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## YALE LAW & POLICY REVIEW

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### Administrative Aggregation Applied: Theorizing Class Motions in EOIR Adjudication

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## INTRODUCTION

The Executive Office for Immigration Review (EOIR) is an agency in need of structural intervention. Its failure to ensure due process for noncitizens in removal proceedings has grave consequences for those individuals, their families, and their communities. Despite the high human stakes of its decisions, EOIR's adjudications are plagued by a lack of access to meaningful participation, extreme backlog, and inconsistent application of the law. Ensuring respondents' ability to participate in their defense is especially fraught: a lack of guaranteed legal representation, scarce pro bono resources, language barriers, unfamiliarity with the U.S. legal system, detention, and untreated trauma are among the myriad factors that impede legal access.

For agencies like EOIR that are tasked with determining individuals' rights through high-volume adjudications, aggregating similar procedural parts of claims across many cases is one way to make adjudication both faster and fairer. I argue that partial, representative aggregation in the form of respondent-initiated class motions could help make EOIR adjudications accessible, efficient, and consistent. Due-process concerns would arise, however, from giving one individual's eligibility for immigration relief preclusive effect in another's proceedings. This problem counsels tailoring EOIR's aggregation mechanism to serve a narrower function than the resolution of whole cases. Smaller issues—especially procedural ones—frequently recur across cases. This commonality is particularly likely in the wake of law or policy changes that affect many cases in the same way. Limiting aggregation to procedural motions could mitigate the risk of overemphasizing efficiency at the expense of procedural protections while still bringing significant benefits. Aggregate motions to reopen or reconsider, for example, could allow similarly situated noncitizens to benefit from a change without litigating redundant individual motions. And if the agency were to lay the requisite groundwork in its regulations, motions for administrative closure corresponding to announced enforcement priorities could also potentially be adjudicated on a class-wide basis.

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Several factors present barriers to EOIR's use of aggregation mechanisms that group entire claims, such as class actions. In particular, the individualized eligibility criteria for immigration relief limit aggregation's potential role in removal cases, as does the centrality of adjudicators' discretion to grant or deny relief. The fact that noncitizens in removal proceedings are respondents, rather than petitioners seeking an affirmative benefit, is a further complication. The class-motion approach would accommodate these realities while reducing the procedural and practical barriers facing respondents, who might otherwise be unable to meaningfully pursue relief. In addition, it would relieve the agency of the need to adjudicate thousands of equivalent motions across similar cases.

In Part I, I describe some current uses of aggregation in the administrative state to show that, while it is not yet the norm, agencies are beginning to recognize the advantages that scholars have argued attend various forms of administrative aggregation. I then examine the legal basis for agencies' ability to aggregate claims and to customize their adjudication procedures with minimal outside restrictions. This freedom empowers them to be creative but carries the risk of an overemphasis on expediency at the expense of due process, especially in agencies like EOIR that regulate parties who tend to be underresourced or politically unpopular.

Part II provides an overview of EOIR removal proceedings and considers the agency's past and present use of aggregation principles in its adjudications. Although EOIR has not yet embraced most readily recognizable forms of aggregation, it has signaled conceptual openness to aggregation in some of its docket management practices.

In Part III, I explain my proposal for EOIR's bespoke aggregation procedure. I suggest developing a procedure by which a representative respondent can file a class motion to resolve a discrete legal issue across a class of similar cases. I envision this type of aggregation being useful in the wake of changes in policy or law, such as the rescission of a rule affecting eligibility for relief, a retroactive change in case law, or even new enforcement priorities. After adjudication of the class motion by a panel of adjudicators assembled for that purpose, the individual removal cases could proceed, with the ruling on the aggregate motion applying in each case. Because due process is best served by including an opt-out mechanism, a period would follow the initiation of the class motion during which public and—to the extent possible—personal notice would be given to affected individuals that they could opt out of the class if they desired. For certain types of motions, like motions to reopen, an opt-in procedure might be preferable. To illustrate some scenarios where I believe that a class motion could be useful, I present two case studies: first, of the initial Migrant Protection Protocols (MPP) rescission in summer 2021, and second, of

administrative closure if the administration were to deindividualize the substantive standard for that procedure.

I then consider factors that I believe preclude the possibility of wholesale aggregation, such as class actions, in EOIR adjudications. Both substantive immigration law and regulated parties' posture as respondents, rather than petitioners, present obstacles to the fulsome use of aggregation. The fact-bound, individualized criteria for immigration relief are in tension with the notion of common claims across a numerous class. Even beyond the statutory and regulatory eligibility criteria, for most types of relief available to respondents in removal proceedings, the ultimate grant or denial depends on the EOIR adjudicator's favorable exercise of discretion. Virtually any factor in the respondent's life can influence this determination, making it inescapably individualized. In addition, the fact that respondents are defending against removal, rather than petitioning for affirmative benefits, complicates the adoption of classic aggregation models like the class action. Literature on the defense class action and other forms of defendant aggregation inspires features of my proposal that are responsive to these issues and that the flexibilities of informal adjudication can accommodate.

In Part IV, I discuss policy interests and values that class motions stand to advance in removal proceedings. Whether in civil litigation or the administrative context, aggregation generally conveys three main benefits: improved legal access, efficiency, and consistency. EOIR is in need of improvement on each of these metrics, and I argue that class motions are well-suited to address aspects of these problems. First, EOIR adjudicates the rights of noncitizens who face obstacles to access and participation in their defense against removal, many of which are built into the design of the agency. Language barriers, limited financial resources, lack of legal representation, detention during proceedings, untreated trauma, and many other factors combine to tip the scale dramatically toward removal as a foregone conclusion. Aggregation could help correct this imbalance by allowing individuals who were unable assert their rights to benefit from motions headed by class representatives who could. Aggregation would also allow nonprofit organizations and other counsel to pool resources and represent large numbers of individuals on an issue at once rather than litigating similar motions one by one in each case. By simplifying cases procedurally, class motions would maximize the impact of scarce legal resources. Second, EOIR's immense backlog of cases perpetuates inefficiency and compromises accurate decision-making. Aggregation could reduce redundant adjudications and allow adjudicators to spend more time engaging with the substance of each remaining case on their dockets. Third, class motions would improve consistency—a longstanding issue in EOIR

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adjudication, where discrepancies in the outcomes of similar cases across different adjudicators abound. Aggregation promotes consistency by applying one decision across all similar cases, improving predictability. In addition, it might be preferable over other reforms because of its compatibility with decisional independence in EOIR. Although class motions fall far short of resolving every issue plaguing EOIR and the broader immigration enforcement system, their promising potential role in reform merits exploration.

### I. AGGREGATION IN AGENCY ADJUDICATIONS

To understand the options available to EOIR, it is useful to consider how other agencies have incorporated forms of aggregation in their adjudications. The presence and potential of aggregation in agency adjudication has gained increased recognition in recent years. Agencies now use various forms of aggregation across a range of regulatory fields. This diversity shows both agencies' willingness to explore new techniques and their different ways of addressing the risks inherent in this burgeoning area of procedural reforms. Aggregation's flexibility, combined with agencies' wide-ranging authority to implement it, stands to transform the administrative state.<sup>1</sup> But because of the danger that agencies will pursue expediency at the expense of regulated parties' due-process rights, safeguards are essential.

#### A. Legal Authority

Although most agencies have yet to realize the potential of aggregation, they have the discretion to adopt procedures implementing it in informal and formal ways.<sup>2</sup> The authority to establish aggregation mechanisms is part of the agency's discretion to craft its preferred adjudication procedures.<sup>3</sup> The Supreme Court has explained that agencies are free to

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1. Michael Sant'Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action*, 126 YALE L.J. 1634, 1655, 1681-91 (2017).
  2. *Id.* at 1652-57.
  3. See *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 143 (1940); *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978) (“[T]his Court has for more than four decades emphasized that the formulation of procedures [is] basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments.”).

decide “whether [cases] should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another’s proceedings, and similar questions . . . .”<sup>4</sup> This discretion is rooted in agencies’ freedom “to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.”<sup>5</sup> The Office of Legal Counsel endorsed the legality of the Equal Employment Opportunity Commission’s (EEOC) class-action procedure, one of the longest standing examples of formal administrative aggregation, in 2004, concluding that the agency had “broad authority to aggregate claims in its adjudicatory proceedings, even without an express statutory provision for aggregation.”<sup>6</sup> In the context of legislative courts that hear appeals from agency adjudications, the Federal Circuit located the U.S. Court of Appeals for Veterans Claims’s (CAVC’s) authority to entertain aggregate claims in its ability under the All Writs Act to create procedures that help it carry out its substantive mission.<sup>7</sup>

The prevalence of informal adjudication in the modern administrative state underscores agencies’ broad discretion over their adjudicatory procedures. Although the Administrative Procedure Act (APA) prescribes procedures for formal adjudication,<sup>8</sup> agencies are not required to follow them, and in practice, most agencies have opted to use informal

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4. *Pottsville Broad. Co.*, 309 U.S. at 138.

5. *Id.* at 143.

6. Sant’Ambrogio & Zimmerman, *supra* note 1, at 1634 (citing Office of Legal Counsel, *Legality of EEOC’s Class Action Regulations: Memorandum Opinion for the Vice President and General Counsel United States Postal Service*, U.S. DEP’T OF JUST. 254, 261 n.3 (Sept. 20, 2004), [http://www.justice.gov/sites/default/files/olc/opinions/2004/09/31/op-olc-v028-p0254\\_0.pdf](http://www.justice.gov/sites/default/files/olc/opinions/2004/09/31/op-olc-v028-p0254_0.pdf) [<https://perma.cc/Z65W-RMTG>]).

7. *Monk v. Shulkin*, 855 F.3d 1312, 1319 (Fed. Cir. 2017) (“We see no principled reason why the Veterans Court cannot rely on the All Writs Act to aggregate claims in aid of [its] jurisdiction.”); *see also* 38 U.S.C. § 501(a) (“The Secretary [of Veterans Affairs] has authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department . . . including . . . the manner and form of adjudications and awards.”). Zimmerman has proposed that the All Writs Act also contains untapped aggregation authority for federal circuit courts to hear appellate class actions. Adam S. Zimmerman, *The Class Appeal*, 89 U. CHI. L. REV. 1419, 1455-59 (2022) (arguing that under the All Writs Act, appellate courts may have claim-aggregating authority that resembles Rule 23).

8. 5 U.S.C. §§ 554, 556-57.

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adjudication instead.<sup>9</sup> Unlike informal rulemaking, which is governed by APA § 553, the APA contains no default procedures for informal adjudication.<sup>10</sup> Indeed, the APA “only minimally governs” informal adjudications; there are “almost no required procedures.”<sup>11</sup> Instead, the APA creates a presumption that agencies’ final decisions, including those reached through informal adjudication, are subject to judicial review and establishes “‘ancillary’ protections—such as the right to retain counsel, to appear before the agency, and to receive notice of the grounds for an agency’s denial of a request—that typically apply to formal and informal adjudication alike.”<sup>12</sup>

Emily Bremer points out that the siloed nature of informal adjudication—with each agency developing idiosyncratic procedures—means that there is little clarity as to what these procedures can or cannot look like.<sup>13</sup> The development of adjudication procedures has been left

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9. Kent Barnett & Russell Wheeler, *Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal*, 53 GA. L. REV. 1, 5 (2018) (“[M]ost administrative hearings are before adjudicators who are not ALJs.”); Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141, 153 (2019) (“[T]he vast majority of agency adjudications and federal regulatory actions do not involve APA-governed formal adjudications before an ALJ or the agency itself.”); Aaron L. Nielson, *Three Wrong Turns in Agency Adjudication*, 28 GEO. MASON L. REV. 657, 665 (2021) (“[I]nformal adjudications are essentially the default form of agency decisionmaking.” (quoting 2 THE FUNDAMENTALS OF ADMINISTRATIVE LAW FOR NATURAL RESOURCES PRACTICE 1, 1-4 (2019))).
  10. Emily S. Bremer, *Reckoning with Adjudication’s Exceptionalism Norm*, 69 DUKE L.J. 1749, 1758 (2020); James Hannaway, *Codifying the Agency Class Action*, 87 GEO. WASH. L. REV. 1451, 1465 (2019) (“The APA imposes minimal procedural requirements from which transsubstantive precedent can derive, and thus enables creativity and difference among agencies.”).
  11. Barnett & Wheeler, *supra* note 9, at 18.
  12. BEN HARRINGTON & DANIEL J. SHEFFNER, CONG. RSCH. SERV., R46930, INFORMAL ADMINISTRATIVE ADJUDICATION: AN OVERVIEW (2021).
  13. Bremer, *supra* note 10, at 1758 (“Most adjudications are conducted according to procedures that have been tailored to suit the substantive needs of the individual agency or regulatory program.”); Hannaway, *supra* note 10, at 1464 (“Today, all precedent concerning aggregate actions within agencies is agency-specific.”); JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 93 (1985) (“Tax cases cite tax cases; immigration cases cite immigration cases; rate cases cite rate cases; nuisance regulation cases cite nuisance regulation cases; and so on.”).

largely to agency determination rather than judicially-created “administrative common law,” and, although “[d]ue process provides a theoretical floor, [] in practice, its requirements are so flexible that it imposes minimal limitations on agency procedural discretion.”<sup>14</sup> Case law on the subject of informal adjudication is likewise “sparse.”<sup>15</sup> Agencies thus have discretion to choose the features of their adjudicatory processes, including aggregation devices. Of course, this wide-ranging discretion also heightens the risk of undermining the due-process rights of regulated parties—rights that standardized, guaranteed procedures are designed to protect.<sup>16</sup> I examine issues related to ensuring due process in immigration removal proceedings in Parts II and IV.

### B. Current Use

Decades after aggregation first began to transform civil litigation through the class action, multidistrict litigation (MDL), and other techniques, agency uptake of aggregation in adjudication has proven slow but steady. After Matthew Sant’Ambrogio and Adam Zimmerman drew attention to aggregation’s potential benefits for an overburdened administrative state,<sup>17</sup> the Administrative Conference of the United States (ACUS) adopted their recommendations<sup>18</sup> and encouraged agencies to

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14. Bremer, *supra* note 10, at 1758. Bremer argues that this apparent freedom actually impedes progress toward more effective procedures since agencies do not have examples to follow and cannot crosspollinate from each other’s initiatives. *Id.* at 1789 (“Adjudication’s exceptionalism norm wholly rejects a common procedural baseline and produces a profoundly nontransparent system. These conditions are antithetical to procedural evolution.”).
  15. *Id.* at 1785. (“Without a common procedural baseline, judicial precedent addressing the procedural requirements in informal adjudication is sparse.”).
  16. James Hannaway suggests that codification of aggregation procedures would combat uniformity concerns, whether through congressional action, executive order, or an ACUS model rule. Hannaway, *supra* note 10, at 1466-68 (arguing that codified aggregation procedures would “strike the appropriate balance between flexibility and predictability”); *see id.* at 1465, 1471.
  17. *See generally* Sant’Ambrogio & Zimmerman, *supra* note 1; Michael D. Sant’Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 COLUM. L. REV. 1992 (2012).
  18. *See generally* MICHAEL SANT’AMBROGIO & ADAM ZIMMERMAN, ADMIN. CONF. U.S., AGGREGATE AGENCY ADJUDICATION: FINAL REPORT (2016) (allowing Sant’Ambrogio



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aggregate similar claims in adjudication.<sup>19</sup> The recognition of these procedural reforms' promise for improving administrative adjudication has since spread beyond the academy and ACUS. Nonagency actors familiar with aggregation's role in federal litigation have also "pushed agencies to adopt aggregation procedures" and "cited judicial economy and fairness as reasons to do so."<sup>20</sup> There is a growing consensus that "the general reasons used to justify aggregation in civil litigation—that it increases judicial efficiency, promotes legal access, and makes judicial decisions more consistent—apply part and parcel to administrative proceedings."<sup>21</sup>

Aggregation in administrative adjudication can take many forms, and indeed, the variations in the substantive law that a given agency administers require flexibility. The most obvious analog to civil litigation, the class action, has gained traction in some agencies, especially those that adjudicate benefits petitions. Nine agencies have procedures that closely resemble class actions, three of which use them regularly.<sup>22</sup> One of these enthusiastic adopters is the EEOC, which hears class-action antidiscrimination claims.<sup>23</sup> The EEOC class-action procedure closely tracks Federal Rule of Civil Procedure Rule 23, including the use of a class-certification stage,<sup>24</sup> and is the "most frequently utilized and most powerful" example of agency aggregation.<sup>25</sup> Under the EEOC's procedures, if the agency receives an individual discrimination complaint that falls within an existing class complaint that has not yet reached final judgment, it adds that complaint to the class and notifies the individual.<sup>26</sup>

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and Zimmerman to reiterate their case for aggregate adjudication on behalf of ACUS).

19. 81 Fed. Reg. 40,260 (June 21, 2016).
20. Shannon M. Grammel & Joshua C. Macey, *The Costs of Aggregating Administrative Claims*, 70 STAN. L. REV. ONLINE 123, 126 (2018).
21. *Id.*
22. Hannaway, *supra* note 10, at 1457.
23. Sant'Ambrogio & Zimmerman, *supra* note 1, at 1665-67.
24. *Chapter 8 Complaints of Class Discrimination in the Federal Government*, U.S. EQUAL OPPORTUNITY EMP. COMM'N, <https://www.eeoc.gov/federal-sector/management-directive/chapter-8-complaints-class-discrimination-federal-government> [<https://perma.cc/XNA7-RX2E>].
25. Hannaway, *supra* note 10, at 1458. In fact, EEOC class actions do not include a procedure to allow parties to opt out; in this way, the EEOC method is even stricter than Rule 23. *Id.*
26. U.S. EQUAL OPPORTUNITY EMP. COMM'N, *supra* note 24.

Class actions have also begun to appear in legislative courts that review agency adjudications. For example, the CAVC, an Article I tribunal with exclusive jurisdiction to review Board of Veterans' Appeals decisions, now entertains class-action petitions following the Federal Circuit's 2017 decision locating its authority to do so in the All Writs Act.<sup>27</sup> The CAVC has chosen to adopt Rule 23's requirements for class actions and to engage in limited fact-finding to make the procedures effective.<sup>28</sup>

Despite its successful adoption by some other agencies, the class action is likely an ill-suited vehicle for aggregation in EOIR. Immigration removal proceedings are highly fact-bound and give adjudicators such broad discretion that multiple individuals likely could not be similarly situated enough for their entire removal cases to be resolved as a class. Although Rule 23's requirements of adequacy and typicality do not have to control the formation of agency classes unless the agency decides to institute such rules, due-process concerns counsel in favor of respecting these or similar principles when determining the appropriateness of class proceedings.

Even if the class action is a poor fit for an agency's needs, however, other forms of aggregation can play a role in optimizing its adjudication. Administrative aggregation ranges from "formal" methods like class actions to "informal" ones like routing similar claims to specialized adjudicators.<sup>29</sup> Many agencies have adopted aggregation procedures other than class actions that are better suited to their mandates. In fact, sixty-nine agencies "allow consolidation or joinder that would allow something like agency MDL."<sup>30</sup> Sant'Ambrogio and Zimmerman have explored major agency aggregation initiatives, including notable non-class-action procedures, in detail. For example, the National Vaccine Injury Compensation Program's "Omnibus Proceedings" are a form of multiparty consolidation that allows petitioners to obtain "no-fault" compensation for injuries caused by

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27. See *Monk v. Shulkin*, 855 F.3d 1312, 1319 (Fed. Cir. 2017); Leo Shane III, *Court Allows a Class Action Lawsuit Against VA for the First Time*, MIL. TIMES (June 17, 2019), <https://www.militarytimes.com/news/pentagon-congress/2019/06/17/court-allows-a-class-action-lawsuit-against-va-for-the-first-time> [https://perma.cc/G7SQ-T6SC].

28. *Monk v. Wilkie*, 30 Vet. App. R. 167, 170 (2018), *aff'd*, 978 F.3d 1273 (Fed. Cir. 2020), [https://law.yale.edu/sites/default/files/area/clinic/document/monk\\_order.pdf](https://law.yale.edu/sites/default/files/area/clinic/document/monk_order.pdf) [https://perma.cc/7PKS-QNUP].

29. Sant'Ambrogio & Zimmerman, *supra* note 1, at 1644.

30. Hannaway, *supra* note 10, at 1457 (citing Sant'Ambrogio & Zimmerman, *supra* note 1, at 1659).

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vaccines rather than litigating their claims in court.<sup>31</sup> In addition, the Office of Medicare Hearings and Appeals has long allowed consolidation of common issues in claims, but it has also piloted a statistical sampling program by which a “statistician selects a sample from the universe of claims, the ALJ makes decisions based on the sample units, and the statistician then extrapolates the results to the universe of claims.”<sup>32</sup>

The variety of administrative aggregation methods is possible because agencies are not limited to imitating civil-litigation procedures. For example, in 2016, the Department of Education (DOE) debuted an aggregate procedure for borrower defenses to loan repayment by which individuals with loans from schools that engaged in fraud or other misconduct can join a group claim seeking the discharge of their debt.<sup>33</sup> The initial mechanism only allowed agency officials, not student borrowers, to make the decision to aggregate claims.<sup>34</sup> In that program, once DOE officials determined that borrower defenses should be aggregated, the agency could then “proactively identify and contact borrowers who may qualify for relief under the borrower defense regulations based upon information in its possession,” and the notified borrower could either join or opt out of the group defense.<sup>35</sup> Some scholars argued that this design usefully allowed the agency to retain control of its regulatory agenda,<sup>36</sup> while others criticized the lack of respondent-initiated aggregation as undermining many of the intended benefits of group claims.<sup>37</sup> In late 2021, DOE proposed changes that would expand its aggregate procedure and allow borrowers to initiate group defense claims themselves.<sup>38</sup> This proposed expansion, announced after a negotiated rulemaking session open to the public, suggests that both

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31. Sant’Ambrogio & Zimmerman, *supra* note 1, at 1670.

32. *Id.* at 1676-80.

33. *See Borrower Defense Loan Discharge*, U.S. DEP’T OF EDUC. (2022), <https://studentaid.gov/borrower-defense> [<https://perma.cc/M2KJ-Z3Q5>].

34. 34 C.F.R. § 685.222(e)(6) (2020).

35. 81 Fed. Reg. 75,965 (Nov. 1, 2016).

36. Grammel & Macey, *supra* note 20, at 131-32.

37. *Id.* at 132 (discussing Luke Herrine’s criticism that this scheme fails to protect students’ interests).

38. Matthew Arrojas, *Department of Education to Expand Options for Students Defrauded by Colleges*, BEST COLLEGES (Dec. 20, 2021), <https://www.bestcolleges.com/news/2021/12/20/defrauded-students-expanded-debt> [<https://perma.cc/R6CB-EEEL>].

DOE and commenting parties see promise in the group defense to help more people become aware of their rights and access relief.

Despite the benefits that these example agencies have derived from aggregation innovations, Sant’Ambrogio and Zimmerman found that most agencies still do not use aggregation techniques, and only a few use them regularly.<sup>39</sup> In fact, some agencies actively resist aggregation. Those agencies that have explained their decision not to aggregate claims often cite cost as a reason—agency class actions, especially those resulting in mass payouts, are expensive to manage and administer.<sup>40</sup> Indeed, some agencies’ opposition appears to be specific to the class-action vehicle, which is only one of many potential forms of aggregation, or to be based on drawbacks that stem from the type of adjudications the agency performs, such as administering financial benefits.<sup>41</sup> Nevertheless, several agencies have embraced aggregation to improve their adjudication processes and outcomes, and even more have some framework in place for aggregating claims, even if they seldom use it.<sup>42</sup>

## II. IMMIGRATION ADJUDICATION

### A. Overview of EOIR Removal Proceedings

EOIR is an office within the Department of Justice (DOJ) that staffs and oversees the immigration courts and the Board of Immigration Appeals (BIA).<sup>43</sup> Though it is only one part of the United States’s massive

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39. Sant’Ambrogio & Zimmerman, *supra* note 1, at 1658-59.

40. See Grammel & Macey, *supra* note 20, at 127-31.

41. *Id.* at 130.

42. Sant’Ambrogio & Zimmerman, *supra* note 1, at 1634; Grammel & Macey, *supra* note 20, at 123; Hannaway, *supra* note 10, at 1452; Adam S. Zimmerman, *Surges and Delays in Mass Adjudication*, 53 GA. L. REV. 1335, 1361-62 (2019).

43. Removal proceedings in immigration court are far from the only route by which the government removes individuals from the United States. In addition to carrying out the removals ordered by EOIR adjudicators, Department of Homeland Security (DHS) officers issue orders for expedited removal, by which certain noncitizens are summarily removed without a hearing before EOIR. See 8 U.S.C. § 1225(b) (2018). DHS also implements the Centers for Disease Control and Prevention’s (CDC) Title 42 program, under which officials summarily expel individuals at or near the United States’s land borders and coastal points of entry. 85 Fed. Reg. 42,828 (Aug. 5, 2021). For

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immigration bureaucracy,<sup>44</sup> EOIR is one of “the most prominent examples of mass adjudication in the federal administrative state.”<sup>45</sup> It employs approximately 600 Immigration Judges (IJs) in sixty-eight immigration courts nationwide<sup>46</sup> as well as twenty-three Appellate Immigration Judges, the members of the BIA, who sit at EOIR’s Virginia headquarters.<sup>47</sup>

EOIR’s adjudicatory responsibilities have by and large outpaced the capacity of its personnel.<sup>48</sup> Between 1998 and 2018, the number of removal

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context on the Title 42 program, see Lucas Guttentag, *Coronavirus Border Expulsions: CDC’s Assault on Asylum Seekers and Unaccompanied Minors*, JUST SEC. (Apr. 13, 2020), <https://www.justsecurity.org/69640/coronavirus-border-expulsions-cdcs-assault-on-asylum-seekers-and-unaccompanied-minors> [<https://perma.cc/9W25-8636>]. Despite these and other forms of removal, my focus in this paper is on “regular” removal proceedings under § 240 of the Immigration and Naturalization Act (INA), 8 U.S.C. § 1229a, because I believe that that process is the ripest for the use of aggregation to advance due-process values.

44. DHS, the Department of State (DOS), the Department of Labor (DOL), and the Department of Health and Human Services (HHS) all administer programs related to immigration.
45. David Ames, Cassandra Handan-Nader, Daniel E. Ho & David Marcus, *Due Process and Mass Adjudication: Crisis and Reform*, 72 STAN. L.R. 1, 8 (2020).
46. *Office of the Chief Immigration Judge*, U.S. DEP’T OF JUST. (Jan. 19, 2023), <https://www.justice.gov/eoir/office-of-the-chief-immigration-judge> [<https://perma.cc/WRV7-4M5X>].
47. *Board of Immigration Appeals*, U.S. DEP’T OF JUST. (Sept. 14, 2021), <https://www.justice.gov/eoir/board-of-immigration-appeals> [<https://perma.cc/PWU4-SCFB>].
48. The Biden administration has undertaken IJ hiring initiatives and other reforms, such as giving USCIS asylum officers the ability to grant asylum to applicants at the border, aimed at this issue. See *100 New Immigration Judges Hired to Address Court Backlog*, LMT ONLINE (July 22, 2021), <https://www.lmtonline.com/news/article/100-new-immigration-judges-hired-to-address-court-16332262.php> [<https://perma.cc/7DEX-B6Q6>]; Julia Ainsley, *Biden Admin’s New Rule Will Let Asylum Officers, Not Just Judges, Decide If Immigrants Can Stay in U.S.*, NBC NEWS (Mar. 24, 2022 8:30 AM), <https://www.nbcnews.com/politics/immigration/biden-admins-new-rule-will-let-asylum-officers-not-just-judges-decide-rcna21313> [<https://perma.cc/2S5Z-EQTQ>]. For additional information about factors contributing to the EOIR backlog and proposed solutions, see generally *Budgeting for Immigration Enforcement: A Path to Better Performance*, NAT’L RSCH. COUNCIL (2011),

cases pending before IJs “grew nearly sixfold, from 129,505 to 768,257, while the number of IJs increased by only about two-thirds.”<sup>49</sup> A 2018 estimate suggested that IJs would take nearly three years to clear the then-existing backlog, which at that point had not yet reached one million cases, even if DHS initiated no cases in the interim.<sup>50</sup> DHS nonetheless ramped up its commencement of removal proceedings significantly. The number of new cases per year reached a record high each year between Fiscal Year (FY) 2017 and 2019 before dropping with the onset of the coronavirus pandemic in FY 2020. The number of new cases initiated each year declined between FY 2020 and FY 2022, but the number of pending cases continued to rise even during the dip in initiation, reaching around two million pending cases at the end of the first quarter of FY 2023.<sup>51</sup> The national average wait time for an immigration-court hearing is currently 866 days, with courts in many states (e.g., Virginia, California, Maryland, New Jersey, and Nebraska) recording an average wait time above 1,000 days.<sup>52</sup>

This large and growing backlog is problematic for at least three reasons. First, it prolongs the time that many immigrants live in legal limbo without the opportunity to regularize their immigration status. The months or years that cases remain pending may entail living without the ability to lawfully work, drive, or travel outside of the United States, harm to mental health related to fear of removal and separation from family, and, in some cases, prolonged detention. Second, the backlog figures negatively in political discourse around immigration, which stymies political will to advance immigrants’ rights. The backlog is a talking point for supporters of restrictionist policies that cut procedural protections and access to

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<https://nap.nationalacademies.org/read/13271/chapter/2#3>  
[<https://perma.cc/28GJ-2M57>].

49. Ames et al., *supra* note 45, at 16.

50. *Id.* (citing Miguel de Figueiredo, Alexandra Lahav & Peter Siegelman, *Swift Injustice*, SLATE (Apr. 18, 2018, 3:51 PM), <https://slate.com/news-and-politics/2018/04/its-a-terrible-idea-to-push-immigration-judges-to-close-cases-more-quickly.html> [<https://perma.cc/42ZD-CW58>]).

51. *Executive Office for Immigration Review Adjudication Statistics*, U.S. DEP’T OF JUST. (Jan. 16, 2023), <https://www.justice.gov/eoir/page/file/1242166/download> [<https://perma.cc/SU8Q-95TB>] (reporting 1,874,336 pending cases); *Immigration Court Backlog Tool*, TRAC IMMIGR. (Feb. 2023), [https://trac.syr.edu/phptools/immigration/court\\_backlog](https://trac.syr.edu/phptools/immigration/court_backlog) [<https://perma.cc/4B9P-SFSW>] (reporting 2,056,328 pending cases).

52. TRAC IMMIGR., *supra* note 51.

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immigration relief.<sup>53</sup> Across administrations, immigration agencies have pursued policy changes that divert noncitizens from receiving full process in immigration court to the detriment of their safety and ability to present their claims, for example, through programs like expedited removal, expanded expedited removal, MPP, transit and port-of-entry bans on asylum applications, and Title 42, rather than implementing procedural reforms within immigration court proceedings to both address the backlog and bolster due-process protections. Third, the immense caseload negatively impacts the quality of EOIR adjudicators' work. IJs report that they find themselves overwhelmed to the point that they cease trying to ensure due process and even resent respondents' pursuit of their case and rightful appeals.<sup>54</sup>

Removal proceedings in immigration court are an example of what ACUS has called "'formal-like'" informal adjudication, "in the sense that they consist of trial-type, adversarial evidentiary hearings but are not governed by the APA's formal hearing requirements."<sup>55</sup> Other aspects of the system manifest a similar lack of formality that scholars and immigrants' rights advocates have criticized as incongruous with the gravity of the rights at stake. For example, IJs, who conduct removal hearings, and BIA members, who review IJs' decisions on appeal, are not Administrative Law Judges (ALJs).<sup>56</sup> As non-ALJs, IJs and BIA members lack statutory protections from agency influence such as protection from at-will removal, limits on ex-parte communications, and a requirement of impartiality.<sup>57</sup>

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53. *See generally, e.g.,* Andrew R. Arthur, *The Massive Increase in the Immigration Court Backlog*, CTR. FOR IMMIGR. STUDIES (July 24, 2017), <https://cis.org/Report/Massive-Increase-Immigration-Court-Backlog>.

54. THE ATTORNEY GENERAL'S JUDGES: HOW THE U.S. IMMIGRATION COURTS BECAME A DEPORTATION TOOL, INNOVATION L. LAB & S. POVERTY L. CTR. 21 (June 25, 2019), [https://www.splcenter.org/sites/default/files/com\\_policyreport\\_the\\_attorney\\_generals\\_judges\\_final.pdf](https://www.splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf) [<https://perma.cc/88MA-W8XR>]; Stuart L. Lustig, Niranjana Karnik, Kevin Delucchi, Lakshika Tennakoon, Brent Kaul, Dana Leigh Marks & Denise Slavin, *Inside the Judges' Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 GEO. IMMIGR. L.J. 57, 70 (2009).

55. HARRINGTON & SHEFFNER, *supra* note 12, at ii; Bremer, *supra* note 10, at 1768 ("[Immigration adjudications] are...not conducted under the APA's adjudication provisions.").

56. *See* Barnett & Wheeler, *supra* note 9, at 13.

57. HARRINGTON & SHEFFNER, *supra* note 12, at 13.

Removal proceedings under 8 U.S.C. § 1229a begin when ICE serves the respondent with a Notice to Appear (NTA) containing the statutorily required information listed in 8 U.S.C. § 1229(a). These proceedings are adversarial: an ICE Trial Attorney (TA) represents the government in a prosecutorial role, and the EOIR IJ presides. Some noncitizens are subject to discretionary detention and may post bond to be released or monitored via an alternative to detention;<sup>58</sup> others are subject to indefinite mandatory detention with no opportunity for a bond hearing.<sup>59</sup> The length of proceedings varies greatly based on many factors in the individual's case. The agency has a history of understating how long proceedings take and how long it detains people.<sup>60</sup>

The noncitizen's first court hearing is a master calendar hearing, which serves a similar purpose as an arraignment in the criminal legal context. If the noncitizen contests removability, typically by asserting a claim that she qualifies for one or more forms of immigration relief, the IJ schedules an individual merits hearing. Following the merits hearing, the IJ issues a decision,<sup>61</sup> and either or both parties can reserve appeal. If the BIA upholds a removal order, it becomes a final agency order of removal.<sup>62</sup> DHS cannot appeal a BIA decision, but the noncitizen can seek judicial review of certain grounds for denial in federal appellate court.<sup>63</sup>

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58. See 8 U.S.C. § 1226(a) (2018).

59. See *id.* § 1226(c).

60. See, e.g., Brief of Amici Curiae American Immigration Council, American Immigration Lawyers Association, and National Immigration Project of the National Lawyers Guild in Support of Appellee at 6-13, *Ayom v. Garland*, No. 20-2274 (S. Ct. May 27, 2021) (explaining how EOIR admitted after the Supreme Court's decision in *Demore v. Kim* that the five-month estimate of the length of mandatory detention on which the court relied in that case had been incorrect, and the average time was closer to a year).

61. The IJ decision does not have to be written; often she will only dictate an oral decision into a recording device. Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 547 (2015).

62. See 8 U.S.C. § 1101(a)(47)(A)-(B).

63. See *id.* § 1252.



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### B. Current Use of Aggregation

Some of EOIR's internal management techniques contain elements of aggregation, signaling the agency's willingness to explore this type of innovation. For example, EOIR divides the immigration-court docket into detained and nondetained cases, with detained cases on a faster timeline.<sup>64</sup> This use of separate docket tracks can be understood as a method of informal aggregation because it groups cases according to detention status to prioritize adjudication of detained respondents' cases.<sup>65</sup> EOIR also uses panels of judges to adjudicate BIA cases and has experimented with specialized courts in the past.<sup>66</sup> On a conceptual level, the rules and guidelines that EOIR issues to govern adjudication and BIA's precedential case law also function to harmonize adjudication across cases. Although the cases themselves are not aggregated, the agency does not decide each issue anew in every case. A more robust aggregation mechanism like class motions would thus not require a wholesale rethinking of EOIR's approach to docket management; rather, it would provide a useful tool to accomplish aims that the agency has already signaled are priorities.

### III. CLASS MOTIONS PROPOSAL

As long as legislative gridlock inhibits major changes to the statutory criteria for immigration relief, it is unlikely that a class of noncitizens could satisfy commonality or typicality requirements in an administrative class

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64. See *Challenges and Best Practices in Docketing and Case Managements*, EXEC. OFF. FOR IMMIGR. REVIEW (May 21, 2018), <https://www.aila.org/File/Related/18082203h.pdf> (EOIR presentation outline referring to the prioritization of detained cases); Memorandum from MaryBeth Keller, Chief Immigr. Judge, to All Immigr. Judges, et al., at 26 (Jan. 17, 2018), <https://www.aila.org/File/Related/18082203h.pdf> (EOIR guidance memorandum explaining the circumstances under which "a case can be moved between detained and non-detained court"); *Practitioners' Guide to Obtaining Release From Immigration Detention*, CATH. L. IMMIGR. NETWORK, INC., <https://www.cliniclegal.org/resources/enforcement-and-detention/practitioners-guide-obtaining-release-immigration-detention> (collection of template motions for practitioners including a motion to "Reclassify Proceedings (Detained to Non-Detained Docket)" and a "Sample Motion to Transfer Case to Non-Detained Docket").

65. See Sant'Ambrogio & Zimmerman, *supra* note 1, at 1663.

66. See *infra* Section III.D.3 for a discussion of the Texas "surge courts" and the due-process issues that they raised.

action that would resolve complete claims. Many cases have narrower issues than eligibility for relief in common, however, particularly when policy shifts affect many cases in the same way, such as by requiring respondents to take the same procedural step to proceed with their cases. With this type of categorical law or policy change in mind, I propose allowing respondents to organize class motions that would be ruled upon by a panel of adjudicators assembled for this purpose and would apply in all cases within the affected category. After the ruling on the class motion, the respondents would proceed to litigate the remaining issues in their individual cases. Class-motion panels would avoid the possibility of a single adjudicator making an aberrant decision. To further protect respondents, the agency could also allow respondents to appeal the ruling.

In addition, I propose including either an opt-out or opt-in period, depending on the type of motion, so that individuals will not be bound by the ruling on the class motion if it would harm their interests. For example, an individual who is not prepared to pursue her substantive claims on the merits due to personal circumstances or lack of legal representation might be averse to having her case reopened along with the others in a class motion to reopen. Since cases would proceed to individual merits adjudications after reopening, it would be important that members of the class motion understood that result. Importantly, some motions, including motions to reopen, are subject to statutory and regulatory numerical limits.<sup>67</sup> If the agency were to equate participation in a class motion with filing one's own motion, participants would be waiving their right to file an individual motion in the future unless they met one of the few exceptions to those numerical limits.

After discussing some considerations for implementation, I illustrate my proposal with two examples. I first explore the role that class motions could have played in the wake of the summer 2021 rescission of MPP, prior to the ongoing litigation that has resulted in injunctions continuing the program. Second, I examine administrative closure to show how class motions could magnify the positive impact of this practice if the administration chose to deindividualize the relevant legal standard. Finally, I discuss aspects of immigration law that hinder the use of aggregation and how class motions might minimize some of the due-process concerns about aggregation in this context.

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67. See 8 U.S.C. § 1229a(c)(7)(A) (2018) (establishing a one-motion numerical limit on most motions to reopen); 8 C.F.R. § 1003.23(b)(1) (2022) (same, in immigration court); *id.* § 1003.2(c)(2) (2022) (same, at the BIA).

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### A. Implementation

The best way for EOIR to implement an aggregation procedure such as class motions is likely through notice-and-comment rulemaking under APA § 553. Although EOIR could reasonably argue that such a rule would be exempt from notice-and-comment requirements as a “rule[] of agency organization, procedure, or practice,”<sup>68</sup> the new program’s ability to “substantially affect[] the rights of those over whom the agency exercises authority”<sup>69</sup> warrants promulgation through full § 553 procedures from the start in order to reduce the risk of litigation that would delay its effectiveness. A rulemaking is also preferable to an EOIR directive or other guidance because it is more firmly established than guidance. Promulgating a rule will make the program more likely to endure across administrations and less susceptible to changes that undermine due process. A rule is also the clearest way to ensure that EOIR adjudicators have the power to implement the program, since EOIR’s regulations provide that they may take “any action consistent with their authorities under the [INA] and regulations that is appropriate and necessary” to adjudicate removal proceedings.<sup>70</sup>

As discussed above, a respondent-led approach to aggregation requires particular attention to implementation because most existing procedures are designed with petitioners bringing affirmative claims in mind. As a result, my class-motions proposal combines elements of Rule 23 class actions and Greg Reilly’s interdistrict related case coordination proposal for defense aggregation. I believe that a representative structure best realizes the benefits that aggregation stands to contribute to immigration adjudication. For example, a nonrepresentative respondent-led structure would require respondents whose cases contained a common issue to coordinate with one another on an unrealistic level that would defeat a main purpose of aggregating in this context. Because many respondents are pro se, detained, or both, it is unreasonable to expect them to inform themselves about the consolidation of claims relevant to their cases and timely join the class. A representative model better capitalizes on a key advantage of the aggregate structure for EOIR proceedings by allowing similarly situated

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68. 5 U.S.C. § 553(b)(3)(A) (2018).

69. *Pickus v. U.S. Bd. of Parole*, 507 F.2d 1107, 1113 (D.C. Cir. 1974).

70. 8 C.F.R. § 1003.10(b) (2022) (setting forth this authority for IJs); *accord id.* § 1240.1(a)(1)(iv) (2022); *id.* § 1003.1(d)(1)(ii) (2022) (setting forth the same authority for the BIA).

individuals who lack the information or resources to pursue their own claim to benefit from a representative's claim.<sup>71</sup>

The notice issue highlights the representative structure as the natural choice for aggregation in the immigration context. In order to realize the benefit of avoiding redundant motions that apply the same policy change to similar cases, respondents must be aware that they can join such a motion. Likely the most logical solution is to require the agency to inform them.<sup>72</sup> This notice requirement would resemble DOE's practice during the first instantiation of its group borrower defense program, under which it affirmatively notified individuals that a group defense existed that they might qualify to join.<sup>73</sup> By generating a duty for the agency, that plan would somewhat compromise the salutary effects of decreased workload that aggregation brings, but it would directly serve the policy interest in legal access, which is class motions' primary contribution to EOIR proceedings. The undesirable consequence of more work for EOIR could also be avoided by shifting the notice-giving requirement to DHS. For example, the ICE TA in an affected case could file a notice with the immigration court that informed EOIR and the respondent of his right to join, or opt out of, a pending class motion on the issue, or notice could accompany the NTA. Since DHS controls whether individuals are in removal proceedings, and the class motions would replace motions that could otherwise be filed individually by each respondent, this new mechanism could successfully improve access at the same time it reduced the number of motions for EOIR to adjudicate and DHS to litigate.

An opt-in or opt-out mechanism, depending on the type of motion, is important to protect individuals who have an interest in not being bound by the class-motion ruling, especially since some motions can only be filed once unless they meet statutory or regulatory exceptions.<sup>74</sup> In some scenarios, such as motions to reopen proceedings—a situation in which I imagine class motions being particularly useful in the wake of law or policy change—

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71. In the immigration removal context, the "free-rider problem," where individuals reap benefits of aggregate litigation without contributing resources to the effort, is a positive factor and is one reason that aggregation is desirable.

72. In Rule 23 class actions, if it would be easier for the defendant to identify class members than the representative plaintiff, the court may order the defendant to perform the tasks necessary to send notice. *See* Fed. R. Civ. P. 23(d); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S.340, 355-56 (1978).

73. *Borrower Defense Loan Discharge*, *supra* note 33.

74. *See, e.g., infra* note 79 and accompanying text.

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respondents are, in a sense, initiating the proceedings and conceptually behaving more like petitioners. Given the stakes of removal proceedings and the fact that cases would continue individually beyond the class motion, it would likely be preferable to use an opt-in, rather than opt-out, system for class motions to reopen. The opt-in model would avoid a situation where a case was reopened against a respondent's interest or when they were not prepared to pursue their substantive claims, which could lead to a negative outcome on the merits of their overall immigration case.

Regardless of whether proceedings are closed, DHS should still have the requisite information to provide qualifying individuals with notice of a class motion.<sup>75</sup> But depending on ICE's position on the motion, it might be unlikely to voluntarily send out a notice to respondents with closed cases that are affected by a given policy change informing them that they can take advantage of reopening. If ICE opposed the class motion, such a notice would compromise the agency's litigation position. Of course, if ICE instead joined the class motion, the notice issue would be less problematic. In any event, where a class motion seeks to reopen cases, notice might be better served to individuals by EOIR or by public notice, with an announcement on the EOIR website that advocacy organizations could then spread to individuals. Government-driven personal notice is preferable due to the government's superior knowledge of whom a policy change affects and how to contact them; indeed, the scarcity of nonprofit and many private removal defense counsel's resources partly animates the proposal in the first place. If resources allowed, respondent's counsel would likely also create a webpage or other campaign to provide notice to possibly qualifying individuals that they needed to decide whether to participate in the class motion.

#### *B. Case Study: MPP Rescission*

In summer 2021, the Biden administration first rescinded MPP, or the "Remain in Mexico" program, commenced by the Trump administration.<sup>76</sup>

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75. Noncitizens in the United States are required to update their address with USCIS (and with EOIR if they are in removal proceedings) each time that they change their address. *See* 8 C.F.R. § 265.1 (2022); *id.* § 1003.15(d)(2).

76. For information on MPP and the ongoing litigation that has enjoined its termination at various points, *see Featured Issue: Migrant Protection Protocols (MPP)*, AM. IMMIGR. LAWS. ASSOC. (Oct. 7, 2022), <https://www.aila.org/advocacy/media/issues/port-courts> [<https://perma.cc/3JS9-M8NQ>]; and *The "Migrant*

The program's wind down presented the conundrum of how individuals ordered removed after being required to wait in Mexico for their court date under MPP could reopen their cases to raise, or re-raise, their asylum claims under regular procedures. A class motion to reopen could have streamlined the implementation of such a policy shift. Although cases of individuals ordered removed under MPP vary widely in their facts and procedural histories, a class motion aggregating this portion of their cases—a motion to reopen due to the rescission—could have cleared a major procedural obstacle and allowed them to proceed with adjudication of their individual asylum applications. The uncertain status of MPP<sup>77</sup> following the latest in a series of injunctions against its termination makes this discussion purely hypothetical for the time being, but it is nonetheless a useful illustration of a policy change after which class motions might have a role to play.

In a wind down of MPP, partial aggregation via a class motion to reopen would overcome legal obstacles and ensure consistent application of the changed policy without encroaching on adjudicators' decisional independence. I base this claim on three main observations.

First, immigration law mounts multiple procedural obstacles to individuals subjected to MPP having their asylum claims heard and adjudicated. Without the ability to aggregate, each person ordered removed under MPP would need to file a motion to reopen her immigration case.<sup>78</sup> Time and number limits, from which motions that ICE joins are exempt,<sup>79</sup> make joint motions ideal—and in some cases, necessary. The decision of whether to join these motions is at the discretion of ICE attorneys and their supervisors. If ICE declines to join a motion, that noncitizen, at best, faces a greater chance of denial, or at worst, is barred from filing at all. Second, even

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*Protection Protocols*," AM. IMMIGR. COUNCIL (Oct. 6, 2021), <https://www.americanimmigrationcouncil.org/research/migrant-protection-protocols> [<https://perma.cc/26H4-YVUW>].

77. *See, e.g., Judge Blocks Biden Bid to End 'Remain in Mexico' Policy*, PBS NEWS HOUR (Dec. 16, 2022), <https://www.pbs.org/newshour/politics/us-judge-blocks-biden-bid-to-end-remain-in-mexico-policy> [<https://perma.cc/SA9Y-WRQH>].

78. *See generally EOIR Policy Manual § 5.7 – Motions to Reopen*, U.S. DEP'T OF JUST. (Nov. 14, 2022), <https://www.justice.gov/eoir/eoir-policy-manual/5/7> [<https://perma.cc/LZC3-DXEN>].

79. 8 C.F.R. § 1003.2(c)(3)(iii) (2022) (governing joint motions before BIA); *id.* § 1003.23(b)(4)(iv) (same for IJ).

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if DHS joins the motion, there is no guarantee that an IJ or the BIA will grant it.<sup>80</sup>

EOIR adjudicators also possess sua-sponte reopening authority that they could theoretically use to reopen a broad swath of cases.<sup>81</sup> Indeed, the BIA appears to have used this mechanism in this way once before when it announced a policy of granting sua-sponte reopening for asylum claims based on coercive population control policies in China.<sup>82</sup> However, the label “sua sponte” is misleading—the agency cannot reopen the case on its own initiative except in very limited circumstances; typically, a party must file a motion for sua-sponte reopening.<sup>83</sup> This option is thus potentially useful if an applicant needs to overcome time or number bars and DHS declines to join the motion, but it does not address the resource issues surrounding the ability to bring and successfully litigate a motion to reopen an immigration case, discussed below. Further, the future of sua-sponte reopening authority remains uncertain. The Trump administration promulgated a rule eliminating sua-sponte reopening except to correct ministerial errors; that rule is currently enjoined nationwide and under review by the Biden administration.<sup>84</sup>

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80. See James McHenry, Dir., Exec. Off. for Immigr. Rev., PM 21-15: Adjudicator Independence and Impartiality (Jan. 19, 2021), <https://www.justice.gov/eoir/book/file/1356761/download> [<https://perma.cc/UH67-Q6Y6>]; see also NAT'L IMMIGR. JUST. CTR., BASIC PROCEDURAL MANUAL FOR ASYLUM REPRESENTATION AFFIRMATIVELY AND IN REMOVAL PROCEEDINGS 51 (Dec. 2020) (noting that “the judges believe firmly they are not bound by agreement between the DHS and the respondent, and may not accept such stipulations”).
81. 8 C.F.R. § 1003.2(a) (2022) (BIA); *id.* § 1003.23(b)(1) (IJ).
82. See *X-G-W-*, 22 I. & N. Dec. 71, 74 (B.I.A. 1998).
83. 8 C.F.R. § 1003.2(a) (BIA) (providing that the agency can reopen a case on its own initiative to correct ministerial errors, but “[i]n all other cases,” it can reopen a case “solely pursuant to a motion filed by one or both parties.”); 8 C.F.R. § 1003.23(b)(1) (same for IJ).
84. The enjoined rule is Appellate Procedure and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 81,588 (Dec. 16, 2020). See *Centro Legal de la Raza v. Exec. Off. for Immigr. Rev.*, 524 F. Supp. 3d 919, 919 (N.D. Cal. 2021); *Cath. Legal Immigr. Network, Inc. v. Exec. Off. for Immigr. Rev.*, 513 F. Supp. 3d 154 (D.D.C. 2021). The cases challenging the regulation are being held in abeyance while the agency conducts its review pursuant to Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans, Exec. Order No. 14,012, 86 Fed. Reg. 82,777 (Feb. 5, 2021).

The need to litigate these motions in each individual case, even with DHS's potential support, thus leaves the door open for inconsistent outcomes among similarly situated applicants depending on whether their assigned adjudicator is amenable to reopening MPP cases. It might be possible to constrain adjudicators via targeted rulemaking or binding guidance mandating a certain outcome for these motions, but that action would undermine the goal, shared by many agency officials and immigration advocates alike, of increasing the independence of immigration decision-making from agency control. Indeed, the Attorney General (AG) has historically avoided taking steps such as directing EOIR adjudicators to grant certain motions or delegating authority to the EOIR director to adjudicate them himself, even though these tools are available under the law.<sup>85</sup> Even less drastic options that stop short of mandating an adjudicatory outcome, such as guidance from DHS that ICE attorneys will presumptively join all MPP motions to reopen, could be seen as interfering with traditional prosecutorial discretion.

Indeed, it appears that DHS has never required its attorneys to exercise prosecutorial discretion on a categorical basis absent an accompanying interim regulation. However, it has issued guidance strongly encouraging the positive exercise of discretion for groups such as U-Visa holders, individuals who received defective NTAs, and DACA recipients.<sup>86</sup> There is also precedent for ICE agreeing to join motions to reopen on a class-wide

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85. See 8 C.F.R. § 1003.0(c) (2022) (providing that the EOIR director cannot adjudicate cases himself “[e]xcept as provided by statute, regulation, or delegation of authority from the Attorney General, or when acting as a designee of the Attorney General” (emphasis added)).

86. *E.g.*, Peter S. Vincent, Principal Legal Advisor, ICE, Guidance Regarding U Nonimmigrant Status (U Visa) Applicants in Removal Proceedings or with Final Orders of Deportation or Removal 2 (Sept. 25, 2009), <https://www.ice.gov/doclib/foia/prosecutorial-discretion/u-visa-applicants.pdf> [<https://perma.cc/MW32-W93E>]; Memorandum from William J. Howard, Principal Legal Advisor, Immigr. & Customs Enft, to all OPLA Chief Counsel, on VAWA 2005 Amendments to the Immigration and Nationality Act and 8 U.S.C. § 1367, at 13 (Feb. 1, 2007); ICE Interim Litigation Position Regarding Motions to Reopen in Light of the U.S. Supreme Court Decision in *Niz-Chavez v. Garland* (June 9, 2021), <https://www.ice.gov/legal-notice> [<https://perma.cc/63T8-NNLA>]; Memorandum from Janet Napolitano, Secretary, DHS, on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children 2 (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/ED3T-FXC8>].



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basis when settling litigation, such as *Franco-Gonzalez v. Holder*, a class-action lawsuit on behalf of individuals with mental disabilities in immigration detention.<sup>87</sup> Nonetheless, the possibility of guidance that encourages reopening is insufficient to address the barriers that individuals with MPP removal orders face. Even if DHS agrees to join every MPP-related motion to reopen, the risk that EOIR will not grant them remains.<sup>88</sup>

In addition, practical obstacles prevent many individuals from bringing their own motions to reopen at all. This fact would likely lead to unequal application of the new policy to qualifying cases even if consistent adjudication of motions filed could be ensured. Several factors make it difficult for those with MPP removal orders to avail themselves of the rescission. Asylum seekers should not be expected to possess the legal expertise needed to prevail in motion practice in their cases. Very often, they lack the financial resources to retain counsel, and securing pro bono counsel requires the availability of lawyers with the capacity to accept the case as well as requiring the asylum seeker to navigate the logistics of identifying and retaining counsel, unless an organization identifies them and offers representation.

Nor is self-representation a viable solution for asylum applicants to obtain a full and fair hearing. Legal representation is strongly correlated with successful applications for immigration relief,<sup>89</sup> and the need for representation to successfully navigate proceedings is heightened when

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87. Agreement Regarding Procedures for Notifying and Reopening Cases of Franco Class Members Who Have Received Final Orders of Removal, ECF No. 807-1, *Franco-Gonzalez v. Holder*, No. CV 10-02211 DMG (C.D. Cal. Feb. 27, 2015), <https://www.ice.gov/sites/default/files/documents/Document/2015/Settlement%20Agreement.pdf> [<https://perma.cc/6GJJ-RXHU>].

88. See NAT'L IMMIGR. JUST. CTR., *supra* note 80.

89. *E.g.*, A.B.A. COMM'N ON IMMIGR., 2019 UPDATE REPORT: REFORMING THE IMMIGRATION SYSTEM 32 (2019), [https://www.americanbar.org/content/dam/aba/publications/commission\\_on\\_immigration/2019\\_reforming\\_the\\_immigration\\_system\\_volume\\_1.pdf](https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_1.pdf) [<https://perma.cc/N75S-LTY6>] (“Representation is associated with dramatically more successful case outcomes for immigrant respondents.”); Karen Berberich & Nina Siulc, *Why Does Representation Matter? The Impact of Legal Representation in Immigration Court*, VERA INST. JUST. (Nov. 2018), <https://www.vera.org/downloads/publications/why-does-representation-matter.pdf> [<https://perma.cc/94QY-WUAG>]; *Access to Counsel*, NAT'L IMMIGRANT JUST. CTR. (2020), <https://immigrantjustice.org/issues/access-counsel> [<https://perma.cc/7XSL-3FPP>].

pursuing one's claims involves added layers in the form of motion practice and coordination with opposing counsel. The complexity of immigration law alone is a serious hindrance to effective pro se representation.<sup>90</sup> On top of the substantive law, asylum applicants often face language barriers and varying levels of literacy. And because they are actively fleeing persecution, they are also frequently dealing with untreated and unresolved trauma.<sup>91</sup>

Allowing a decision on a class motion to reopen the cases of all eligible respondents would ensure that the inability to litigate a motion to reopen would not prevent qualifying individuals from receiving the benefit of a policy change. By simplifying the case procedurally, resolving the motion to reopen would also lessen the time and effort required to pursue the respondent's claims. Simpler cases would likely be easier for counsel to take on and would amplify the impact of legal representatives' resources. Nonprofit legal organizations that represent asylum seekers could organize their efforts accordingly under this new procedure to maximize the benefits of class motions to respondents.

Because of the individual merits decision that would follow the motion to reopen and the bar on subsequent motions that participation could trigger, I believe that an opt-in, rather than opt-out, procedure would better protect individuals' rights in the case of post-MPP class motion to reopen.<sup>92</sup> As discussed *supra* in Section III.A, EOIR, DHS, class counsel, and advocacy organizations could work to notify individuals of the existence of the class motion and their right to join within a certain period. This procedure balances the need for accessibility with the problems caused by reopening the cases of individuals who have not affirmatively agreed to join the class.

Third, the MPP rescission raises resource concerns due to the large number of applicants affected by this policy shift. Aggregation would mitigate these problems for various actors on both sides of immigration adjudication— asylum applicants, immigration defense counsel, advocacy organizations, DHS, and EOIR—by avoiding redundant motion practice

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90. See, e.g., Dana Leigh Marks, Nat'l Assoc. of Immigr. Judges, *Reflections on a 40-Year Career as an Immigration Lawyer and Judge*, CTR. FOR MIGRATION STUDIES (2018), <https://cmsny.org/publications/marks-40yr-career> [<https://perma.cc/LR69-YJJG>]; C.J.L.G. v. Barr, 923 F.3d 622, 635 (9th Cir. 2019) (Paez, J., concurring) (describing the complexity of immigration law).

91. See, e.g., Ben McVane, *PTSD in Asylum-seekers: Manifestations and Relevance to the Asylum Process*, PSYCH. RSCH. (2019), <https://doi.org/10.1016/j.psychres.2019.112698> [<https://perma.cc/X75V-HYUG>].

92. See *supra* Section III.A.

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across thousands of procedurally similar cases. It could also reduce some apprehension about making future beneficial policy changes retroactive because it would obviate the need for individuals to file scores of repetitive motions to apply a change to each one of their cases.

The resources of nonprofit organizations that provide legal counsel for immigrants are perpetually strained. For legal representatives and providers that assist with related needs, such as interpretation, litigating the same motion across individual cases limits the number of people that they can assist. From the agency's perspective, too, adjudicating thousands of substantially similar motions to reopen based on the MPP rescission expends significant government resources that an aggregated action would conserve.

These points highlight the positive impact that I imagine class motions could have in immigration adjudication. If respondents could bring one aggregate motion to reopen all proceedings conducted under MPP, the uncertainty of DHS's position on thousands of individual motions and each different IJ or BIA panel's decision could be avoided, and valuable resources for all parties could be conserved. The use of respondent-initiated aggregation, panels rather than a single adjudicator, and an opt-in mechanism with personal and public notice mitigates due-process concerns as much as possible.

### *C. Case Study: Administrative Closure*

Administrative closure is a docket-management technique allowing EOIR to "indefinitely suspend removal proceedings" in nonpriority cases, removing them from IJs' or the BIA's active dockets.<sup>93</sup> EOIR first began using administrative closure over three decades ago.<sup>94</sup> This practice has significant benefits for both the agency and noncitizens. For example, it can allow a respondent to "await the adjudication of a relevant collateral matter," such as an application before USCIS, from which he could obtain relief enabling the termination of removal proceedings, or it can be a tool to

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93. AM. CIV. LIBS. UNION & AM. IMMIGR. COUNCIL, ADMINISTRATIVE CLOSURE AFTER MATTER OF CRUZ-VALDEZ PRACTICE ADVISORY (2022), [https://www.aclu.org/sites/default/files/field\\_document/2019.10.22\\_castro-tum\\_pa\\_w\\_zuniga\\_romero\\_update\\_-\\_final.pdf](https://www.aclu.org/sites/default/files/field_document/2019.10.22_castro-tum_pa_w_zuniga_romero_update_-_final.pdf) [https://perma.cc/QJN5-FTKW].

94. See Gutierrez-Lopez, 21 I. & N. Dec. 479, 480 (B.I.A. 1996) (quoting Amico, 19 I. & N. Dec. 652, 654 n.1 (B.I.A. 1988)).

suspend proceedings for recipients of deferred action.<sup>95</sup> Administrative closure is also desirable because it can allow a respondent to maintain work authorization based on a pending application.<sup>96</sup> Furthermore, it “eliminates unnecessary costs associated with remaining in active removal proceedings” and frees up IJs and BIA members “to prioritize other cases.”<sup>97</sup>

The BIA established an individualized standard for administrative closure in 2012 with its decision in *Matter of Avetisyan*,<sup>98</sup> which requires EOIR to consider “all relevant factors” in the respondent’s case, including the likelihood of success on any outside pending petitions and the “ultimate outcome of removal proceedings” when the case is eventually recalendared or reinstated.<sup>99</sup> This shift was motivated by the BIA’s discomfort with the previous prevailing standard that required the consent of both parties, effectively giving DHS a veto power over the adjudicatory discretion of EOIR decision-makers.<sup>100</sup> In a subsequent case, *Matter of W-Y-U-*, the BIA refined the standard, making the primary consideration “whether the party opposing administrative closure has provided a persuasive reason for the case to proceed and be resolved on the merits.”<sup>101</sup>

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95. AM. CIV. LIBS. UNION & AM. IMMIGR. COUNCIL, *supra* note 93.

96. DHS can alternatively move to have the case dismissed if it decides not to pursue removal, but the work authorization issue makes administrative closure preferable for individuals pursuing meritorious applications. For example, a respondent who applies for defensive asylum and obtains employment authorization based on the pending application can maintain it if her case is administratively closed but not if the agency dismisses it without reaching the merits. See PRACTICE ADVISORY: THE RETURN OF ADMINISTRATIVE CLOSURE, NAT’L IMMIGR. JUSTICE CTR. 3 (2020), <https://immigrantjustice.org/for-attorneys/legal-resources/file/practice-advisory-return-administrative-closure> [<https://perma.cc/6QUW-3Y89>] (noting that noncitizens with administratively closed applications for asylum, withholding of removal, adjustment of status, or cancellation of removal may be eligible for work authorization based on their pending applications).

97. Elizabeth Montano, *The Rise and Fall of Administrative Closure in Immigration Courts*, 129 YALE L.J. F. 567, 568 (Feb. 11, 2020).

98. *Id.* at 572 (citing *Avetisyan*, 25 I. & N. Dec. 688, 694 (B.I.A. 2012)).

99. *Avetisyan*, 25 I. & N. Dec. at 696 (listing six nonexhaustive factors for adjudicators to consider).

100. Montano, *supra* note 97, at 572.

101. *W-Y-U-*, 27 I. & N. Dec. 17, 20 (B.I.A. 2017).

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The program's tumultuous recent history spotlights the AG's regulatory power to certify BIA cases to himself as a method of setting agency policy.<sup>102</sup> The Trump administration effectively eliminated administrative closure in May 2018, when AG Sessions announced in *Matter of Castro-Tum*<sup>103</sup> that IJs and the BIA lacked authority to administratively close cases unless regulations or settlement agreements explicitly allowed it. The agency then codified that change in the same rule that gutted adjudicators' sua-sponte reopening authority, which remains enjoined and under study by the Biden administration. In the meantime, AG Garland overruled *Castro-Tum* and revived administrative closure when he certified another case, *Matter of Cruz Valdez*,<sup>104</sup> to himself. Garland explained that *Castro-Tum* "departed from long-standing practice" and had been rejected by three federal courts of appeals.<sup>105</sup>

The *Cruz Valdez* decision restored the former *Avetisyan* and *W-Y-U* standard pending the promulgation of a regulation addressing administrative closure.<sup>106</sup> The upcoming rulemaking, or a self-certification of a relevant case by the AG, is thus an opportunity for the agency to move away from an individualized administrative-closure inquiry. The agency could deemphasize prongs like likelihood of success that require individualized showings and focus instead on DHS's announced enforcement priorities, creating a presumption that cases outside priority enforcement categories may be removed from the active docket. In that case, once a respondent filed a class motion, EOIR could adjudicate the administrative closure of all individual cases within that class and notify respondents that their case was administratively closed. This review of factual profiles and closing of cases that met the class definition would be similar to EEOC's assessment and aggregation of identical individual discrimination complaints in its class procedure.<sup>107</sup> Following substantive modification of the administrative closure standard, class motions, enforcement priorities, and administrative closure could be a powerful trio

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102. 8 C.F.R. § 1003.1(h)(1)(i) (2022).

103. 27 I. & N. Dec. 271 (A.G. 2018).

104. 28 I. & N. Dec. 326 (A.G. 2021).

105. *Id.* at 328-29.

106. *Id.* at 326 (specifying that EOIR adjudicators should apply the *Avetisyan* and *W-Y-U* tests "[w]hile rulemaking proceeds and except when a court of appeals has held otherwise").

107. *See supra* text accompanying note 26.

of docket-management tools that would enable the agency to conserve its resources and allow more people to seek and obtain immigration relief.

Because the administrative-closure standard is a matter of internal policy and precedent, the agency can alter it through rulemaking or the AG's self-certification of a BIA case, as it has done several times already. If EOIR made the standard objective by equating presumptive eligibility for administrative closure with DHS's enforcement priorities, the combination of administrative closure and class motions could vastly reduce the active caseload at EOIR, allowing both DHS and EOIR to focus their resources on priority cases. This move would have some basis in the practices of past administrations: during the Obama administration, DHS often consented to administrative closure of nonpriority cases "as a tool to preserve government resources."<sup>108</sup>

Formally tying eligibility for administrative closure to enforcement priorities without requiring individualized assessments would provide a workable, consistent standard that EOIR could apply when ruling on a class motion for administrative closure. Current enforcement priorities identify three discrete categories of individuals that DHS will seek to apprehend and remove: noncitizens who are considered a threat to national security, public safety, or border security.<sup>109</sup> While these priorities influence DHS's new apprehensions and decisions such as scheduling a noncitizen for removal, they could be all the more effective at conserving agency resources and allowing respondents to pursue affirmative relief if noncitizens already in proceedings could obtain administrative closure through a class motion ruling by virtue of their nonpriority status.

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108. Montano, *supra* note 97, at 574 (citing Memorandum from Riah Ramlogan, Acting Principal Legal Advisor, Immigr. & Customs Enft, to Off. of Principal Legal Advisor Att'ys 2 (Apr. 6, 2015), [https://www.ice.gov/doclib/foia/prosecutorial-discretion/guidance\\_eoir\\_johnson\\_memo.pdf](https://www.ice.gov/doclib/foia/prosecutorial-discretion/guidance_eoir_johnson_memo.pdf) [https://perma.cc/NZ7F-Z7CN]); Memorandum from Peter S. Vincent, Principal Legal Advisor, Immigr. & Customs Enft, to All Chief Counsel, Off. of Principal Legal Advisor, Exec. Off. for Immigr. Rev. 3 n.5 (Nov. 17, 2011), <https://www.ice.gov/doclib/foia/prosecutorial-discretion/case-by-case-review-incoming-certain-pending-cases-memorandum.pdf> [https://perma.cc/S65D-T7T6]).

109. See Memorandum from Alejandro Mayorkas, Sec'y, Dep't of Homeland Sec., to Tae D. Johnson, Acting Dir., Immigr. & Customs Enft, Guidelines for the Enforcement of Civil Immigration Law at 3-4 (Sept. 30, 2021), <https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf> [https://perma.cc/SXK8-G5LF].

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### D. Barriers to Aggregation

Although aggregation is well-suited to meet some of EOIR's pressing needs, there are significant barriers that attempts to implement aggregation in removal proceedings are bound to encounter.<sup>110</sup> Some of the features that make aggregation an attractive solution for immigration adjudication also make it difficult to implement fairly in this setting. In particular, substantive immigration law limits agencies' ability to embrace the potential for procedural reform through aggregation. Two factors contributing to this limitation are the pervasiveness of discretionary relief and immigration law's capacious, individualized reach into all areas of applicants' or respondents' lives, including their criminal history, medical history, employment history, family and community ties, and moral character.<sup>111</sup> Although these barriers do not make aggregation impossible to implement in the immigration context, they define important limits on its use.

#### 1. Discretionary and Individualized Nature of Immigration Relief

Most forms of relief available in removal proceedings, such as asylum, adjustment of status, statutory waivers of inadmissibility and deportability, cancellation of removal, and voluntary departure, contain a discretionary component.<sup>112</sup> Mandatory forms of relief, such as withholding of removal and protection under the Convention Against Torture (CAT), do not provide a path to permanent legal status, making the discretionary forms of relief

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110. See Legomsky, *supra* note 140, at 937 (describing immigration law as a "constitutional oddity"); Marks, *supra* note 90 (describing immigration law as "a substantive law which has spiraled out of control" and "so misshapen by unrelated, sometimes conflicting or overly repetitive congressional tweaks that it has become an almost unnavigable labyrinth").

111. Kate Aschenbrenner, *Discretionary (In)Justice: The Exercise of Discretion in Claims for Asylum*, 45 U. MICH. J.L. REFORM 595, 624 (2012) ("[A]n immigration judge can consider essentially anything he wishes in making a discretionary determination . . ."). The invasive nature of immigration law's inquiry into noncitizens lives has been described as an aspect of a system of "post-entry social control" to which immigrants are subjected. DANIEL KANSTROOM, *DEPORTATION NATION* 91-131 (2007).

112. See Shoba Sivaprasad Wadhia, *Darksided Discretion in Immigration Cases*, 72 ADMIN. L. REV. 367, 376-402 (2020); Patel, 17 I. & N. Dec. 597 (B.I.A. 1980).

highly preferable for respondents.<sup>113</sup> When determining whether to grant relief, the IJ not only makes findings as to whether the respondent meets the factual eligibility criteria; she also weighs the respondent's positive and negative equities and decides whether to favorably exercise discretion. These "all-encompassing"<sup>114</sup> considerations often include whether the respondent has family members in the United States, the citizenship status of those family members, the respondent's community involvement, employment, length of residence in the United States, contact with the criminal legal system, medical conditions, and many other categories of personal information.<sup>115</sup> "Virtually anything is a permissible factor."<sup>116</sup>

Because of the discretionary component, eligibility requirements for important categories of immigration relief are so individualized that it would be nearly impossible for a collective removal defense to satisfy the commonality requirement found in some of the best-tested models of claim aggregation, such as class actions.<sup>117</sup> While informal adjudication's flexibility allows agencies to group claims in ways that do not necessarily satisfy Rule 23 commonality requirements, such an initiative would likely be constitutionally problematic in this context. The need for commonality in an aggregate action, especially a representative one, is rooted in due-process protections. Even in informal adjudication, the Due Process Clause still provides a "theoretical floor."<sup>118</sup> Every individual asylum claim, for example, is unique. Adjudication requires the analysis of whether someone meets the statutory refugee definition<sup>119</sup> based on their experience or fear of persecution because of a protected ground in the nation that they have

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113. *Cf.* Aschenbrenner, *supra* note 111, at 624-32 (arguing that asylum should be a mandatory form of relief).

114. *Id.* at 623.

115. *See also* Pula, 19 I. & N. Dec. 467, 473 (B.I.A. 1987) (directing adjudicators to consider "the totality of the circumstances"); DeLucia, 11 I. & N. Dec. 565 (B.I.A. 1966) (holding that a noncitizen seeking a favorable exercise of discretion cannot request to limit the scope of inquiry to certain aspects of the case); Y---, 7 I. & N. Dec. 697 (B.I.A. 1958) (same).

116. Aschenbrenner, *supra* note 111, at 623; *accord id.* at 623-24.

117. *Cf.* Hannaway, *supra* note 10, at 1460 (reasoning that, in the context of Social Security claims, aggregation is ill-suited to "necessarily individualized" questions of how someone's disability affects her ability to do her particular work).

118. Bremer, *supra* note 10, at 1758.

119. *See* 8 U.S.C. § 1101(a)(42)(A) (2018); *id.* § 1158(b)(1)(A).



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fled. Aggregating these fact-bound claims, especially in a representative action, could raise serious due-process concerns.

Even when relief is largely based on factual characteristics that groups of respondents might share, such as the same category of criminal conviction or number of years residing in the United States, the discretionary nature of the ultimate decision to grant or deny the application makes aggregation of whole immigration cases infeasible. The adjudicator's decision that one individual does not merit a favorable exercise of discretion cannot fairly preclude other applicants, who have unique equities to be balanced, from having their claim reviewed on the merits. The adjudicator's broad discretion means that even the smallest difference could tip the scale. Family-based adjustment of status is one such form of relief for which aggregation is not viable despite its largely fact-based statutory eligibility requirements.<sup>120</sup> IJs may adjust the status of respondents who have a qualifying family relationship and meet the other eligibility criteria,<sup>121</sup> but because the decision to grant or deny adjustment of status is discretionary, it could not fairly bind a class, for example, of all individuals in removal proceedings who are married to a U.S. citizen. Although many people satisfy the same factual criteria, it is unrealistic to imagine a class of respondents sharing so many personal equities that their claims for discretionary relief could be fairly adjudicated together. Aggregation of removal cases or relief applications in their entirety would thus likely violate due process, leaving aggregation with a more limited role to play in EOIR proceedings. For these reasons, I favor partial aggregation in the form of class motions as a type of aggregation better suited to the EOIR context under the current substantive law.

### 2. Posture as Respondents

The fact that noncitizens in removal proceedings are respondents, rather than petitioners, also complicates their ability to aggregate. Most existing aggregation procedures in the civil litigation and administrative contexts involve petitioner classes or the partial aggregation of affirmative claims. Respondent classes are less tested and, in some ways, less intuitive, since the individuals forming the class are not the ones who initiated the claim or proceedings. Despite this puzzle, aggregation initiated by the regulated parties is preferable to agency-led aggregation from a due-process standpoint, as discussed further *infra* in Section III.D.3. As the Texas

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120. See Wadhia, *supra* note 112, at 389.

121. See 8 U.S.C. § 1255(a) (2018).

“surge court” example demonstrates, there are institutional incentives for EOIR to use aggregation in pursuit of expediency at the expense of due process for noncitizens. But since parties are likely to decide to aggregate only when it is in their interest to do so, placing the decision to aggregate in respondents’ hands would ensure that agencies do not aggregate claims against noncitizens’ interests.

To conceive of respondent-led administrative aggregation, it is useful to consider forms of defendant aggregation that have been explored in civil litigation. In 2005, Assaf Hamdani and Alon Klement proposed a procedure for the class defense, arguing that just as petitioners have the ability to join forces to pursue their civil-litigation claims, “justice and efficiency also mandate that similarly positioned defendants be provided with an adequate procedure for consolidating their defenses.”<sup>122</sup> Though they developed their proposal with civil litigation in mind (e.g., companies suing many individuals for illegally downloading music), many of its conceptual underpinnings find easy analogs in removal adjudications. For example, “a powerful plaintiff employing aggressive litigation tactics fil[ing] similar lawsuits against thousands of...dispersed defendants”<sup>123</sup> roughly describes DHS’s issuance of NTAs to noncitizen respondents, whose proceedings EOIR then adjudicates. Although not perfectly analogous, the power imbalance between a large corporation suing an individual evokes the asymmetry between the U.S. government and a single noncitizen whose removal it seeks in EOIR proceedings. It makes sense that principles conceived to enable individual civil litigants to coordinate a defense of their rights could find some purchase in the removal context.

The “defense class action” envisions a plaintiff suing a defendant who, once served, asks the court to convert the suit into a class defense.<sup>124</sup> The court would then “alter the nature of the plaintiff’s suit” so that the judgment in that case would bind the plaintiff against all class members. Adequacy of representation and the court’s other considerations for class certification would be determined according to similar inquiries as in the plaintiff class-action context. Since “[d]ue process requires that potential class members be given notice of the pending class certification and an

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122. Assaf Hamdani & Alon Klement, *The Class Defense*, 93 CALIF. L. REV. 687, 687 (2005). For an additional perspective on defendant class actions that considers possible deficiencies in Hamdani & Klement’s approach, see Francis X. Shen, *The Overlooked Utility of the Defendant Class Action*, 88 DENV. U. L. REV. 73 (2010).

123. Hamdani & Klement, *supra* note 122, at 690.

124. *Id.* at 731-34.

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opportunity to opt out,” but “future defendants lack incentive to step forward,” public rather than personal notification might be most realistic.<sup>125</sup> This issue is somewhat simpler in the context of immigration class motions: the government already knows of the identities of the respondent class, and the motions would apply in pending cases or reopen proceedings that were previously commenced against the respondent, leaving no need for parties to self-identify in a way that would impede notification.

But, as in the petitioner-led context, the concept of aggregation encompasses a broad array of possible implementations. Representative class actions, “quasi-class action settlement structures through MDL,”<sup>126</sup> joinder,<sup>127</sup> consolidation,<sup>128</sup> and other vehicles are all forms of aggregation from which agencies can choose—or that they can alter—to fit their needs. Literature further exploring the idea of defendant-led aggregation has questioned the suitability of representative structures for this purpose.<sup>129</sup> Indeed, “[a]lthough Rule 23 purports to apply equally to plaintiffs and defendants,” and despite the theoretical possibility of defendant class actions according to scholarship, they “are virtually non-existent,” a fact that suggests difficulty translating this idea into a workable mechanism.<sup>130</sup>

The exploration of other vehicles for aggregating defendants has generated valuable insights for the immigration context. Indeed, anytime “entire cases are aggregated, a mix of common and individual issues will exist, creating concerns about fact-finder confusion, fairness and autonomy, and coordination costs.”<sup>131</sup> This observation resonates with the individualized, discretionary nature of immigration relief. In the civil

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125. *Id.* at 732.

126. Jaime Dodge, *Disaggregative Mechanisms: Mass Claims Resolution Without Class Actions*, 63 EMORY L.J. 1253, 1256 n.12 (2014). MDL has been used to consolidate pretrial proceedings when federal civil actions in different districts depend on common questions of fact. *See* 28 U.S.C. § 1407 (2018).

127. FED. R. CIV. P. 19, 20.

128. FED. R. CIV. P. 42.

129. Greg Reilly, *Aggregating Defendants*, 41 FLA. ST. UNIV. L.R. 1011, 1017 (2014). Reilly’s concerns about representative defense aggregation are that it would “increase[] the chances of jury confusion” or heighten the risk that civil liability and evidence will be misattributed due to its minimization of individualization. *Id.* at 1053.

130. *Id.* at 1017 (citing Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 119-20 (1996)).

131. *Id.* at 1056.

litigation context, a form of partial defense aggregation is one possible solution. Reilly proposes “[l]imiting aggregation to common issues, with individual issues resolved separately outside of the group litigation” in a procedure that he dubs “inter-district related case coordination.”<sup>132</sup> His idea has roots in MDL procedures, in which cases are combined only for pretrial proceedings and then proceed separately, as well as in related cases within a federal district.<sup>133</sup> The respondent posture of noncitizens in removal proceedings thus does not preclude them from initiating aggregation; rather, scholarship on civil defendants supports the idea that partial aggregation is most appropriate in this context.

### 3. Risk of Abuse

Another important counterargument to the advisability of EOIR developing an aggregation mechanism is the risk that the agency would use aggregation to undermine, rather than promote, due process for respondents. An administration eager to restrict immigration could use aggregation to dispose of many immigration cases as quickly as possible, and the overall fragility of immigrants’ constitutional rights in removal proceedings could leave them vulnerable to such policies.<sup>134</sup>

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132. *Id.*

133. *See id.* at 1056-57.

134. The U.S. legal system does not recognize many constitutional protections for noncitizens in immigration proceedings, such as the right to appointed counsel, the right to a speedy trial, or a prohibition on retroactive application of penalties. *See generally* TWO SYSTEMS OF JUSTICE, AM. IMMIGR. COUNCIL (2013), [https://www.americanimmigrationcouncil.org/sites/default/files/research/aic\\_twosystemsofjustice.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/aic_twosystemsofjustice.pdf) [<https://perma.cc/53HS-NLFB>] (comparing constitutional protections in immigration removal proceedings and the criminal legal system). The Due Process Clause of the Fifth Amendment, however, does govern these proceedings. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“[T]he Due Process Clause applies to all ‘persons’ within the United States, including [noncitizens], whether their presence here is lawful, unlawful, temporary, or permanent.”); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (explaining that noncitizens “who have once passed through our gates, even illegally,” are afforded the full panoply of procedural due process protections, and “may be expelled only after proceedings conforming to traditional standards of fairness”). The Supreme Court, however, has potentially disturbed these longstanding principles in recent decisions. *See* Diana G. Li, *Due Process in Removal Proceedings After*

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Past EOIR experiments with types of aggregation illustrate this danger. Often, the push for efficient processing has prioritized speed at the expense of noncitizens' due-process rights. For example, the agency used immigration "surge courts," a form of informal aggregation, to adjudicate the asylum claims of Central American families detained at a facility in Dilley, Texas.<sup>135</sup> These "surge courts" were connected with what was effectively a no-release policy for asylum-seeking families for the purpose of deterring future arrivals.<sup>136</sup> In *R.I.L-R v. Johnson*, a federal district court enjoined the policy due to the serious due-process concerns it raised.<sup>137</sup> In particular, the court held that the government's general deterrence justification did not outweigh respondents' right to freedom from imprisonment, and the fact that the government applied the policy indiscriminately to all individuals who arrived seeking asylum—regardless of the merits of their claims or their likelihood of dangerousness—further weakened its justification.

The concern that institutional values of expediency incentivize the abuse of mass adjudication procedures makes allowing regulated parties to initiate aggregation preferable to agency-directed aggregation. The need for a respondent-initiated procedure is not necessarily a reflection of a risk from class motions, which aim to minimize due-process concerns through their limited nature and features like the ability to opt out. Rather, if government-led aggregation were to become normalized in immigration adjudication, there is reason to believe that agency officials' assumptions and biases regarding categories of cases that are likely to be meritorious could replace individualized process. This danger of abuse is especially real for classes of respondents, such as recent arrivals at the border or noncitizens with criminal convictions, who tend to be politically unpopular and whose due-process rights are perpetually debated and eroded. Given the grave consequences of error in removal proceedings, this risk is too high to tolerate, and the adoption of an exclusively respondent-driven aggregation model helps carefully cabin it from the outset.

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Thuraissigiam, 74 STAN. L. REV. 793 (2022) (discussing *Department of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959 (2020), and arguing for limiting its holding to its facts in order to reconcile the decision with precedent).

135. Sant'Ambrogio & Zimmerman, *supra* note 1, at 1664.

136. See Flores v. Lynch, 828 F.3d 898, 904-05 (9th Cir. 2016), as reprinted in BILL ONG HING, JENNIFER M. CHACÓN & KEVIN R. JOHNSON, IMMIGRATION LAW AND SOCIAL JUSTICE 681 (2d ed. 2022).

137. *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 187-88 (D.D.C. 2015).

A mechanism allowing respondents to control the aggregation lever would be a wise exercise in self-restraint by which EOIR could impede future abuse rather than paving the way for it. As in the criminal context, serious life, liberty, and property interests are at stake for individuals in removal proceedings, even if constitutional jurisprudence does not fully recognize or protect them.<sup>138</sup> A related concern is the asymmetry of power between the agency and noncitizens: not only are the government's interests adverse to the respondent in removal proceedings, but the government is a vastly more sophisticated and well-resourced litigant. Vesting the power to aggregate with respondents is thus an important way to prevent erroneous deprivation of rights and correct for that power imbalance.

#### IV. POLICY BENEFITS OF CLASS MOTIONS

Both EOIR and the parties that it regulates stand to benefit substantially from implementation of a class motion mechanism in removal adjudications. Three advantages over individual claims generally attributed to aggregation, whether in civil litigation or administrative adjudication, are improved legal access, efficiency, and consistency.<sup>139</sup> Mapping these benefits onto some of immigration adjudication's longstanding problems reveals that EOIR is a natural candidate for the use of partial aggregation and that class motions are particularly well-suited to promote important policy values.

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138. Although the interests at stake in removal proceedings and criminal proceedings are similarly weighty, there is a stark difference in the procedural protections afforded to immigrant respondents and criminal defendants. *See, e.g.,* TWO SYSTEMS OF JUSTICE, *supra* note 134; sources cited *infra* notes 160-161 and accompanying text; Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 511-518 (2007).

139. Sant'Ambrogio & Zimmerman, *supra* note 1, at 1649; Grammel & Macey, *supra* note 20, at 126 (“[T]he general reasons used to justify aggregation in civil litigation—that it increases judicial efficiency, promotes legal access, and makes judicial decisions more consistent—apply part and parcel to administrative proceedings.”).

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### A. Access and Participation

A host of due-process concerns in immigration proceedings fall under the category of lack of access to participation. These barriers stem from the systemic failure to accommodate any of a range of circumstances that limit a respondent's ability to advocate for her interests. Centuries of deference to the government's denial of rights to noncitizens<sup>140</sup> has produced a "law enforcement assembly line"<sup>141</sup> that functions to issue removal orders to as many people as possible as quickly as possible. The complexity of the relevant substantive law, lack of government-appointed legal counsel, language barriers, conditions of detention or supervision, and other concerns all weigh against the noncitizen fighting to assert her claims for immigration relief.<sup>142</sup> Of these factors, one of the most striking is the lack of right to appointed counsel, even for children.<sup>143</sup>

A respondent-initiated class motion could promote legal access for individuals who lack it under the current regime. A chief benefit of aggregation is that it enables parties to bring claims that they could not bring individually. The traditional illustration of this principle in the context of class-action civil litigation is a claim for monetary damages that is too small to warrant its own complaint. Although bringing the claim would serve the interests of justice by vindicating the injured party's rights and deterring the defendant's bad acts, without aggregation, it might not be worth the resources to litigate the case, or the claim might not satisfy requirements for jurisdiction. In the immigration context, the principle of meaningful access to adjudication looks different than this classic example, primarily due to the extremely high stakes of each individual

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140. See, e.g., David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29 (2015); Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925 (1995).

141. INNOVATION L. LAB & S. POVERTY L. CTR., *supra* note 54.

142. See Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 KAN. L. REV. 541, 563-72 (2011).

143. At the time of writing, almost one-third of the new immigration removal cases that DHS had initiated in FY 2022 were against children aged zero to seventeen. *One-Third of New Immigration Court Cases Are Children; One in Eight Are 0-4 Years of Age*, TRAC IMMIGR. (Mar. 17, 2022), <https://trac.syr.edu/immigration/reports/681> [<https://perma.cc/8YAP-A4GS>]. Twelve percent, or 32,691 cases, are children between ages zero and four. *Id.*

adjudication<sup>144</sup> juxtaposed with significant barriers to parties' participation. I argue that these realities of the immigration system heighten the potential gain from class motions, making it an even more compelling reform than in other contexts.

A class-motions policy alone cannot cure EOIR's systemic issues, but it would promote noncitizens' access to justice in several ways. First, it creates the potential for respondents to combine resources. Class motions would give noncitizens a way to collectively assert a common claim before the agency—something that they cannot currently do. Although immigration proceedings involve many individualized determinations, there are discrete circumstances where joining forces is beneficial, and partial aggregation directly serves that goal. By its design, the immigration system discourages noncitizens from pursuing relief and penalizes the exercise of procedural rights (for example, by prolonging time in detention during the appeals process). Aggregation fosters the possibility of collective impact, as opposed to individual adjudications that can have little effect on the overall administration of the system.<sup>145</sup> One IJ decision, or even one federal court of appeals decision on a petition for review, is unlikely to cause the agency to reevaluate its internal administration or alter its processes to improve due-process protections.<sup>146</sup> Especially in a context like removal proceedings, where regulated parties have relatively little power as individuals, it is all the more likely that their constitutional rights will be violated and that those violations will then go unredressed if they cannot harness the benefits of aggregation.<sup>147</sup>

This mechanism would also amplify the impact of organizations that provide pro bono representation. Rather than litigating only as many individual motions as limited resources allow, counsel on a class motion could clear certain procedural obstacles across all affected cases at once. The subsequent proceedings in each case would be simpler as a result, allowing individual counsel or pro se respondents to focus efforts on their

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144. See sources cited *infra* notes 160-161.

145. See sources cited *infra* note 165.

146. *Id.*

147. See, e.g., *ICE Can Deport Those Who Complain of Abuse by the Agency*, NBCNEWS (Aug. 5, 2014, 4:23 PM), <https://www.nbcnews.com/news/latino/ice-can-deport-those-who-complain-abuse-agency-n173186> [<https://perma.cc/9VQ3-DD6S>]; Maunica Sthanki, *Deconstructing Detention: Structural Impunity and the Need for an Intervention*, 65 RUTGERS L. REV. 447, 464-65 (2013).



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substantive claims for relief rather than the procedural issue that the class motion resolved.

Class motions would thus increase the effectiveness of existing pro bono resources and promote access to the legal system for individuals who might otherwise abandon or lose their cases due to lack of counsel, language interpretation services, or other resources.

### *B. Efficiency*

Agencies conducting high-volume adjudications benefit from aggregation as a mechanism to reduce backlog and avoid adjudicating substantially similar claims many times over. This change would contribute to improved decisional quality, thereby promoting due-process values. Aggregation of claims or portions of proceedings would ease the pressure on EOIR adjudicators to decide cases quickly rather than correctly. More time and attention on each case and claim would ameliorate one major factor that compromises accurate decision-making.<sup>148</sup>

The principal way that high-volume adjudication compromises decisional quality is by undermining accuracy. Accuracy has been a key consideration in administrative due-process cases since *Goldberg v. Kelly*,<sup>149</sup> when it “emerged as an element of...the government’s interest in procedural expedition” and “served to subordinate that interest where welfare pretermination hearings were concerned.”<sup>150</sup> Following *Goldberg*, accurate decision-making continued to be “equated with the state’s interest . . . , tipping the balance forcefully in favor of the private party’s procedural demands.”<sup>151</sup> Finally, in *Mathews v. Eldridge*,<sup>152</sup> accuracy was enshrined as an independent component of the constitutional analysis. *Eldridge* made clear that the public interest was not in “getting every decision right, but rather an interest in a generally reliable process of decision.”<sup>153</sup>

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148. See *C.J.L.G. v. Barr*, 923 F.3d 622, 636-37 (9th Cir. 2019) (Paez, J., concurring) (noting that “the volume of cases on an IJ’s docket severely limits the IJ’s capacity to develop the record” and observing that that caseload is “enormous”).

149. 397 U.S. 254 (1970).

150. *MASHAW*, *supra* note 13, at 103.

151. *Id.* at 104.

152. 424 U.S. 319 (1976).

153. *MASHAW*, *supra* note 13, at 104.

Removal proceedings routinely fall woefully short of the *Eldridge* standard of a reliable decision-making process. EOIR conducts among the highest number of adjudications of any agency each year.<sup>154</sup> Resource deficiencies contribute to adjudicators' inability to "competently handle" the enormity of their caseload, with serious consequences borne by respondents.<sup>155</sup> IJs frequently issue rushed decisions that are based on poorly developed records, legally incorrect, or underexplained.<sup>156</sup> An immense workload and pressures from superior agency officials lead to hasty, inaccurate decision-making.<sup>157</sup> Recently retired IJ Dana Leigh Marks, who famously characterized IJs' work as "doing death penalty cases in a traffic court setting," has emphasized that when dockets are crowded, IJs' "attention spans are shrinking."<sup>158</sup> Another former IJ stated that "[d]ue process is nothing" in removal proceedings; rather, "[i]t's an assembly line. They come down a belt, you've got a big stamp, you stamp them on the forehead that says 'deport,' and away they go. The problem is you don't have time to grant relief and have a hearing . . . It's just a law enforcement assembly line."<sup>159</sup>

Considering the gravity of respondents' interests in these proceedings, this situation is untenable from a due-process standpoint.<sup>160</sup> Noncitizens in

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154. Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 TEX. L.R. 1097, 1104-05, 1111 (2018).

155. See A.B.A., REFORMING THE IMMIGRATION SYSTEM, at 2-16 (2010) (noting that although Lustig et al.'s 2008 stress and burnout survey did not make the correlation between IJs' burnout and courtroom results, these factors were clearly significant problems).

156. See Cohen, *supra* note 61, at 542-45 ("In many cases, [circuit judges'] review concluded that the immigration judges' reasoning was incoherent, indecipherable, or not supported by the record."); Jill E. Family, *Immigration Adjudication Bankruptcy*, 21 J. CONST. L. 1025, 1046 (2019) (explaining that the Trump "[a]dministration's actions value efficiency at the expense of accuracy" in immigration adjudication).

157. *E.g.*, Ames et al., *supra* note 45, at 9 (explaining that the caseload crisis makes hard to decide cases accurately).

158. Mark A. Drummond, "Death Penalty Cases in a Traffic Court Setting": Lessons from the Front Lines of Today's Immigration Courts, 44 LITIG. NEWS 26-27 (2018).

159. INNOVATION L. LAB & S. POVERTY L. CTR., *supra* note 54.

160. See, *e.g.*, *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) ("[Deportation] obviously deprives [the noncitizen] of liberty . . . It may result also in loss of both property and life, or of all that makes life worth living.").

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removal proceedings face “deportation back to a country where [they] may face anything from undesirable living conditions to the possibility or even probability of a violent death.”<sup>161</sup> Many have lived in the United States for much of their lives, often as lawful permanent residents (LPRs), and face separation from their families, loss of their careers and businesses, and myriad other consequences as the result of a civil administrative violation.

One attempt at reform has been the requirement that IJs explain the basis for their decisions, but this reason-giving requirement is stricter in some circuits than others and mainly serves to permit meaningful judicial review, rather than furthering “a participatory or legitimizing” goal.<sup>162</sup> For many individuals ordered removed, judicial review is not practically obtainable. The same systemic barriers that burden participation in immigration proceedings persist throughout the appeals process and make the prospect of filing a petition for review in the circuit court formidable.<sup>163</sup> Even if a noncitizen does file a petition for review, deferential standards of appellate review and the stripping of federal courts’ jurisdiction to review many facets of removal decisions<sup>164</sup> further reduces the possibility that the

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161. Bremer, *supra* note 10, at 1795-96; *see id.* at 1768, 1777-78.

162. Cohen, *supra* note 61, at 546.

163. *See supra* Section II.A. In fact, bringing a petition for review (PFR) of a final BIA decision is likely to be more difficult than participation in agency removal proceedings. Not only does it entail litigating in federal court, often pro se, but because in many circuits there is no automatic stay of removal issued once a PFR is filed, petitioners are often removed from the United States while their PFRs are pending. Even if they successfully litigate those PFRs from abroad and obtain relief, they might lack the resources to return to the United States despite having lawful status. *See* Tianyin Luo & Sean Lai McMahon, *Victory Denied: After Winning on Appeal, An Inadequate Return Policy Leaves Immigrants Stranded Abroad*, BENDER’S IMMIGR. BULLETIN (2014), [https://www.law.nyu.edu/sites/default/files/upload\\_documents/19%20Benders%20Immigr%20Bull%201061\\_Victory%20%282%29.pdf](https://www.law.nyu.edu/sites/default/files/upload_documents/19%20Benders%20Immigr%20Bull%201061_Victory%20%282%29.pdf) [<https://perma.cc/J877-BZJC>]; *FAQs: Facilitating Return for Lawfully Removed Aliens*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Nov. 3, 2020), <https://www.ice.gov/remove/facilitating-return> [<https://perma.cc/DE3R-4QV9>] (notifying individuals who win their immigration cases after ICE deports them that they “will be responsible for all transportation costs back to the United States and any fees associated with acquiring the required passport”).

164. *See, e.g., Patel v. Garland*, 142 S. Ct. 1614 (2022) (holding that federal courts lack jurisdiction to review facts found as part of certain discretionary immigration relief proceedings); *see also Garland v. Aleman Gonzalez*, 142 S.

federal courts can be a check on EOIR's accuracy. The contribution of individual appeals to system-wide progress or the protection of individuals who are unable to appeal is thus highly limited. At bottom, an appeal in an individual case "does not oblige the agency or a reviewing court 'to determine whether' the appeal represents 'an isolated problem or the tip of an iceberg of similar but unappealed cases.'"<sup>165</sup> Thus, while a reason-giving requirement assists federal appellate judges in reviewing the records that make it to their courthouses, additional reforms are needed to improve systemic efficiency and, with it, accuracy.

Inaccuracy that starts at the IJ level contributes to a cycle of severe delays in cases and worsens the agency's overall backlog. Immigration removal cases, especially those cases in which individuals are pursuing meritorious claims for relief that motivate them to continue to assert their rights, frequently take years to complete. Either party might appeal an IJ's decision, and the BIA might remand to the IJ multiple times before the case is ultimately resolved.<sup>166</sup> These potentially indefinite proceedings are drawn out by scheduling difficulty due to case backlogs, leaving respondents in legal limbo and often in detention.<sup>167</sup> The tension between the need for careful individual attention to satisfy due process in these high-stakes cases and the harm that results from years-long delays in resolving

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Ct. 2057 (2022) (holding that federal courts lack jurisdiction to grant noncitizens classwide injunctive relief); Aaron Reichlin-Melnick, *After a Harsh Supreme Court Decision on Immigrant Rights, Advocates and Lawyers Have Two Key Questions*, SLATE (June 14, 2022, 2:15 PM), <https://slate.com/news-and-politics/2022/06/garland-v-gonzalez-two-key-question-from-immigrant-rights-advocates.html> [<https://perma.cc/V5FQ-EWDE>] (discussing the impact of the *Aleman Gonzalez* decision).

165. Ames et al., *supra* note 45, at 23 (quoting Jerry L. Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772, 785 (1974)).

166. *See infra* note 170.

167. The threat of indefinite detention combined with a lack of accurate legal information frequently causes noncitizens to abandon their claims for relief, even prior to their first immigration hearings, since accepting removal is the only sure route to escape detention. *See* JENNIFER LEE KOH, JAYASHRI SRIKANTIAH & KAREN C. TUMLIN, *DEPORTATION WITHOUT DUE PROCESS*, at iii, 6-12 (2011), <https://www.nilc.org/wp-content/uploads/2016/02/Deportation-Without-Due-Process-2011-09.pdf> [<https://perma.cc/QG4M-TSCW>] (discussing the stipulated removal program).

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them highlights the importance of pursuing reforms that address both issues.

Class motions are one reform that would be flexible enough to accommodate these dueling considerations. Different types of class motions would serve efficiency goals directly or indirectly. An example of a class motion aimed at reducing the backlog would be a class motion for administrative closure. If coupled with policy changes making administrative closure more robust, such a motion would allow EOIR to clear nonpriority adjudications from its active docket and use its resources on priority cases. Class motions to terminate proceedings could serve a similar function. Increased time and attention on fewer active cases would afford adjudicators the opportunity to improve decisional quality by responding to the view that they currently do not have time to ensure that they reach correct results.

Other types of class motions would reduce the procedural steps and number of rulings required in complex cases and help ensure that the most current version of the law applies to all cases. Class motions aimed at streamlining cases procedurally, such as motions to reopen or reconsider, would thus improve efficiency indirectly by reducing redundant motion practice. Since simplified cases might proceed more swiftly to adjudication on the merits, over time, even these motions could help ease the backlog somewhat.

Class motions also have the potential to magnify and accelerate the impact of future policy changes. This impact could be transformative, especially if the agency began to make policy with this procedure in mind. For example, EOIR could lower barriers to relief by deindividualizing standards like the criteria for administrative closure<sup>168</sup> or exceptions to procedural barriers<sup>169</sup> to increase the number of issues that could be well-suited for resolution on a class-wide basis. It might also be more likely to consider retroactive application of substantive reforms given their easier application across cases.

In addition, procedural reforms that aim to achieve efficient, accurate decision-making in immigration proceedings must consider how EOIR's

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168. *See supra* Section III.C.

169. For example, the “changed circumstances” and “extraordinary circumstances” exceptions to the time bar on asylum applications are potentially well-suited to class-wide application. *See* 8 U.S.C. § 1158(a)(2)(D) (2018); 8 C.F.R. § 208.4(a)(4)-(5) (2022). EOIR could clarify objective standards for these exceptions via guidance or regulation that would facilitate their use on a class-wide basis.

relationship to other agencies limits its ability to manage its own caseload. ICE is responsible for enforcement actions that determine the inflow of cases into EOIR's dockets. ICE attorneys also determine whether to prosecute a case and when to appeal IJ decisions that grant immigration relief. Indeed, ICE's decisions to appeal grants of immigration relief can substantially prolong immigration proceedings.<sup>170</sup>

Since EOIR has little ability to control how many cases it receives or the duration of proceedings, reforms such as class motions that are aimed at maximizing efficiency are important to counterbalance DHS's enforcement activity. As noted above, a potential application of class motions in this vein would be class motions for administrative closure or termination of proceedings, which would let EOIR clear nonpriority cases from its docket. In addition, the incremental effect of streamlining complex cases via narrower class motions, such as motions to reopen or reconsider, could also lessen the backlog over time.

One objection to the use of aggregation in agency adjudications is that it could lead to a form of over-efficiency by "reduc[ing] bureaucratic delay, but . . . hinder[ing] an agency's ability to control its own policy priorities."<sup>171</sup> This critique is primarily based on the possibility of ALJs delivering class rulings that result in unaffordable outlays for agencies that disburse monetary benefits, such as the Department of Veterans Affairs. Because EOIR does not pay out benefits—or, for that matter, use independent ALJs—this concern is less relevant in the immigration context. Facilitating the resolution of immigration cases and claims to relief will likely have the opposite effect by freeing up EOIR resources that are currently expended in redundant and drawn-out adjudications.

Efficiency and accuracy thus go hand-in-hand when considering how to improve EOIR's system of adjudication. Making every decision in every

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170. For example, if an IJ grants cancellation of removal for an LPR with a criminal conviction, restoring his LPR status, ICE can appeal that decision. The cycle of remands and appeals could, in theory, be infinite, and each trip up and down the EOIR adjudication structure is likely to take over a year, if not significantly longer, given the current average wait time for a hearing. *See supra* note 51 and accompanying text. Meanwhile, that LPR can be trapped in mandatory detention for the duration of the entire proceedings. Since indefinite detention often presents respondents with a "Hobson's choice" of either pursuing their claims for relief or self-deporting to escape detention, shortening case times supports due-process values by making it less burdensome to pursue the right to remain in the United States. KOH et al., *supra* note 167, at iii.

171. Grammel & Macey, *supra* note 20, at 127.

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immigration case individually wastes time and resources that could be focused on developing the record and carefully applying the law to each case. Continuing to rely on this “dysfunctional” system “on the brink of collapse”<sup>172</sup> to determine respondents’ right to remain in the United States has devastating effects on their ability to pursue claims for relief. The extreme backlog also delays the resolution of immigration cases, causing heavy caseloads for adjudicators and relegating noncitizens to life in legal limbo that deprives them of security and rights in the United States.

Class motions could thus serve organizational goals of internal administrative law as well as enabling the exercise of individual procedural rights. Lowering hurdles to meaningful participation in individual cases can influence systemic change, especially when reforms are designed to promote collective organization of regulated parties.<sup>173</sup> “To the extent that [individual procedural] rights can improve the overall accuracy of an agency’s decision-making, as a practical matter they do so only if unrelated individuals collectively exercise their rights in significant enough numbers and with some degree of unintended coordination.”<sup>174</sup> In the immigration context, it is especially true that “this happy result is unlikely” to occur organically.<sup>175</sup> Noncitizen respondents have relatively few resources to pursue their legal claims and face significant barriers to participation, including language barriers, detention, retaliation by agency officials, and lack of counsel. Class motions could contribute to protecting due process in the agency’s decision-making scheme by enabling coordination and consistent application of policy changes. The ability to aggregate motions would ensure that similarly situated respondents could all benefit from the same ruling, freeing up agency resources to spend more time on each case.

### C. Consistency

Class motions support consistent decision-making by ensuring that like claims are resolved in a like manner and that changes take effect in the cases of all noncitizens to whom they apply. This reform is needed in immigration adjudication for several reasons. For example, decisions in similar cases vary widely depending on which immigration court and which IJ a respondent happens to be assigned. Research has shown glaring disparities

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172. A.B.A. COMM’N ON IMMIGR., *supra* note 89, at 26.

173. *See* Ames et al., *supra* note 45, at 22.

174. *Id.*

175. *Id.*

in asylum grant rates among IJs in different regions of the United States even when controlling for the asylum applicant's country of origin and other factors.<sup>176</sup> Consistency is especially difficult to realize in immigration proceedings because so many forms of relief depend on adjudicators' discretion.

In addition, aggregation is partly desirable for what it is not. Unlike other potential reforms, it is compatible with the movement seeking decisional independence for EOIR adjudicators because it does not involve policymakers mandating substantive adjudicatory outcomes. EOIR adjudicators' lack of independence leaves room for policy preferences and the agency's prosecutorial bent to affect its decision-making. These scenarios negatively impact consistency since it means that decisions about similar cases under the same law vary from administration to administration and across adjudicators with different career and personal backgrounds.

EOIR adjudicators' lack of independence is due at least in part to the agency's informal adjudication system.<sup>177</sup> IJs and BIA members are not ALJs. As non-ALJs, they lack statutory protections from undue political influence that the APA provides for ALJs, such as a requirement of impartiality and prohibition on performing duties inconsistent with their adjudicatory function (i.e., investigation or prosecution) or reporting to officials with those duties.<sup>178</sup> The APA also prohibits ALJs from reporting to any officer with investigative or prosecutorial duties or conducting those duties themselves to ensure a "separation of functions between adjudication and prosecution within the agency," places limits on ex-parte communications, exempts ALJs from performance appraisals, and prohibits removal except

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176. *E.g.*, Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007); U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-72, ASYLUM: VARIATIONS EXIST IN OUTCOMES OF APPLICATIONS ACROSS IMMIGRATION COURTS AND JUDGES 2, 17 (2016), <https://www.gao.gov/assets/gao-17-72.pdf> [<https://perma.cc/G596-ADLC>]; *see also* Gabriel Thompson, "Your Judge Is Your Destiny", TOPIC (July 6, 2019), <https://www.topic.com/your-judge-is-your-destiny> [<https://perma.cc/Q9YE-DPHV>] (describing IJ Agnelis L. Reese of Louisiana as "unique among her peers" for having denied every asylum application she heard in the past five years).

177. *Cf.* Bremer, *supra* note 10, at 1795-96 ("In the context of immigration adjudication...[an] expansive understanding of agency procedural discretion can be used to undermine an immigrant's right to an impartial decisionmaker.").

178. Barnett & Wheeler, *supra* note 9, at 15-16.



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for “good cause established and determined by” the Merit Systems Protection Board, an independent agency.<sup>179</sup> By comparison, IJs are non-ALJs with a quasi-judicial role, a category that might or might not have protections from “strict hierarchical control” based on internal “custom,” or sometimes formal regulation.<sup>180</sup> The AG hires IJs and requires that they meet “only minimal eligibility criteria.”<sup>181</sup> They are subject to biennial performance appraisals and can be removed if they are rated “less than satisfactory.”<sup>182</sup>

Along with scholars and advocacy organizations,<sup>183</sup> IJs themselves have decried the political pressure that they find impedes them from doing their jobs fairly. Mimi Tsankov, an IJ since 2006 and the current president of NAIJ, recently examined the “fundamental inequities that result from a

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179. *Id.*

180. Ames et al., *supra* note 45, at 10.

181. *Id.* at 14.

182. *Id.* (quoting Labor Agreement Between the National Association of Immigration Judges and USDOJ, Executive Office for Immigration Review arts. 22.2, 22.11 (2018), <https://perma.cc/4XPV-WRHH>). The IJ union, the National Association of Immigration Judges (NAIJ), secured some personnel protections for IJs, such as the ability to challenge disciplinary action through a grievance process. *Id.* In 2020, the Trump DOJ succeeded in decertifying NAIJ as a union. U.S. Dep’t of Just. Exec. Off. For Immigr. Rev. v. Nat’l Ass’n Immigr. Js., Case No. WA-RP-19-0067, 71 FLRA No. 207 (Nov. 2, 2020), <https://www.flra.gov/decisions/v71/71-207.html> [<https://perma.cc/X93E-649V>]. Although the Biden administration reversed the DOJ’s position on the issue and withdrew its opposition to NAIJ’s motion for reconsideration, Agency’s Withdrawal of Opposition to Respondent’s Motion for Reconsideration, U.S. Dep’t of Just. Exec. Off. For Immigr. Rev. v. Nat’l Ass’n Immigr. Js., Case No. WA-RP-19-0067 (FLRA, June 25, 2021), [https://www.naij-usa.org/images/uploads/newsroom/Agency\\_Withdrawal\\_of\\_Opp\\_to\\_Mot\\_for\\_Reconsideration.pdf](https://www.naij-usa.org/images/uploads/newsroom/Agency_Withdrawal_of_Opp_to_Mot_for_Reconsideration.pdf) [<https://perma.cc/GZ8R-4V2S>], DOJ still now considers and treats the union as “defunct,” Erich Wagner, *Justice Dept. Continues to Insist Immigration Judges Union is ‘Defunct,’ Despite Moving to Nullify Decertification Decision*, GOV’T EXEC. (Sept. 1, 2021), <https://www.govexec.com/workforce/2021/09/justice-dept-continues-insist-immigration-judges-union-defunct-despite-moving-nullify-decertification-decision/185031/> [<https://perma.cc/8EDF-WEDH>].

183. *E.g., America Needs an Independent Immigration Court—AILA Urges Passage of the Real Courts, Rule of Law Act of 2022*, AM. IMMIGR. LAWS. ASS’N (Apr. 11, 2022), <https://www.aila.org/dueprocess> [<https://perma.cc/T87P-U9WW>]; A.B.A. COMM’N ON IMMIGR., *supra* note 89, at 17-19.

nonindependent [immigration] court,” which she argues include “politicized hiring, inadequate and imbalanced funding, insufficient hiring of judge teams, insufficient time to adequately consider cases, heavy reliance on the use of oral decisions, instances of judicial intemperance and burnout, and concerns about overreliance on videoconferencing.”<sup>184</sup> Indeed, the lack of protection from political influence is a serious problem in removal proceedings given their profound consequences. Based on their comprehensive study of non-ALJs, Kent Barnett and Russell Wheeler concluded that “impartial non-ALJs are central to due process, fair proceedings with correct decisions, and . . . faith in government and administrative programs.”<sup>185</sup> They explain that “concerns over non-ALJ independence are at their apex” when the agency itself is a party to the proceeding.<sup>186</sup> EOIR adjudicators work for DOJ whereas ICE TAs work for DHS, but this principle still has resonance in removal proceedings where one executive agency is advocating for a result to another executive agency—especially since a significant portion of IJs worked for ICE or other DHS immigration branches prior to joining EOIR<sup>187</sup> and because DOJ is responsible for criminal prosecution of immigration offenses.<sup>188</sup>

An institutional structure that exposes decision-makers to political pressures is not the only factor that compromises the integrity of results in removal proceedings. Even though removal proceedings are trial-like, “immigration courts operate outside procedural norms that govern most other courts, limiting the ability of judges to constrain prosecutorial

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184. Mimi Tsankov, *The Immigration Court: Zigzagging on the Road to Judicial Independence*, 93 U. COLO. L. REV. 303, 308 (2022). *But see* OFF. INSPECTOR GEN., MANAGEMENT ADVISORY MEMORANDUM: RECOMMENDATIONS REGARDING THE IMMIGRATION JUDGE AND BOARD OF IMMIGRATION APPEALS MEMBER HIRING PROCESS, U.S. DEP’T OF JUSTICE (Mar. 31, 2022), <https://oig.justice.gov/sites/default/files/reports/22-061.pdf> [<https://perma.cc/62UD-7ZHN>] (finding insufficient evidence to prove systemic discrimination based on political affiliation in EOIR’s hiring process).

185. Barnett & Wheeler, *supra* note 9, at 6.

186. *Id.* at 51; *see* Ames et al., *supra* note 45 at 20 (discussing ACUS Recommendation 92-7 that non-ALJs who adjudicate matters “with substantial economic effects or limitations on personal liberty” should have “standards for independence, selection, experience, and compensation that approximate those accorded to ALJs”).

187. *See, e.g.*, INNOVATION L. LAB & S. POVERTY L. CTR., *supra* note 54.

188. Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1299 (2010).

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excess.”<sup>189</sup> And on top of EOIR’s inability to temper “zealous administration”<sup>190</sup> on the part of DHS, biased adjudicators in EOIR have long been a significant concern. This concern makes sense given that EOIR is largely staffed by former DHS enforcement officers, contributing to a deep-seated prosecutorial culture.<sup>191</sup> Non-ALJs’ lack of insulation combined with this agency culture has prompted proponents of immigration reform to assert the need for increased decisional independence.<sup>192</sup>

Politically unpopular groups particularly stand to gain from an aggregate motion procedure in removal proceedings. For example, many individuals in removal proceedings are LPRs who are put in removal proceedings based on criminal convictions.<sup>193</sup> Their cases are typically more substantively and procedurally complex than recent arrivals, they are more likely to be detained throughout their proceedings, and future executive action and legislative reforms are less likely to advance their due-process rights since they are often political scapegoats.<sup>194</sup> Even when an adjudication does not call for discretion as a component of the decision, external factors and implicit bias can impact the adjudicator’s decision.<sup>195</sup> Class motions could allow noncitizens in politically unpopular groups to

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189. Robert Knowles & Geoffrey Heeren, *Zealous Administration: The Deportation Bureaucracy*, 72 RUTGERS U. L. REV. 749, 798 (2020).

190. *Id.* at 749.

191. *E.g.*, Jill E. Family, *Immigration Adjudication Bankruptcy*, 21 J. CONST. L. 1025, 1029-30 (2019); Andrew Cohen, *Biden’s New Immigration Judges Are More of the Same* (May 10, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/bidens-new-immigration-judges-are-more-same> [<https://perma.cc/DXN3-HUHZ>].

192. *E.g.*, Tsankov, *supra* note 184; Family, *supra* note 142, at 543-44; Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 389 (2006).

193. *See generally* César Cuauhtémoc García Hernández, *Due Process and Immigrant Detainee Prison Transfers: Moving LPRs to Isolated Prisons Violates Their Right to Counsel*, 21 BERKELEY LA RAZA L.J. 17, 29 (2011) (explaining that many LPRs find themselves facing deportation due to criminal offenses).

194. *E.g.*, Christie Thompson, *Deporting ‘Felons, Not Families’*, MARSHALL PROJ. (Nov. 21, 2014, 5:22 PM), <https://www.themarshallproject.org/2014/11/21/deporting-felons-not-families> [<https://perma.cc/9FNK-N32E>] (critiquing President Obama’s focus on immigration enforcement against noncitizens with criminal convictions).

195. *See, e.g.*, Fatma Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417 (2011).

benefit from rulings made in the cases of representatives who IJs find sympathetic, shielding them from the potential for external considerations to unfairly impact procedural decisions in their cases. A class motion procedure would represent a significant step toward more equal application of the law across regulated parties.

Given the issues surrounding EOIR adjudicators' lack of insulation from political pressure, procedural reforms that serve other goals like legal access and efficiency should ideally cohere with the push to increase decisional independence. EOIR could issue regulations or guidance mandating substantive adjudication outcomes that might accomplish some goals of class motions, but to the extent that those measures undermine other reform efforts, they would be counterproductive. Aggregation is thus desirable in part because of its ability to serve consistency goals without compromising the push for independent decision-makers. DOJ guidance telling EOIR adjudicators how to decide issues would set a precedent that could swing in the direction of gutting protections in the future.<sup>196</sup> Partial aggregation initiated by regulated parties allows consistent application of policy while promoting institutional legitimacy and reducing the potential for future abuse.

#### CONCLUSION

A class-motion procedure tailored to accommodate the realities of immigration law and minimize the risk of abuse could improve EOIR adjudication for respondents and adjudicators alike. The appeal of aggregation's promotion of legal access and participation, efficiency, and consistency is clear in this context given EOIR's inability to realize these values within its current model of adjudication.

This proposal is only the start of imagining how aggregation could serve the goal of finding faster and fairer ways to provide relief to eligible noncitizens. At the same time, procedural reforms such as class motions cannot eliminate due-process concerns in removal proceedings. Noncitizens who pursue the right to remain in the United States face obstacles that are deeply entrenched in the administrative state and other government institutions. The extent to which the substantive law and weak constitutional protections in this context limit aggregation's potential, even

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196. Tsankov, *supra* note 184, at 305 (explaining that until removal proceedings occur in "a neutral setting, free from interference, the IJs and the process they serve will remain vulnerable to the whims of politics: hence a Republican 'zig' to every Democratic 'zag'").

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as its benefits map well onto the agency's needs, reveals that it can at best be a small part of an urgently needed systemic solution.