December 9, 2021

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

Tae D. Johnson, Acting Director (tae.d.johnson@ice.dhs.gov)
cc: Kerry E. Doyle, Principal Legal Advisor (kerry.doyle@ice.dhs.gov)
U.S. Immigration and Customs Enforcement
500 12th Street, SW
Washington, DC 20536

Ur M. Jaddou, Director (ur.m.jaddou@uscis.dhs.gov)
U.S. Citizenship and Immigration Services
111 Massachusetts Avenue, NW
Washington, DC 20001

Re: Petition to Ensure Access to EOIR Records of Proceedings, Digital Audio Recordings, and DHS A-Files

Dear Director Neal, Acting Director Johnson, and Director Jaddou,

As organizations whose staff and members provide legal services to individuals, including low-income and/or detained immigrants, in removal proceedings, we submit this petition to request that the Executive Office for Immigration Review (EOIR) revise its regulations, policies, practices, and procedures for providing access to records of proceedings (ROPs) and digital audio recordings (DARs) in immigration courts across the nation.[1] We further request that U.S. Immigration and Customs Enforcement (ICE) and U.S. Citizenship and Immigration Services (USCIS) revise their regulations, policies, practices, and procedures for providing access to Alien Files ("A-Files") in immigration court and USCIS proceedings, as FOIA is an inadequate mechanism for records access.

Federal law recognizes the importance of access to these materials to immigrants and their counsel in removal and affirmative asylum proceedings. *See, e.g.*, 8 U.S.C. § 1229a(b)(4)(B), (c)(2)(B); 8 C.F.R. §§ 208.9(d)(1), 1292.4(b). We know from our work representing immigrants that access to these materials is critical to provide effective representation to immigrants in removal and affirmative asylum proceedings, and to ensure that immigrants obtain due process and a "full and fair hearing" on their claims. *See, e.g., Quintero v. Garland*, 998 F.3d 612, 623 (4th Cir. 2021); *Mendoza-Garcia v. Barr*, 918 F.3d 498, 504–05 (6th Cir. 2019);

[1] Legal service providers in the National Qualified Representative Program (NQRP) previously submitted a letter to EOIR on August 10, 2021, raising issues with records access.

Toure v. Att'y Gen. of U.S., 443 F.3d 310, 325 (3d Cir. 2006); *Al Khouri v. Ashcroft*, 362 F.3d 461, 464–65 (8th Cir. 2004); *United States v. Copeland*, 376 F.3d 61, 71 (2d Cir. 2004); *Hasanaj v. Ashcroft*, 385 F.3d 780, 783 (7th Cir. 2004); *Mekhoukh v. Ashcroft*, 358 F.3d 118, 129–30 & n.14 (1st Cir. 2004); *Agyeman v. INS*, 296 F.3d 871, 877, 883–84 (9th Cir. 2002).

We request that EOIR, ICE, and USCIS establish mechanisms for requesting records that are widely available to all noncitizens in immigration proceedings, including detained and *pro se* immigrants, and result in timely, fulsome disclosure. The current system, which relies on FOIA requests, is unworkable and ineffective in facilitating timely access for immigrants, their counsel, and legal service providers providing *pro se* assistance. DHS regulations, codified at 8 C.F.R. §§ 208.12, 240.69, require immigrants to submit FOIA requests to obtain their A-Files, and similar EOIR regulations, policies, and practices (*e.g.*, 8 C.F.R. § 1208.12(b); EOIR Policy Manual § 1.5(d)) give immigration courts discretion to require immigrants to file FOIA requests to obtain ROPs and DARs. For cases where there is an eROP, access is currently limited to an attorney or accredited representative of record and unavailable to all *pro se* respondents and *pro se* assistance staff.

These procedures fail to provide meaningful access to critical records, which immigrants and their counsel need in removal and affirmative asylum proceedings. Both EOIR and DHS have longstanding practices of failing to comply with FOIA requests for these materials within the statutory deadline, or within the times necessary for counsel to adequately prepare for removal hearings. *See, e.g.*, *Nightingale v. USCIS*, 507 F. Supp. 3d 1193, 1196, 1207 (N.D. Cal. 2020) (finding a clear "pattern of unreasonable delay" that "deprives [immigrants] of the information they need to defend against removal, to obtain benefits, and to gain citizenship"). On top of this delay, *pro se* individuals are often unaware that FOIA even exists. In short, requiring immigrants in removal and affirmative asylum proceedings to seek these records through FOIA does not provide them a "reasonable opportunity" to "examine the evidence against them," as required by federal law and the Due Process Clause. FOIA was created as a means of increasing government transparency for the public and is an inappropriate substitute for clerical services for immigration proceedings.

We appreciate your work to broaden access to justice in our immigration courts and affirmative asylum proceedings—an objective to which this Administration has shown its commitment—but, as identified in this letter, we believe that current policies fall significantly short.

Accordingly, pursuant to 5 U.S.C. § 553(e), we request that EOIR, ICE, and USCIS rescind their rules and policies requiring immigrants in removal and affirmative asylum proceedings to submit FOIA requests to obtain ROPs, DARs, and A-Files, and issue rules providing for timely disclosure of these materials upon request.

GROUNDS FOR PETITION

I. Introduction

We are organizations whose staff and members provide legal services, including direct representation and *pro se* assistance, to both detained and non-detained immigrants in removal and

affirmative asylum proceedings across the country. Over the last two years, in the face of unprecedented challenges brought by the COVID-19 pandemic, many of our organizations continued to provide "Know Your Rights Presentations" to adults and children and represented both detained and non-detained clients in immigration court and affirmative asylum proceedings. Our work makes us well-positioned to assess EOIR's policies concerning access to ROPs and DARs, as well as ICE's and USCIS's policies on accessing A-Files.

Our experience representing and assisting adults and children in removal and affirmative asylum proceedings tells us that building a meaningful argument to give our clients a fair chance of obtaining relief requires reviewing their complete immigration court records and A-Files. We rely heavily on these materials, especially where our clients previously appeared *pro se* or when we are assisting *pro se* individuals in removal and affirmative asylum proceedings.

Our organizations and our members rely on DARs, ROPs, and A-Files to, among other things:

- Discern what happened in prior proceedings for respondents with prior removal orders and/or applications for relief.
- Bring appeals of adverse bond decisions, which result from hearings that are *not* transcribed.
- Assess evidence that provides the bases for removal and identify potential bases for allowing clients to remain in the United States, including eligibility for citizenship.
- Assess viability of appeals for *pro bono* placement and representation.
- Develop merits appeals on behalf of clients before the Board of Immigration Appeals (BIA) where the immigration judge only issued an oral decision and not a written one.
- Discover the details of what occurred in prior hearings for respondents who are unable to recount their proceedings due to mental health challenges and incompetency.
- Understand the procedural posture and next steps of a case for *pro se* respondents, particularly for respondents who are detained and have an upcoming filing deadline.

Without complete and accurate records, immigrants facing removal—and especially those fighting their cases from detention—cannot effectively put forward their claims for relief.

While EOIR has taken steps to broaden access to records, including issuing its December 4, 2020, rulemaking regarding Electronic Case Access and Filing, the Proposed Rule leaves significant gaps in access to records, particularly with regard to DARs and access for detained *pro se* respondents. *See* Executive Office for Immigration Review Electronic Case Access and Filing, 85 Fed. Reg. 78,240-58 (Dec. 4, 2020). Moreover, given the timing of this proposed rulemaking, published on December 4, 2020, with a 30-day deadline for comments—which was in the midst of the holiday season and several additional major rulemaking changes in immigration law—EOIR received only six comments on the proposed rule.[2] Regulations.gov, Proposed Rule Electronic

[2] Courts have recognized that a 30-day comment period is inadequate to provide the public an opportunity to comment on complex immigration-related rules, particularly in light of the global pandemic and where the proposed rule is part of a "staggered" rulemaking process. *See Centro Legal de la Raza v. EOIR*, 524 F. Supp. 3d 919, 955-62 (N.D. Cal. 2021).

Case Access and Filing, Browse Comments, https://www.regulations.gov/document/EOIR-2020-0008-0001/comment.

Rulemaking provides an opportunity for EOIR to rescind 8 C.F.R. § 1208.12(b) and adopt a single, uniform policy across all immigration courts. To comply with federal law and constitutional requirements, that new rule should provide DARs and ROPs as of right in response to requests by respondents in removal proceedings, their counsel, or third parties designated by respondents.

USCIS and ICE should similarly reopen 8 C.F.R. § 208.12(b) and any similar rules and policies that require submission of a FOIA request to obtain an A-File, and replace them with a rule that provides the A-File as of right in response to requests by respondents in removal or affirmative asylum proceedings, their counsel, or a designated third parties.

II. EOIR's and DHS's Failure to Timely Provide ROPs, DARs, and A-Files Violates Noncitizens' Due Process Rights and Their Statutory Right to a Fair Hearing.

"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). And "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Recognizing that a meaningful opportunity to be heard in immigration proceedings turns on a respondent's ability to "examine the evidence against [them]" and access all records "pertaining to [their] admission or presence in the United States," Congress codified these rights in the Immigration and Nationality Act (INA) at 8 U.S.C. § 1229a(b)(4)(B) and (c)(2)(B), respectively.

In turn, federal courts across the country have held that noncitizens facing removal are entitled to records in the government's possession, such as ROPs, DARs, and A-Files, "to fully and fairly litigate [their] removal" and are "entitled to a reasonably complete and accurate record to facilitate appellate review." *See, e.g., Dent v. Holder*, 627 F.3d 365, 374 (9th Cir. 2010); *Witjaksono v. Holder*, 573 F.3d 968, 971 (10th Cir. 2009). *See also, e.g., Oroh v. Holder*, 561 F.3d 62, 65 (1st Cir. 2009); *Ortiz-Salas v. INS*, 992 F.2d 105, 106 (7th Cir. 1993).

Furthermore, the federal courts have recognized a duty on behalf of immigration courts to develop the legal and factual record in removal proceedings. *See, e.g., Quintero*, 998 F.3d at 623. This duty flows from "(1) the abstruse nature of immigration law; (2) the substantial disadvantages faced by uncounseled noncitizens generally due to factors such as a lack of English proficiency and relevant legal knowledge; and (3) the gravity of the interests at stake . . . ." *Id.* at 627. Implicit in this duty is an obligation to make evidence and court records available to immigrants, particularly detained immigrants, who are inherently limited in their ability to access records themselves. In *pro se* cases especially, "individuals are deprived of adequate hearings when they are thrown into removal proceedings and left to sink or swim without adequate assistance from the immigration judge." *Id.* at 628. Providing access to ROPs, DARs, and A-Files upon request is a simple yet critical way to ensure that individuals in removal proceedings, and particularly *pro se* respondents, are not "left to sink or swim" without understanding the basis for the government's case against them.

Not providing access to ROPs, DARs, and A-Files upon request violates the due process and statutory rights of immigrants in removal and affirmative asylum proceedings to examine the evidence against them and access any records pertaining to their presence in the United States. In practice, EOIR's and DHS's rules and policies make it immensely difficult for respondents to exercise their due process and statutory rights to access evidence, especially where respondents are detained and *pro se*. For example, an individual who is detained and *pro se* has absolutely no way of viewing their ROP or A-File, let alone obtaining copies of documents or DARs without outside help.[3] This lack of outside help is all but a forgone conclusion for respondents detained in remote detention facilities away from their family, friends, and legal service providers.

Limitations on accessing records further violate noncitizens' due process, statutory, and regulatory rights by hindering noncitizens' access to counsel in immigration proceedings. *See, e.g.*, 8 U.S.C. § 1229a(b)(4)(A); 8 C.F.R. §§ 208.9(b), 1240.10(a)(1)-(2); *Usubakunov v. Garland*, 16 F.4th 1299, 1303-04 (9th Cir. 2021); *Hernandez Lara v. Barr*, 962 F.3d 45, 53 (1st Cir. 2020); *Mendoza-Garcia v. Barr*, 918 F.3d 498, 503-05 (6th Cir. 2019); *Leslie v. Att'y Gen. of U.S.*, 611 F.3d 171, 180-82 (3d Cir. 2010). Non-profit organizations often rely on ROPs, DARs, and A-Files in determining whether to take on or place a case *pro bono*. DARs are especially necessary when assessing whether to take on an appeal before the BIA when the immigration judge issued a *pro se* respondent an oral decision rather than a written one. When such records are unavailable or prohibitively difficult to access for *pro se* respondents and *pro se* assistance staff, it is very difficult for legal service providers who are considering representation to assess the viability of a case. This results in viable cases going unplaced due to resource constraints and in more individuals left to fend for themselves *pro se*. *See Usubakunov*, 16 F.4th at 1300 ("Navigating the asylum system with an attorney is hard enough; navigating it without an attorney is a Herculean task.").

If enacted, the transition to electronic files and filings outlined in the EOIR Proposed Rule would solve the problem of barriers to ROP access in eligible cases for attorneys and *pro se* respondents with internet. However, the Proposed Rule fails to address access barriers to DARs, and it does not address ROP access for detained *pro se* respondents, other *pro se* respondents without internet access, and authorized legal service providers screening a *pro se* case for placement, nor does it provide for ROP access for cases initiated prior to the launch of electronic filing and recordkeeping. Further, there is no proposed rule or policy for DHS that addresses A-File access barriers.

Ultimately, due process demands that noncitizens facing deportation and affirmatively seeking asylum be granted access upon request to the records flowing from their immigration proceedings.

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[3] The vast majority of detained immigrants are *pro se* in their removal proceedings. *See, e.g.*, Ingrid V. Eagly & Steven Shafer, A National Study of Access to Counsel in Immigration Court, 164 U. Pa. L. Rev. 1, 32 (2015) (noting that from 2007 to 2012, "only 14% of detained respondents were represented," compared to 66% for non-detained respondents).

III. Restrictive Procedures in Immigration Courts Have Made It Even More Difficult for Respondents to Effectively Pursue Immigration Relief.

Pursuant to EOIR policy, immigration courts across the country have adopted widely divergent policies for providing access to ROPs and DARs. This has resulted in arbitrary and capricious results, where access to DARs and ROPs turns on the immigrant's geographical location. Such disparate policies further demonstrate why mandatory disclosure upon request is necessary. The following is a survey of DAR and ROP access procedures in various immigration courts.

- In Arlington Immigration Court, court staff regularly decline to provide ROPs and DARs as a matter of discretion and instead require respondents to submit FOIA requests to EOIR. The court requires in-person appointments to listen to DARs and review ROPs. In recent months, the window for scheduling these appointments has become prohibitively narrow, with attorneys and non-detained individuals required to make appointments several weeks in advance for only a handful of slots a week. For detained *pro se* respondents, in-person appointments are completely unavailable.

- At Eloy Immigration Court, respondents and their counsel sign a record review authorization document to review the ROP and listen to the DAR. Prior to COVID-19, records were made available for review within a day or two of submitting the request. A 25-page limit for copying is strictly enforced. Court staff request that for shorter hearings, respondents and their counsel come in to listen to the DAR rather than requesting a copy. The court allows for DAR requests for longer hearings and takes up to a few weeks to send the CD.

- The procedures for Florence Immigration Court are like those of Eloy, except that the page limit is not as strictly enforced and instead of having individuals come in to listen to the DAR, Florence court staff process and leave DAR CDs in legal service providers' mailboxes.

- At Varick Immigration Court, attorneys must request access to view the ROP and copying is limited to 20 pages. The Court also accepts requests for DAR files but often takes around six weeks to respond.

- At Aurora Immigration Court, attorneys must submit a file review request form and either a release of information form or an E-28 to view the file in person and copy up to 25 pages at the court. They can also listen to DAR recordings at the court but must submit FOIA requests to get a copy of the DAR.

- At Pearsall Immigration Court, ROP and DAR review is available if requests are made in person. The court does not respond to mailed or emailed requests for DAR CDs.

- At Atlanta Immigration Court, attorneys are told to file FOIA requests for DARs and ROPs. They are able to request limited documents by letter. *Pro se* individuals can also request limited pages from their court files.

These policies give rise to clear due process violations and impermissibly burden marginalized groups. For example, EOIR's requirement of in-person review of ROPs and DARs during exceedingly narrow windows prejudices *pro se* detained respondents and non-detained *pro se* respondents with limited transportation options or employment and family obligations, in addition to counsel, some of whom are located out of town. The unjust requirement is especially problematic for detained individuals, whose hearings are often scheduled with less than four weeks' notice. EOIR's policies further impose an entirely arbitrary 25-page limit on copies of ROPs and provide no guaranteed mechanism for obtaining DARs.

While some of our organizations are occasionally able to obtain authorization from *pro se* respondents to review and copy certain records for them, our *pro se* assistance efforts have been hindered by the patchwork of non-standardized policies across immigration courts limiting records access for those assisting *pro se* respondents. For instance, some immigration courts do not allow organizations with properly executed authorization forms to engage in this type of record review unless they enter their appearance and others limit the number of requests they will entertain, making it immensely difficult even for *pro se* detained respondents with outside help to access records.[4]

All of these limits stand in stark contrast to the access provided to ICE attorneys, who typically have convenient access to ROPs and DARs, on top of possession of the entire A-File of documents. This difference in access is also arbitrary and creates an unfair advantage for the government in removal proceedings.

IV. Unclear and Inconsistent Instructions from Immigration Courts, Coupled with Delays, Inaudible DARs, and Incomplete Transcripts, Compound the Due Process Violations.

Furthermore, individual immigration courts themselves cannot articulate a clear, consistent procedure by which our staff and clients can access DARs and ROPs. The following are some examples of conflicting directives organizational staff have received from immigration courts across the country.

Over the last few months, organizations have received the following directives from immigration court staff:

- On March 29, 2021, the EOIR Public Information Officer articulated that the Arlington Immigration Court would provide ROP and DAR copies on a discretionary basis and, for cases in which these records were not provided, the Court would direct the requester to submit FOIA requests or schedule a viewing time. The Officer further stated, "There is no new policy relating to file review or providing case files/recordings," even though CAIR Coalition had historically obtained DAR copies from Arlington Immigration Court.

[4] EOIR policies make *pro se* assistance with records difficult even when such policies are uniform across immigration courts. For cases with an eROP in ECAS, eROP access is limited solely to an attorney or accredited representative of record.

- On June 8, 2021, during a master calendar hearing, an Arlington immigration judge told a CAIR Coalition attorney that filing a FOIA request for an ROP with EOIR delays DHS's ability to access the file "because there is only one copy." The judge seemed irritated that the attorney had submitted a FOIA request.

- On June 10, 2021, Arlington Immigration Court staff informed a CAIR Coalition staff member via email that "formal written requests by respondents' qualified representatives are required in order to complete requests for DAR copies; email requests cannot be accepted as official requests. These written requests should be submitted to us either via mail or in person at the Court's front window." Just weeks earlier, however, the Court *had* provided DARs in response to email requests but *failed* to process in-person requests.

- At Varick Immigration Court, Bronx Defender staff must repeatedly ask court staff to obtain access to view the ROP. An immigration judge denied a Bronx Defender attorney's motion to terminate right after she requested to review the ROP in order to reply to DHS's opposition brief even though the set deadline for the reply had not yet passed.

When organizational staff do successfully navigate these inconsistent instructions to obtain ROPs and DARs—either at the Court's discretion or through FOIA—they sometimes arrive so incomplete, garbled, or redacted as to be unusable. For cases on appeal before the BIA, we have also frequently received hearing transcripts so replete with "unintelligible" denotations that it is impossible to discern what happened.

Together with EOIR's discretionary disclosure policies, the inconsistent instructions from individual immigration courts and poor-quality records place an enormous burden on our staff and our clients. While we understand the resource constraints associated with a high volume of record requests, such constraints cannot be used to justify the due process violations resulting from the immigration courts' inability to operate in a consistent, timely manner.

V. FOIA Is not an Adequate Remedy.

Although noncitizens and their counsel can, in theory, access ROPs, DARs, and A-Files by submitting FOIA requests, in practice FOIA has proven to be an unacceptable means of providing access. As the *Nightingale C*ourt found, DHS, including ICE and USCIS, experienced a "chronic failure to comply with the FOIA statute" and was responsible for a "systemic failure across the agencies to make timely determinations on A-File FOIA requests," resulting in "noncitizens experienc[ing] significant delays in obtaining their A-Files nationwide." 507 F. Supp. 3d at 1204. The Court granted injunctive relief, ordering DHS to comply with FOIA deadlines for A-File requests, eliminate its backlog for such requests, and submit quarterly compliance reports. *Id.* at 1213-14. DHS has now cleared the vast majority of its backlog and is in compliance with statutory deadlines for almost each request. These are significant improvements with A-File access but they do not cure all underlying issues, including that *pro se* individuals, especially those who are detained, still lack the knowledge and ability to submit FOIA requests. Moreover, FOIA request results are frequently heavily redacted to the point where documents are unusable and results do not contain audio or video files.

Our experience with FOIA requests to EOIR is beset with the same issues identified by the *Nightingale* Court—EOIR routinely takes months or even years to process FOIA requests, even when the requests are designated as "track one" for "expedited processing." In addition to significantly prejudicing noncitizens, EOIR's delayed response times clearly violate FOIA's statutory mandate to respond to requests within a 20-business day window (or 30 business days in unusual circumstances). 5 U.S.C. § 552(a)(6)(A), (B).

We highlight a few examples below.

- Immigrant Legal Defense (ILD) staff filed a FOIA request with EOIR for a client on December 19, 2019, to gather documents needed to support a motion to reopen in San Francisco Immigration Court based on the Violence Against Women Act. While awaiting the results, the client continued to live in a highly precarious situation with her abusive U.S. citizen spouse. The FOIA results did not arrive until January 2021.

- A family, whose main language is Mam, has been waiting on FOIA results since January 27, 2021, so that ILD staff can document the interpretation issues at their final hearing in Detroit Immigration Court. ILD staff have not received results as of the date of this letter.

- On February 27, 2021, a CAIR Coalition staff member filed a FOIA request for the ROP of a client who had been found incompetent and had a merits hearing scheduled for April 30, 2021, in Baltimore Immigration Court. Despite receiving an automated response that the request was being processed on March 10, 2021, she did not receive the FOIA results until August 20, 2021. These results were ultimately unusable, as another respondent's documents were inadvertently included and mixed in, and in an abundance of caution, the staff member stopped viewing the documents to comply with ethics protocols.

- On May 22, 2021, a CAIR Coalition staff member submitted a FOIA request for a DAR on behalf of a client who is detained and had an individual competency hearing scheduled for June 23, 2021, in Arlington Immigration Court. The client, who had diagnosed mental health issues and a serious brain injury, had previously had a *pro se* competency hearing. The CAIR Coalition attorney sought the DAR from the *pro se* proceeding. She did not receive the FOIA records in time for the hearing. The staff member still has not received the FOIA results as of the date of this letter.

- A Legal Aid Justice Center (LAJC) client's individual merits hearing was scheduled for January 2022 in Arlington Immigration Court, two and a half years after the initial portion of the hearing. On October 25, 2021, an LAJC staff member requested the DAR file and to view the ROP from court staff in preparation for the remainder of the hearing. Court staff stated that the court was no longer providing ROPs; instead, they are only available through FOIA requests. On November 4, 2021, LAJC submitted an expedited FOIA request. On November 15, 2021, EOIR FOIA Intake rejected the expedite request, noting that they are experiencing significant delays. LAJC contacted the EOIR FOIA Service Center/FOIA Public Liaison a day later. The representative stated that she was unable to assist with the ROP because the physical file was with the immigration court and the estimated completion date for the audio file was March 16, 2022, after the hearing.

The examples provided above are not isolated incidents. They reflect a consistent practice of EOIR declining to provide ROPs and DARs on request and its subsequent failure to respond to FOIA requests within the statutorily mandated time frame. This practice does not comport with due process. The Ninth Circuit has observed, "It would indeed be unconstitutional if the law entitled [a noncitizen] in removal proceedings to his [immigration records], but denied him access to it until it was too late to use it. That would unreasonably impute to Congress and the agency a Kafkaesque sense of humor about noncitizens' rights." *Dent*, 627 F.3d at 374.

Resource limitations do not justify policies that give rise to systemic due process violations. Nor do they justify EOIR's consistent failure to respond to FOIA requests in a timely manner. As Judge Orrick wrote: "Although courts recognize that resources for FOIA compliance may be heavily taxed by the quantity and depth of FOIA requests (especially in light of budget constraints that limit personnel and resources assigned to an agency), that does not grant the agency carte blanche to repeatedly violate congressionally mandated deadlines." *Nightingale*, 507 F. Supp. 3d at 1198 (internal quotation marks omitted).

FOIA is not an adequate remedy due to extensive delays, redactions, missing file types, and barriers to FOIA requests for *pro se* individuals. EOIR and DHS should instead establish widely available and accessible mechanisms for *pro se* individuals, counsel, and authorized third parties to access ROPs, DARs, and A-Files in a timely manner.

5 U.S.C. § 553(e) Petition

For the foregoing reasons, we respectfully petition pursuant to 5 U.S.C. § 553(e) that EOIR, promptly issue, amend, and repeal its rules, policies, and practices to:

1. Remove all elements of discretion from its DAR and ROP disclosure policies, with one uniform policy across all immigration courts that makes disclosure of such records mandatory upon request. This policy should be entirely separate from an individual's rights to seek records under FOIA and the Privacy Act.

2. Require that immigration courts provide ROPs and DARs within 20 business days after a respondent, their counsel, or a third party authorized by respondent submits a request.

3. Require that the ROPs and DARs be sent (a) electronically or made available online to attorneys and *pro se* respondents with internet access, and (b) in hard copy for respondents who are detained and other *pro se* respondents who lack internet access.

4. Allow for ROP and DAR requests by mail, in-person, and online.

5. Inform all respondents in writing and orally during their initial master calendar hearing of their right to request ROPs, DARs, and A-Files and of the request process. Publish, in a place that is visible and accessible, the exact process for requesting ROPs and DARs and for accessing them online and provide clear notice when these procedures change. All immigration courts should also post this process on their individual webpages and at their physical locations.

6. Provide accountability and enforcement mechanisms for compliance with ROP and DAR requests.

7. Implement procedures to ensure that *all* audio is captured during hearings. Court staff should confirm that DARs are audible and transcripts are intelligible before sending them to respondents.

8. Reopen the comment period for the proposed Electronic Case Access and Filing rule with a new 30-day comment period to allow for more fulsome feedback from legal service providers and other stakeholders.

We further respectfully petition pursuant to 5 U.S.C. § 553(e) that USCIS and ICE promptly issue, amend, and repeal their rules, policies, and practices to:

1. Remove all elements of discretion from their A-File disclosure policies, with one uniform policy across all USCIS and ICE offices that makes disclosure of such records mandatory upon request. This policy should be entirely separate from an individual's rights to seek records under FOIA and the Privacy Act.

2. Require that USCIS and ICE provide A-Files within 20 business days after a respondent, their counsel, or a third party authorized by respondent submits a request.

3. Require that the A-Files be sent (a) electronically or made available online to attorneys and *pro se* respondents with internet access, and (b) in hard copy for respondents who are detained and other *pro se* respondents who lack internet access.

4. Allow for A-File requests by mail, in-person, and online.

5. Inform individuals in affirmative asylum proceedings in writing of their right to request A-Files and of the request process. Publish, in a place that is visible and accessible, the exact process for requesting A-Files and for accessing them online and provide clear notice when these procedures change. All USCIS and ICE offices should also post this process on their individual webpages and at their physical locations.

6. Provide accountability and enforcement mechanisms for compliance with A-File requests.

Thank you for your attention to the constitutional, statutory, and regulatory concerns implicated by EOIR's and DHS's records access policies. Absent action within 45 days, we will view EOIR, USCIS, and ICE as having rejected the requests in this petition and will proceed accordingly.

Sincerely,

Advocates for Basic Legal Equality, Inc.

American Immigration Council

American Immigration Lawyers Association

Asian Americans Advancing Justice – Atlanta

Brooklyn Defender Services

Capital Area Immigrants' Rights (CAIR) Coalition

Catholic Charities, Migration & Refugee Services Cleveland, OH

Catholic Legal Services, Archdiocese of Miami

Civil Rights Education and Enforcement Center

Columbia Law School Immigrants' Rights Clinic

Community Legal Services in East Palo Alto

Florence Immigrant & Refugee Rights Project

Immigrant ARC

Immigrant Legal Defense

Law Office of Helen Lawrence

Legal Aid Justice Center

Legal Services of New Jersey

Mariposa Legal, program of COMMON Foundation

Migrant Center for Human Rights

National Immigrant Justice Center

National Immigration Litigation Alliance

New York Legal Assistance Group (NYLAG)

Northeast Justice Center

Northwest Immigrant Rights Project

Open Immigration Legal Services

Pennsylvania Immigration Resource Center

Public Defenders Coalition for Immigrant Justice (PDCIJ)

RAICES

Rainbow Beginnings

Rocky Mountain Immigrant Advocacy Network

Southern Poverty Law Center

Tahirih Justice Center

TASSC (Torture Abolition & Survivors' Support Coalition) International

The Door's Legal Services Center

UnLocal