



Submitted via <http://www.regulations.gov>

March 30, 2020

Lauren Alder Reid, Assistant Director
Office of Policy, Executive Office for Immigration Review
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Falls Church, VA 22041

**Re: 85 FR 11866; EOIR Docket No. 18-0101, A.G. Order No. 4641-2020; RIN 1125-AA90;
Comments in Opposition to Proposed Rulemaking: Fee Review**

Dear Assistant Director Alder Reid:

The Catholic Legal Immigration Network, Inc. (CLINIC)¹ submits these comments urging the Department of Justice (DOJ) to rescind this rulemaking, which would dramatically increase fees for applications submitted to the Executive Office for Immigration Review (EOIR). The proposed fees will put justice out of reach for many vulnerable noncitizens who will not be able to afford to pursue applications for relief, motions to reopen or reconsider, or to appeal the denial of their applications to the Board of Immigration Appeals (BIA).

Embracing the Gospel value of welcoming the stranger, CLINIC promotes the dignity and protects the rights of immigrants in partnership with a dedicated network of immigration legal services programs. This network includes approximately 380 programs operating in 49 states and the District of Columbia. CLINIC's network employs roughly 1,400 attorneys and accredited representatives who, in turn, serve hundreds of thousands of low-income immigrants each year. In addition to affirmative applications for benefits, CLINIC affiliates have increasingly begun to represent clients in removal proceedings. In 2019, CLINIC established a section, Defending Vulnerable Populations, which focuses on training and mentoring in the area of removal defense, asylum, and appeals.

As discussed more fully below, CLINIC opposes these proposed fee increases, which will make it impossible for many noncitizens to pursue their rights. This proposed rule continues a trend by the current administration to speed up removals without providing noncitizens a fair day in court.² By

¹ These comments were primarily authored by Victoria Neilson, Managing Attorney of CLINIC's Defending Vulnerable Populations (DVP) Program, Michelle Mendez, DVP Director, and Ann Garcia, DVP Staff Attorney. CLINIC would like to thank Pro Bono Scholar Alex Petkanas and law student Hannah Howard for their invaluable contributions to this comment.

² See Statement Of Innovation Law Lab, Southern Poverty Law Center, Las Americas Immigrant Advocacy Center, Santa Fe Dreamers Project, And Catholic Legal Immigration Network, Inc. (CLINIC), Submitted to the House

making it financially impossible for many noncitizens to appeal their cases to the BIA, more immigration judge decisions will become final orders, at the very time that judges have less time to spend on each case and greater incentives to issue removal orders. (*See* Section II F below.)

The administration has already taken steps to turn United States Citizenship and Immigration Services (USCIS), the benefits-granting agency within the Department of Homeland Security (DHS), into an enforcement agency.³ Now the administration is similarly emphasizing deportations over due process through EOIR.⁴

I. PROCEDURAL DEFECTS OF THE NOTICE OF PROPOSED RULEMAKING (NPRM)

DOJ should withdraw these proposed fee increases because it did not give an adequate time for comments and because it did not provide the materials on which it based the proposed fee increase.

As discussed below, the proposed rule would put into effect an enormous increase—including some fees that will be nearly nine times the current amount. This increase would prevent many noncitizens from pursuing their statutory and constitutional rights in removal proceedings. The public has a right to conduct research and provide detailed, reasoned comments on this extraordinary increase in fees. Yet, with no explanation regarding its choice of allowing 30 days rather than 60, DOJ has allowed the public only 30 days to provide comments. For this reason alone, DOJ should withdraw the notice, and any reissuance in the future would need to have an adequate public response time built in.

On March 6, 2020, more than 90 immigration and legal service providers submitted a letter to DOJ, requesting that the comment period be extended for an additional 30 days.⁵ USCIS complied with a similar request in response to its own proposed rule to raise USCIS application fees in the fall of 2019, extending the comment deadline from December 16, 2019 to December 30, 2019. The comment period was then re-opened from January 24, 2020 to February 10, 2020.⁶ Here, DOJ

Judiciary Committee, Hearing on “Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts,” Jan. 29, 2020 <https://docs.house.gov/meetings/JU/JU01/20200129/110402/HHRG-116-JU01-20200129-SD009.pdf> [hereinafter “House Judiciary Statement”].

³ Joshua Breisblatt, *USCIS Is Slowly Being Morphed Into an Immigration Enforcement Agency*, IMMIGRATION IMPACT, Jul. 9, 2018, <https://immigrationimpact.com/2018/07/09/uscis-guidance-immigration-benefit/#.XmtvzqhKjIU>.

⁴ Advocates have already decried changes at EOIR, which have led to decreased due process and increased deportations. *See* Innovation Law Lab and Southern Poverty Law Center, *The Attorney General's Judges: How the U.S. Immigration Courts Became a Deportation Tool*, (June 2019) https://www.splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf [hereinafter “Attorney General’s Judges”].

⁵ CLINIC, 90+ Organizations Join in Requesting 60-Day Comment Period to Respond to EOIR Fee Increases (Mar. 6, 2020), <https://cliniclegal.org/resources/federal-administrative-advocacy/90-organizations-join-requesting-60-day-comment-period>.

⁶ *See* U.S. Citizenship and Immigration Services, *Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements*, (Dec. 9, 2019) and U.S. Citizenship and Immigration Services, *Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements*, (Jan. 24, 2020), <https://www.federalregister.gov/documents/2020/01/24/2020-01189/us-citizenship-and-immigration-services-fee-schedule-and-changes-to-certain-other-immigration>.

has neither extended the comment deadline, nor even responded to the request made by advocates. This arbitrary action is another reason that DOJ should withdraw the rulemaking.

Moreover, with the recent outbreak of the novel coronavirus, which has been declared a worldwide pandemic,⁷ all aspects of daily life have been affected for the general public. As stakeholders learn to perform their jobs remotely, in many instances while providing childcare and/or assisting children to engage in online learning, it is unreasonable to expect the public to submit comments on these sweeping changes by March 30. This pandemic alone should be grounds to withdraw this notice of proposed rulemaking (NPRM) reserving the possibility of reissuing it at a future date. On March 23, 2020, CLINIC and more than 100 other organizations submitted a second letter requesting that the deadline for comment submission be delayed in light of the disruptions caused by the COVID-19 pandemic. Again, DOJ has not responded.

The NPRM does not include any of the underlying data required by the public to determine whether its fee calculation is accurate or reasonable. While DOJ explains the process it employed in polling staff about the work flow concerning particular types of applications, it has not made any of that data, other than the conclusions, a part of the rulemaking record. It is impossible to comment with accuracy on whether the fee structure is arbitrary when the data the agency uses to support these increases is not available. On March 6, 2020, CLINIC sent a message to Office of Management and Budget requesting this data, and a follow up to OMB and DOJ on March 18, 2020, but still has not received it. For the sake of the record, CLINIC is commenting on what we can below, but note that our comment is incomplete because we do not have the data that underpins the rulemaking. Again, DOJ should withdraw this rulemaking because of its failure to make critical data publicly available.

As discussed below, if DOJ raises EOIR fees, it will be crucial for the agency to make fee waivers broadly available. CLINIC has heard, anecdotally, that EOIR fee waiver requests have increasingly been denied in recent months. CLINIC submitted a Freedom of Information Act (FOIA) request to DOJ on October 4, 2019, seeking data on the number of fee waivers filed, granted, and denied. CLINIC has not yet received that data, despite communicating to the EOIR FOIA officer the urgency of receiving the information in order to provide comprehensive comments on this rulemaking. This failure to provide this critical data is another reason DOJ should withdraw the current rulemaking.

For these procedural reasons alone, DOJ should withdraw the current rulemaking, or, at a minimum, extend the time-period to submit comments and make publicly available the data necessary for the public to write fully informed comments.

II. SUBSTANTIVE CRITIQUES OF THE NPRM

The comments that follow address the substantive reasons that DOJ should withdraw this proposed fee increase.

⁷ World Health Organization, *WHO Director-General's Opening Remarks at the Media Briefing on COVID-19 - 11 March 2020* (Mar. 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

A. DOJ is not a fee-funded agency

Unlike USCIS, DOJ is not a fee-funded agency; and EOIR obtains its funding through appropriations. DOJ admits this fact in its own notice of proposed rule-making, stating outright, “[a]lthough EOIR is an appropriated agency, EOIR has determined that it is necessary to update the fees charged for these EOIR forms and motions to more accurately reflect the costs for EOIR’s adjudications of these matters.”⁸ Despite this conclusory statement, DOJ never even attempts to explain why “it is necessary” to raise the fees.

DOJ cites to the Independent Offices Appropriations Act (IOAA), Public Law 82–137, 65 Stat. 268, 290 (1951), Section 286(m) of the Immigration and Nationality Act (“INA”), *Ayuda, Inc. v. Attorney Gen.*, 848 F.2d 1297, 1301 (D.C. Cir. 1988), and the Homeland Security Act of 2002 (HSA), Public Law 107–296, 116 Stat 2135 (2002), as the current sources of its authority for increasing EOIR fees. However, this accounting and description of current sources of authority overlooks that prior to 2003, when Congress created the Department of Homeland Security through the Homeland Security Act of 2002 (HSA), the Attorney General administered immigration and naturalization benefits through the Immigration and Nationality Services (INS) in addition to EOIR.

The HSA fundamentally changed the immigration landscape, including which agency collects the fees for processing and adjudicating immigration and naturalization applications. Prior to that time, DOJ housed both EOIR and INS, which adjudicated affirmative benefits adjudications. The HSA established DHS as a separate, cabinet-level agency, and within that larger agency, it created the affirmative adjudications sub-agency, which was initially called the Bureau of Immigration and Citizenship Services.⁹ It is important to understand the evolution of fee collection under INS to appreciate the impact of the changes brought by the HSA.

From 1952 to 1988, INS’s fee-setting authority was principally based on the IOAA, which permitted federal agencies to collect user fees for “a service or thing of value provided by the agency” and deposited them with the U.S. Treasury as “miscellaneous receipts.” Congressional appropriations funded the entire costs of the INS’s administration of immigration and naturalization benefits.¹⁰ In 1988, Congress enacted INA sections 286(m) and 286(n). Through that legislation, Congress directed INS to collect fees for processing and adjudicating immigration and naturalization applications.¹¹ Section 286(m) of the INA set up Immigration Examinations Fee Account (IEFA) as the depository for “all adjudication fees.” Under INA § 286(n), INS was to use fees deposited in the IEFA to fund the “expenses in providing immigration adjudication and naturalization services.” Additionally, under INA § 286(j), the Attorney General had the authority to “prescribe such rules and regulations as may be necessary to carry out” sections 286(m) and (n), among others. The IEFA funds were intended for “enhancing naturalization and adjudication programs.”¹²

⁸ 85 Fed. Reg. 11866, 11870 (Feb. 28, 2020).

⁹ See 6 USC § 271(b)(4)(b).

¹⁰ See U.S. Citizenship and Immigration Services Fee Schedule, Final Rule, 75 Fed. Reg. 58962, 58966 (Sept. 24, 2010) (AR 17080, 17084).

¹¹ See *Ayuda, Inc. v. Attorney Gen.*, 848 F.2d 1297, 1299 (D.C. Cir. 1988).

¹² H.R. Rep. No. 100–979 at 38 (1988).

In the NPRM, DOJ states that the “proposed fees would help the Government recoup some of its costs when possible and would also protect the public policy interests involved.”¹³ But its justification for this statement is a federal appeals case concerning the pricing of cable television services. *Nat’l Cable Television Ass’n, Inc. v. F.C.C.*, 554 F.2d 1094, (D.C. Cir. 1976). Citing to this case is misguided, both because the circuit court remanded the case finding that the FCC did not adequately explain the fee schedule proposed and, more importantly, because the court in that case considered what portion of an agency’s costs could be passed on to a consumer in the context of subscribing voluntarily to a cable television service. While it is true that both the FCC and the DOJ are federal agencies, the justification for an agency to pass along some cost associated with regulating a television subscription service is in no way comparable to forcing a party in immigration court proceedings to relinquish the right to seek relief or appeals. They could suffer possible persecution or permanent separation from family members through the EOIR adjudication system because of inability to pay a fee.

The NPRM also cites to a 1988 case, *Ayuda, Inc. v. Attorney General*, 848 F.2d 1297 (1988), as authority for the current proposed fee increase. In that case, an immigration nonprofit, Ayuda, challenged proposed fee increases by DOJ. The DC Circuit Court of Appeals upheld DOJ’s fee increase on, among other things, BIA appeals. The *Ayuda* case is distinguishable from the current fee increase in a number of ways. First, DOJ did not rely on INA § 286(m), as DOJ now does, because it had not been enacted at the time the case was filed. Second, the Circuit Court upheld the fee in part because it found the agency was authorized to impose “a reasonable charge” on litigants. *Ayuda, Inc. v. Attorney Gen.*, 848 F.2d 1297, 1300 (D.C. Cir. 1988). As discussed below, the fees in this rulemaking cannot be characterized as “reasonable.” The fee increases challenged in *Ayuda* averaged \$65, whereas the fee increases here are, in some instances, more than \$800.¹⁴ And, finally, as discussed below, the case predates the establishment of DHS as a distinct agency from DOJ.¹⁵

Subsequent to the *Ayuda* case, in 1990, Congress amended INA section 286(m) to state:

[f]ees for providing adjudication and naturalization services may be set at a level that will ensure recovery of the full costs of providing all such services, including the costs of similar services provided without charge to asylum applicants or other immigrants. Such fees may

¹³ 85 Fed. Reg. 11866, 11870 (Feb. 28, 2020).

¹⁴ DOJ does not claim that the fees were intended to cover the cost of adjudication at the time they were implemented in 1985. Even accounting for inflation, it is hard to imagine that an appeal could have cost only \$110 in staff time to adjudicate in 1985. Thus the assumption that noncitizens should pay for the cost of adjudicating their own court cases is entirely new in this rulemaking. And, as discussed in section II R below, no other federal agency forces litigants to pay for the cost of comparable hearings.

¹⁵ CLINIC believes that the *Ayuda* case was wrongly decided. The *Ayuda* court itself conceded, “At first blush, it seems odd to require payment of a fee before the agency will review its own determinations or consider staying the effect of its decisions. This oddity is all the more pronounced in view of the apparent failure of other agencies to impose similar regimes.” *Ayuda, Inc. v. Attorney Gen.*, 848 F.2d 1297, 1299 (D.C. Cir. 1988). The *Ayuda* court still found the scope of the underlying statute to be broad enough to allow for fees. In the intervening decades, some federal courts have been less permissive in allowing agencies to charge fees without fully justifying the need and calculation of the fee. See *Engine Mfrs. Ass’n v. E.P.A.*, 20 F.3d 1177, 1179 (D.C. Cir. 1994). See also *Silver Buckle Mines, Inc. v. United States*, 117 Fed. Cl. 786, 796 (2014).

also be set at a level that will recover any additional costs associated with the administration of the fees collected.

The House Appropriations Committee recognized that the purpose of the 1990 amendment was to ensure that the IEFA fees would fund “the entire cost of operating the Adjudications and Naturalization program.”¹⁶ The reason for this amendment was that the Adjudications Branch of INS was no longer a line item on the budget and was newly required to be self-sustaining.¹⁷

DOJ now claims authority for this fee increase by citing to INA § 286(m) stating that that section of the law, “authorizes DOJ to charge fees for immigration adjudication and naturalization services at a level to ‘ensure recovery of the full costs of providing all such services, including the costs of similar services provided without charge to asylum applicants or other immigrants.’” 85 Fed. Reg. 11867. However, INA § 286(m) pre-dates the establishment of the Department of Homeland Security. The language at INA § 286(m) stating that “fees for providing *adjudication and naturalization services* may be set at a level that will ensure recovery of the full costs of providing all such services. . . [emphasis added]” was added to the INA in 1988—three years before the September 11 terrorist attack and five years before the HSA separated the adjudication of affirmative applications from DOJ and its immigration court functions.¹⁸ Given the proximity of the words “naturalization services” to the word “adjudication” the most logical reading of this section of the INA is that it refers to INS’s function in adjudicating benefits applications, including naturalization applications, not to EOIR’s very different adjudicative functions which have never included jurisdiction over applications for naturalization.

The legislative history of the section of the law supports this reading. The House Report of the Amendment establishing an Immigration Examinations Fee Account states:

The conference agreement directs that all deposits into the Account in excess of \$50,000,000 be used to reimburse the Department for immigration adjudication and naturalization services. The conferees expect that funds generated by this Account shall not be used for any purpose other than enhancing naturalization and adjudications programs. Additionally, naturalization and adjudications fees shall not be increased beyond the extent they would have been increased absent the existence of the Account. 134 Cong. Rec. H8297-01, 1988 WL 176092.

This language demonstrates that this fund is intended to apply to legacy INS benefits functions, not to the immigration court and appeals functions of EOIR. First, the language of the fund itself is Immigration Examinations Fee Account. Non-adversarial benefits interviews are often referred to as “examinations.” By way of contrast, adversarial immigration court proceedings have never been called “examinations;” they are typically called “hearings.” The transfer of appellate jurisdiction to the BIA from the INS’ Associate Commissioner for Examinations for appeals from decisions on removals underscores this distinction.¹⁹ Moreover, the language of the House Report

¹⁶ *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act for 1991: Hearing on H.R. 5021 Before a Subcomm. of the Comm. on Appropriations*, 101st Cong. 72 (1990).

¹⁷ Immigration and Naturalization Service and the Executive Office for Immigration Review; Fee Review, 54 Fed. Reg. 47348-01 (Nov. 14, 1989).

¹⁸ See Pub. L. No. 100-459 (H.R. 4782), Pub. L. 100-459, October 1, 1988, 102 Stat. 2186.

¹⁹ 61 Fed. Reg. 40552-01 (Aug. 5, 1996); 8 CFR § 3.62(c); 8 CFR § 3.64 (1997).

refers to “adjudication and naturalization” together, three times throughout the paragraph. Since INS performed adjudications and naturalization in the affirmative benefits context, the most logical reading of Congress’s intent is that the fund was created for fees for INS affirmative benefits’ adjudications, since nothing in the legislative history even hints that these provisions are designed to reach the immigration court. Finally, even assuming *arguendo* that DOJ were correct in using this provision of the INA to justify its fee increase, the explicit language of the House Report is that “fees shall not be increased beyond the extent they would have been increased absent the existence of the Account.” This language indicates Congress’s intent was to create a specific account, the Immigration Examinations Fee Account, to hold the money generated from reasonable fees, but the language of the statute is clear that the existence of the account should not be used to justify any fee increases.

In 1996, DOJ engaged in further regulatory action to clarify the distinction between INS and EOIR by transferring the responsibility for maintaining lists of free legal services in deportation proceedings from the INS to the EOIR’s Office of the Chief Immigration Judge (OCIJ).²⁰ DOJ expanded eligibility for inclusion on the list to include individuals who indicated that they are available to represent asylum seekers in proceedings on a pro bono basis,²¹ thus furthering implementation of section 604(d)(4) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996).²² This transfer of responsibility for the list to EOIR willingness to ensure fair proceedings for those who were unable to pay a for legal counsel and, in turn, a fee. Despite the new responsibilities and additional resources EOIR required to maintain and update this list,²³ the Attorney General certified, in compliance with 5 U.S.C. § 605(b), that “the rule does not have a significant adverse economic impact on a substantial number of small entities” and that the rule is not a “significant regulatory action requiring review by the Office of Management and Budget under Executive Order No. 12866”²⁴ and did not seek to increase fees.

In 1998, the INS issued a proposed rulemaking to raise INS fees pursuant to the Immigration Examinations Fee Account. From DOJ’s response to comments in its final published rule, there is no question that the purpose of establishing this account was to fund benefits adjudications, not the immigration court. “Since FY 1989, the fees collected and deposited into the Examinations Fee Account have been the sole source of funding for immigration adjudication and naturalization services. In creating the IEFA, the *Congress intended that this account be self-sustaining, and not be funded by tax dollars*. The Service has been managing this account consistent with Federal law and Congressional direction. [emphasis added.]” Adjustment of Certain Fees of the Immigration Examinations Fee Account, 63 Fed. Reg. 43604-01. The fees that DOJ adjusted under this rulemaking were all fees for affirmative INS applications—Form I-17; Form I-90; Form I-102; Form I-129; Form I-129F; Form I-129H; Form I-129L; Form I-130; Form I-131; Form I-140; Form I-191; Form I-192; Form I-193; Form I-212; Form I-485; Form I-526; Form I-539; Form I-600;

²⁰ *Id.* The rule also transferred authority to make decisions to remove listed legal service providers from the list from the INS’ Associate Commissioner for Examinations for appeals to the BIA.

²¹ See 8 CFR § 3.62 (c) (1997) (replacing 8 C.F.R. § 292a).

²² See INA § 208(d)(4)(B).

²³ For a description of the responsibilities and resources, please refer to Office of the Chief Judge, EOIR, Operating Policy and Procedure Memorandum 97-1, Maintaining the List of Free Legal Serv. Providers (1997).

²⁴ Nicolaine M. Lazarre & Daniel P. Derechin, *Developments in the Executive Branch*, 11 GEO. IMMIGR. L.J. 903, 903-904 (1997).

Form I-600A; Form I-601; Form I-612; Form I-751; Form I-765; Form I-817; Form I-824; Form I-829; Form N-400; Form N-565; Form N-600; Form N-643—not for EOIR forms.²⁵ If DOJ believed the intent of INA § 286(m) was to use fees to fund the immigration court, it could have raised EOIR fees at the same time it raised INS fees.

In 2002, Congress changed the entire agency structure of overseeing immigration into the United States by passing the Homeland Security Act. The HSA created DHS and within DHS it moved the responsibility for adjudicating immigration and naturalization benefits from INS within DOJ to USCIS with DHS.²⁶ Congress directed the Comptroller General of the United States to report to Congress, within one year of the enactment of the HSA, on “whether the Bureau of Citizenship and Immigration Services is likely to derive sufficient funds from fees to carry out its functions in the absence of appropriated funds.”²⁷ Unlike USCIS’s duties regarding fee collection, the HSA is silent with regard to EOIR’s fee collection responsibilities. Instead, the HSA added this language:

The Attorney General shall have such authorities and functions under this Act and all other laws relating to the immigration and naturalization of aliens as were exercised by the Executive Office for Immigration Review, or by the Attorney General with respect to the Executive Office for Immigration Review, on the day before the effective date of the Immigration Reform, Accountability and Security Enhancement Act of 2002.

In the absence of express language granting EOIR fee collection authority, the HSA requires a look backward to assess the answers to two questions: what were the authorities and functions of EOIR or the Attorney General prior to the HSA? Did any of those authorities and functions include collecting and increasing fees? Tellingly, in 1996, DOJ sought a 13.7 percent increase over the prior year to fight drugs, violent crime, terrorism, and illegal immigration. The DOJ asked Congress for \$25.69 million to provide “increased litigative support for immigration cases” by adding 17 new attorneys to “address the United States Attorneys immigration caseload, increase EOIR judges and support, and expand INS/EOIR’s pilot Port Court program to provide on-site adjudication at ports of entry.”²⁸ Despite the IOAA, INA § 286(m), and *Ayuda, Inc. v. Attorney Gen.*, 848 F.2d 1297, 1301 (D.C. Cir. 1988) all being in force in 1996, the DOJ nonetheless sought congressional appropriations for EOIR rather than fee increases to pay for similar increased costs in adjudications that it now seeks to raises fees to fund. Therefore, with no express authority to set and collect fees per the HSA and no indication in the history of EOIR that it exercised such authority, DOJ is not a fee-funded agency. Since DOJ is not a fee-funded agency, then DOJ is subject to the stricter costs-for-services-rendered requirements under the IOAA.

Assuming arguendo that the HSA did not allocate all fee setting and collection authority from the INS to USCIS leaving EOIR devoid of this authority, although the IOAA established the concept that federal agencies may charge fees for services, this statute in no way required agencies to charge fees. In the services listed in the IOAA, while seemingly not exhaustive, Congress does not

²⁵ 63 Fed. Reg. 43604 (Aug. 14, 1998).

²⁶ Pub. L. No. 107–296 §§ 451(b), 441.

²⁷ Pub. L. No. 107–296 § 477(d)(3).

²⁸ DOJ New Release, *Justice Department Seeks 13.7 Percent Increase in FY 97 Budget to Reduce Violent Crime, Drugs, Terrorism and Illegal Immigration*, March 19, 1996, DOJ 96-119.

include administrative hearing or appeals fees. DOJ cites to this law claiming that it directs agencies to be self-sustaining, but the full sentence is less clear in intent:

any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing of value or utility performed, furnished, provided, granted, prepared or issued by any Federal agency. . .to for any person (including groups, association, organizations, partnerships, corporations, or businesses), except those engaged in the transaction of official business of the Government, shall be self-sustaining to the full extent possible. *Id.*

First, if EOIR is faithful to its mission to “to adjudicate immigration cases by fairly, expeditiously, and uniformly interpreting and administering the Nation’s immigration laws,”²⁹ it cannot posit that the opportunity to appeal an order of removal to the BIA is a “service or thing of value provided by the agency” to a user to which user fees could be affixed. Second, hearings to determine whether or not noncitizens can be removed from the United States clearly fall within the category of the “transaction of official business of the Government”³⁰ which is explicitly excluded from the self-funding provision. In any event, nothing in this law requires the imposition of a fee and the unreasonable fee increases proposed will prevent vulnerable noncitizens from achieving fair results in court.

B. DOJ miscalculated the compound annual growth rate for forms and motions

DOJ attempts to justify its steep increase in fees for EOIR filings at 85 Fed. Reg. 11866, 11874 by calculating what the estimated increase would have been if DOJ had raised its fees on an annual basis since 1986. The agency does this by calculating the compound annual growth rate (CAGR), but it misses the rate in four of the eight filing categories they calculate. Running a CAGR requires three inputs, which DOJ provides on the table at 85 Fed. Reg. 11866, 11874. In EOIR fee terms, these are: 1) the current fee, 2) the proposed fee, and 3) the time period, expressed in years, passing between when EOIR last changed their rates, and 2019. The number of years passing between 1986 and 2019 is 33 years. The formula for CAGR is:

$$\text{Compound Annual Growth Rate} = \left(\frac{\text{Proposed Fee}}{\text{Current Fee}} \right)^{1/\text{Number of Years}} - 1$$

DOJ calculates the CAGR for EOIR-40 and EOIR-42A forms as 3.33 percent by inputting the \$305 proposed fees, \$100 current fees, and the 33-year time period. DOJ is 0.11 percent too low in their calculation, which should have yielded 3.44 percent CAGR for these forms. Likewise, DOJ miscalculates the CAGR for the EOIR-42B form, which they put at a 3.84 percent CAGR. To reach this CAGR, DOJ should have input the \$360 proposed fee for the EOIR-42B form, as well as the \$100 current fee for the form, and the 33-year time period passing between 1986 and 2019 to get a 3.96 percent CAGR. Instead, DOJ calculated a 3.84 percent CAGR for this form. Finally, DOJ miscalculated the CAGR for motions to reopen before the immigration court, which they

²⁹ DOJ, EOIR Mission, (Updated Aug. 14, 2018), <https://www.justice.gov/eoir/about-office>.

³⁰ See *Arizona v. United States*, 567 U.S. 387, 394 (2012) (“The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens.”). This broad power rests, in part, on its constitutional power to “establish an uniform Rule of Naturalization,” Art. I, § 8, cl. 4.

calculated as 0.82 percent. The agency should have input the proposed \$145 fee to file a motion to reopen before the immigration court, the \$110 current fee for this motion, and the 33-year timespan to reach a 0.84 percent CAGR.

While these miscalculations are small, they call into question DOJ's computational accuracy in arriving at the proposed fees. The fact that DOJ does not share any of the underlying data to their activity-based costing analysis renders the public, including CLINIC, entirely unable to verify the accuracy of the calculations on which they base these unprecedented fee hikes.

C. The U.S. government should not try to recoup fees from the most vulnerable

The proposed fee increases are unconscionably high and appear designed to prevent noncitizens from accessing critical rights to appeal cases, move to reopen cases, and file applications they are statutorily entitled to pursue. "Just as a generally valid notice procedure may fail to satisfy due process because of the circumstances of the defendant, so too a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard."³¹

As DOJ itself states in the NPRM, it has not increased fees for EOIR filings in 33 years.³² It does not explain, however, why it has not done so. Presumably, keeping these fees affordable has been a policy choice to allow access to justice in our immigration system.

The budget for EOIR is miniscule when compared to DHS's enforcement budget. According to a White House budget fact sheet, in fiscal year (FY) 2021, the U.S. government proposes to spend \$15.6 billion on Customs and Border Protection, \$9.9 billion on Immigration and Customs Enforcement (ICE), compared to \$900 million on EOIR.³³ The NPRM states "the proposed rule would cause applicants to pay approximately \$47 million in fee revenue beyond that which would be expected if the filing fees were not changed." 85 Fed. Reg. 11866, 11874. Even assuming this figure is correct, this amount is only 1.8 percent of the combined CBP and ICE proposed budget for FY2021, and only 5.2 percent of the budget amount EOIR will request for FY2021.³⁴ Moreover, the proposed rule never estimates how many more noncitizens will apply for and be granted fee waivers in light of the drastic increase in fee amounts. Therefore, the total amount in fees paid to EOIR may amount to even less than 5 percent of EOIR's budget in FY2021.

The U.S. government is willing to pay billions of dollars to capture non-citizens (many of them lawfully seeking asylum), detain them, and prosecute them, but now wants to transfer the cost of having a fair day in court to the noncitizen. While the rulemaking states that the government is permitted to charge "user fees" to recipients who receive "special benefits," 85 Fed. Reg. 11866, 11867, noncitizens in removal proceedings are not voluntarily accessing a benefit system; they are charged with immigration violations and "prosecuted" by DHS. Thus, while immigration court proceedings are civil, there are aspects of the system that are more akin to criminal proceedings. Charging cost-prohibitive fees to applicants to pursue cancellation of removal, suspension of

³¹ *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971).

³² 85 Fed. Reg. 11866 (Feb. 28, 2020).

³³ White House, *Strengthening Border Security and Immigration Enforcement* (Feb. 2, 2020)

<https://www.whitehouse.gov/wp-content/uploads/2020/02/FY21-Fact-Sheet-Immigration-Border-Security.pdf>.

³⁴ *Id.*

deportation, or asylum is the equivalent of charging fees to criminal defendants who interpose affirmative defenses in cases in which they face prosecution.

It is not even clear from the proposed rulemaking that fees paid by vulnerable noncitizens will be used to fund the immigration court system. Under current procedures, EOIR fees for immigration court applications are paid to DHS, not to DOJ.³⁵ The NPRM states that the “proposed fees would help the Government recoup some of its costs when possible and would also protect the public policy interests involved.” 85 Fed. Reg. 11866, 11870. This vague reference to “the Government” does not clarify whether these fees would even be allocated to EOIR.

In 2019, DHS sought to transfer funds from USCIS, which is a fee-funded agency, to ICE, an agency that is funded through Congressional appropriations.³⁶ CLINIC and our Catholic partners denounced this move in comments submitted in response to last year’s proposed USCIS fee increases, pointing out that it is egregious for a fee-funded sub-agency to use its benefits’ application filing fees to fund ICE, an entirely separate, appropriations-funded immigration enforcement sub-agency.³⁷

DOJ is now seeking to drastically increase fees for noncitizens who are defending against removal in the immigration court system. Given that this rulemaking never states that DOJ needs the fees collected to meet its costs, CLINIC has concerns that the government may use these fees for activities that are unrelated to adjudicating immigration court and BIA cases. We are concerned that since DOJ has not stated that EOIR has a funding shortfall, it may also transfer funds from those seeking relief or appeals in immigration court to ICE—the very agency prosecuting and appealing these cases, and in some instances holding the noncitizens in detention.

While one purported justification for the fee increase is to save the taxpayer money, the overall cost of EOIR is very low when compared to income taxes. In 2017, there were 143.3 million taxpayers in U.S.³⁸ If the total \$1.6 trillion in individual income taxes paid in 2017 were to be divided evenly among this taxpayer base, each taxpayer paid about \$11,165 total in income taxes

³⁵ See Board of Immigration Appeals Practice Manual Ch. 3.4 (i), <https://www.justice.gov/eoir/page/file/1250701/download> (“Application fees. – The Board does not collect fees for underlying applications for relief (e.g., adjustment of status, cancellation of removal). Application fees should be paid to DHS or other agency in accordance with the instructions on the application form.”); Immigration Court Practice Manual Ch. 3.4(a), <https://www.justice.gov/eoir/page/file/1259631/download> (“Where paid. — Fees for the filing of motions and applications for relief with the Immigration Court, when required, are paid to the Department of Homeland Security as set forth in 8 C.F.R. § 1103.7. The Immigration Court does not collect fees. See 8 C.F.R. §§ 1003.24, 1103.7.”).

³⁶ See Dep’t of Homeland Security, U.S. Cit. & Immigr. Serv., Budget Overview Fiscal Year 2019, Congressional Justification CIS – IEFA - 4 (2019), at CIS – IEFA – 8.

³⁷ See CLINIC et al., *Catholic Partners Join in Submitting Comment in Opposition to USCIS’ Proposed Fee Schedule* (Dec. 19, 2019), <https://cliniclegal.org/resources/federal-administrative-advocacy/catholic-partners-join-submitting-comment-opposition>.

³⁸ IRS, Statistics of Income, “Number of Returns, Shares of AGI and Total Income Tax, AGI Floor on Percentiles in Current and Constant Dollars, and Average Tax Rates,” Table 1, <https://www.irs.gov/statistics/soi-tax-stats-individual-income-tax-rates-and-tax-shares>.

in 2017, and of that tax contribution, only \$2.79 went to fund EOIR as compared to a contribution of \$108.86 per taxpayer to CBP and \$69.08 per taxpayer to ICE.³⁹

Rather than raise fees on noncitizens seeking to assert their rights the adjudication system, DOJ could transfer unclaimed bond money to EOIR. INA § 286(r) establishes the “Breached bond/detention fund.” This fund stood at \$204 million in July 2018, with approximately \$55 million being added to the fund annually.⁴⁰ This section of the statute requires breached bonds in excess of \$8 million to be used for expenses related to bond collection and to detention. INA § 286(r)(3). However, the statute does not specify how the initial \$8 million, which are deposited in the general fund of the U.S. Treasury,⁴¹ should be used. CLINIC suggests that these funds be used to pay EOIR expenses. Moreover, INA § 286(r) only governs bonds that have been “breached.” The government also undoubtedly collects bonds that remain unclaimed as opposed to “breached.”⁴² That is, the 286(r) fund specifies how bonds must be used if a noncitizen does not attend a court date or otherwise breaches the terms of the bond. However, there are undoubtedly millions of dollars left unclaimed in bond fees as well, following the removal of noncitizens, or release of noncitizens where the bond sponsor does not collect the bond fee. These monies could be put towards EOIR costs and it would be logical to use the money for this purpose, given that one function of EOIR is to conduct bond hearings and appeals.

D. The proposed rule provides no assurance that fee waivers will be readily available

The proposed rule dramatically increases fees yet provides almost no information about fee waivers. DOJ never provides information in the NPRM about the current number of fee waiver requests or the percentage of fee waivers granted and denied. It is impossible to analyze the effect of this dramatic proposed fee increase without a full understanding of how many noncitizens can afford the current, lower fees. There are only two data points regarding fee waiver requests in the entire rulemaking. One is found at footnote 11 to a table entry labeled “FY 2018 fees charged.” The footnote states, “[a]pproximately 36% of these fees were not received due to fee waiver approvals.”⁴³ However, neither the table nor the footnote indicates what types of applications received these fee waivers, what criteria were used to adjudicate the fee waivers, or how adjudication of fee waivers has changed over time. Instead of framing the fee waiver as a critical access to justice tool, DOJ states in the same footnote, “[t]he impact of the waivers themselves is to provide a Government subsidy because the Government absorbs required costs on behalf of an

³⁹ *Id.*; EOIR received \$400 million in discretionary funding in FY2017. White House, *Strengthening Border Security and Immigration Enforcement* (Feb. 2, 2020) <https://www.whitehouse.gov/wp-content/uploads/2020/02/FY21-Fact-Sheet-Immigration-Border-Security.pdf>.

⁴⁰ Meagan Flynn, *ICE is holding \$204 million in bond money, and some immigrants might never get it back*, WASH. POST, Apr. 26, 2019, https://www.washingtonpost.com/immigration/ice-is-holding-204-million-in-bond-money-and-some-immigrants-might-never-get-it-back/2019/04/26/dcaa69a0-5709-11e9-9136-f8e636f1f6df_story.html?noredirect=on&utm_term=.a0e66c530c5a.

⁴¹ DHS, ICE Breached Bond Detention Fund at ICE – BBDF - 3, located within *DHS ICE, Congressional Budget Justification, FY 2020*, https://www.dhs.gov/sites/default/files/publications/19_0318_MGMT_CBJ-Immigration-Customs-Enforcement_0.pdf.

⁴² See Immigrants’ Rights Clinic at Stanford Law School and the Immigration Law Clinic at the UC Davis School of Law, *Following the Money: New Information about the Federal Government’s Billion Dollar Immigration Detention and Bond Operations* (Feb. 25, 2019), <https://stanford.app.box.com/s/2pqsqypukwdjoz1g5nl3e0lxtop4rej>.

⁴³ 85 Fed. Reg. 11866, 11869 (Feb. 28, 2020).

individual who is subject to the fee. The taxpayer subsidization, therefore, is greater than the number provided in this chart.”⁴⁴

The second quantitative reference to fee waivers in the NPRM states that “if fees had been collected for each of [the more than 95,000] filings at the current fee levels [in 2018], EOIR would have collected \$6.7 million in revenue.”⁴⁵ From the construction of this sentence, it is clear that EOIR did not collect the full amount because many applicants applied for and received fee waivers.

The NPRM does not discuss the number of fee waiver applications received by the agency, the number of fee waivers granted and denied, nor changes in the grant/denial rate over time. However if 36 percent of fee waivers were granted for application fees ranging from \$100-110, it is common sense that many more noncitizens would apply for waivers of fees that are three to eight times higher than the existing fees.

The proposed rulemaking makes several references to the existence of a fee waiver process such as, “[c]onsistent with current practice, the OCIJ and the BIA would continue to entertain requests for fee waivers and have the discretionary authority to waive a fee for an application or motion upon a showing that the filing party is unable to pay. See 8 CFR 1003.8(a)(3), 1003.24(d), 1103.7(c).”⁴⁶ But nowhere does the rulemaking acknowledge that an eightfold fee increase in the most commonly filed form, EOIR-26, Notice of Appeal before the BIA, will dramatically increase the number of fee waiver requests filed. Likewise, the proposed rulemaking does not account for the added costs associated with adjudicating the increased fee waiver requests.

E. The proposed rule must ensure that applicants whose fee waivers are denied will be given adequate time to meet required deadlines

DOJ regulations require the appealing party to file the Notice of Appeal with the BIA within 30 days of the immigration judge’s decision. 8 CFR § 1003.38(b). The Notice of Appeal must be accompanied by the required fee or a fee waiver form; if the fee or fee waiver does not accompany the Notice of Appeal, the appeal is not deemed properly filed. 8 CFR § 1003.38(d). The BIA and federal courts of appeals have applied this filing deadline stringently—even if an overnight courier fails to timely deliver the Notice of Appeal, the appeal has been deemed untimely.⁴⁷

Notably, while the regulations state that the Notice of Appeal must be accompanied by a fee or fee waiver, they do not specify whether the appeal is deemed timely if the fee waiver is denied. Likewise, the instructions on the Notice of Appeal form, Form EOIR-26 state, “Your appeal may be rejected or dismissed if you fail to submit a fee or a properly completed Fee Waiver.” However, neither the regulations, nor the practice manuals, nor any published BIA cases explains whether a fee waiver that is timely filed but not granted suffices for the BIA to consider the Notice of Appeal timely filed. Even if the BIA does consider the filing of the fee waiver form with the Notice of

⁴⁴ *Id.*

⁴⁵ *Id.* at 11874.

⁴⁶ *Id.* at 11871.

⁴⁷ *Matter of Liadov*, 23 I. & N. Dec. 990, 992 (BIA 2006) (“that delivery was a day or 2 past the ‘guaranteed’ date to be a ‘rare’ circumstance that would excuse the late filing.”) *upheld by Liadov v. Mukasey*, 518 F.3d 1003, 1006 (8th Cir. 2008) (“an alien whose appeal to the BIA was dismissed as untimely is precluded from judicial review of the merits of the removal order because he failed to properly exhaust an available administrative remedy.”).

Appeal sufficient to comply with 8 CFR § 1003.38(b), there is no regulatory or agency guidance that specifies how much time the noncitizen has after the denial of the fee waiver to resubmit the Notice of Appeal with the fee.

By way of contrast, the Immigration Court Procedures Manual, states explicitly:

Fee waivers are not automatic. The request for a fee waiver must be accompanied by a properly executed affidavit or unsworn declaration made pursuant to 28 U.S.C. § 1746, substantiating the filing party's inability to pay the fee. If a filing is submitted without a required fee and the request for a fee waiver is denied, *the filing will be deemed defectively filed and may be rejected or excluded from evidence.* (emphasis added)⁴⁸

CLINIC urges DOJ to specify that the 30-day clock for filing a Notice of Appeal would restart upon denial of a respondent's fee waiver. As described in section II G below, unless DOJ reasonably grants fee waiver requests and allows time for refiling when fee waivers are denied, it will force the U.S. government to shift more resources to the federal court system to adjudicate appeals of wrongly denied fee waiver requests and unfairly applied filing deadlines.

F. As noncitizens receive less due process in immigration court, there is a greater need for motions and appeals than ever

In the past three years, the administration has taken steps to dramatically alter immigration court procedures.⁴⁹ These steps have included far-reaching changes both procedurally and substantively to established procedures. These changes have included:

- the implementation of performance metrics for immigration judges which give judges a financial incentive to complete cases quickly⁵⁰
- the implementation of a “rocket docket” for families who have arrived recently in the United States, which again prioritize speed over due process⁵¹
- docket shuffling, which leads to chaotic scheduling for counsel and forces some cases to proceed before they are fully prepared while others languish for years in a growing backlog⁵²
- the issuance of fake court dates in notices to appear and notices of hearing⁵³

⁴⁸ Immigration Court Procedures Manual Ch. 3.4(d), <https://www.justice.gov/file/1250706/download>.

⁴⁹ See House Judiciary Statement, *supra* note 2.

⁵⁰ Memorandum from James R. McHenry III, Director, EOIR, Case Priorities and Immigration Court Performance Measures (Jan. 17, 2018), <https://www.justice.gov/eoir/page/file/1026721/download>. These performance metrics have been strongly condemned by the immigration judges' union. See Maria Sacchetti, *Immigration Judges Say Proposed Quotas From Justice Dept. Threaten Independence*, WASH. POST, Oct. 12, 2017, https://www.washingtonpost.com/local/immigration/immigration-judges-say-proposed-quotas-from-justice-dept-threaten-independence/2017/10/12/3ed86992-ae11-e7-be94-fabb0f1e9ffb_story.html.

⁵¹ House Judiciary Statement, *supra* note 2, at 6–7.

⁵² See Attorney General's Judges, *supra* note 4, at 20.

⁵³ Monique O. Madan, *Fake court dates are being issued in immigration court. Here's why*, SEATTLE TIMES, Sep. 22, 2019, <https://www.seattletimes.com/nation-world/fake-court-dates-are-being-issued-in-immigration-court-heres-why/>. EOIR has continued to accept NTAs with incorrect dates and times or no date and time at all, in spite of the Supreme Court's admonition that “a notice that does not specify when and where to appear for a removal proceeding is not a “notice to appear.” *Pereira v. Sessions*, 138 S. Ct. 2105, 2108, (2018).

- the elimination of judges' discretion to administratively close cases⁵⁴
- the severe curtailment of immigration judges' ability to grant continuances in cases⁵⁵ and
- the severe curtailment of immigration judges' ability to terminate or dismiss cases.⁵⁶

Concurrent with these procedural changes, which have increased the odds of immigration judges ordering noncitizens removed and appealing their cases, the BIA has become increasingly politicized. In August 2019, EOIR issued an interim final rule (IFR) establishing an Office of Policy within EOIR for the first time ever.⁵⁷ This IFR fundamentally changed the internal organization of EOIR and politicized⁵⁸ a branch of DOJ that is intended to be adjudicative in nature, by having EOIR play a new role in immigration policy-making.⁵⁹ The addition of this politicized office within EOIR was strongly denounced by the National Association of Immigration Judges, calling the rule, “a blatant attempt to use EOIR as an enhanced immigration law enforcement tool.”⁶⁰

Also in August 2019, the attorney general added six sitting immigration judges as permanent members of the BIA, the first time Board members have been permitted to simultaneously conduct hearings and make appellate rulings. Among these appointees, five had asylum denial rates of over 90 percent of their cases, with one having a 96 percent asylum denial rate and another having a 98.7 percent denial rate.⁶¹ One of the judges rewarded with permanent membership on the BIA had defied a prior order by the Board to complete background checks and grant asylum in the case of Ms. A-B-. Instead the judge held the decision, without legal cause, and ultimately referred it to Attorney General Jeff Sessions⁶² who used it as a vehicle to overturn *Matter of A-R-C-G-*, 26 I&N

⁵⁴ *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018).

⁵⁵ *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018).

⁵⁶ *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018).

⁵⁷ 84 Fed. Reg. 44537, 44538 (Aug. 26, 2019).

⁵⁸ Disclosures obtained by CLINIC through the Freedom of Information Act show close coordination between the White House and EOIR in creating this Office of Policy. CLINIC, *FOIA Disclosures on the Office of Policy* (Oct. 24, 2019), <https://cliniclegal.org/resources/freedom-information-act/foia-disclosures-office-policy>.

⁵⁹ See CLINIC, *CLINIC Submits Comment Opposing EOIR's Reorganization Interim Rule, Calls for Withdrawal* (Oct. 18, 2019), <https://cliniclegal.org/resources/federal-administrative-advocacy/clinic-submits-comment-opposing-eoirs-reorganization> (“EOIR itself stated that the Office of Policy ‘will be key in EOIR’s efforts to meet the Presidential and Attorney General Priority goal to Enforce Immigration Law.’” (citing to Freedom of Information Act disclosures concerning the creation of the Office of Policy obtained by CLINIC).

⁶⁰ National Association of Immigration Judges (NAIJ), *Comments on the Department of Justice's Regulation Radically Changing the Structure of the Immigration Court* (Aug. 2019), https://www.naij-usa.org/images/uploads/publications/NAIJ_Comments_on_the_Department_of_Justice%E2%80%99s_Regulation_Radically_Changing_the_Structure_of_the_Immigration_Court.pdf [hereinafter “NAIJ Office of Policy Comments”] (“With the ability to overturn any immigration judge’s decision, the Director has the power to pressure immigration judges to issue decisions in line with the Director’s political view as opposed to established law, since the percentage of cases remanded counts against a judge in his or her individual performance review plan under the current Agency’s quotas and deadline system.”).

⁶¹ See House Judiciary Report, *supra* note 2, at 4–5.

⁶² Jane Fonda and Karen Musalo, *Her Husband Beat Her and Raped Her. Jeff Sessions Might Deport Her.*, N.Y. TIMES, May 17, 2018, <https://www.nytimes.com/2018/05/17/opinion/jeff-sessions-asylum-domestic-violence.html>.

Dec. 338 (BIA 2014) through an attorney general precedential decision. *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018).⁶³

As EOIR rewards adjudicators who deny cases and promotes them to positions through which they can issue precedential decisions, it is inevitable that fewer noncitizens will prevail in immigration court or before the BIA. The administration's changed procedures have robbed many noncitizens appearing at their immigration hearings of their due process rights and led to elevated numbers of orders of removal.⁶⁴

The procedural roadblocks the current administration has erected have also resulted in increased numbers of *in absentia* removal orders.⁶⁵ These increased numbers mean that more noncitizens must file motions to rescind and reopen or face potential arrest, detention, and removal by ICE than in the past. The Supreme Court has recognized that motions to reopen are "an 'important safeguard' intended 'to ensure a proper and lawful disposition' of immigration proceedings."⁶⁶ Noncitizens have a statutory right to file a motion to reopen their immigration case.⁶⁷ The proposed fee increases for these motions would trample on that statutory right. This important right was recently addressed by the U.S. Supreme Court, which held on March 23, 2020, that immigrants with longstanding orders of removal may seek judicial review of denials of their motions to reopen by asserting that they are eligible for "equitable tolling."⁶⁸

Under current law, motions to reopen before the immigration court and the BIA do not require fees if they are "based exclusively on an application for relief that does not require a fee." 8 CFR § 1003.24(b)(2) (immigration court); 8 CFR 1003.8 (a) (2) (ii)-(iii) (BIA). However, since the proposed rule would, for the first time, charge asylum-seekers to submit asylum applications, motions to reopen, including those based on an application for asylum, could now be interpreted to require the full filing fee. Pursuant to the proposed rule, the fee would be \$145 for motions to reopen before the immigration judge, and \$895 for motions to reopen filed before the BIA.⁶⁹

Such fees would render motions to reopen a statutory right in name only, given that few noncitizens will be able to come up with the required filing fees. That is especially the case for detained

⁶³ That judge also made headline news, prior to being elevated to the BIA, by threatening a 2-year old that his dog would bite him if we was not quiet. Marina Pitofsky, *Immigration Judge Told 2-Year-Old To Be Quiet Or A Dog Would 'Bite You': Report*, THE HILL, Sep. 10, 2019, <https://thehill.com/blogs/blog-briefing-room/news/460739-immigration-judge-told-2-year-old-to-be-quiet-or-his-dog-would>.

⁶⁴ According to EOIR's Statistical Yearbook, in FY2014 EOIR issued 76,061 removal orders whereas in FY2018, the last year for which EOIR published a Statistical Yearbook, EOIR issued 116,508 removal orders. U.S. Department of Justice, Executive Office for Immigration Review, *Statistics Yearbook Fiscal Year 2018* 13, <https://www.justice.gov/eoir/file/1198896/download>.

⁶⁵ According to EOIR's Statistical Yearbook, in FY2014 EOIR issued 26,234 in absentia orders whereas in FY2018, the last year for which EOIR published a Statistical Yearbook, EOIR issued 46,480 in absentia orders. U.S. Department of Justice, Executive Office for Immigration Review, *Statistics Yearbook Fiscal Year 2018* 33, <https://www.justice.gov/eoir/file/1198896/download>. See also, CLINIC, *FOIA Disclosures on In Absentia Removal Numbers Based on Legal Representation* (Mar. 27, 2020), <https://cliniclegal.org/resources/freedom-information-act/foia-disclosures-absentia-removal-numbers-based-legal>.

⁶⁶ *Kucana v. Holder*, 558 U.S. 233, 242 (2010) (quoting *Dada v. Mukasey*, 554 U.S. 1 (2008)).

⁶⁷ See *Reyes Mata v. Lynch*, 135 S. Ct. 2150, 2153 (2015); *Dada*, 554 U.S. at 4-5.

⁶⁸ *Guerrero-Lasprilla v. Barr*, --U.S. --, No. 18-1015, 2020 WL 1325822 (U.S. Mar. 23, 2020).

⁶⁹ 85 Fed. Reg. 11866, 11870 (Feb. 28, 2020).

individuals, most of whom are only able to earn \$1 per day of work.⁷⁰ At that pay rate, it would take a detained noncitizen working every single day two and half years to raise the funds necessary to file a motion to reopen before the BIA. At that point, the motion would be deemed untimely—generally, the immigration court or the BIA must receive the motion to reopen within 90 days of the final removal order.⁷¹ Typically, ICE removes noncitizens at the first possible opportunity and, in any event, ICE would unlikely keep a noncitizen in civil detention for 2.5 years as that would prompt a prolonged detention legal challenge. In reality, without generous fee waivers, those who are detained and wish to appeal decisions would be unable to do so.

At the same time, the number of case appeals to the BIA has risen from 13,558 in 2014 to 31,902 in 2018.⁷² EOIR statistics are not yet available for cases adjudicated after 2018, when many of the changes in the adjudication process were fully implemented. There also are no publicly available statistics on the number of appeals filed by DHS as opposed to the noncitizen.

In effect, EOIR has become another highly politicized arm of immigration enforcement rather than an impartial adjudications branch of DOJ.⁷³ In this proposed rulemaking, DOJ describes the government's interests as being identical with those of DHS. "As DHS is the party opposite the alien in these proceedings, EOIR's hearings provide value to both aliens seeking relief and the Federal interests that DHS represents."⁷⁴ But EOIR itself should be representing the equally important "Federal interest" of fairness and justice for all parties who appear before the immigration court and BIA.

The steps the administration has taken to "weaponize" EOIR as an enforcement agency⁷⁵ will undoubtedly lead to more federal appeals. The structure of appeals as set forth in the Immigration and Nationality Act allows noncitizens to appeal final orders of removal only if the petitioner "has exhausted all administrative remedies available to the alien as of right." INA § 242(d)(1). Thus, noncitizens with final removal orders cannot access the federal court system to review immigration judge decisions unless they first appeal to the BIA.

⁷⁰ See *Novoa v. GEO Grp., Inc.*, No. EDCV172514JGBSHKX, 2019 WL 7195331, at *3 (C.D. Cal. Nov. 26, 2019).

⁷¹ 8 USC § 1229a(c)(7)(C)(i).

⁷² U.S. Department of Justice, Executive Office for Immigration Review, *Statistics Yearbook Fiscal Year 2018* 33, <https://www.justice.gov/eoir/file/1198896/download> at 36.

⁷³ See *Attorney General's Judges*, *supra* note 4, at 5 (the attorney general is "abusing his power in order to manipulate and ultimately weaponize the court system toward enforcement-oriented ends.") Former Attorney General Jeff Sessions issued explicitly political remarks when inducting a new class of immigration judges in 2018, "The number of illegal aliens and the number of baseless claims will fall. A virtuous cycle will be created, rather than a vicious cycle of expanding illegality...The American people have spoken. They have spoken in our laws and they have spoken in our elections." Jeff Sessions, *Att'y Gen., U.S. Dep't of Justice, Attorney General Sessions Delivers Remarks to the Largest Class of Immigration Judges in History for the Executive Office for Immigration Review (EOIR)* (Sep. 10, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-largest-class-immigration-judges-history>.

⁷⁴ 85 Fed. Reg. 11866, 11870 (Feb. 28, 2020).

⁷⁵ See *House Judiciary Statement*, *supra* note 2, at 2 ("under the current administration, the executive branch has gone even further by actively weaponizing the immigration court system against asylum seekers and immigrants of color. Its actions have created a system in which due process rights are not, and cannot be, protected.").

G. Lack of due process before the immigration courts and BIA, coupled with dramatically increased fees, will place an undue burden on federal courts

Increasingly, the BIA is issuing cursory decisions denying relief. In the past three years, its role has become to narrow eligibility for virtually every form of relief through its precedential decisions and decisions issued by the attorney general.⁷⁶ The attorney general has issued nine precedential decision in the past three years, all of which have constricted eligibility for relief for noncitizens with an additional three self-certified decisions pending.⁷⁷ By way of contrast, in the eight years of the prior administration, the attorney general issued only four precedential decisions none of which restricted noncitizens' eligibility for relief.⁷⁸ During the past three years, 83 percent of published BIA decisions have found against respondents whereas 56.5 percent found against respondents in the prior eight years.⁷⁹

Advocates now understand that, in many cases, they must make a record before the immigration judge, and go through an appeal before the BIA, with the ultimate goal of appeals before the federal circuit courts as EOIR becomes overtly politicized and focused on ordering removal over fairness.⁸⁰ In the past, during the George W. Bush administration, Attorney General Ashcroft implemented a "streamlined" appeal system allowing single Board members to affirm immigration judge decisions without opinion. "These streamlining goals enabled the Immigration Court to reduce its backlog, but created an avalanche of appeals at the Circuit Court levels, which the Courts then remanded back to the Immigration Courts based on due process concerns, creating another backlog."⁸¹ When litigants do not receive justice at the BIA, they file federal court appeals in higher numbers.⁸² By way of contrast, when the BIA rescinded most of its streamlining policies, federal appeals dropped.⁸³

The proposed fee increase will only exacerbate the burden on the federal courts by creating a new source of appeals: denial of the fee waiver and the subsequent dismissal of the appeal for lack of timely filing. For noncitizens who are unable to pay the \$975 appeal fee within the 30 day appeal window, or whose applications for fee waivers are denied, there will be no opportunity to have the

⁷⁶ DOJ, AG / BIA Decisions Listing, <https://www.justice.gov/eoir/ag-bia-decisions>. The case outcome analysis cited in the text is based on analysis of precedential decisions over the past 11 years performed internally by CLINIC.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ See NAIJ Office of Policy Comments, *supra* note 60, and surrounding text.

⁸¹ National Association of Immigration Judges, *By the Numbers: Why Quotas on Immigration Judges Will Adversely Impact the Court's Backlog* (Mar. 13, 2018), https://www.naij-usa.org/images/uploads/publications/By_the_Numbers_-_3-13-18.pdf.

⁸² John R.B. Palmer et al., *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEORGETOWN IMMIGR L. JOURNAL 86, 94 (2005) ("[O]ur data support the hypothesis that appeal rate has increased as a result of a surge in BIA decisions that leave non-detained aliens with final expulsion orders, and a fundamental shift in behavior among lawyers and their clients, causing them to focus their litigation in the Courts of Appeals for the first time. We think this fundamental shift was triggered by the high volume of final expulsion orders that began to be issued starting in March 2002, and a general dissatisfaction with the BIA's review.")

⁸³ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-17-438, IMMIGRATION COURTS: ACTIONS NEEDED TO REDUCE CASE BACKLOG AND ADDRESS LONG-STANDING MANAGEMENT AND OPERATIONAL CHALLENGES 31 (2017) ("Specifically, the number of new appeals filed with the BIA annually decreased from about 47,000 appeals filed in fiscal year 2006 to about 29,000 filed in fiscal year 2015.").

merits of their cases heard by an independent, Article III court. The proposed fee schedule will put BIA appeals out of reach for many, if not most, noncitizens, and with the very real possibility that their fee waiver requests will be denied, it is likely that federal courts will again see an “avalanche” of appeals, this time, on the denial of the fee waiver and the subsequent dismissal of the appeal for lack of timely filing. Such appeals will place an enormous and unnecessary strain on the federal court system, and will likely lead to many cases being remanded to the BIA and increasing the backlog there. Adding to the pressure this will cause the federal judiciary system, most of these appeals will also require the adjudication of a fee waiver by the federal courts. As a result, whatever money the federal government as a whole hopes to take in by imposing these fees will likely be expended by the federal courts, and DOJ attorneys, in processing and likely remanding hundreds or thousands of cases in which fee waiver requests have been wrongly denied.

H. DHS is appealing more cases than before and noncitizens should not have to bear the cost of their appeals

DOJ bases its calculation of the cost increase for each application on a flawed formula. It calculates the cost per adjudication, (as discussed above, DOJ has not made its full data in this cost calculation available), and then it passes this cost on to the noncitizen in the form of a fee. The chart at 85 Fed. Reg. 11866, 11869 bases the cost to the U.S. taxpayer on the difference between what is currently being collected in fees and what DOJ claims the real cost to be. Yet nowhere in this proposed rulemaking does DOJ break down the percentage of appeals filed by the government as opposed to the number of appeals filed by the noncitizen. Anecdotally, advocates have found in the past three years that DHS, stripped of prosecutorial discretion,⁸⁴ has filed appeals in a much higher percentage of cases that the respondent has won than in the past. It is fundamentally flawed logic to calculate the cost to the taxpayer of the current number of appeals without revealing the exact number of appeals filed by DHS, which does not pay a filing fee since increased fees to the noncitizen will not relieve the taxpayer of the burden of paying for DHS appeals.

The increased number of cases in immigration court and, correspondingly, on appeal, are a direct result of priorities the administration has set, which are being carried out by ICE, the agency that issues the Notice to Appear document that begins removal proceedings. ICE’s 2018 annual report to Congress stated explicitly:

Additional attorney resources are important to ICE maintaining its operational effectiveness in response to the increased caseload and court dockets that will result from implementation of the [Executive Order] and ensuring that ICE can effectively uphold the integrity of the immigration system during a period of increased enforcement. At the end of FY 2016, more than 520,000 immigration cases were pending nationally. In FY 2017, ICE’s workload is projected to grow to nearly 1.2 million cases, a 54 percent increase over

⁸⁴ See American Immigration Council, *The End of Immigration Enforcement Priorities Under the Trump Administration* (Mar. 7, 2018), <https://www.americanimmigrationcouncil.org/research/immigration-enforcement-priorities-under-trump-administration>.

FY 2016. The expansion in enforcement activity resulting from the [Executive Order] will significantly increase the number of pending cases.”⁸⁵

Under current rules, DHS is exempt from paying a filing fee when it appeals.⁸⁶ As a result, there is no incentive for DHS to limit the appeals it files to cases where appeals are meritorious. As discussed above, the proposed budget for ICE in FY2021 is \$9.9 billion.⁸⁷ Thus, CLINIC proposes that ICE pay for appeals to the BIA. If ICE paid for its share of appeals, EOIR could collect a substantial amount of fees without having to seek them from the most vulnerable noncitizens who are defending their rights before the courts.

I. Requiring asylum seekers to pay for protection is immoral and violates domestic and international law

DOJ proposed a fee for defensive asylum applications for the first time ever. This proposed fee is immoral and should be withdrawn. Pope Francis has consistently emphasized the need for those who are safe and secure not to forget those who are suffering:

Loving our neighbor as ourselves means being firmly committed to building a more just world, in which everyone has access to the goods of the earth, in which all can develop as individuals and as families, and in which fundamental rights and dignity are guaranteed to all. . . This means being a neighbor to all those who are mistreated and abandoned on the streets of our world, soothing their wounds and bringing them to the nearest shelter, where their needs can be met.⁸⁸

Indeed, the United States was founded on the concept of being a haven for those fleeing oppressive conditions. In 1776, Thomas Paine wrote, this “new world hath been the asylum for the persecuted lovers of civil and religious liberty from *every part* of Europe. Hither they have fled, not from the tender embraces of the mother, but from the cruelty of the monster. . .”⁸⁹

For decades following World War II, the United States has been that “shelter” for refugees and asylum seekers. In 2018, for the first time ever, Canada surpassed the United States in resettling refugees.⁹⁰ Congress has provided greater protections for those seeking asylum who are on U.S. soil. INA 208 (a)(1) explicitly states, “Any alien who is physically present in the United States or who arrives in the United States . . . irrespective of such alien’s status, may apply for asylum.”

⁸⁵ DHS, ICE Operations & Support at O&S - 14–15, located within *DHS ICE, Congressional Budget Justification, FY 2018—Volume II*,

<https://www.dhs.gov/sites/default/files/publications/DHS%20FY18%20CJ%20VOL%20II.PDF>.

⁸⁶ 8 CFR 1003.8 (a) (2) (vi).

⁸⁷ White House, *Strengthening Border Security and Immigration Enforcement* (Feb. 2, 2020)

<https://www.whitehouse.gov/wp-content/uploads/2020/02/FY21-Fact-Sheet-Immigration-Border-Security.pdf>.

⁸⁸ Gerard O’Connell, *Pope Francis Reminds Christians that Migrants and Refugees Should Be Welcomed Around the World*, AMERICAN, THE JESUIT REVIEW, Sep. 29, 2019,

<https://www.americamagazine.org/faith/2019/09/29/pope-francis-reminds-christians-migrants-and-refugees-should-be-welcomed-around>.

⁸⁹ Thomas Paine, COMMON SENSE, 1776, <https://www.gutenberg.org/files/147/147-h/147-h.htm>.

⁹⁰ Jason Markusoff, *Canada Now Brings in More Refugees than the U.S.*, MACLEAN’S, Jan. 23, 2019, <https://www.macleans.ca/news/canada/refugee-resettlement-canada/> (“For the first time in the history of the United Nations refugee program, the U.S. has slipped behind another country.”).

As a signatory to the 1967 Protocol of the 1951 Convention Relating to the Status of Refugees, the United States has an obligation to accept asylum seekers who seek protection. Further, through the Refugee Act, the United States has domestic legal responsibility to asylum seekers. Originally drafted in 1980, the Refugee Act establishes the core principles of asylum adjudications in line with U.S. treaty obligations. The Refugee Act has been amended but never has Congress required a fee for an asylum application. Refusing asylum applicants for the inability to pay would effectively cause the United States to abrogate its treaty obligations and would violate the basic intent of the 1980 Refugee Act. In fact, the vast majority of countries that are signatories to the 1951 Convention and/or 1967 Protocol do not charge a fee for an asylum application.⁹¹ According to research conducted by USCIS, the United States would be one of only four countries charging fees for asylum applications.⁹²

By charging a fee for asylum applications, for the first time, asylum seekers may be prevented from applying for asylum if they cannot pay or if their fee waiver applications are denied. Charging a fee to seek asylum contradicts fundamental American values and values of people of faith.

J. The proposed mandatory fee for asylum application will burden survivors of persecution

Asylum seekers often come to the United States fleeing persecution and most come to the shores of the United States with nothing more than the clothes on their backs. Upon arrival, asylum seekers face many obstacles. Among these, under current law, asylum seekers have to wait to receive permission to legally work in the United States. Congress codified a waiting period for work permits for asylum seekers in 1996 in response to the purported notion that asylum seekers were filing asylum applications in order to gain work authorization.⁹³ Thus, asylum seekers must wait to apply for an employment authorization document (EAD) until 150 days after they have submitted an application for asylum with the assumption that the employment authorization would be issued after the 180 days the application is pending.⁹⁴ Asylum seekers must wait six full months *after* the asylum application has been filed in order to receive employment authorization and start the road to financial stability. As discussed below, further DHS rules that have been proposed but not yet finalized, will make the financial situation for asylum seekers even more dire.

At the same time asylum seekers face statutory and regulatory obstacles to work lawfully, most asylum seekers are prohibited from receiving federal public benefits and most state public benefits.⁹⁵ Thus, with no safety net or access to employment, asylum seekers who arrive with

⁹¹ Global Legal Research Center, Law Library of Congress, *Fees Charged for Asylum Applications by States Parties to the 1951 Refugee Convention* (2017), www.loc.gov/law/help/asylum-application-fees/asylum-application-fees.pdf.

⁹² U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 84 Fed. Reg. 62280, 62319 (Nov. 14, 2019). The other three countries are Iran, Fiji, and Australia.

⁹³ David A. Martin, *Making Asylum Policy: The 1994 Reforms*, 70 WASH. L. REV. 725, 733 (1995).

⁹⁴ 8 CFR § 208.7 (1994).

⁹⁵ Karina Fortuny & Ajay Chaudry, Urban Institute, *A Comprehensive Review of Immigrant Access to Health and Human Services* vii (2011), www.urban.org/sites/default/files/publication/27651/412425-A-Comprehensive-Review-of-Immigrant-Access-to-Health-and-Human-Services.PDF.

nothing more than the clothes on their backs and small amounts of cash in their pockets are unable to pay an asylum fee of any amount.⁹⁶

Asylum seekers often deplete their life savings to travel to the United States and cannot afford even the extra cost of \$50.⁹⁷ Consequently, many asylum seekers face severe financial instability and the prospect of working in industries where they could be vulnerable to exploitation, unsafe work environments, and labor or sex trafficking.⁹⁸ Asylum seekers are forced to live hand to mouth as they struggle to pay for their daily living expenses and a mandatory fee of \$50 would be a heavy burden. The amount of money is irrelevant when the pocket from which it is charged is empty.

In the past the U.S. government has recognized the unique vulnerability of asylum seekers and recent asylees. In 1993, INS withdrew a proposed rule that would have required a fee for an I-730 application. In withdrawing the proposed rule, DOJ explained, “Unlike some benefits sought by asylees, a relative petition may be filed at a time when the asylee has recently arrived in the United States and is most unlikely to be financially self-sufficient.” 58 Fed. Reg. 12146-02. Just as it would have been unreasonable to require an asylee who arrived recently to pay a fee to reunite with family, it is even more unreasonable to require an asylum seeker who is not even lawfully permitted to work, to pay a fee to seek asylum.

K. Coupled with punitive EAD proposed rules concerning asylum seekers, the fee increases are designed to prevent asylum seekers from pursuing their legal rights

In the past three years, the administration has made radical changes to make it more difficult for asylum seekers to pursue their claims for safety.⁹⁹ Among the changes designed to prevent asylum seekers from succeeding on their cases are the following:

- “Metering” at the border to prevent asylum seekers from entering the United States
- “Asylum Ban 1.0” which seeks to prevent asylum seekers who enter between ports of entry from obtaining asylum in the United States
- The so-called “Migrant Protection Protocols” which requires non-Mexican asylum seekers to await hearings in the United States in dangerous conditions in Mexico and with limited or no access to counsel in the United States

⁹⁶ Lindsay M. Harris & Joan Hodges-Wu, *Asylum Seekers Leave Everything Behind. There’s No Way They Can Pay Trump’s Fee.*, WASH. POST, May 1, 2019, www.washingtonpost.com/outlook/2019/05/01/asylum-seekers-leave-everything-behind-theres-no-way-they-can-pay-trumps-fee/?noredirect=on&utm_term=.f4103a5f7230; Human Rights Watch, “We Can’t Help You Here”: U.S. Returns Asylum Seekers to Mexico (2019), www.hrw.org/report/2019/07/02/we-cant-help-you-here/us-returns-asylum-seekers-mexico.

⁹⁷ Harris & Hodges-Wu, *supra* note 96; Suzanne Gamboa, ‘Heartless’: Advocates Bristle at Trump Plan to Charge Asylum-Seekers a Fee, NBC NEWS, Apr. 30, 2019, www.nbcnews.com/news/latino/heartless-advocates-bristle-trump-plan-charge-asylum-seekers-fee-n1000341.

⁹⁸ See, e.g., Int’l Labour Org. & Walk Free Found., *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage* 52–53 (2017), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_575479.pdf (“[I]n countries of destination . . . the identification and protection of those deemed most at risk of modern slavery should be considered part of the response to influxes of asylum seekers.”).

⁹⁹ See National Immigrant Justice Center, *A Timeline of the Trump Administration’s Efforts to End Asylum*, <https://www.immigrantjustice.org/issues/asylum-seekers-refugees>.

- The so-called “Asylum Cooperative Agreements” which allow Customs and Border Protection officers to send asylum seekers to violent Northern Triangle countries rather than allowing them to pursue asylum claims in the United States
- “Asylum Ban 2.0” which prevents asylum seekers who traveled through a third country from being eligible for asylum in the United States unless they applied for and were denied asylum abroad, and
- The so-called Prompt Asylum Claim Review (PACR) and Humanitarian Asylum Review Process (HARP), which are designed to complete asylum claims within weeks and effectively prevent asylum seekers from accessing legal counsel.¹⁰⁰

Importantly, this list is not comprehensive; it is merely included to provide a backdrop to the new obstacles to justice imposed in the past three years. These overt restrictions on asylum are one reason that it is difficult to assume that the administration is acting in good faith in promulgating these extraordinary fee increases.

In addition to this generalized assault on the asylum system, there are specific rules that have been implemented, or which are likely to be implemented soon, which make it particularly difficult for asylum seekers to afford the \$975 fee for BIA appeals.

DHS has recently issued two proposed rules explicitly designed to make asylum seekers wait longer to receive an initial EAD. DHS issued one proposed regulation that would eliminate an existing rule requiring USCIS to process asylum seekers’ EAD applications within 30 days of filing¹⁰¹ and a second rule that would require asylum seekers to wait 365 days to apply for an initial EAD.¹⁰²

At the same time, EOIR has instituted docketing rules to expedite asylum case adjudications, and discourage granting continuances even when they are needed. In November 2018, it issued guidance stating that immigration judges should seek to complete all asylum adjudications within 180 days of the filing of the asylum application.¹⁰³ EOIR also directed immigration judges to prioritize cases designated as “family unit” cases “in an expeditious manner with the expectation that they will be completed within one year or less...”¹⁰⁴ As a result, advocates have had difficulties obtaining continuances even when needed to seek evidence, counseling for vulnerable clients, or consult with expert witnesses.

With EOIR intentionally speeding up asylum adjudications, at the same time DHS proposes to lengthen the waiting period for asylum seekers to obtain work authorization, the end result will be that asylum seekers will receive decisions on the merits of their asylum claims before they receive

¹⁰⁰ *Id.*

¹⁰¹ 84 Fed. Reg. 47148 (Sep. 9, 2019).

¹⁰² 84 Fed. Reg. 62374, 62377 (Nov. 14, 2019).

¹⁰³ Memorandum from James R. McHenry III, Director, EOIR, Guidance Regarding the Adjudication of Asylum Application Consistent with INA 208(d)(5)(A)(iii) (Nov. 29, 2018), <https://www.justice.gov/eoir/page/file/1112581/download>.

¹⁰⁴ Memorandum from James R. McHenry III, Director, EOIR, Tracking and Expedition of “Family Unit” Cases (Nov. 16, 2018), <https://www.justice.gov/eoir/page/file/1112036/download>. See also House Judiciary Statement, *supra* note 2 at 6–7.

an “asylum pending” EAD. Thus, if an immigration judge denies asylum and enters a removal order against an asylum seeker, the asylum seeker will be required to pay \$975 before ever having received employment authorization. The result of these combined rules will be to encourage asylum seekers to engage in unauthorized employment or else render asylum appeals only accessible to those asylum seekers who are fortunate enough to have a network of family members or social service or faith-based organizations that can provide them with financial support.

Making matters worse, anyone appealing a removal order to the BIA must do so within 30 days of the immigration judge’s decision. For those asylum seekers who were able to pay for a private attorney, often working extra hours or borrowing money from extended family, they will have a very short period of time in which to gather \$975 or forever forfeit their right to appeal. Asylum seekers who are working without authorization would be placed in the difficult position of admitting to violating the law on a fee waiver application or being unable to pursue their legal right to an appeal.

L. By requiring a mandatory asylum fee, the government is reversing its own policy that humanitarian applications should be fee exempt.

For the first time, DOJ is proposing to charge a fee for asylum applications.¹⁰⁵ USCIS likewise recently issued a fee schedule, which would for the first time impose a fee on affirmative asylum applications. In fact, apparently recognizing that most asylum seekers would qualify for a fee waiver, in its rulemaking, USCIS specifically excluded asylum seekers from being eligible to seek a fee waiver, stating that the cost of adjudicating fee waiver requests may exceed the revenue of the fee thus “offsetting any cost recovery achieved from the fee.”¹⁰⁶ Thus, USCIS, the benefits adjudication branch of immigration adjudications, determined that because most asylum seekers would need a fee waiver, the fee would be mandatory and no asylum seeker would be able to have it waived.

While DOJ does not explicitly prohibit asylum seekers from requesting a fee waiver in the NPRM, it nonetheless breaks with the government’s prior position of not requiring fees for humanitarian applications. Given that DOJ’s reasoning in its proposed fee increase is generally aligned with that of DHS in its NPRM increasing USCIS fees, DOJ may also intend to stop issuing fee waivers to asylum seekers. This decision to force the world’s most vulnerable migrants to pay to access safety or face deportation is an unprecedented departure from decades of government practice, similar to the now conscience-shocking poll tax charged under Jim Crow laws.

In prior regulations, USCIS determined that it would expend more resources adjudicating fee waiver than collecting fees for noncitizens in particularly vulnerable categories. Thus in a prior rulemaking, USCIS stated:

USCIS proposed to exempt certain classes of aliens from paying a filing fee where it believes that the incidence of fee waivers due to inability to pay would be very high. In the proposed rule, USCIS proposed to expand the class fee exemptions to

¹⁰⁵ In fact, the section of the INA DOJ relies on for this rulemaking, INA § 286 (m), specifically states that fees collected should be “without charge to asylum applicants.”

¹⁰⁶ 84 Fed. Reg. 62280, 62319 (Nov. 14, 2019).

three small volume programs: Victims of human trafficking (T visas), victims of violent crime (U visas), and Violence Against Women Act (VAWA) self petitioners. . . . Anecdotal evidence indicates that applicants under these programs are generally deserving of a fee waiver. Thus, USCIS determined that *these programs would likely result in such a high number of waiver requests that adjudication of those requests would overtake the adjudication of the benefit requests themselves.* (emphasis added)¹⁰⁷

In the past, USCIS made a reasoned decision to not charge fees for applications where it is so likely that the applicant would need to request a fee waiver that the agency would expend more resources in adjudicating the fee waivers than it would recoup in fees paid. If DOJ applies a reasonable standard in adjudicating fee waivers for asylum seekers filing I-589s, there is a strong likelihood that many, if not most, asylum applicants will qualify for a fee waiver. DOJ will thus expend significant resources in adjudicating fee waiver applications for the possibility of recouping \$50 per application. As a matter of efficiency and cost benefit, charging this fee, which in many instances can and should be waived, is irrational.

USCIS recently published its own fee schedule also proposing, for the first time ever, to implement a mandatory \$50 fee on all affirmative asylum applications.¹⁰⁸ In its rulemaking, USCIS stated that the amount of \$50 was chosen because it was large enough to produce a revenue but small enough to be “affordable.”¹⁰⁹ DOJ, by way of contrast, does not offer any justification for its \$50 fee on asylum applications. CLINIC strongly opposed the imposition of a fee on affirmative applications,¹¹⁰ and notes that in the context of defensive applications, the financial impact for asylum-seeking families will be even more severe. In asylum applications before the immigration court, family units will likely have to file an application for each family member and potentially for dependents, thus making the cost per household even higher in defensive cases.¹¹¹ Furthermore, it is more critical for asylum seekers in removal proceedings to obtain counsel to navigate an increasingly complex and adversarial process. If an asylum seeker has to pay for counsel, paying application fees is an even heavier burden.

According to the EOIR 2018 Statistical Yearbook, there were 110,469 asylum receipts in 2018.¹¹² If every one of those applicants paid the \$50 fee, and no one qualified for a fee waiver, the sum total of money the government would take in would be \$5,523,450. This money collected by the federal government would be roughly the same as the government’s expenditure on the

¹⁰⁷ Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule, 72 Fed. Reg. 29851, 29865 (May 30, 2007) (to be codified at 8 CFR pt. 103).

¹⁰⁸ 84 Fed. Reg. 62280 (Nov. 14, 2019).

¹⁰⁹ *Id.* at 62320.

¹¹⁰ See CLINIC et al., *Catholic Partners Join in Submitting Comment in Opposition to USCIS’ Proposed Fee Schedule* (Dec. 19, 2019), <https://cliniclegal.org/resources/federal-administrative-advocacy/catholic-partners-join-submitting-comment-opposition>.

¹¹¹ As discussed below, the I-589 is used to seek asylum, withholding, and CAT protection. Thus it is prudent for dependents in immigration court to file their own I-589 applications. Asylum officers can adjudicate applications for asylum but not for withholding or CAT protection, thus dependents may not feel the need to file their own I-589 at the asylum office level of adjudication.

¹¹² U.S. Department of Justice, Executive Office for Immigration Review, *Statistics Yearbook Fiscal Year 2018* 24, <https://www.justice.gov/eoir/file/1198896/download>.

Washington DC, Fourth of July celebration in 2019.¹¹³ This potential \$5.5 million in asylum seekers' fees can also be contrasted to the budget for ICE, which will exceed \$27.1 million *per day*.¹¹⁴

Moreover, DOJ implies in its NPRM that it is following the lead of DHS in raising fees.¹¹⁵ It discusses DHS's recent fee increase regulations, and goes into detail about DHS's proposal to charge a fee for asylum applications for the first time ever. DHS also recently proposed changes to its fee waiver to make it more difficult for non-citizens' fee waiver applications to be granted. CLINIC submitted comments opposing this proposed rule change.¹¹⁶ While this rulemaking does not specify any changes to its fee waiver form, CLINIC is concerned that EOIR will also seek to restrict access to fee waivers.

DOJ may take the position in adjudicating asylum fee waivers that because \$50 is a relatively low amount,¹¹⁷ it will not be generous in granting fee waivers. Indeed, there is nothing in the language of the proposed rule¹¹⁸ that indicates that DOJ will give any special consideration to the unique circumstances of asylum seekers. However, a fee of \$50 may be insurmountable for many asylum seekers.

M. A filing fee for defensive asylum applications will be especially harmful to families fleeing harm

A growing number of asylum seekers enter the United States in family units. Thus, adults must not only provide for themselves but also for children. As discussed in section II K above, the federal government has recently proposed rules regarding employment authorization eligibility for asylum seekers which will make it more difficult for them to obtain work authorization until their asylum applications are granted.

It is generally a best practice for every member of a family to file their own I-589. At the time an asylum seeker and their family are preparing applications for relief before the immigration court, they may not know whether they will meet the one year filing deadline for asylum, whether they will face one of the asylum bars (and whether any particular asylum bar will be in effect or enjoined by federal courts), whether they will be able to demonstrate a nexus to a protected characteristic, or whether a long-standing BIA precedent will be suddenly overturned by the attorney general. For these reasons, even if the "lead" respondent in a case appears to have a strong asylum claim at the time the I-589 is filed, it is important that every member of the family file their own I-589. For

¹¹³ *Trump's Fourth of July Event Cost an Estimated \$5.4 Million*, PBS, Jul. 11, 2019, <https://www.pbs.org/newshour/politics/trumps-fourth-of-july-event-cost-an-estimated-5-4-million>.

¹¹⁴ White House, *Strengthening Border Security and Immigration Enforcement* (Feb. 2, 2020) <https://www.whitehouse.gov/wp-content/uploads/2020/02/FY21-Fact-Sheet-Immigration-Border-Security.pdf>.

¹¹⁵ 85 Fed. Reg. 11866, 11870–71 (Feb. 28, 2020).

¹¹⁶ CLINIC, *CLINIC Comments on Fee Schedule Revised Forms I-912 and I-129MISC* (Dec. 27, 2019), <https://cliniclegal.org/resources/federal-administrative-advocacy/clinic-comments-fee-schedule-revised-forms-i-912-and-i-129misc>.

¹¹⁷ In the DHS fee schedule NPRM, it stated that the agency chose the amount of \$50 because "it could be paid in one payment, would not require an alien an unreasonable amount of time to save, would generate some revenue to offset costs, discourage frivolous filings, and not be so high as to be unaffordable to even an indigent alien." 84 Fed. Reg. 62280, 62320 (Nov. 14, 2019).

¹¹⁸ See section II D above discussing the very limited consideration the NPRM gives to fee waivers.

large families, this will result in hundreds of dollars of fees for each family member to pursue asylum rather than just \$50.

The instructions for the form I-589 indicate that “dependents” on a primary asylum seeker’s application must file the first three pages of the I-589 to be included with the primary asylum seeker’s application. The rule should clarify that there is no fee for dependents’ asylum applications. If dependents had to pay, then family asylum fees could quickly grow to be many hundreds of dollars as asylum seekers file both as primary applicants and as dependents on more than one application. For example, a family of five—two parents and three children—might have five primary I-589s, as well as each spouse listed as a dependent on the other spouse’s application and each child listed as a dependent on each parent’s I-589 for a total of 10 separate dependent applications and 15 applications altogether.

In some cases, asylum seekers, especially those who are unrepresented or poorly represented, may seek to only file asylum for the “lead” respondent in an effort to save money. The result of such a decision, if the lead respondent does not qualify for asylum, would be to deprive the family members of their own independent applications for asylum, withholding, and Convention against Torture (CAT) protection.

N. The new fee on asylum applications could lead to asylum seekers paying multiple filing fees

If DOJ does not rescind the asylum fee, it should clarify that an asylum seeker need only pay it one time. It is common for asylum seekers to file an I-589 affirmatively pro se, or through “notarios,” and file applications that leave out or make errors regarding important details. When new counsel takes over the case, it is often best practice to file a new I-589 that corrects erroneous information and/or more fully explains the basis of the claim. DOJ should not require asylum seekers to pay for a new I-589 under these circumstances.

DOJ should also not require asylum seekers to pay to file a new I-589 where the version of the I-589 form has been updated by USCIS before proceedings in EOIR concluded, a common occurrence that forces attorneys and pro se noncitizens to resubmit I-589s on the new version of the form.¹¹⁹

O. The new fee, combined with regulations designed to limit asylum eligibility, will force asylum seekers to give up the right to seek asylum if they cannot pay the fee

Asylum seekers who appear to be subject to one of the regulatory asylum bans may not understand that there is litigation challenging these rules and may therefore choose not to pay for asylum relief, which appears to be unavailable to them. Such asylum seekers may then be barred from full asylum relief in the future if they did not pay what is the equivalent of an asylum tax. Asylum seekers should not be forced to choose between a path to full integration into U.S. society and putting food on the table.

¹¹⁹ In the past four years alone, USCIS has issued four new versions of the I-589 form. These new editions have been dated 12/23/2016, 05/16/2017, 04/09/2019, and 12/23/2019.

Although the NPRM does not say so explicitly, DOJ may take the position that it is complying with international law because even asylum seekers who are deemed ineligible for failure to pay the filing fee or receive approval for their fee waiver, can still seek protection by applying for statutory withholding of removal and CAT protection. This is the position the government has taken in promulgating border rules that prohibit the grant of asylum to individuals who do not seek asylum in third countries before requesting it in the United States,¹²⁰ as well as the position the government has taken in promulgating regulations seeking to prevent asylum seekers who enter between ports of entry from qualifying for asylum.¹²¹ The latter rule, the so-called Asylum Ban 1.0, is currently enjoined.¹²²

However, the difference between being granted asylum and being granted withholding of removal or CAT protection cannot be overstated. Whereas asylee status puts an individual on a pathway to lawful permanent residence and citizenship, those who are granted withholding or CAT protection remain in a permanent limbo in the United States, living with an order of removal that could be executed to a third country at any time. At the same time, withholding and CAT often result in permanent family separation.¹²³ Those who prevail on withholding or CAT applications have no ability to petition for family members to join them in the United States, nor can they ever travel abroad to visit family because doing so executes the order.

Furthermore, the legal standards for withholding and CAT are more onerous than those for asylum, and there is no provision for derivatives. Thus, a parent may be able to meet the higher standard and win withholding or CAT in their own right, but if a minor child has not suffered similar persecution or torture, the child may be ordered removed even though the parent is granted relief. Oftentimes the result of limiting asylum eligibility is family separation.

Forcing applicants to pay for the adjudication of an asylum application but not for the adjudication of withholding and CAT protection is irrational and the intent appears to be punitive. Applications for asylum, withholding of removal, and CAT protection are all filed on the same form, the I-589. When an applicant seeks all three forms of relief, the immigration judge considers them simultaneously. Asylum and withholding of removal, in particular, require the immigration judge to consider identical evidence since both forms of relief require a fear of future persecution based on a race, religion, nationality, membership in a particular social group, or political opinion. The NPRM does not articulate any reason for charging money for the asylum application but not for related forms of humanitarian relief. This utter lack of justification makes the proposed rule arbitrary and irrational.

P. The new fee will have other negative effects on asylum seekers and the nonprofits who serve them

Furthermore, subject to limited exceptions, asylum seekers must file for asylum within one year of their last arrival into the United States. INA § 208(a)(2)(B). The imposition of a filing fee on

¹²⁰ See 8 CFR § 1208.3(c)(4); 84 Fed. Reg. 33829, 33835 (Jul. 16, 2019).

¹²¹ See 8 CFR § 1208.13(c)(3) (currently enjoined).

¹²² *O.A. v. Trump*, 404 F. Supp. 3d 109 (D.D.C. 2019).

¹²³ See, e.g., Adolfo Flores, *A Venezuelan Dad Was Allowed Into The US, But His 18-Year-Old Daughter Was Sent Back To Mexico Alone*, BUZZFEED NEWS, Feb. 17, 2020, <https://www.buzzfeednews.com/article/adolfoflores/venezuelan-father-separated-teen-daughter-asylum-mexico>.

asylum seekers may result in legitimate asylum seekers being unable to pay the fee, and they may as a result miss the deadline. Even for those asylum seekers who do timely file an application for asylum with a properly completed fee waiver, if the fee waiver is denied, according to the Immigration Court Practice Manual, the immigration court may find the filing defective. “If a filing is submitted without a required fee and the request for a fee waiver is denied, *the filing will be deemed defectively filed and may be rejected or excluded from evidence.*” (emphasis added)¹²⁴ The regulations should clarify that if an asylum seeker properly submits a fee waiver application that is rejected by the immigration judge, the asylum seeker’s application will qualify for an extraordinary circumstances exception and the asylum seeker will not be denied asylum based on the one year filing deadline. DOJ should clarify that, notwithstanding the language of the Immigration Court Practice Manual, an asylum seeker in this situation would fall under the extraordinary circumstances exception laid out at 8 CFR § 1208.4(a)(5)(v).¹²⁵

The imposition of a fee on asylum seekers would also place an undue burden on nonprofit organizations and faith-based organizations that serve asylum seekers. In urgent situations where an asylum seeker or an asylum-seeking family is unable to afford the fee, or has the fee waiver application rejected, nonprofit organizations may feel compelled to pay the fee themselves. If this becomes common practice, legal service providers will have fewer resources to expend on their core missions of providing legal representation and representation rates will decrease.

There has never been a wealth test for the world’s most vulnerable individuals to exercise their right to seek asylum in the United States; it is unconscionable that DOJ now plans to force the most vulnerable to pay to seek the right to live freely in the United States.

Q. DOJ must clarify that fee waivers would be generously available to those who cannot pay

As discussed above, CLINIC urges DOJ to withdraw this rulemaking. If, however, DOJ issues the fee schedule as proposed, it must clarify that it will grant fee waivers generously. As discussed above, *see* Section II D above, the rulemaking says almost nothing about its criteria for fee waivers, only stating that “the OCIJ and the BIA would continue to entertain requests for fee waivers and have the discretionary authority to waive a fee for an application”¹²⁶ But nothing in the rulemaking acknowledges that the need for fee waivers will be dramatically higher as fees increase in some instances by almost 900 percent.

While all noncitizens facing removal are vulnerable, CLINIC urges DOJ to implement relaxed fee waiver rules for those who are particularly vulnerable, including but not limited to those who are: detained, unaccompanied children, those who have been deemed mentally incompetent, and those subject to Migrant Protection Protocols (MPP). CLINIC recommends that those noncitizens who

¹²⁴ Immigration Court Procedures Manual Ch. 3.4(d), <https://www.justice.gov/file/1250706/download>.

¹²⁵ This regulation provides for an exception to the one year filing deadline where the, “applicant filed an asylum application prior to the expiration of the 1-year deadline, but that application was rejected by the Service as not properly filed, was returned to the applicant for corrections, and was refiled within a reasonable period thereafter.” Although the language in this regulation refers to “the Service,” 8 CFR § 1208 relates to EOIR procedures not USCIS procedures.

¹²⁶ 85 Fed. Reg. 11866, 11871 (Feb. 28, 2020).

fall within populations with these extra vulnerabilities be considered presumptively eligible for fee waivers.

Under the Trump administration, the number of noncitizens subject to detention has increased dramatically. In FY2019, ICE's daily detention population averaged 50,165, "an increase of 19% compared to FY 2018. At times, ERO's detention population exceeded 56,000."¹²⁷ Statistics from 2017 show that detention has grown monumentally during the Trump administration as compared to the Obama administration. In October 2017, there were 39,678 immigration detainees.¹²⁸ In part, the ballooning of the detained population is due to the Trump administration's implementation of policies making it more difficult for asylum seekers to gain release from detention,¹²⁹ and other guidance indicating that all noncitizens in the United States without lawful status are priorities for enforcement.¹³⁰ By definition, those who are being held in immigration detention are unable to work. DOJ should therefore clarify that detained individuals will be eligible for fee waivers for applications before the immigration court as well as applications before the BIA.

Similarly, there are thousands of unaccompanied children fighting removal proceedings in the immigration court system.¹³¹ A large percentage of these children seek asylum, and many will need to file motions to reopen in absentia removal orders as they may lack competency to understand the proceedings they are in. Children who have been designated as "unaccompanied"¹³² should likewise be entitled to a presumption in favor of granting a fee waiver. Children under the age of 18 should be attending school, not working. Even if a teen child holds a part-time job, in many instances the income will be negligible, and the child may need the money to contribute to household expenses.

The INA recognizes that some noncitizens who suffer from mental illness or are otherwise lacking in mental competency are entitled to special safeguards in immigration court. Specifically, if an immigration judge finds that a respondent is not competent, the judge "shall prescribe safeguards

¹²⁷ ICE, *FY 2019 Achievements* Last Reviewed/Updated: Feb. 24, 2020, <https://www.ice.gov/features/ERO-2019>.

¹²⁸ TRAC, *Immigration and Customs Enforcement Detention: ICE Data Snapshots, up to April 2019*, <https://trac.syr.edu/phptools/immigration/detention/>.

¹²⁹ Brett Samuels, *Homeland Security Touts End of 'Catch and Release' Next Week*, THE HILL, Sep. 23, 2019, <https://thehill.com/homenews/administration/462699-homeland-security-touts-end-of-catch-and-release-next-week>; see also, Noah Lanard, *ICE Office Must Stop Keeping All Asylum Seekers Locked Up, Federal Judge Orders*, MOTHER JONES, Sep. 5, 2019, <https://www.motherjones.com/politics/2019/09/ice-office-must-stop-keeping-all-asylum-seekers-locked-up-federal-judge-orders/> (in the New Orleans ICE Field Office, "[i]n 2016, the Office denied parole in only 24.5% of the 229 decisions made. In 2017, that denial rate skyrocketed to 82% of 78 decisions. In 2018, it rose even higher to 98.5% of 130 decisions.").

¹³⁰ American Immigration Council, *The End of Immigration Enforcement Priorities Under the Trump Administration* (Mar. 2018), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_end_of_immigration_enforcement_priorities_under_the_trump_administration.pdf.

¹³¹ TRAC, *Juveniles — Immigration Court Deportation Proceedings*, <https://trac.syr.edu/phptools/immigration/juvenile/>. The last year for which TRAC received data on unaccompanied minors, as opposed to all juveniles (including those in family units), was 2017. In that year, unaccompanied minors accounted for over 62,000 cases.

¹³² "The term 'unaccompanied alien child' means a child who— (A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom— (i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody." 6 USC § 279(g)(2).

to protect the rights and privileges of the alien.”¹³³ The BIA elaborated on some of these safeguards in *Matter of M-A-M-*, 25 I&N Dec. 474, 481–82 (BIA 2011). Among the potential safeguards is that the immigration judge can reserve the appeal rights on the respondent’s behalf. *Id.* at 483. However, that safeguard will become meaningless if respondents who lack mental capacity are unable to pay the \$975 appeal fee. Because those who lack the competency to understand immigration court proceedings are unlikely to be financially self-sufficient, DOJ should presumptively grant fee waivers for their applications.

Asylum seekers who are subjected to MPP should also be presumptively eligible for fee waivers. These asylum seekers have no ability to earn income in the United States because they are forced to await their court dates in Mexico. Despite early promises from Mexico that asylum seekers subject to MPP would be given humanitarian visas, many asylum seekers are living along the border in dangerous, makeshift camps.¹³⁴ Thus, a filing fee of \$50 will likely make it impossible for many asylum seekers subject to MPP to file for asylum. DOJ may respond to this point by stating that the administration has implemented the Asylum Ban 2.0 which, as of July 16, 2019, prohibits non-Mexican asylum seekers who seek to enter the United States at the southern border from qualifying for asylum unless they first filed for asylum in a third country and were denied. These individuals can pursue withholding and CAT protection without paying a fee, and DOJ may take the position that these are the only forms of relief to which they are legally entitled. However, the Asylum Ban 2.0 is currently the subject of federal litigation, and asylum seekers subject to MPP who do not preserve an argument that they are entitled to asylum, because they cannot afford to pay the fee, may be forced to forfeit valuable future rights as a result of this new “asylum tax.” Furthermore, asylum seekers may have fulfilled the requirements of seeking asylum in third countries en route to the United States and will only be able to argue their asylum eligibility if they pay the fee for the I-589.

Furthermore, those subject to MPP are uniquely vulnerable to receiving *in absentia* removal orders.¹³⁵ Several human rights organizations have documented the danger and chaos that those asylum seekers forced to wait in Mexico must endure on a daily basis.¹³⁶ Moreover, the BIA recently issued a decision allowing immigration judges to issue *in absentia* removal orders against

¹³³ INA § 240(b)(3).

¹³⁴ Human Rights Watch, *Q&A: Trump Administration’s “Remain in Mexico” Program* (Jan. 29, 2020), https://www.hrw.org/news/2020/01/29/qa-trump-administrations-remain-mexico-program#_What_are_conditions.

¹³⁵ CLINIC, *FOIA Disclosures on In Absentia Removal Numbers Based on Legal Representation* (Mar. 27, 2020), <https://cliniclegal.org/resources/freedom-information-act/foia-disclosures-absentia-removal-numbers-based-legal>. These disclosures show that unrepresented respondents are far more likely to receive *in absentia* removal orders. Those in MPP have abysmally low rates of legal representation with only 3120 receiving representation out of 46,979 asylum seekers in the program in 2019, TRAC, MPP Data, <https://trac.syr.edu/phptools/immigration/mpp/>.

¹³⁶ See Press Release, Human Rights First, *Marking One Year of the Horrific “Remain in Mexico” Policy – Over 800 Violent Attacks on Asylum-Seekers* (Jan. 22, 2020), <https://www.humanrightsfirst.org/press-release/marking-one-year-horrific-remain-mexico-policy-over-800-violent-attacks-asylum-seekers>; Amnesty International, *Examining the Human Rights and Legal Implications of DHS’ “Remain in Mexico” Policy Before the H. Homeland Sec. Comm., Subcomm. on Border Sec., Facilitation, and Operations*, 116th Cong. (2019) (statement by Charanya Krishnaswami, Americas Advocacy Director, Amnesty International USA), <https://www.amnestyusa.org/wp-content/uploads/2019/11/11.18.2019-Amnesty-International-Statement-for-House-HSC-Border-Security-Subcommittee-Hearing-on-RIM-1.pdf>; Fernanda Echavarri, “A F****ing Disaster That Is Designed to Fail”: How Trump Wrecked America’s Immigration Courts, MOTHER JONES, Feb. 6, 2020, <https://www.motherjones.com/politics/2020/02/trump-immigration-court-backlog-migrant-protection-protocols/>.

those subject to MPP even when the government does not have an actual address at which to send them communications while in Mexico.¹³⁷ It is hardly surprising that vulnerable asylum seekers, most of whom have little money, who are not eligible to work in Mexico, and who must present themselves at the border, often in the early hours of dawn before public transportation is running in Mexico, would have an extraordinarily high rate of *in absentia* removal orders.

The fee schedule will, for the first time,¹³⁸ require a fee for a motion to reopen in cases where the underlying application is for asylum. Pursuant to the proposed rule, the fee would be \$145 for motions before the immigration judge, and \$895 for motions filed before the BIA. Both fee levels would be impossible for individuals stuck in Mexico to pay. Moreover, many of those forced to await court dates in Mexico are family units, thus these already-high fees, could increase by many times based on the number of family members who would need their cases reopened.

It is unsurprising given the extraordinary obstacles the U.S. government has imposed on accessing the U.S. immigration court system that the *in absentia* removal rate for MPP cases is extremely high. There have been 61,097 MPP removal cases filed, and 25,550 have received *in absentia* removal orders.¹³⁹ Of the 46,979 asylum seekers placed in MPP in 2019 a mere 3,214—6.6 percent—have been represented by counsel.¹⁴⁰ Overall, only 481 individuals in MPP have been granted relief, less than one percent of cases.¹⁴¹ In short, MPP makes a mockery of the U.S. asylum system,¹⁴² and it is imperative that asylum seekers subjected to this process have full access to motions to reopen and appeals before the BIA, particularly because, as discussed above, INA § 242(d)(1) requires anyone seeking to challenge a removal order in federal court to first appeal to the BIA. The Court of Appeals for the Ninth Circuit has found that MPP clearly violates the INA and “is causing extreme and irreversible harm to plaintiffs.”¹⁴³ However, if an asylum seeker cannot afford a BIA appeal, or is denied a fee waiver, they will never be able to get their case before an Article III judge. If an asylum seeker subject to MPP wants to appeal a removal order, the fee of \$975 will make it impossible to do so, and, again, if multiple family members have been ordered removed, fees to file appeals could climb to several thousand dollars.

The per capita Gross Domestic Product in Mexico in 2017 was \$19,900 for Mexican citizens.¹⁴⁴ However, this number may be skewed to the high end because 46.2 percent of Mexicans live in

¹³⁷ *Matter of J.J. Rodriguez*, 27 I&N Dec. 762 (BIA 2020).

¹³⁸ Under current law, motions to reopen or reconsider before the BIA do not require fees if they are “based exclusively on an application for relief that does not require a fee.” 8 CFR 1003.8 (a) (2) (ii)-(iii). Under the proposed rule, since asylum applications would no longer be applications for relief that do not require a fee, motions to reconsider and reopen would now require the full filing fee.

¹³⁹ TRAC, *Details on MPP (Remain in Mexico) Deportation Proceedings* (data through Jan. 2020), <https://trac.syr.edu/phptools/immigration/mpp/>.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Victoria Neilson and Anna Gallagher, *Trump Administration Makes a Mockery of Asylum System*, THE HILL, May 11, 2019, <https://thehill.com/opinion/immigration/443200-trump-administration-makes-a-mockery-of-asylum-system>.

¹⁴³ *Innovation Law Lab v. Wolf*, No. 19-15716, 2020 WL 1046241, at *4 (9th Cir. Mar. 4, 2020) *stay granted*, *Wolf v. Innovation Law Lab*, No. 19A960, 2020 WL 1161432, at *1 (U.S. Mar. 11, 2020).

¹⁴⁴ CIA World Factbook, Mexico, (last updated Mar. 17, 2020) <https://www.cia.gov/library/publications/the-world-factbook/geos/mx.html>.

poverty.¹⁴⁵ It would therefore be impossible for most Mexicans to afford these filing fees, and for those subject to MPP, who are not even able to work lawfully in Mexico, the fees are astronomical. The Court of Appeals for the Ninth Circuit has already found that MPP violates the fundamental rights of those subjected to the procedure. DOJ should not compound these violations by denying asylum seekers in MPP access to asylum, motions to reopen, and appeals. DOJ should clarify that individuals in MPP are presumptively eligible for fee waivers.

R. The proposed EOIR fees are exponentially higher than those for comparable adjudications by other federal agencies

DOJ does not explain in its proposed rulemaking why it needs to charge fees. The U.S. federal government houses several other agencies that include adjudicatory functions, but no other agency that provides hearings for individual beneficiaries charges a fee at all, let alone fees that are higher than those imposed by federal courts.

For example, individuals may apply for benefits like Social Security Disability Insurance, Supplemental Security Income, and the Supplemental Nutrition Assistance Program without paying a fee.¹⁴⁶ Applicants who have been denied benefits may initially appeal decisions for free.¹⁴⁷ Only when applicants have exhausted all of their administrative remedies and must file an appeal to a federal court are they usually required to pay filing fees or file a motion for *in forma pauperis* status.

Similarly, Veterans Affairs allows individuals to apply for health care and disability benefits without paying a fee, and to appeal an initial denial to the Board of Veterans' Appeals for free.¹⁴⁸ After an initial appeal, if the applicant has still been denied, they may file a Notice of Appeal to appeal the decision of the Board of Veterans' Appeals to the United States Court of Appeals.¹⁴⁹ This external appeal to the judicial branch costs \$50 to file, and may be waived if applicants submit a Declaration of Financial Hardship.¹⁵⁰

Agencies whose primary users are corporations and professionals, do charge application fees.

¹⁴⁵ *Id.* The poverty rate is from 2014.

¹⁴⁶ *Apply Online for Disability Benefits*, Social Security Administration, <https://www.ssa.gov/applyfordisability/>; *Supplemental Security Income (SSI) Benefits*, Social Security Administration, <https://www.ssa.gov/benefits/ssi/>; *How to Complete the Supplemental Nutrition Assistance Program (SNAP) Application/Recertification*, New York State Office of Temporary and Disability Assistance, <http://otda.ny.gov/programs/applications/4826A.pdf>.

¹⁴⁷ *Disability Appeal*, Social Security Administration, <https://secure.ssa.gov/iApplsRe/start>; *Appeal A Decision*, Social Security Administration, <https://www.ssa.gov/benefits/disability/appeal.html>; *How Do I Appeal?* U.S. Department of Veterans Affairs, <https://www.bva.va.gov/docs/Pamphlets/How-Do-I-Appeal-Booklet--508Compliance.pdf>.

¹⁴⁸ *Apply for health care benefits*, U.S. Department of Veterans Affairs, <https://www.va.gov/health-care/apply/application/introduction>; *How to file a VA disability claim*, U.S. Department of Veterans Affairs, <https://www.va.gov/disability/how-to-file-claim/>; *How to apply for the GI Bill and related benefits*, U.S. Department of Veterans Affairs, <https://www.va.gov/education/how-to-apply/>; *How Do I Appeal?* U.S. Department of Veterans Affairs, <https://www.bva.va.gov/docs/Pamphlets/How-Do-I-Appeal-Booklet--508Compliance.pdf>.

¹⁴⁹ *Id.*

¹⁵⁰ *Court Forms*, United States Court of Appeals for Veterans Claims, http://www.uscourts.cavc.gov/forms_fees.php.

Filing a trademark application costs \$225 or \$275, depending on the statute the filing falls under.¹⁵¹ Patent applications may cost \$200 or \$300 to file, depending on the type of patent.¹⁵² Appeals of decisions made by the United States Patent and Trademark Office cost between \$200 and \$300, depending on whether they are filed electronically or on paper.¹⁵³ Appeals of patent applications cost \$800.¹⁵⁴

Applications to the Food and Drug Administration (FDA), which benefit almost exclusively corporate entities, are very high. New drug applications for animals cost \$449,348 to file, and new prescription drug applications cost nearly \$3 million.¹⁵⁵ The FDA will grant a waiver or reduction to prescription drug application fees if a waiver or reduction is necessary to protect public health, if the fee would present a barrier to innovation, or if the applicant is a small business submitting its first application.¹⁵⁶ Additional waivers are available for animal drug applications.¹⁵⁷ Appeals may be requested by filing a request for reconsideration within 30 days of the decision, and then an appeal within 30 days of a subsequent denial.¹⁵⁸

Applications for immigration relief benefit individuals who are often low income, rather than corporations. Moreover, unlike applicants for drug approvals or trademarks, noncitizens are not accessing EOIR to make money; they are seeking protection in the United States from life-threatening harm in their home countries, often with family members. These applications, appeals, and motions should be available for free, like other similar federal administrative applications.

¹⁵¹ *USPTO Fee Schedule*, United States Patent and Trademark Office, <https://www.uspto.gov/learning-and-resources/fees-and-payment/uspto-fee-schedule>.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Animal Drug User Fee Act (ADUFA)*, Food and Drug Administration, <https://www.fda.gov/industry/fda-user-fee-programs/animal-drug-user-fee-act-adufa>; *Prescription Drug User Fee Amendments*, Food and Drug Administration, <https://www.fda.gov/industry/fda-user-fee-programs/prescription-drug-user-fee-amendments>.

¹⁵⁶ *Prescription Drug User Fee Act Waivers, Reductions and Refunds for Drug and Biological Products*, Food and Drug Administration, <https://www.fda.gov/media/131797/download>.

¹⁵⁷ *Animal Drug User Fee Act (ADUFA)*, Food and Drug Administration, <https://www.fda.gov/industry/fda-user-fee-programs/animal-drug-user-fee-act-adufa>.

¹⁵⁸ *Assessing User Fees Under the Prescription Drug User Fee Amendments of 2017*, Food and Drug Administration, <https://www.fda.gov/media/108233/download>.

Table 1: Application and Internal Appeal Cost at U.S. Federal Agencies with Adjudicatory Functions

	Applications	Internal Appeals
Social Security Disability Insurance (SSDI) ¹⁵⁹	\$0	\$0
Supplemental Security Income (SSI) ¹⁶⁰	\$0	\$0
Veterans Administration (health care, disability, GI bill, other benefits) ¹⁶¹	\$0	\$0
SNAP ¹⁶²	\$0	\$0
NLRB (filing a charge against employer) ¹⁶³	\$0	\$0
EEOC (filing a charge of employment discrimination) ¹⁶⁴	\$0	\$0
U.S. Patent and Trademark Office (trademarks) ¹⁶⁵	\$225/275	\$200/300
U.S. Patent and Trademark Office (patents) ¹⁶⁶	\$200/300	\$800
FDA (animal drug) ¹⁶⁷	\$449,348	\$0
FDA (prescription drug) ¹⁶⁸	\$2,942,965	\$0

S. EOIR case volume is in line with that of other federal agencies

In its rulemaking, DOJ points to increased numbers of immigration court cases and appeals as one reason for raising fees.¹⁶⁹ However, the number of cases pending before an agency is not a reason to increase fees especially where, as discussed above, the increasing caseload in immigration court

¹⁵⁹ *Apply Online for Disability Benefits*, Social Security Administration, <https://www.ssa.gov/applyfordisability/>; *Disability Appeal*, Social Security Administration, <https://secure.ssa.gov/iApplsRe/start>.

¹⁶⁰ *Supplemental Security Income (SSI) Benefits*, Social Security Administration, <https://www.ssa.gov/benefits/ssi/>; *Appeal A Decision*, Social Security Administration, <https://www.ssa.gov/benefits/disability/appeal.html>.

¹⁶¹ *Apply for health care benefits*, U.S. Department of Veterans Affairs, <https://www.va.gov/health-care/apply/application/introduction>; *How to file a VA disability claim*, U.S. Department of Veterans Affairs, <https://www.va.gov/disability/how-to-file-claim>; *How to apply for the GI Bill and related benefits*, U.S. Department of Veterans Affairs, <https://www.va.gov/education/how-to-apply/>; *How Do I Appeal?* U.S. Department of Veterans Affairs, <https://www.bva.va.gov/docs/Pamphlets/How-Do-I-Appeal-Booklet--508Compliance.pdf>.

¹⁶² *How to Complete the Supplemental Nutrition Assistance Program (SNAP) Application/Recertification*, New York State Office of Temporary and Disability Assistance, <http://otda.ny.gov/programs/applications/4826A.pdf>.

¹⁶³ *Fillable Forms*, National Labor Relations Board, <https://www.nlr.gov/how-we-work/fillable-forms>.

¹⁶⁴ *Filing a Formal Complaint*, Equal Employment Opportunity Commission, https://www.eeoc.gov/federal/fed_employees/filing_complaint.cfm; *Appeals*, Equal Employment Opportunity Commission, https://www.eeoc.gov/federal/fed_employees/appeal.cfm.

¹⁶⁵ *USPTO Fee Schedule*, United States Patent and Trademark Office, <https://www.uspto.gov/learning-and-resources/fees-and-payment/uspto-fee-schedule>.

¹⁶⁶ *Id.*

¹⁶⁷ *Animal Drug User Fee Act (ADUFA)*, Food and Drug Administration, <https://www.fda.gov/industry/fda-user-fee-programs/animal-drug-user-fee-act-adufa>.

¹⁶⁸ *Prescription Drug User Fee Amendments*, Food and Drug Administration, <https://www.fda.gov/industry/fda-user-fee-programs/prescription-drug-user-fee-amendments>.

¹⁶⁹ 85 Fed. Reg. 11866, 11868 (Feb. 28, 2020). (DOJ states EOIR’s “caseload and the costs of adjudication have increased.”).

is due largely to the administration's elimination of prosecutorial discretion and decisions to seek removal of anyone who violates an immigration law, without regard to how long they have been in the United States and the equities to remain in this country.

In any event, other administration agencies which adjudicate applications and appeals for free also have very high caseloads yet do not seek to impose fees on those who need agency assistance. In 2018, the Social Security Administration's (SSA) Office of Hearings Operations received 567,911 hearing requests.¹⁷⁰ 765, 554 dispositions were made, but at the end of FY 2018 there were 858,383 cases still pending.¹⁷¹ The Appeals Council, SSA's final administrative decisional level, received 152,888 appeals in 2018 and ended the year with a backlog of 91,400 cases.¹⁷² The Board of Veteran's Appeals (BVA) adjudicated 85,288 appeals¹⁷³ and had a backlog of 137,383 pending cases¹⁷⁴ in FY 2018. In FY 2019, EOIR received 504,848 new cases¹⁷⁵ and ended the year with a total of 1,047,803 pending cases.¹⁷⁶

The wait times and backlogs at the SSA and the VA have not been met with an institution of application fees, however. The SSA has set a goal of reducing wait time to 270 days by the end of FY 2021. In support of this goal, Congress has provided \$290 million in special funding over the last three years.¹⁷⁷ The Appeals Modernization Act, which took effect in February 2019, streamlined the VA appeals process with the goal of reviewing supplemental claims and higher level reviews in an average of 125 days and decisions appealed to the BVA in 365 days. In support of this goal, the VA received funding for 605 additional appeals employees in FY 2019, and used this increase to establish three Decisions Review Operations Centers.¹⁷⁸ Unlike immigrants and asylum seekers, applicants for Social Security and veterans benefits have not been asked to shoulder the burden of improving the very services upon which they depend.

T. The proposed fees for EOIR adjudications are significantly higher than federal court fees

The proposed fees for immigration benefits are also particularly extreme when viewed in comparison to federal court fees. Filing a case in district court requires a filing fee of \$350. Costs to appeal a decision range from \$38, for appealing a misdemeanor conviction by a magistrate

¹⁷⁰ Social Security Administration, Annual Statistical Supplement to the Social Security Bulletin, at Table 2.F9—Number of hearing level receipts, dispositions, and end-of-year pending cases, fiscal years 2016–2018, <https://www.ssa.gov/policy/docs/statcomps/supplement/2019/index.html>.

¹⁷¹ *Id.*

¹⁷² Social Security Administration, Annual Statistical Supplement to the Social Security Bulletin, at Table 2.F11—Number of SSA Appeals Council cases, fiscal years 2015–2018.

¹⁷³ Dept. of Veterans Affairs, Annual Performance Plan and Report, at 19, (March 2019) <https://www.va.gov/oei/docs/VA2020appr.pdf>.

¹⁷⁴ Dept. of Veterans Affairs, Annual Performance Plan and Report, at 32.

¹⁷⁵ Executive Office for Immigration Review, New Cases and Total Completions, (Jan. 23, 2020) <https://www.justice.gov/eoir/page/file/1238741/download>.

¹⁷⁶ Executive Office for Immigration Review, Adjudication Statistics Pending Cases, (Jan. 23, 2020) <https://www.justice.gov/eoir/file/1242166/download>.

¹⁷⁷ Social Security Administration, *Information About Social Security's Hearings and Appeals Process*, <https://www.ssa.gov/appeals/>.

¹⁷⁸ Veterans Administration Office of Public and Intergovernmental Affairs, *VA's Appeals Modernization Act takes effect today*, (Feb. 19, 2019) <https://www.va.gov/opa/pressrel/pressrelease.cfm?id=5207>.

judge, to \$505, for appealing a decision to the circuit court. EOIR's proposed fees for a notices of appeal range from \$675 to \$975. Additionally, the proposed fee for a motion to reopen with the BIA far exceeds the fee to reopen several categories of cases in bankruptcy court. EOIR's proposed fees are not in keeping with the fees charged for similar procedures in other federal venues and should not be implemented.

III. CONCLUSION

CLINIC urges DOJ to withdraw this notice of proposed rulemaking. DOJ is not a fee-funded agency and has not adequately justified these dramatic proposed fee increases. The fee increases are unconscionably high and would result in many noncitizens being denied critical rights to pursue applications for relief, motions, and appeals. DOJ has not adequately documented its need for additional fees, nor has it provided the data and studies underlying the conclusions it reached concerning adjudication costs. Moreover, the NPRM never even states explicitly that these increased fees would be used to fund EOIR.

The NPRM does not provide data on fee waivers, nor does it describe an intent to expand access to fee waivers with fees rising so steeply. With rigid deadlines for appeals and some motions, many noncitizens may be unable to access the BIA, and as a result, Article III courts at all, and the NPRM does not establish any exceptions to filing deadlines based on having timely filed fee waiver requests.

This NPRM would deny thousands of noncitizens fundamental rights to pursue justice through the immigration court system. Deportation "may result . . . in loss of both property and life, or of all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law." *Ng Fung Ho v. White*, 259 U.S. 276, 284–85, (1922). The stakes in immigration court are too high to prevent vulnerable noncitizens from access to the courts based on their inability to pay.

Thank you for the opportunity to submit these comments. We appreciate your consideration. Please do not hesitate to contact Jill Marie Bussey, CLINIC's Advocacy Director, at jbussey@cliniclegal.org should you have any questions about our comments or require further information.

Sincerely,

A handwritten signature in blue ink that reads "Anna Marie Gallagher". The signature is fluid and cursive, with the first name "Anna" being the most prominent.

Anna Marie Gallagher
Executive Director