FAIR
FEDERATION FOR AMERICAN IMMIGRATION REFORM

November 7, 2023

Raechel Horowitz
Chief, Immigration Law Division, Office of Policy
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 1800
Falls Church, VA 22041

RE: RIN 1125–AB18; Comment on Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure

Dear Ms. Horowitz,

The Federation for American Immigration Reform (FAIR) respectfully submits the following public comments to the Executive Office for Immigration Review in response to the Notice of Proposed Rulemaking (NPRM) titled *Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure* (RIN 1125–AB18).

FAIR is a national, nonprofit, public-interest organization comprised of millions of concerned citizens who share a common belief that our nation's immigration laws must be enforced, and that policies must be reformed to better serve the national interest. Our organization examines trends and effects, educates the public on the impacts of sustained high-volume immigration, and advocates for sensible solutions that enhance America's environmental, societal, and economic interests today, and into the future.

FAIR has over three million members and supporters of all racial, ethnic, and religious backgrounds, and across the political spectrum. The organization was founded in 1979 and is headquartered in Washington, D.C.

I. Background

Today's border crisis is leading to future challenges for our immigration system, particularly as the government looks to carry out removal orders and ensure "consequences" for illegal entry into the United States. Millions of illegal aliens have entered the country in the last three years, and the immigration courts are suffering severe backlogs that will ensure these aliens are able to stay in the country for years to come. Making the matter worse are the policies being set forth by the Biden Administration related to our immigration courts.

According to the Executive Office for Immigration Review (EOIR), the backlog of cases today stands at more than 2.1 million through the third quarter of Fiscal Year (FY) 2023 (although some newer estimates suggest the backlog is closer to 3 million).[1] Shockingly, only a small fraction of cases are completed each year, resulting in illegal aliens waiting years until their cases are even heard.

Fiscal Year	Pending Cases at End of Fiscal Year	Initial Receipts	Total Completions
2008	186,144	225,871	228,828
2009	223,828	255,036	231,607
2010	262,817	247,186	222,271
2011	298,287	238,159	219,136
2012	327,705	212,936	186,071
2013	356,369	196,620	155,952
2014	430,245	230,176	141,682
2015	460,220	193,006	143,644
2016	521,682	228,459	143,494
2017	656,332	295,262	163,081
2018	796,813	316,138	195,138
2019	1,088,523	547,311	277,083
2020	1,261,071	369,758	232,252
2021	1,408,704	244,140	115,897
2022	1,791,777	707,558	314,310
2023 (third quarter)	2,159,486	747,366	376,144

Rather than adjudicating the cases before them, immigration judges are administratively closing cases to get them off their docket. While there is no statutory authority for the practice, immigration judges have been administratively closing their cases for years in

[1] Executive Office for Immigration Review, "Adjudication Statistics," July 13, 2023, https://www.justice.gov/media/1174681/dl?inline.

order to "manage" their docket. When they "administratively close" cases, the judges simply put them back into the file drawer without making a decision on the merits. Cases that are administratively closed are taken off the active docket and are no longer seen as part of a backlog.

For some illegal aliens, administrative closure serves as a way to pause cases while they apply for legal status or another form of legal relief. But for many illegal aliens, administrative closure is an opportunity to pause their cases indefinitely to avoid receiving a denial of asylum and a deportation order.

Despite the damage inflicted on the courts, the NPRM would encourage immigration judges to use administrative closure.

II. Administrative Closure Changes Made by the Proposed Rule

The proposed changes to how administrative closure is employed by EOIR would function as a new avenue for prosecutorial discretion and further reinforce this administration's circumvention of immigration law.

In addition to withdrawing the entire rule, FAIR strongly recommends:

- That EOIR adjudicators be denied "the general authority to administratively close, and to recalendar, individual cases pursuant to a party's motion" and that such authority not be codified.
- That 8 CFR 1003.1(d)(1)(ii) and 1003.10(b) not be interpreted to provide "that immigration judges' and the Board's authority to take 'any action' includes administratively closing cases."
- That 8 CFR 1003.1(d)(1)(ii) and 1003.10(b) not be interpreted to replace the phrase "appropriate and necessary" with "necessary or appropriate" to grant EOIR adjudicators the ability to administratively close cases even when not required.

III. The Proposed Rule Inappropriately Treats Administrative Closure as a Non-Enforcement Policy

FAIR strongly believes that creating a general authority for EOIR adjudicators to administratively close cases has no basis in statute and would result in the widespread use of such closures as a form of non-enforcement policy. While administrative closure has been abused for decades, such closures significantly increased following a 2011 policy memorandum from Immigration and Customs Enforcement (ICE) outlining new guidance

intended to undermine immigration enforcement through prosecutorial discretion.[2] The NPRM is now proposing to follow the same approach.

This is made explicit in the proposed rule, which notes:

> Since 2011, the U.S. Department of Homeland Security ("DHS") has issued a number of enforcement priority memoranda, some of which have subsequently been rescinded, that included discussions of when U.S. Immigration and Customs Enforcement ("ICE") attorneys should exercise prosecutorial discretion in pursuing removal, which noncitizens were considered priorities for removal, and methods for implementing those priorities as to noncitizens who were already in removal proceedings, including by filing joint motions to administratively close proceedings. *See, e.g.*, Memorandum for All Field Office Directors et al., from John Morton, Director, ICE, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* at 2 (Jun. 17, 2011) (describing prosecutorial discretion as a decision "not to assert the full scope of the enforcement authority available to the agency")…Memorandum for Tae D. Johnson, Acting Director, ICE, from Alejandro N. Mayorkas, Secretary, DHS, *Guidelines for the Enforcement of Civil Immigration Law* (Sept. 30, 2021)… The use of administrative closure [under the Obama Administration] served to facilitate the exercise of prosecutorial discretion by allowing DHS counsel to request that certain low-priority cases be removed from immigration judges' active calendars and the Board's docket, thereby allowing adjudicators to focus on higher priority cases.

Following the adoption of closures as a form of non-enforcement policy under President Obama, their number spiked considerably before beginning to fall under President Trump.[3] Although presumptively temporary, many such closures are in effect permanent. As noted by EOIR in 2022, "For inactive pending cases, the average length of time a case has been administratively closed is 6,199 days (approximately 17 years) and the median length of time is 4,346 days (approximately 12 years)."[4]

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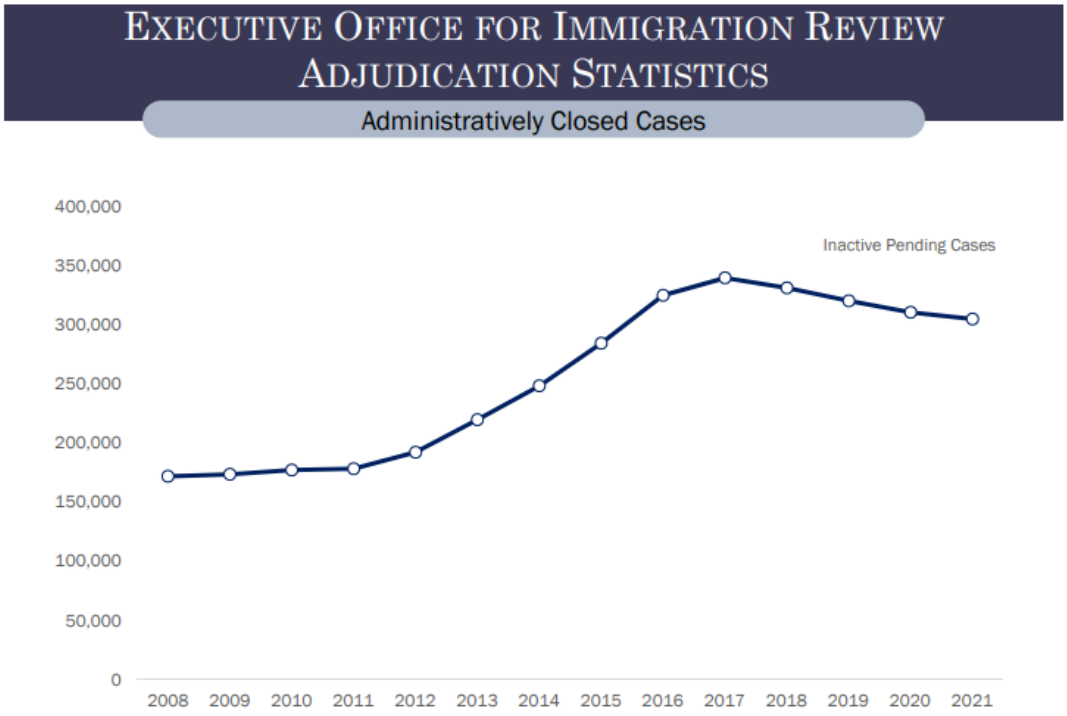
[2] John Morton, "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens," U.S. Immigration and Customs Enforcement, June 17, 2011, https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

[3] Executive Office for Immigration Review, "Administratively Closed Cases," January 19, 2022, https://www.justice.gov/d9/pages/attachments/2018/05/09/4._administratively_closed_cases.pdf.

[4] *Id.*



The Obama Administration frequently used administrative closure for cases involving certain supposedly deserving populations, such as unaccompanied alien children (UACs) and asylum claimants, to artificially lower the case backlog while it in fact continued to grow. According to a study from the Government Accountability Office (GAO), from 2006 to 2015 merit-based decisions declined from 95 to 77 percent of all cases, while administrative closures increased from 2 to 23 percent of all cases during the same time period.[5] This failed strategy is again being pursued. After dropping precipitously under the Trump Administration to less than one percent of all cases decided, by the third quarter of FY23 the administrative closure rate for asylum cases had risen again to 9.26 percent of cases decided, or 14,841 cases, but still short of the 21,557 cases closed in the last year of the Obama Administration.[6] The proposed rule, however, will only worsen this trend.

By relying on administrative closure as an informal "docket management tool" to effectively dismiss immigration cases, the Biden Administration is again encouraging further illegal immigration by signaling that entire classes of cases will not be prosecuted.

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[5] U.S. Government Accountability Office, "Immigration Courts: Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges," June 2017, 23-24, https://www.gao.gov/assets/gao-17-438.pdf.

[6] Executive Office for Immigration Review, "Asylum Decision Rates," July 13, 2023, https://www.justice.gov/media/1174741/dl?inline.

Not only does this undermine the rule of law, it creates yet another unfair standard facing legal immigrants who choose to follow our laws.

IV. Conclusion

FAIR strongly urges that the *Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure* rule be withdrawn. While the rule makes multiple ill-advised changes – such as creating an ability to terminate cases out of thin air – the most notable is attempting to codify a general right for immigration judges to use administrative closure as an informal form of prosecutorial discretion.

Expanding the use of administrative closure to support non-enforcement of our immigration laws will only lead to further increases in the EOIR case backlog. Removing cases from the backlog through procedural legerdemain does nothing to address the underlying issues driving the backlog and, to the contrary, deepens those issues by giving rise to *de facto* amnesty.

Rather than continuing to reinforce the harmful effects of administrative closure as a form of prosecutorial discretion, the Executive Office for Immigration Review should focus on repairing the damage done.

Sincerely,

Dan Stein
President