CAPITAL AREA IMMIGRANTS' RIGHTS COALITION

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VIA ELECTRONIC MAIL

David Neal, Director (david.neal@usdoj.gov)
Executive Office for Immigration Review
U.S. Department of Justice
5107 Leesburg Pike
Falls Church, VA 22041

Re: Misuse of Form Addenda of Law

Dear Director Neal,

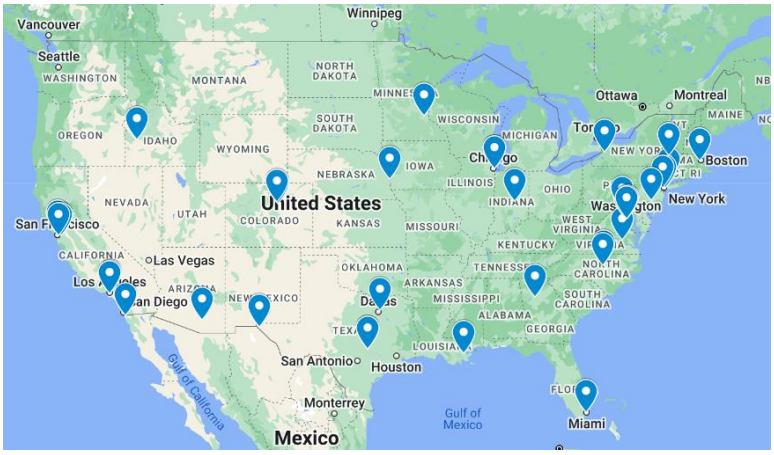
We write to ask your office to take immediate steps to redress Immigration Judges' ("IJs") misuse of standardized legal recitations ("form addenda of law" or "form addenda"), in lieu of the individualized analyses they are required to apply in the cases before them—cases involving noncitizens' fundamental rights, including whether they can remain in the United States.

Misuse of Form Addenda. Misuse of form addenda is a troubling and growing practice wherein an IJ appends a standardized recitation of law to a barebones oral decision in lieu of rendering a sufficient and thorough application of the law to the facts of the particular case. Form addenda may be intended to balance the need for efficient adjudication with each respondent's due process rights. But in practice, IJs regularly use form addenda as substitutes for individualized analyses of how the law applies to the facts of each case. *See* 8 CFR 1240.12(a) (explaining that an IJ's decision must "contain reasons for granting or denying the request."). Not only does this misuse contribute to the very inefficiencies that form addenda were intended to alleviate, it renders the process of adjudication fundamentally unfair to respondents, hinders our organizations' efforts to provide legal services, and frustrates appellate review by making it difficult or impossible for respondents and their counsel to understand the IJ's reasoning in a decision.

We urge the Executive Office for Immigration Review (EOIR) to standardize and reform the regulations, policies, practices, and procedures governing the use of these addenda in oral decisions. EOIR should prescribe precisely when and how form addenda of law may be used, including by requiring that each IJ include, in ***every*** decision they issue—whether oral or written—a thorough, individualized application of the relevant law to the facts of the given respondent's case, as required by law. At a minimum, and as a starting point, IJs should be required to promptly provide a copy of the form addendum used to each respondent as part of their decision.

Who We Are. Capital Area Immigrants' Rights (CAIR) Coalition provides legal services, including direct representation and *pro se* assistance, to detained and non-detained noncitizens in removal proceedings. We also represent our clients and provide *pro se* assistance on appeal before both the Board of Immigration Appeals (BIA) and the U.S. Circuit Courts of Appeals. We write

on behalf of fifty-one other organizations, law school clinics, law firms, and individuals that provide similar legal support to noncitizens. These legal service providers are located across the country (as reflected on the map below) and have a wide range of expertise related to immigration issues, including the misuse of form addenda.



We have been uniquely impacted by misuse of form addenda. Many of our organizations continued to provide services for noncitizens in the face of unprecedented challenges brought on by the COVID-19 pandemic over the past three years. Our work offers us a first-hand understanding of how IJs' misuse of form addenda of law creates greater obstacles to fair and efficient adjudication, including by frustrating appellate review.

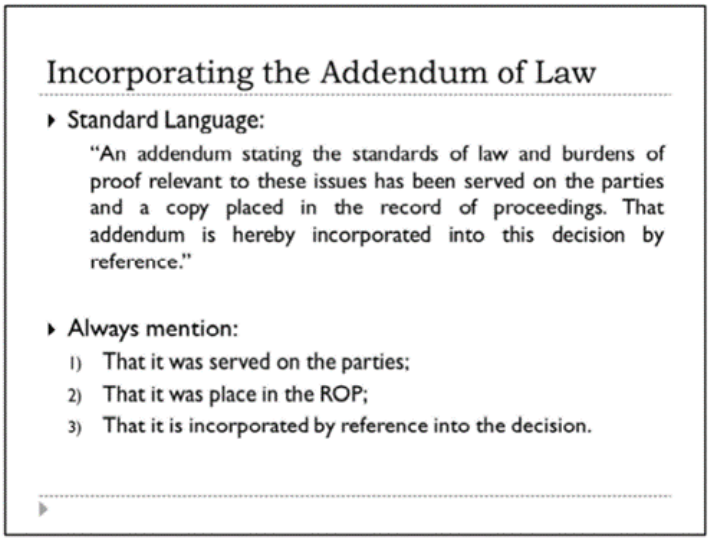
Form Addenda of Law—Background and Intended Use. Form addenda are boilerplate recitations of immigration law available to IJs as supplements to their oral decisions. Form addenda provide a summary of circuit-specific legal standards relevant to a category of cases. The length, specificity, and description of these legal standards vary significantly from one immigration court to another, and from one IJ to another.

Two recent EOIR Freedom of Information Act (FOIA) results shed some light on how IJs are instructed to use form addenda, but the public knows relatively little about their origin and legal justification. Following a months-long, disputed FOIA request that sought information about the use and justification of form addenda, the Capital Area Immigrants' Rights (CAIR) Coalition received a single-document response that included a PowerPoint presentation training provided by EOIR to IJs, explaining how to include a form statement of law as part of an oral decision. A separate FOIA production published by the nonprofit organization Muckrock revealed a 30-minute EOIR training video by the same title that instructs IJs on the use of oral decisions.

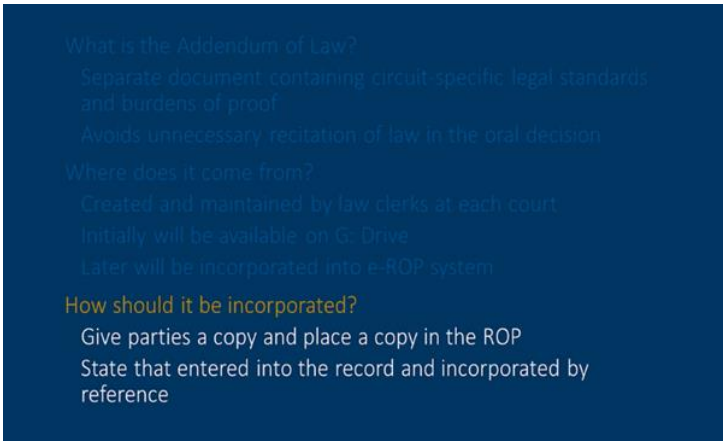
From these FOIA results, we know that EOIR claims that "[t]he goal of the [form] addendum of law is to do away with the unnecessary recitations of law during the issuance of an oral decision, while still ensuring that the decision is sufficient for appellate review and easily understood by the parties." Training Video at 11:09. Instead of reciting legal standards, IJs may "provide the parties with a written addendum of law that clearly states the legal standards related to the case at hand. . . .[containing] the relevant, circuit-specific standards of law that are pertinent to each issue in the case." *Id.* at 12:38. IJs are told that "[i]f the addendum does not address every issue in the case at

hand, the [IJ] should modify the addendum as necessary, so that it can address the legal standards for every issue discussed in the case." *Id.* at 15:07.

IJs are instructed to (1) provide the form addendum to the parties, (2) state for the record that a form addendum is included in the record of proceedings, and (3) incorporate it by reference into the oral decision. PowerPoint at 18. Only then does the form addendum become part of the IJ's (and the agency's) formal decision. The Training Video emphasizes that "[i]t is important that the addendum be addressed on the record with the parties and entered into the records so that both parties and the appellate courts are aware of the standards of law that are being applied to the issue in the case." Training Video at 13:57; *see* PowerPoint at 28 (pictured below). The IJ ensures this in part by "always print[ing] three copies of the addendum and ensur[ing] that the respondent's name, A-number, and date of the decision are included on the document[, and,]. . . . before issuing the decision on the record, the judge should provide both parties with a printed copy of the addendum of law." Training Video at 15:07 (pictured below). According to the Training Video, form addenda "will be a helpful tool for judges in more efficiently issuing oral decisions." *Id.* at 17:55.



PowerPoint at 28



Training Video at 15:07

The need to efficiently adjudicate cases does not lessen an IJ's responsibility to provide sound reasoning that applies the relevant law to the respondent's facts. We recognize that many IJs face overwhelming caseloads and that efficient consideration of each case is important to our immigration system. *See Valarezo-Tirado v. Att'y Gen. of United States*, 21 F.4th 256, 265 (3d Cir. 2021) ("A 2019 study found that on average each immigration judge currently has an active pending caseload of over two thousand cases.") (internal quotations omitted). But even an oral decision, whether or not it is accompanied by a form addendum of law, must include a reasoned and individualized analysis that applies the law to the facts of a case. *See* 8 CFR 1240.12(a); *Ascencio v. Garland*, No. 21-1147, 2022 WL 112071, at *4 (4th Cir. Jan. 12, 2022) ("An IJ cannot issue a summary decision in lieu of a full oral or written decision where the alien applies for asylum or withholding of removal.") (citation omitted). An IJ cannot "dispense with an adequate explanation of a final decision merely to facilitate or accommodate administrative expediency." *Valarezo-Tirado*, 21 F.4th at 263; *see Recinos De Leon v. Gonzales*, 400 F.3d 1185, 1193 (9th Cir. 2005) (remanding the IJ's "incoherent" decision for lack of sound reasoning while acknowledging that "caseload pressures" make it "difficult for IJs to explain their often complicated decisions adequately").

Form Addenda of Law—Misuse Means Decisions Are Issued Without Adequate Analysis or Reasoning. Since EOIR began to formalize and encourage the use of form addenda around 2019, a disturbing trend has emerged: IJs regularly issue oral decisions that include form addenda, but *without sufficiently analyzing the relevant law and applying it to the facts of the respondent's case*. A decision that fails to thoroughly explain how the law summarized in a form addendum applies to a respondent's case is irredeemably flawed. Simply put, this practice violates the well-established principle that IJs must provide a "reasoned explanation for [their] decision[s]." *Cordova v. Holder*, 759 F.3d 332, 337 (4th Cir. 2014) (quotation omitted); *Sagaydak v. Gonzales*, 405 F.3d 1035, 1040 (9th Cir. 2005) (holding that "Immigration Judges . . . must indicate how they weighed factors involved and how they arrived at their conclusion"). A form addendum alone, or an addendum accompanied by cursory or insubstantial analysis, falls far short of this standard because it does not address the unique facts of a respondent's case. Any meaningful adjudication must apply the law to the facts of the case. Indeed, "an agency opinion that fails to build a rational bridge between the record and the agency's legal conclusion cannot survive judicial review." *Mengistu v. Ashcroft*, 355 F.3d 1044, 1047 (7th Cir. 2004); *She v. Holder*, 629 F.3d 958, 963 (9th Cir. 2010) ("Due process and this court's precedent require a minimum degree of clarity in dispositive reasoning."); *Singh v. Sessions*, 898 F.3d 518, 522 (5th Cir. 2018) (granting the petition for review because the Board's legal conclusions were based on a "barren" record).

When used appropriately, form addenda may *supplement* thoroughly-reasoned oral decisions, allowing IJs to "[r]esolve disputed issues quickly" while still "[p]roviding legal reasoning for parties and appellate courts." PowerPoint at 7. When an IJ does not adequately apply the law to the facts of a respondent's case, the resulting incomplete decision violates the respondent's due process rights, contradicts the INA and basic principles of administrative law, exacerbates challenges faced by *pro se* respondents, and inhibits the work of our organizations. The following examples are just a few illustrations of misuse we have encountered:

- One practitioner in the Charlotte Immigration Court informed us that in the entire year of 2019, she did not see a single form addendum of law attached to an IJ's decision or in her clients' records when she took on their appeals, despite many IJs stating they relied on

form addenda in rendering a decision. She reported further that respondents, especially *pro se* respondents, were unable to access the addenda after their hearing.

- Practitioners in Colorado and Louisiana similarly report receiving addenda that are outdated, or include cases that are not binding in the relevant circuit; they also report receiving decisions that purport to incorporate a form addendum, but the form addendum is never actually attached or otherwise provided to the noncitizen.

- A former clerk in multiple East Coast immigration courts explained that each court's approach to and characterization of the relevant circuit's case law varies, with some courts, or even different judges within the same court, relying on addenda that take strongly anti-respondent postures not representative of the relevant circuit's law.

- A practitioner in the Midwest represents a noncitizen with competency issues who was in removal proceedings several years ago. Instead of holding a Judicial Competency Inquiry, with necessary safeguards, the IJ granted cancellation and attached a form addendum with no personalized analysis. Now the noncitizen is back in immigration proceedings, his one opportunity for cancellation has been used, and there is minimal record of what happened in the earlier case.

- A practitioner in New York is representing a noncitizen in appealing the denial of a fear-based asylum claim. The IJ issued a written decision that included template form addenda language regarding one basis for denying asylum—but in his oral decision, denied the claim for a different reason. This disconnect between the two decisions significantly complicates the appeal.

- Finally, in an egregious display of the current mismatch between the intended efficiency and actual inefficiency of the use of form addenda, another practitioner provided us with a form addendum given to her client in South Carolina that included three names, A-File numbers, and dates—one set of which were crossed out with the other typed in over it—***with neither set of personal information belonging to the actual respondent receiving the addendum***.

Misuse Violates Due Process. An IJ's decision that omits a thorough, individualized application of law is unconstitutional: it falls short of the due process owed to each respondent. Noncitizen respondents in removal proceedings are entitled to due process rights under the Fifth and Fourteenth Amendments to the U.S. Constitution. "It is well established that the Fifth Amendment entitles [noncitizens] to due process of law in deportation proceedings." *Reno v. Flores*, 507 U.S. 292, 306 (1993); *see Landon v. Plasencia*, 459 U.S. 21, 33 (1982) ("[A] continuously present permanent resident alien has a right to due process" when threatened with deportation.). The Immigration and Nationality Act (INA) also provides procedural protections in removal proceedings. *See e.g.*, 8 U.S.C. §§ 1229, 1229a, 1231, 1252 (affording a respondent the right to notice of proceedings, the right to counsel, the right to present evidence, the right to examine evidence brought against them, the right to appeal an adverse agency decision, and requiring that a complete record be kept of all testimony and evidence presented at a hearing). Importantly, a noncitizen's due process rights in immigration court include "the right to an individualized determination of his or her interests." *Abdulai v. Ashcroft*, 239 F.3d 542, 549 (3d Cir. 2001)

(quotation marks and citation omitted); *see Sankoh v. Mukasey*, 539 F.3d 456, 466 (7th Cir. 2008) (same); *Martinez-Mendoza v. Barr*, 799 F. App'x 627, 632 (10th Cir. 2020) (same); *Precaj v. Holder*, 491 F. App'x 663, 668 (6th Cir. 2012) (same); *Quintero v. Garland*, 998 F.3d 612, 626 (4th Cir. 2021) ("[I]mmigration judges have a legal duty to fully develop the record in the cases that come before them.").

A decision consisting of a summary oral explanation accompanied by a form addendum violates due process because a respondent is not afforded an individualized determination of their interests when the IJ fails to apply the relevant law to the facts of the case. Without any legal analysis specific to the respondent's circumstances, they and their attorneys have no way of understanding the basis of the IJ's decision. They cannot know whether the IJ considered all of the evidence presented, how each piece of evidence was considered, or whether the IJ reached reasoned conclusions supported by law. As a result, their path to appealing the IJ's decision is severely undermined or eliminated, violating the respondent's due process rights and making it impossible to correct the IJ's mistakes on appeal. *See Witjaksono v. Holder*, 573 F.3d 968, 970 (10th Cir. 2009) ("Due process entitles aliens to meaningful appellate review of their removal proceedings."); *Samet v. Att'y Gen. of United States*, 840 F. App'x 701, 704 n.4 (3d Cir. 2020); *Bulatovic v. Holder*, 351 F. App'x 978, 983 (6th Cir. 2009). Accordingly, due process demands that respondents in removal proceedings be provided with what an oral decision accompanied by a form addendum of law too often lacks—an individualized application of the law to the facts of their case.

Misuse Runs Contrary to the INA and to Basic Principles of Administrative Law. The often-inadequate legal analysis attending many uses of form addenda is not just a problem for immigration court respondents and their attorneys. For federal courts to engage in meaningful judicial review, the IJ (and BIA) decisions that they consider must have adequately applied the relevant law to the facts of the given cases. This requirement stems from the express statutory provision authorizing judicial review of final orders of removal within the INA, as well as foundational principles of administrative law—both of which are undermined by inadequately-reasoned IJ decisions and addenda.

With narrow exceptions, the INA provides that final orders of removal may be appealed to the appropriate federal court of appeals. 8 U.S.C. § 1252(a)(2)(D). When an IJ issues a decision that includes a form addendum and little or no additional analysis, meaningful judicial review is impossible because the reviewing court cannot effectively assess the IJ's reasoning, effectively foreclosing this important statutory recourse.

Similarly, established administrative law doctrines mandate that any IJ or BIA decision must provide explanations for its conclusions in order to allow a reviewing court to assess the decisionmaker's reasoning. *Dia v. Ashcroft*, 353 F.3d 228, 242 (3d Cir. 2003) (citation omitted); *Cordova*, 759 F.3d at 338. A foundational principle of administrative law holds that "the process of [judicial] review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943). The reviewing court is directed to defer to many agency conclusions, but cannot do so if those conclusions are indecipherable or are not supported by sufficient analysis. Accordingly, every circuit has rejected cursory IJ and BIA analyses for failing to engage with an applicant's evidence in a manner that allows for meaningful judicial review. *See, e.g.*, *Soeung v. Holder*, 677 F.3d 484, 488–89 (1st Cir. 2012); *Ojo v. Garland*, 25 F.4th 152, 169 (2d Cir. 2022); *Sheriff v. Att'y Gen. of United States*,

587 F.3d 584, 592 (3d Cir. 2009); *Cordova*, 759 F.3d at 338; *Arulnanthy v. Garland*, 17 F.4th 586, 598–99 (5th Cir. 2021); *Denko v. INS*, 351 F.3d 717, 726 (6th Cir. 2003); *Ferreira v. Lynch*, 831 F.3d 803, 810 (7th Cir. 2016); *Omondi v. Holder*, 674 F.3d 793, 800 (8th Cir. 2012); *Munyuh v. Garland*, 11 F.4th 750, 758 (9th Cir. 2021); *Matumona v. Barr*, 945 F.3d 1294, 1306–07 (10th Cir. 2019); *Ali v. U.S. Att'y Gen.*, 931 F.3d 1327, 1336–37 (11th Cir. 2019).

In sum, inadequately-reasoned IJ decisions that include a form addenda undermine appellate review as prescribed by the INA and foundational principles of administrative law because the Courts of Appeals "cannot give meaningful review to a decision in which an IJ does not explain how it came to its conclusion." *Valarezo-Tirado*, 21 F.4th at 262 (quotation marks and citation omitted). Unable to evaluate the reasoning of such a barebones decision, the reviewing court may be required to remand the case for further fact finding or explanation, increasing the burden on the immigration court, the courts of appeals, and, most especially, the noncitizen caught in the middle.

Misuse Exacerbates Disadvantages Faced by* Pro Se *Respondents. The absence of individualized analysis in oral decisions that include the use of form addenda further compounds the many challenges already faced by *pro se* respondents. Nearly half of all immigration court respondents are not represented by counsel, with far lower rates for individuals who are detained. Individuals must contend with the complex immigration adjudication system alone, often facing tremendous disadvantages. "Noncitizens subjected to removal proceedings are disproportionately unlikely to be familiar with the U.S. legal system or fluent in the English language. Even so, these individuals must navigate the Nation's labyrinthine immigration laws without entitlement to appointed counsel or legal support." *Garland v. Aleman Gonzalez*, 142 S. Ct. 2057, 2076 (2022) (Sotomayor, J. dissenting). In any given immigration case, a *pro se* respondent may need to cross-examine witnesses, secure country condition reports, file exhibits, translate documents, and perform other tasks that amount to substantial obstacles. *See Quintero*, 998 F.3d at 623 (noting the "substantial disadvantages faced by uncounseled noncitizens generally due to factors such as a lack of English proficiency and relevant legal knowledge").

Misuse of form addenda of law exacerbates the challenges facing *pro se* respondents. In addition to lacking the reasoning that supports the IJ's decision, *pro se* respondents often have little or no understanding of their rights or what they should expect from the adjudication process. For example, *pro se* respondents may not understand how to interpret a form addendum that does not reference their specific case, or may not understand that the document is only a part of the IJ's decision. Worse still, when a *pro se* respondent is not provided a copy of the form addendum, they may not know to request it or even recognize its absence. Similarly, *pro se* respondents are likely unaware of any right to challenge the decision on the basis of insufficient reasoning.

Misuse Hinders Our Organizations' Legal Services and Increases Inefficiency. We cannot provide effective legal assistance when we cannot understand an IJ's decision. Our practitioners and members rely on IJ decisions to assess cases for *pro bono* placement and representation and to develop merits appeals on behalf of clients before the BIA. For example, as legal services providers, we perform thousands of intake interviews each year. When a prospective client's record includes a form addendum and an oral decision that is inadequately-reasoned or lacks individualized analysis altogether, it is difficult or impossible for our staff to understand whether the individual has viable relief warranting *pro bono* placement, allowing them to secure access to counsel. Unable to fully assess the prospective client's case, our staff cannot meaningfully

evaluate whether the decision should be appealed to the BIA or what merits arguments to raise on appeal. This is particularly true if the individual seeks *pro bono* counsel on appeal and is detained. The difficulty communicating with detained noncitizens and the 30-day notice of appeal deadline make it all the more essential that we are able to understand the IJ's rationale when we first evaluate a prospective client's record.

Requiring IJs to provide sufficient reasoning also benefits the government and our immigration adjudication system. The government gains no advantage by keeping noncitizens in the dark about the merits of their cases. An IJ's detailed, individualized legal analysis may help convince some respondents to abandon non-meritorious challenges or encourage them to file a more narrow appeal, which takes less time and effort for both the BIA and U.S. Circuit Courts to adjudicate. Conversely, inadequately-reasoned IJ decisions worsen the very systemic inefficiencies that the form addenda are purportedly meant to reduce. Without the benefit of well-reasoned IJ decisions, respondents and their attorneys are more likely to pursue appeal on non-meritorious claims or to appeal the IJ's decision on more expansive grounds—adding to the already overwhelming backlog of 89,803 case appeals. *See* Adjudication Statistics: Case Appeals Filed, Completed, and Pending, EOIR (last visited Feb. 28, 2023), https://www.justice.gov/eoir/page/file/1248501/download. Simply put, misuse of form addenda undermines their very purpose, worsening instead of alleviating immigration adjudication caseloads.

EOIR Should Reform the Use of Form Addenda. The need for reform is clear from all stakeholders' perspectives. Insufficient analysis and cursory opinions relying on boilerplate form addenda deny noncitizens their fundamental due process rights, frustrate appellate review, undermine our organizations' work to provide legal services, and delay the timely application and enforcement of our immigration laws by increasing the already tremendous reviewing burdens on the BIA and circuit courts. The consequences of an IJ's decision for a respondent cannot be overstated. "[O]ne of the most important decisions in our legal system" is "whether an individual has the right to remain in the United States." *Ojo,* 25 F.4th at 157. The stakes are unimaginably high: deportation can mean death for those fleeing persecution, and it almost always means permanent exile from family and loved ones. When an IJ fails to explain why the law demands that a noncitizen be removed from the U.S. or that an asylum applicant's claim falls short, their decision fails to "fairly, expeditiously, and uniformly interpret[] and administer[] the Nation's immigration laws." About the Office, EOIR, Dept. of Justice (last visited Feb. 28, 2023), https://www.justice.gov/eoir/about-office.

To address the concerns laid out above, we urge EOIR to:

- Provide guidance and training to IJs requiring them to apply individualized analysis of law to the facts of each case*, even when they use form addenda*;
- Require each circuit to maintain form addenda that are standardized to the law of the circuit and require IJs to use only the form addenda specific to their circuit;
- Require that IJs provide each respondent and their counsel with copies of the form addendum used in the decision in their case, and to make those copies available before or immediately after the conclusion of the hearing;

- Provide respondents with a coversheet for the form addendum explaining its intended use and the IJ's requirement to provide individualized decisions and require IJs to verbally convey this explanation to *pro se* respondents;
- Create a publicly-accessible database of the form addenda used in each circuit;
- Collect and publish data on the use of form addenda in each immigration court;
- Appoint an ombudsman to receive and investigate complaints and allegations of noncompliance with EOIR rules and regulations concerning form addenda;
- Clarify and make public policies specifying the proper use of form addenda and the method and review process for creating and updating them.

We appreciate your attention to the misuse of form addenda and request a meeting where we can discuss solutions that improve efficiency while ensuring that noncitizen respondents facing one of the most important decisions in our legal system receive full and fair consideration.

Sincerely,

African Human Rights Coalition

Al Otro Lado

American Gateways

American Immigration Council

Americans for Immigrant Justice

Ayuda

Blessinger Legal

Capital Area Immigrants' Rights (CAIR) Coalition

Central American Resource Center (CARECEN) of California

Centro Legal de la Raza

Chacón Center for Immigrant Justice, University of Maryland Francis King Carey School of Law

Colorado Asylum Center

Constitutional Law Center for Muslims in America (legal division of Muslim Legal Fund of America)

Diocesan Migrant and Refugee Services, Inc.

ECBA Volunteer Lawyers Project, Inc.

Erie Neighborhood House

Florence Immigrant & Refugee Rights Project

Hiller Legal

Human Rights First

Hutchison Immigration

Immigrant ARC

Immigrant Justice Idaho

Immigrant Legal Center

Immigrant Legal Defense

Immigration Clinic, University of North Carolina School of Law

Immigration Equality

ISLA: Immigration Services and Legal Advocacy

Just Neighbors

Las Americas Immigrant Advocacy Center

Legal Aid Justice Center

Mariposa Legal

Minnesota Freedom Fund

National Immigrant Justice Center

National Immigration Project (NIPNLG)

National Lawyers Guild - Los Angeles Chapter - Immigration Committee

Nationalities Service Center

Neighbors Link

New York Legal Assistance Group (NYLAG)

Open Immigration Legal Services

Pangea Legal Services

Polanco Law, P.C.

Prisoners' Legal Services of NY

Professor Denise Gilman, Director, Immigration Clinic, University of Texas School of Law (as an individual, with affiliation for identification purposes only)

Rocky Mountain Immigrant Advocacy Network

Rutgers Law School Detention and Deportation Defense Initiative Team

STERN Law, LLC & CrImmigration Experts, LLC

Tahirih Justice Center

The Right to Immigration Institute (TRII)

Travis John Collins, Immigrant/Labor Law Firm

UnLocal

U.S. Committee for Refugees and Immigrants (USCRI)

Washington, D.C. Chapter of the American Immigration Lawyers Association (AILA)