standards of due process that the United States is obliged to ensure under the ICCPR and national law. Moreover, by denying due process, the IFR's changes will mean people with bona fide claims for protection from persecution will be denied, resulting in refoulement in violation of U.S. obligations as a party to the Protocol of the Refugee Convention as implemented by the U.S. Refugee Act of 1980.

For the foregoing reasons, the IFR should be withdrawn, the automatic right to appeal an immigration judge's decision within 30 days should remain intact, and appeals to the Board of Immigration Appeals must not be summarily denied.

Respectfully submitted,

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