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RE: EOIR Docket No. 18-0101, RIN 1125-AA90; Fee Review

Dear Assistant Director Reid:

The National Immigrant Justice Center (NIJC) submits this comment letter to express its strong opposition to the proposed Executive Office for Immigration Review (EOIR) Fee Review, published on February 28, 2020 ("proposed rule" or NPRM). As a legal service organization that serves low-income immigrants, we are deeply concerned about the proposed fee changes in the published notice, and urge that EOIR rescind these proposals that make appeals, applications, and motions less accessible to respondents.

EOIR acknowledges that these filings represent "important forms of relief and procedural tools" as well as "safeguards" to assure lawful adjudication.[1] Nevertheless, the proposed fee increases will be cost-prohibitive for countless *bona fide* applicants. The greatest increase is nearly 800 percent, from $110 to $975, to appeal the decision of an immigration judge, placing it outside of the grasp even of families with a moderate income. Likewise, motions to reopen or reconsider before the BIA would rise to $895. Finally, the proposed rule seeks to impose a fee on asylum applications for the first time.

The proposed rule, if actualized, would condition immigrants' ability to access basic due process

[1] *See* 85 Fed. Reg. 11867.

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rights on their ability to pay exorbitant fees. NIJC opposes these unprecedented proposed EOIR fees.

NIJC's strong interest and opposition to proposed changes

Headquartered in Chicago, with additional offices in Indiana, Washington D.C., and San Diego, NIJC is a legal service provider and advocacy organization. Each year, NIJC provides legal services to more than 11,000 immigrants, refugees, and asylum seekers applying for lawful status or facing removal. NIJC has provided these services for more than 30 years. All NIJC clients live below 200% of the federal poverty line. NIJC provides legal services to most of them on a completely *pro bono* basis. As a BIA-accredited organization, our services are either *pro bono* or provided at substantially reduced rates.[2] Additionally, NIJC serves immigrants in detention throughout the Midwest and nationally, all of whom have no source of income and whose strained relatives can barely make ends meet. Finally, NIJC has a long history of representing survivors of domestic violence, trafficking, and other forms of crime, who suffer significant financial instability.

Given the wide spectrum of clients NIJC serves, our clients frequently need to file all the forms, motions, and applications subject to fee increases under the NPRM. However, NIJC's clients struggle to pay EOIR fees at existing levels. The proposed rule would incapacitate and deter most NIJC clients from filing any of the applications, appeals, or motions subject to increase. Furthermore, NIJC advocates federally and at the state and local level for the human rights of all immigrant communities; we object to the proposed rule as a senseless and arbitrary imposition of financial barriers that will deprive individuals of access to the courts and due process purely on the basis of their inability to pay. Consequently, NIJC urges EOIR to rescind the proposed rule.

Objection to the expedited timeframe for this NPRM

In light of NIJC's interest in commenting on the substance of these drastic increases, NIJC strongly objects to the expedited timeframe for this proposed rule. NIJC joined nearly a hundred immigration legal service providers seeking to extend the deadline for this comment period on two separate occasions: first in a letter dated March 5, 2020 requesting a 60-day period;[3] and

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[2] *See* 8 C.F.R. § 1292.11 (accreditation requires proof that organization "provides immigration legal services primarily to low-income and indigent clients" within the United States, and, if the organization charges fees, has a written policy for accommodating clients unable to pay fees for immigration legal services).

[3] *See, e.g.*, Executive Order 12866 (Sept. 30, 1993) (stating that agencies should allow "not less than 60 days" for public comment in most cases, in order to "afford the public a meaningful opportunity to comment on any proposed regulation"); *see also* Executive Order 13563 (January 18, 2011) (stating that "[t]o the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days").

second in a letter dated March 23, 2020 requesting a freeze of the existing comment deadline due to the deadly COVID-19 pandemic. The combined letters—and EOIR's failure to respond to them—raise serious questions as to EOIR's motives in proceeding with a rushed comment period that upends 33 years of set fees within half the time normally granted for public comment, and during a global pandemic. This timeframe impairs NIJC's ability to prepare thorough comments, as the entirety of its staff are currently required to work remotely and face disruptions of normal vessels for attorney-client communication. NIJC is far from alone in our strained capacity; legal service providers and indeed all stakeholders impacted by this proposed rule face the unprecedented strain of endeavoring to continue services and deliver work product while adjusting to life in the time of pandemic. In light of these circumstances, EOIR's truncated notice-and-comment period flies in the face of reasonable regulatory practices.

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More specific comments follow. Thank you for your consideration and please do not hesitate to contact Azadeh Erfani or Heidi Altman for further information.

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DETAILED COMMENTS
In opposition to EOIR Docket No. 18-0101, RIN 1125-AA90; Fee Review

As stated above, NIJC clients routinely file all forms, appeals, and motions subject to raises and will suffer irreparable harm if this rule becomes final. But for the expedited timeframe of this comment period, NIJC would have contributed more substantive comments for each proposed fee raise. Here, we specifically address the following concerns: (1) the proposed rule's inadequate compliance with statutory requirements to raise fees, particularly the statutorily imposed obligation on the agency to address fairness concerns; (2) flawed cost estimates by the agency in issuing its proposed rule; and (3) the adverse impact on asylum seekers and violation of international treaty obligations that flow from charging a fee for asylum applications.

I. EOIR's Focus on Cost to the Agency Overlooks Congress' Fairness Mandate and Balance of Equities.

EOIR has historically drawn the majority of its funding from congressional appropriations.[4] EOIR is not a fee-funded agency and does not explain in the NPRM why it needs this additional money, nor does it state that it cannot cover its operating costs through congressional appropriations. EOIR derives limited authority to raise fees from the Independent Offices Appropriations Act ("IOAA"), where Congress first granted agencies the authority to charge fees.[5] However, the statute imposes requirements which EOIR ignores in its proposed rule. Most blatantly, EOIR all but ignores the statutory requirement that the agency consider *fairness* in its assessment of costs.

A. The NPRM fails to follow the IOAA.

NIJC does not contest that EOIR is lawfully permitted to charge fees for its services.[6] However, EOIR recognizes—but largely overlooks—the balance of equities required under the IOAA. The IOAA authorizes fees so long as they are "fair" (the first requirement listed in the statute) and based on: (1) "the costs to the Government"; (2) "the value of the service or thing to the recipient"; (3) "public policy or interest served"; and (4) "other relevant facts."[7]

In the NPRM, EOIR completely disregards the fairness requirement of the IOAA, instead focusing exclusively on the cost to the agency to process applications. The IOAA mandates that

[4] *See, e.g.,* Executive Office for Immigration Review, Department of Justice, *FY 2020 Budget Request*, www.justice.gov/jmd/page/file/1142486/download.

[5] *See* 31 U.S.C. § 9701(b) (Independent Offices Appropriations Act of 1952).

[6] 31 U.S.C. § 9701(a); 8 U.S.C. § 1356(m).

[7] *Id.*

each fee "shall" be fair. EOIR presented no findings in the NPRM that considered fairness, despite submitting up to eightfold increases in its proposed schedule.

Yet the fairness concerns at play with the EOIR's proposed fee schedule could hardly be of greater consequence: an inability to pay the newly hiked fees will, in many cases, literally render a person unable to obtain their basic due process rights guaranteed by statute and the Constitution to pursue relief in the immigration court system. EOIR gives these concerns only cursory treatment in the NPRM, briefly mentioning that, "EOIR's calculation of fees accordingly factors in both the public interest in ensuring that the immigration courts are accessible to aliens seeking relief and the public interest in ensuring that U.S. taxpayers do not bear a disproportionate burden in funding the immigration system." Yet the NPRM provides zero analysis or rationale to support the proposition that the proposed fees will preserve the accessibility of the courts to immigrants seeking relief.

The only brief nod in the NPRM to the question of respondents' ability to pay is in a footnote, citing a 1976 decision of the Circuit Court for the District of Columbia for the proposition that, "While ability to pay is considered in justifying taxes, it is generally of 'very limited value when assessing a fee which is supposedly related as closely as reasonably possible to the cost of serving each individual recipient."[8] It is not clear if the authors of the NPRM actually read the case cited for support, however; had they done so they would have realized the Court was cautioning agencies *against* overly inflating fees, contrasting the agency's obligation to ensure that a fee is reasonably related to services rendered to the government's greater discretion to impose taxes based on an individual's ability to pay more.[9]

In addition to the agency's near total disregard for the fairness prong of the IOAA's test, EOIR's primary engagement with the remaining factors, including the question of public policy or interest, is to offset all costs onto immigrants in removal proceedings rather than taxpayers. EOIR purports to preserve the public interest by omitting overhead costs or the costs of employee benefits.[10] The rule fails to consider the toll on low-income immigrants, asylum

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[8] *See* 85 Fed. Reg. 11867, 11872 n. 14 (citing for support *Nat'l Cable Television Ass'n v. FCC*, 554 F.2d 1094, 1109 (D.C. Cir. 1976)).

[9] *Natl's Cable Television Ass'n v. FCC*, 554 F.2d 1094, 1109-110 (D.C. Cir. 1976) ("Whatever standard the Commission uses as a basis for its rate it should not have the potentiality in any substantial number of individual instances to produce fees that are not reasonably related to the cost of the services that benefit the individual recipients who are being charged. The fee schedule should be reasonably related to the individual cost of services as well as to the total costs for the particular segments of recipients. This is required so that the 'fee' does not become a 'tax.' In other words, the fact that the Commission may assess a class of recipients with a fee is no justification for imposing a tax upon some of the members of that class to produce the total cost of the service."

[10] 85 Fed. Reg. 11870. Every year, EOIR receives funds from Congress to perform its essential duties. This proposed rule is tailored to "recoup" the entire average cost of each application, despite receiving $672.97 million from the Appropriations Committee in 2020 alone, of which only $4 million was designed as being derived by

seekers, domestic violence survivors, and children and youth who appear regularly before its courts.

The public has a "keen interest in the correctness of administrative decisions"—an interest that EOIR undermines by erecting financial barriers to seek appeals and reconsiderations.[11] Likewise, the public has an interest in the fair administration of justice given the high stakes of removal for respondents' families, employers, and communities. A wide body of academic literature demonstrates that deportations impart irreversible consequences on families and communities, including economic hardship, housing and food instability, and emotional and behavioral challenges for children left behind when a parent or loved one is departed.[12] These hardships are not limited to the families immediately impacted; in the wake of deportations, entire communities are left destabilized by widespread fear and mistrust of public institutions including schools, health clinics, and social service providers.[13] Dramatically increasing fees will inevitably exclude many immigrants with *bona fide* claims to relief from obtaining protection from deportation through the appellate system. The costs associated with these unjust removals will be borne by countless children, families, communities, and the wider public. Yet EOIR gives these concerns not a moment's pause.

In sum, EOIR's review of its proposed fee increases overlooks the fundamental question of fairness and blatantly ignores and/or simplifies the public interest at stake.

B. NIJC's experiences representing indigent immigrants in removal proceedings demonstrates the fairness and public interest concerns that EOIR ignores in its proposed rule.

Far from fair, the proposed rule will disproportionately penalize indigent respondents who are already often unable to afford counsel and navigate onerous fee waivers. As a provider of legal services to indigent immigrants facing removal proceedings, NIJC's legal teams can attest that many immigrants will be forced by this new fee schedule to choose between hiring counsel and affording the proposed fees, leading to poorly developed records on appeal and improper adjudication of the merits of their claims. This is also likely to curb the *pro bono* services offered by the private bar, who already assists clients in meeting existing fees beyond their reach.

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transfer from the EOIR Immigration Review fees account. P.L. No. 116-93, Commerce, Justice, Science, and Related Agencies Appropriations Act, 2020, 133 Stat. 2397, (Dec. 20, 2019).

[11] *See Ayuda v. A.G.*, 848 F.2d 1297, 1301 (D.C.C. 1988).

[12] Regina Day Langhout, *et al.*, *The Effects of Deportation on Families and Communities*, AMERICAN JOURNAL OF COMMUNITY PSYCHOLOGY, July 31, 2018.

[13] *Id.*

One law firm with which NIJC works closely on pro bono matters reported they filed more than twenty BIA appeals last year. In those matters, they almost always paid the filing fee on behalf of clients, knowing that fee waivers are often not granted. Presented with the proposed increase, the firm said, "the fee difference is extraordinary and would impact our pro bono representation." Another pro bono attorney noted that he only recently paid the fee for a client's employment authorization renewal; had the new fee schedule been in place he would not have been able to also file an appeal on behalf of his client and her son. He further reports that, "A fee like this [EOIR's proposed $975 fee] would have prevented my clients from pursuing their appeal, even though we think they have a strong legal basis for that appeal."

EOIR fails to consider the impact of its proposed rule on applicants living at or under the poverty level; nor does it consider the loss to the public interest if these individuals abandon their applications for relief solely on the basis of economic need. It bears reminding that some of these increases affect individuals who have spent nearly a decade in the United States and are seeking cancellation of removal.[14] Despite establishing roots in the U.S., these applicants find themselves facing complex removal proceedings, often with daunting legal fees, and often while detained in a remote facility, unable to work.[15] Fair and timely adjudications of these forms of relief, appeals, and motions are invaluable to entire communities that will suffer indefinite separation from the respondent in each case where a deportation occurs. Failing to account for these factors—and neglecting their value—will leave countless respondents and their loved ones behind.

Even worse, the dramatic nature of the fee increases threatens to leave many respondents entirely unable to access a day in court or appellate relief made available to them by statute simply because of their indigence. Far from imposing costs reasonably related to the services sought, the proposed fee increase constitutes a regressive tax on a largely indigent population that will now be arbitrarily excluded from access to due process. An evolving body of caselaw and literature illustrates how the dramatic escalation in the use of court fees in the criminal justice system has raised constitutional concerns *and* constituted an inefficient source of revenue for the court system.[16] The immigration court system should heed lessons learned, not chase after efforts that have already failed elsewhere in the United States justice system.

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[14] *See* INA § 240A(a)(2) (requiring seven years of continued residence for cancellation of removal of lawful permanent residents) and INA § 240A(b)(1)(A) (requiring ten years of residence for non-lawful permanent residents seeking cancellation of removal).

[15] Yuki Noguchi, *Unequal Outcomes: Most ICE Detainees Held in Rural Areas Where Deportation Risks Soar*, NPR, Aug. 15, 2019, https://www.npr.org/2019/08/15/748764322/unequal-outcomes-most-ice-detainees-held-in-rural-areas-where-deportation-risks.

[16] *See, e.g.*, Matthew Menendez, *et al.*, *The Steeps Costs of Criminal Justice Fees and Fines*, THE BRENNAN CENTER, Nov. 21, 2019, https://www.brennancenter.org/sites/default/files/2019-11/2019_10_Fees%26Fines_Final5.pdf.

II. Even with Respect to Cost Assessment, EOIR Overlooks the Impact of Drastic Increases on its Own Operations.

EOIR's proposed rule also fails to account for *increased costs* the new fee schedule will generate. First, the proposed increases are likely to result in a dramatic increase in the filing of fee waivers applications, which will contribute to the extensive backlog faced in immigration courts. Additionally, the dramatic escalation of fees is likely to mean that a significant number of individuals will forego filing altogether.

Buried in a footnote, EOIR notes that 36% of current fees are waived.[17] Although EOIR does not specify the number of fee waiver applications received, it is safe to presume that some fee waiver requests are denied upon review. This means that a larger proportion than 36% of fee waivers, under the current fee schedule, require allocation of EOIR resources for adjudication.

With an up to eight-fold increase of current fees, the number of fee waivers will balloon well over one third of respondents. The adjudication of those fee waivers alone will take ample resources away from the agency and deflate the benefit of raised fees. The increasing number of fee waiver requests would also divert valuable judicial resources to adjudicating fee waivers rather than substantive claims at a time when the court already has a backlog of more than a million cases. Keeping EOIR fees at a level that most respondents can afford ensures that fee waivers do not become necessary for nearly all filings, and do not become a source of increasing backlogs.

EOIR recognizes that its proposed rule will impose "more burdensome" fees, but punts the central question by noting that fee waivers will remain accessible. Again in a footnote, EOIR asserts that denied fee waivers filed before an IJ or the BIA will not toll the filing.[18] For most motions, appeals, and even asylum applications, applicants have to meet rigorous application deadlines that they may miss simply because they cannot afford to pay the fee proposed.[19] This will either result in denied fee waivers that will save no cost to EOIR or fewer filings due to economic scarcity. In either scenario, EOIR's zero-sum plan to recoup the "full costs" of its services will be unfounded.[20]

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[17] *See* 85 Fed. Reg. 11869 at n. 11.

[18] *See* 85 Fed. Reg. 11874 at n. 21 (Citing 8 CFR 1003.8(a)(3) and 8 CFR 1003.24(d))

[19] For example, respondents have only 30 days after an immigration judge decision to file an appeal; this is a very short timeframe to obtain the $975 fee.

[20] *See* 85 Fed. Reg. 11866.

III. The Proposed Rule Imposes a Wealth Test for Asylum Seekers that Violates U.S. Domestic and International law.

By requiring a $50 fee for the filing of an asylum application, the NPRM will adversely impact highly vulnerable asylum seekers who seek relief before the IJ or appeal their claims before the BIA. Thinly veiled as a fee-based determination, this proposed rule advances this administration's ongoing assault on the right to seek asylum.[21]

A. EOIR provides no lawful basis to impose an application fee for asylum seekers.

Contrary to the other fees proposed, the asylum application is not rooted in revising or updating existing fees. Instead, it is a novel imposition that lacks any justification in the NPRM. Rather than provide a factual or legal explanation for this new fee, EOIR incorporates the regulation proposed by the Department of Homeland Security's U.S. Citizenship and Immigration Services (USCIS) in November 2019, requiring all asylum seekers to file $50 before the immigration judge unless they are solely seeking withholding of removal or relief under the Convention Against Torture (CAT).[22] In essence, EOIR rubber-stamps the $50 fee proposed by USCIS. As an independent agency, EOIR thus fails entirely to engage the rulemaking process when proposing this fee.[23]

The likely intent behind this historic fee is to provide further ammunition for this administration's protracted attack on asylum rights.[24] Imposing a wealth test on humanitarian protection is unconscionable. And the perfunctory reference the NPRM gives to this significant change disregards the prominent role of asylum applications in IJs' dockets.[25]

Refusing asylum applicants access to asylum protections because of an inability to pay would effectively cause the United States to break its treaty obligations and flies in the face of the basic

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[21] *See* National Immigrant Justice Center, *Asylum Seekers and Refugees* (last accessed Mar. 28, 2020), available at https://www.immigrantjustice.org/issues/asylum-seekers-refugees (providing timeline of major regulatory actions and executive decisions that endanger right to seek asylum and unlawfully strip protections from individuals making fear-based claims).

[22] *See* 85 Fed. Reg. 11871-72 (referring to U.S. Citizenship and Immigration Services Fee Schedule, DHS Docket No. USCIS-2019-0010; RIN 1615-AC18).

[23] Even USCIS distinguished the two agencies' rulemaking procedure when proposing its asylum application fee—which NIJC also opposed. *See id.* ("To be clear, DHS is proposing a fee for a Form I–589 filed with DHS only. Whether the fee also will apply to a Form I–589 filed with EOIR is a matter within the jurisdiction of the Department of Justice rather than DHS, subject to the laws and regulations governing the fees charged in EOIR immigration proceedings.").

[24] *See supra* n. 21.

[25] *See* TRAC Immigration, *Asylum Decisions and Denials Jump in 2018* (last accessed March 30, 2020), available at https://trac.syr.edu/immigration/reports/539/.

intent of the 1980 Refugee Act. In fact, the vast majority of countries that are signatories to the 1951 Convention or 1967 Protocol do not charge a fee for an asylum application.[26] First-time asylum seekers are ineligible for a work permit, so charging them $50 to simply access asylum protections may force them to depend on charity or choose between feeding their families and paying this fee. This uncertainty may result in asylum seekers renouncing this protection altogether.

B. This proposed wealth tax will deter countless asylum seekers from seeking lawful protection.

This $50 fee would deter a large number of asylum seekers who seek protection after leaving everything behind. The $50 fee would be compounded with other proposed increases for them to seek full administrative review of their claim.[27] Asylum seekers such as NIJC's client Ferdinand would be unable to avail themselves of the protections under U.S. asylum law.

> *Ferdinand[28] would not have been able to apply for asylum if there were a fee. He was brutally attacked in his home country when extended family learned of his sexual orientation. He was able to flee to the United States but did not immediately apply for asylum due to his fear of his sexual orientation being disclosed here. He fears that if his community here learns that he is gay, he could be harmed again and would lose all support. He has been diagnosed with PTSD after being connected with free medical services at a facility for survivors of torture. He does not have independent resources and relies on family for everything. If there were a fee, Ferdinand would be unable to pay. He would continue to remain closeted and would not seek protection in the U.S.*

Ferdinand's experience is not an anomaly. Asylum seekers often arrive in the United States with little or nothing but the packs on their backs; and after they arrive, are often dependent on friends, family, and community and faith-based organizations for everything from housing to food and transportation. While $50 may seem like a minor fee, for many of NIJC's clients even that amount could in fact be an insurmountable barrier.

EOIR appears to acknowledge that sending clients such as Ferdinand into harm's way because he cannot pay a fee would run afoul of international law, as they carve out the right to seek withholding of removal or protection under the CAT without cost. This exemption will funnel

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[26] *See* Zolan Kanno-Youngs and Miriam Jordan, *New Trump Administration Proposal Would Charge Asylum Seekers an Application Fee*, N.Y. TIMES, Nov. 8, 2019, https://www.nytimes.com/2019/11/08/us/politics/immigration-fees-trump.html (noting that the United States would be only the fourth country in the world to charge a fee for asylum).

[27] This rule imposes a chain of fees for asylum seekers that they have no means to provide. Under this proposed rule, an asylum seeker could pay $50 for an affirmative application before USCIS; upon referral, asylum seekers may pay another $50 before the IJ; and upon appeal, another $975—excluding the cost of motions.

[28] Name changed for client's privacy and safety.

eligible asylum seekers towards forms of relief that incur a higher burden of proof, excluding many *bona fide* applicants from protection.[29] Withholding and CAT also pale in comparison to the benefits of asylum, which permits reunification of spouses and children with the asylum seeker and provides a pathway to citizenship. Forcing asylum seekers to seek withholding or CAT simply because they cannot afford the fee thus harms imposes life-long harms on asylum seekers and their relatives.

Conclusion

In this proposed rule, EOIR failed to follow its statutory obligations and made flawed calculations with respect to fee collection. Each proposed fee is certain to harm countless indigent applicants. Fundamentally, this proposed rule aims to impose a wealth test on those seeking to access the ability to seek relief and appellate rights before the immigration courts. NIJC urges EOIR to rescind its proposed fee increases and maintain its current fee levels for appeals, applications, and motions.

[29] Asylum applicants are eligible to show that they have a ten percent chance of future persecution. *See Cardoza*-Fonseca, 480 U.S. 421, 431 (1987). Withholding and CAT require respondents to show that they are more likely than not to be persecuted or tortured—i.e., requiring more than fifty percent chance. *See* 8 C.F.R. §§ 208.16(b)(1)(iii) and 208.16(c)(2). Relief under CAT also requires respondents to invoke the risk of torture, which is a more particularized and extreme act than persecution.