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Lauren Alder Reid  
Assistant Director, Office of Policy  
Executive Office for Immigration Review  
U.S. Department of Justice  
5107 Leesburg Pike, Suite 2616  
Falls Church, VA 22041

Re: RIN No. 1125-AA85 or EOIR Docket No. 18-0502, Comments in Response to the Interim Rule Reorganizing the Executive Office for Immigration Review

Dear Assistant Director Alder Reid,

On behalf of Innovation Law Lab, we write in response to the Justice Department's Interim Rule that became effective on August 26, 2019 and changes the organization of the Executive Office for Immigration Review ("Interim Rule").

Innovation Law Lab is a nonprofit organization dedicated to upholding the rights of immigrants and refugees. Founded in 2014, in response to the mass detention and deportation of asylum-seeking immigrant families, Innovation Law Lab specializes in the creation of scalable, highly replicable, and connected sites of resistance that create paradigm shifts in immigration representation, litigation, and advocacy. By bringing technology to the fight for immigrant justice, Innovation Law Lab empowers advocates to scale their impact and provide effective representation to immigrants in detention and in hostile immigration courts across the country.

We write to share our grave concerns with the interim final rule (IFR) Organization of the Executive Office for Immigration Review. The IFR would, among other things, formalize the Justice Department's creation of the Office of Policy as a part of the Executive Office of Immigration Review; move of the Office of Legal Access Programs (OLAP) under this office, and delegate authority to the Director of EOIR that would allow the Director to decide cases before the Board of Immigration Appeals (BIA). We ask that these provisions of the rule be

rescinded. The Justice Department should take action to maintain the integrity and independence of EOIR, not undermine it.

**I. Innovation Law Lab Strongly Opposes the Creation and Institutionalization of an Office of Policy within EOIR.**

Innovation Law Lab opposes the creation and regulatory recognition of an Office of Policy within EOIR. We are deeply concerned that the presence of an Office of Policy inappropriately politicizes EOIR and should certainly not be enshrined in regulation. The creation of an Office of Policy within EOIR attacks the integrity of the immigration adjudication system. The Interim Final Rule (IFR) delegates the Office of Policy and its Assistant Director for Policy vast authority over individual adjudicators, including the powers to “supervise and coordinate EOIR’s internal development, dissemination, and implementation of policy guidance” and to “supervise the provision of legal and policy training to all components within EOIR on all relevant matters under its supervision.”<sup>1</sup> The IFR thus purports to give the Office of Policy power to instruct immigration adjudicators on how to apply the law in accordance with EOIR “policy.”

The Office of Policy’s proposed power to implement and enforce binding executive policy upon independent immigration adjudicators fundamentally undermines the impartiality and case-by-case adjudication standards of the immigration court system. EOIR oversees over fifty immigration courts as well as the Board of Immigration Appeals. This adjudication system determines the fates of tens of thousands of immigrants and asylum seekers every year. Immigration courts must adjudicate impartially, as required both by the Constitution and by the Immigration and Nationality Act (INA). See *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950) (“When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality.”); 8 U.S.C. § 1229a(c)(1)(A) (“The determination of the immigration judge shall be based only on the evidence produced at the hearing.”). Members of the Board of Immigration Appeals are also required to “exercise their independent judgment and discretion in considering and determining the cases.”<sup>2</sup>

By creating an Office of Policy with broad powers over individual adjudicators, the IFR establishes a structure that is anathema to the case-by-case adjudication guarantees provided by Congress in the INA. The power of the Office of Policy to issue binding guidance to immigration adjudicators also creates a “constitutionally intolerable probability of bias” in immigration court and BIA proceedings. See *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1901 (2016). For these

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<sup>1</sup> <https://www.federalregister.gov/d/2019-18196/p-60>.

<sup>2</sup> See 8 C.F.R. § 1003.1(d)(1)(ii).

reasons, Innovation Law Lab strongly urges that the Office of Policy be abolished and certainly not institutionalized through regulation.

## **II. Innovation Law Lab Strongly Opposes Moving the Office of Legal Access Programs under the EOIR Office of Policy.**

Innovation Law Lab opposes the Interim Rule's transfer of OLAP's responsibilities to a division in the Office of Policy. Indeed, we are gravely concerned that this move is intended to restrict immigrant access to counsel instead of encouraging it. Though very little information is publicly available on the Office of Policy, all signs strongly suggest that the Office was created to push forward anti-immigrant policies and programs that limit due process and intentionally limit access to counsel.<sup>3</sup> While the Interim Rule claims that "this move ensures an appropriate chain of command and better management of OLAP's programs," a policy office is an inappropriate home for a program tasked with managing Congressionally appropriated funds and grants intended to increase access to legal representation. The crucial task of ensuring access to counsel for immigrants nationwide should not be politicized.

Innovation Law Lab urges that OLAP be returned to its status as an independent office under the EOIR Director.

## **III. The R&A Program Plays a Tremendously Important Role in Innovation Law Lab, Our Community, and Our Immigration System.**

Innovation Law Lab has been recognized by EOIR as an organization "eligible . . . to provide representation through accredited representatives who appear on behalf of clients before the Immigration Courts, the Board, and DHS, or DHS alone."<sup>4</sup> The Department of Justice's Recognition and Accreditation program was created to "address[] the critical and ongoing shortage of qualified legal representation for underserved populations in immigration cases before the Federal administrative agencies."<sup>5</sup> Several Innovation Law Lab staff members are accredited representatives or are seeking individual accreditation under the program, and our programming relies heavily on the tools this accreditation provides.

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<sup>3</sup> See Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829 (July 16, 2019) (to be codified at 8 C.F.R. 208, 10003, 1208) (barring migrants at the southern border of the United States from eligibility for asylum if the migrants passed through a third country en route to the United States without applying for asylum in that third country and being denied).

<sup>4</sup> 8 C.F.R. § 1292.11(a).

<sup>5</sup> Dep't of Justice, Executive Office for Immigration Review, Recognition of Organizations and Accreditation of Non-Attorney Representatives, proposed rule, 80 Fed. Reg. 59514, 59514 (Oct. 1, 2015).

Our accredited representatives play a crucial role in running our innovative pro se asylum workshops, where respondents who would otherwise be forced to fight their cases without legal representation receive limited legal services and advice on their immigration cases. Accreditation plays a critical role in recognizing the significant immigration law experience and expertise of our staff, and puts them in a position where they can effectively implement and lead these workshops. As accredited representatives, Innovation Law Lab staff can clearly identify themselves as trusted and reliable sources of information- in contrast to the many unscrupulous notarios who provide fraudulent and harmful services to immigrants who cannot afford to hire a lawyer. These workshops are a particularly important resource for low-income asylum seekers in the many jurisdictions where the demand for affordable and high-quality immigration court representation far outpaces the available resources. The Recognition and Accreditation Program allows Innovation Law Lab to provide services that help fill that need.

Accreditation is also of paramount importance in our work with detained immigrants, specifically in our BorderX program and in our participation in the El Paso Immigration Collaborative (EPIC). BorderX is our venture to design and deploy scalable, effective legal strategies to win release from detention, and in doing so, challenge the unfair power dynamic that exists in the United States immigration system. BorderX relies on collaboration between nonprofit organizations, private immigration attorneys, and volunteers. Accreditation allows staff members in the BorderX program to access clients in detention centers, nimbly address emergent legal issues, and to collaborate effectively with partner organizations.

The Recognition and Accreditation program is important not only to Innovation Law Lab's programming, but also for low-income immigrants nationwide who would not otherwise be able to access desperately-needed quality and affordable legal services. Therefore, we are deeply concerned that the Office of Policy will not prioritize successful administration of the Recognition and Accreditation program. Delays in approval of applications- or denials- would have an immediate and significant impact on access to immigration legal services for many vulnerable communities. Keeping the Recognition and Accreditation program free from manipulation and political influence is essential for our continued work, and for the dignity and due process rights of immigrants nationwide.

#### **IV. The Director of EOIR Should Not Be Empowered to Issue Precedential Adjudicative Decisions.**

Innovation Law Lab strongly opposes the regulation's grant of authority to the EOIR Director to issue precedential decisions. Under existing law, three members of the Board of

Immigration Appeals (BIA) must decide a case in order to issue a precedential decision.<sup>6</sup> This process acknowledges the importance and broad impact of precedential decisions- which bind immigration judges throughout the country- and allows sufficient time for deliberation, consideration, and input of diverse views from a panel of BIA members. Allowing the EOIR Director to unilaterally decide these cases is an unnecessary change that endangers the integrity of our nation's immigration laws and creates uncertainty for millions of vulnerable respondents.

Moreover, the EOIR Director is in appropriate actor to issue these important decisions. BIA members are appellate immigration judges; must be lawyers; and are often career government officials with extensive experience and expertise in immigration law.<sup>7</sup> The EOIR Director, in contrast is an administrative official tasked with administering an extensive and complicated court system.<sup>8</sup> The Director is both inherently less qualified and much more prone to political interference and influence than a panel of BIA members.

We have similarly grave concerns with the IFR's accelerated timelines for adjudication of BIA appeals, which allows single members only 90 days to decide a case and three-member panels only 180 days.<sup>9</sup> These one-size-fits-all adjudication timelines are not only highly inadequate in light of the many complex and important issues raised in BIA appeals, but are also wholly inappropriate in light of the requirement that cases be decided on their facts and merit. Both the INA and due process demand that adjudicators decide immigration cases- whose outcomes often implicate life-or-death consequences for the respondent- without outside influence or the pressures of arbitrarily imposed deadlines.

Innovation Law Lab urges both the reversal of the EOIR Director's power to issue precedential decisions and the elimination of arbitrary and accelerated timelines for adjudicating BIA appeals. The integrity and independence of our nation's immigration courts depend on it.

## **V. EOIR's Reorganization through Interim Rule Violates the Administrative Procedures Act.**

Unless there is an urgent need to publish regulations quickly, the Administrative Procedures Act requires regulations to go through a Notice of Public Rule-Making (NPRM) process, which allows the public to comment, and requires the agency to respond substantively to the comments. Here, EOIR claims that these regulations do not affect the general public and only affect the agency's internal organization, so they do not require an NPRM process. As discussed

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<sup>6</sup> See 8 C.F.R. § 1003.1(g)(3).

<sup>7</sup> See 8 C.F.R. § 1003.1(a)(1).

<sup>8</sup> EOIR, Office of the Director, <https://www.justice.gov/eoir/office-of-the-director>.

<sup>9</sup> 84 Fed. Reg. at 44,539.

above, this rule enacts major changes to the immigration adjudicatory system, and these changes will directly and irrevocably affect our organization and our clients. There was no reason for EOIR to fast-track this regulation and issue it through an interim final rule. The public should have had an opportunity to be heard before EOIR made these significant changes.

## **VI. Conclusion**

For the above stated reasons, Innovation Law Lab strongly opposes the changes implemented by the IFR. If allowed to remain in place, the IFR will perpetuate this administration's efforts to weaponize EOIR as a tool of deportation instead of an independent court of neutral adjudication.<sup>10</sup> Vulnerable and low-income immigrants will face additional and unnecessary barriers to accessing legal counsel; important and long-held immigration law precedents will change for political reasons; and the integrity of the immigration court system will be significantly undermined.

Thank you for the opportunity to submit these comments. Please do not hesitate to contact me should you have any questions about our comments or require further information.



Stephen Manning  
Executive Director  
Innovation Law Lab

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<sup>10</sup> See Innovation Law Lab & Southern Poverty Law Center, *The Attorney General's Judges*, June 2019, <https://innovationlawlab.org/reports/the-attorney-generals-judges/>.