

May 21, 2021

The Honorable Merrick Garland
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530-0001

The Honorable Lisa Monaco
Deputy Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue NW
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The Honorable Vanita Gupta
Associate Attorney General
United States Department of Justice
950 Pennsylvania Avenue NW
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The Honorable Jean King
Acting Director
Executive Office for Immigration Review
5107 Leesburg Pike, 18th Floor
Falls Church, Virginia 22041

Re: *Request to Repeal EOIR Rule Imposing Draconian Fee
Increases for Critical Immigration Filings*

Dear Attorney General Garland, Deputy Attorney General Monaco, Associate Attorney General Gupta, and Acting Director King:

The undersigned are refugee and immigrants' rights advocacy organizations, legal services providers, law school professors, and providers of other services and supports for unaccompanied children, adults, and families in proceedings before the Immigration Courts or the Board of Immigration Appeals (BIA or Board).¹ We write to address the EOIR Fees Rule, finalized by the Department of Justice (DOJ) and Executive Office for Immigration Review (EOIR) in the waning days of the previous administration, which adopts a harsh new fee schedule for applications, motions, and appeals in Immigration Court and BIA proceedings.²

The EOIR Fees Rule is in every way contrary to the principles of our nation's legal system and to the Biden-Harris Administration's commitment to improving the operation of the Immigration Courts and protecting the vulnerable individuals who appear before them.³ We understand that this Rule is among the anti-immigrant and anti-refugee rules under review pursuant to the February 2, 2021 *Executive Order on Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans*.⁴ We urge DOJ and EOIR to take the steps necessary to repeal the EOIR Fees Rule and ensure that any further rulemaking involving fees in EOIR proceedings adheres to the principle that no person be denied due process

¹ As you are aware, the Executive Office for Immigration Review, within the Department of Justice, oversees the Immigration Courts and the Board of Immigration Appeals and sets the policies governing these adjudicative bodies.

² *Department of Justice and Executive Office for Immigration Review; Fee Review*, 85 Fed. Reg. 82750 (Dec. 18, 2020).

³ The White House has issued several Executive Orders and proposed legislation, the U.S. Citizenship Act of 2021, that convey the Biden Administration's transformative vision and commitment to building a 21st century immigration system that welcomes immigrants and refugees and keeps families together. *See, e.g., The White House, Fact Sheet: President Biden Sends Immigration Bill to Congress as Part of His Commitment to Modernize our Immigration System* (Jan. 20, 2021).

⁴ Executive Order 14012, 86 Fed. Reg. 8277, 8277-80 (Feb. 5, 2021).

or access to asylum and other congressionally-authorized protection from deportation based on inability to pay.

Overview: The EOIR Fees Rule Creates Unacceptable Barriers to Justice

The EOIR Fees Rule imposes excessive fees on already vulnerable noncitizens—many of them unrepresented—seeking to defend their liberty, and often their lives, in proceedings before the Immigration Courts and the BIA. The new fees apply to the filing of applications, appeals, and motions that are integral to due process and to access to humanitarian protection and relief from deportation that Congress intended be available to those who are eligible. They include, for example, a nearly 9-fold increase to file an administrative appeal, which is a prerequisite to federal court review.

The new fees erect an insurmountable barrier to justice. The consequences of this impeded access are severe. Long-time immigrants face permanent exile from the country they consider home and permanent separation from loved ones, who oftentimes are U.S. citizens or lawful permanent residents. For those fleeing persecution or torture, a financial barrier to humanitarian protection can mean death. Those who will suffer a wrongful deportation as a result of the EOIR Fees Rule thus face the gravest impact, but the harm for those left behind will also be devastating.⁵

The gravity of the harms posed by the EOIR Fees Rule has not been felt, but that is only because a federal district court issued a nationwide preliminary injunction stopping nearly all of the new fees from taking effect.⁶ The threat nevertheless remains until the EOIR Fees Rule is formally vacated by the court or a new rulemaking rights the course.

A fundamental value of our nation's system of laws is that access to justice and basic liberty not hinge on one's wealth or lack thereof. Repeal of the EOIR Fees Rule is critical to restoring trust in the nation's legal immigration system and ensuring that no person is deprived of a full and

⁵ Numerous studies have documented a range of harms flowing from deportation-forced family separations, including income, housing, and nutritional instability, trauma, and poor health and education outcomes. In view of these and other harms, the District of Columbia and the States of California, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, and Washington filed an *amicus curiae* brief, available at <https://bit.ly/3whOiEH>, in support of litigation challenging the EOIR Fees Rule. As other studies have shown, these harms fall disproportionately to those who are unrepresented in their proceedings and to their families because not having counsel substantially decreases the likelihood of prevailing in removal proceedings. *See, e.g.*, Ingrid Eagly & Steven Shafe, American Immigration Council, *Access to Counsel in Immigration Court* (Sept. 28, 2016), <https://bit.ly/3uKOj3z>. As noted here and in comments opposing the EOIR Fees Rule, the new fees will diminish access to counsel.

⁶ *Catholic Legal Immigration Network, Inc. v. Executive Office of Immigration Review*, No. 20-CV-03812, -- F. Supp. 3d --, 2021 WL 184359 (D.D.C. Jan. 18, 2021) (Mehta, J.). In enjoining the new fees, the Court focused on the failure of DOJ and EOIR, under the prior administration, to consider the EOIR Fees Rule's impact on legal services providers and the diminished access to counsel that would result for indigent adults, families, and unaccompanied children in proceedings before EOIR. *See id.* As discussed further below, the Rule's promulgation violated the Administrative Procedure Act's substantive and procedural requirements for rulemaking in a host of additional ways.

fair day in court based on an inability to pay. Indeed, given the nature of the proceedings at issue here, the attachment of fees itself ought to be questioned in the first instance. And if fees are to be required at all, they should be returned to their previous level or lower, and be coupled with a principled, transparent fee waiver process that ensures there is access to justice, without unduly burdening legal services providers and adjudicators.

The Trump Administration’s EOIR Fees Rule: Unprecedented Increases for Appeals, Motions, Applications for Relief from Removal; a New *Mandatory* Asylum Application Fee; Violations of the Administrative Procedure Act; and Disregard for Access to Justice

A. The Fees Rule Imposed Radical Multi-Fold Fee Increases for Critical Filings.

The EOIR Fees Rule dramatically increased fees to file appeals, motions to reopen or reconsider, and applications for cancellation of removal or suspension of deportation. The Rule increased nearly 9-fold the fee for appealing removal orders to the BIA (from \$110 to \$975), raised more than 8-fold the cost of motions to the BIA to reopen or reconsider (from \$110 to \$895), increased fees more than 5-fold to appeal certain DHS decisions to the BIA (from \$110 to \$595), and more than tripled the fees to apply for cancellation of removal (from \$100 to \$305 for cancellation of removal for lawful permanent residents (LPRs) or suspension of deportation and from \$100 to \$360 for non-LPR cancellation). With the exception of the fee to file a motion to reopen or reconsider (increased over 30%) before an Immigration Judge, every increase substantially exceeded the rate of inflation for the period of time since the fees were last adjusted.⁷

B. The Fees Rule Added an Unprecedented, Non-Waivable, Defensive Asylum Fee.

The EOIR Fees Rule also for the first time ever imposed a fee to file an asylum application before the Immigration Court. DOJ and EOIR attributed imposition of this mandatory, non-waivable asylum application fee to the Department of Homeland Security’s adoption of such a fee for affirmative asylum applications submitted to U.S. Citizenship and Immigration Services (USCIS). But in fact it was an independent, voluntary decision on the part of DOJ and EOIR to require the fee for the very different context of *defensive* asylum application filings.

DOJ and EOIR adopted this fee without examining the notable differences in the circumstances of those who can apply affirmatively for asylum and those who must apply defensively in Immigration Court proceedings—including that proceedings before the Asylum Office are non-adversarial and affirmative asylum applicants may have other lawful immigration status at the time of filing whereas defensive asylum applicants frequently are detained, have often only recently arrived in the United States with just the clothes on their backs, and lack work authorization at the time of filing. DOJ and EOIR also made no assessment of the impact that a mandatory fee would be expected to have on access to asylum and related humanitarian protection.

⁷ See *Executive Office for Immigration Review; Fee Review*, 85 Fed. Reg. 11866, 11870 (Feb. 28, 2020).

C. *Promulgation of the EOIR Fees Rule Violated the Administrative Procedure Act.*

The rulemaking that led to these fee increases violated the letter and spirit of Administrative Procedure Act by preventing meaningful notice and comment by the public. For the entire comment period, DOJ and EOIR withheld the data and much of the methodology for the study on which they based the proposed fee increases. The agency also failed to disclose the data it possessed regarding fee waivers and provided no information addressing the expected impact that fee increases would have on an already problematic fee waiver system. The inadequate record hindered public comment by depriving the public of crucial information relating to the putative basis for the EOIR Fees Rule.

Additionally, the comment period was limited to 30 days, during the onset of the COVID-19 pandemic-driven lockdown in the United States that forced businesses, courts, government agencies, nonprofit services providers, schools, and daycare providers to close their doors and to move to a new world of remote work. The comment period was not extended despite repeated requests for more time.

The public's ability to meaningfully comment on the impact of the proposed fee increases was also hobbled because DOJ and EOIR waited until the comment period closed before announcing a series of interrelated rulemakings that would exacerbate the impact of the fee increases.⁸

Finally, the agency issued the final rule without adequately addressing the concerns raised in the comments that were filed about how the proposed rules would lock low-income individuals out of court because of the inadequacy of EOIR's fee waiver practices and deprive them of legal representation by devastating the legal services providers on whom they rely.

D. *The EOIR Fees Rule Violates the Biden Administration's Stated Values and Fundamental Principles of Fairness, Access, and Due Process.*

The most serious flaws of the EOIR Fees Rule include the following.

1. *Requiring noncitizens to bear nearly the full cost of adjudications in adversarial proceedings reverses decades of agency policy and defies legal norms.*

EOIR is an appropriated agency, not one that is fee-based. Nonetheless, in a sharp departure from decades-long policy, the EOIR Fees Rule employed an "activity-based" or "cost recovery" model that assigned to respondents in removal proceedings the dollar value of nearly all of the staff time involved in processing, adjudicating, and transmitting Immigration Judge and BIA

⁸ See, e.g., *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 36,264 (June 15, 2020); *Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure*, 85 Fed. Reg. 52,491 (Aug. 26, 2020); *Procedures for Asylum and Withholding of Removal*, 85 Fed. Reg. 59,692 (Sept. 23, 2020); see also *Centro Legal de la Raza v. EOIR*, No. 21-CV-00463-SI, 2021 WL 916804, at *26 (N.D. Cal. Mar. 10, 2021) (noting serious concerns with staggered, piecemeal rulemaking by EOIR, including the EOIR Fees Rule).

decisions on motions, appeals, and applications for cancellation of removal or suspension of deportation.⁹

EOIR is an adjudicative body. Nearly all the proceedings before it are adversarial and initiated and prosecuted by the Government. We are aware of no judicial or quasi-judicial adversarial proceedings in which any party—let alone the one whose liberty is at stake—bears nearly the entire cost of the court staff time involved in adjudicating a motion, an appeal, or an application of the type that is presented in immigration court as a defense to removal.¹⁰ The decision to employ a cost recovery model and impose such radical fee increases was a marked and unjustified departure from decades of agency commitment to keeping costs “at less than full recovery recognizing longstanding public policy and the interest served by these processes.”¹¹

2. *A new mandatory asylum fee defies the Biden Administration’s commitment to undoing the prior administration’s evisceration of U.S. asylum law and policy.*

The decision to adopt an asylum application fee, let alone one that would be mandatory and not waivable, was also an historic and unjustifiable departure from decades-long policy and the practice of nearly every other party to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees. A host of concerns were raised when this fee was proposed for affirmative asylum applications.¹² As explained above, those concerns apply with even greater force to any fee required for *defensive* asylum applications, let alone one that is mandatory.

⁹ The only costs not assigned to respondents under the rule were office overhead, fringe benefits, and certain other costs such as interpreters. The Notice of Proposed Rulemaking noted that such costs could not be included because, for example, they would be incurred in any event for other agency work, do not arise in all cases, and/or are infeasible to calculate because they hinge on decisions such as individual employee benefits selections. *See* 85 Fed. Reg. at 11870, 11872.

¹⁰ Contrasting examples are abundantly available. To name just a few, unlike the heavy fees here, the fee to file a petition for writ of habeas corpus in federal court is only \$5, and there is no cost for any level of administrative review of the denial of Social Security benefits. *See* 28 U.S.C. § 1914(a) (establishing \$5 filing fee for writ of habeas corpus); Social Security Administration, The Appeals Process, Publication No. 05-10041 (Jan. 2018), <https://www.ssa.gov/pubs/EN-05-10041.pdf> (describing the various levels of administrative review and listing no cost for review). There also is no fee to file a motion for reconsideration in federal district court. Under the EOIR Fees Rule, the fee for an appeal to the BIA is nearly double the cost of docketing an appeal before a federal circuit court and more than twice as high as the fees for filing a complaint in federal court. *See* U.S. Courts, Court of Appeals Miscellaneous Fee Schedule (Oct. 1, 2019), <https://bit.ly/3fke1oO> (\$500 docketing fee for appeals before the federal courts of appeal); U.S. District Court for the District of Columbia, Fee Schedule, <https://www.dcd.uscourts.gov/fee-schedule> (last visited Mar. 24, 2020) (\$400 docketing fee for complaint before the federal district court). None of these tribunals seeks to recover anything approximating the full cost of the staff time needed for their adjudications. That is simply not how the justice system works in this country.

¹¹ *Powers and Duties of Service Officers; Availability of Service Records*, 51 Fed. Reg. 39993, 39993 (Nov. 4, 1986) (Final Rule amending fee schedule of the former INS and EOIR).

¹² *See, e.g.*, 85 Fed. Reg. at 46844 (summarizing commenters’ concerns with an affirmative asylum application fee).

3. *The EOIR Fees Rule placed undue reliance on EOIR's inadequate fee waiver process.*

In response to the obvious concerns about the unaffordability of multi-fold increases in fees that many respondents could not afford even at their previous level, DOJ and EOIR pointed to the “possibility” of a fee waiver as protection for indigent respondents.¹³ The wholesale reliance on this “possibility” was another fundamental flaw of the rulemaking. As evidence in the record made clear, fee waivers were an inadequate safety valve even before promulgation of markedly higher fees.¹⁴ Of particular note, there are no clear standards for fee waiver eligibility, and the decision to grant or deny a fee waiver request is entirely discretionary.¹⁵ Not surprisingly, fee waiver requests are inconsistently adjudicated, as DOJ and EOIR have themselves admitted.¹⁶

4. *Fee increases and the increased need for fee waivers harm legal services providers and undermine access to counsel.*

Immigration court respondents who have legal representation are substantially more likely to succeed at every stage of their proceedings. But many cannot afford counsel. As comments opposing the EOIR Fees Rule explained, the prior administration's fee increases ensure that even greater numbers will be forced to go without representation.

In promulgating the Fees Rule, DOJ and EOIR failed to consider the harmful impact of fee increases and a new asylum fee on nonprofit legal services providers and the new fees' adverse impact on low-income respondents' access to counsel. Among the expected impacts of the Final Rule was an explosion in the need for fee waivers and the corresponding need for fee waiver requests, adding to the time required for each individual case and diminishing the capacity of legal services providers to provide free or low-cost legal representation to those unable to afford counsel. DOJ and EOIR dismissed these concerns, but as the federal district court that enjoined the bulk of EOIR's new fees found, “the APA required EOIR to acknowledge those concerns and respond to them in a meaningful way, not blithely dismiss them as ‘outside the limited scope of this rulemaking.’”¹⁷

¹³ See, e.g., 85 Fed. Reg. at 11874.

¹⁴ See, e.g., 85 Fed. Reg. at 82758.

¹⁵ See 8 C.F.R. §§ 1003.8(a)(3), 1003.24(d); see also DOJ, EOIR POLICY MANUAL pt. II, ch. 3, § 3.4(d) (“When a fee to file an application or motion is required, the Immigration Judge has the discretion to waive the fee upon a showing that the filing party is unable to pay the fee.”) (Jan. 28, 2020), <https://www.justice.gov/eoir/eoir-policy-manual/3/4>; *id.* pt. III, ch. 3, § 3.4(c) (“When an appeal or motion normally requires a filing fee, the Board has the discretion to waive that fee upon a showing of economic hardship or incapacity.”) (last updated Dec. 22, 2020), <https://www.justice.gov/eoir/eoir-policy-manual/iii/3/4>; 85 Fed. Reg. at 82759 (“fee waivers are discretionary by nature”).

¹⁶ See, e.g., 85 Fed. Reg. at 82759 (“differences in adjudicatory outcomes are inherent in any system rooted in adjudicator discretion”); see also *id.* (“Any calculations attempted by the Department to ‘account for’ the effects of fee waiver adjudications in light of the updated fees would be unreliable because fee waivers are discretionary by nature.”).

¹⁷ *Catholic Legal Immigration Network, Inc. v. EOIR*, No. 20-CV-03812, -- F. Supp. 3d --, 2021 WL 184359 (D.D.C. Jan. 18, 2021) (quoting 85 Fed. Reg. at 82775).

5. *The EOIR Fees Rule disregards noncitizens' inability to pay exorbitant fees and the attendant impact on access.*

DOJ and EOIR did not undertake their own examination of the impact that fee increases would have on access to due process and justice before the Immigration Courts and the BIA. The Final Rule then failed to heed the substantial concerns that commenters raised in this regard. Indeed, in the Final Rule's publication, DOJ and EOIR stated that the agency's authority to set fees was "not restricted by . . . principles of 'affordability' or 'accessibility.'"¹⁸

The Final Rule, embodying this lack of regard for affordability and access, has no place in a system of justice.

Recommendations

The prior administration undermined the strength and integrity of the Immigration Court system in myriad ways. There is much work to be done to ensure that noncitizens in removal proceedings have fair access to justice and the families of those noncitizens and the entire public see the system has integrity. Repealing the EOIR Fees Rule is not sufficient to achieve this end, but it is a necessary step. Toward this end, we make the following recommendations:

1. The EOIR Fees Rule must be repealed. As outlined above, there is reason to question the imposition of fees on Immigration Court respondents at all given the nature of the proceedings and the liberty interests at stake. At a minimum, fees should be restored to their prior level or be lowered.
2. Such repeal should make explicit the principle—long understood until its upending by the EOIR Fees Rule—that no person should be denied access to the appeals, motions, humanitarian protection or other congressionally-authorized protection or relief from removal, based on an inability to pay.
3. The prior administration's rulemaking exposed deficiencies in EOIR's approach to fee waivers that should be rectified. Standards should be clear, adjudications should be consistent, and safeguards should be adopted to account for special circumstances to ensure that no person is prevented from filing necessary applications, motions, or appeals because of cost.
4. Exemptions from any required fees should be codified for particularly vulnerable populations, including asylum applicants, children, those who are detained, those lacking representation, and those who are incompetent or otherwise have disabilities that interfere with their ability to access justice.

¹⁸ 85 Fed. Reg. at 82754.

5. EOIR must improve its data collection and analysis, ensure transparency, and provide a clear channel for low-income noncitizens to seek a remedy where denial of a fee waiver precludes the filing of any application, motion, or appeal.

In closing, we thank you for the careful review that is underway and your consideration of the foregoing. We look forward to working with the Biden Administration to bring about a more just approach. For further discussion of the EOIR Fees Rule, please contact Avidah Moussavian at moussavian@nilc.org or Jorge Loweree at jloweree@immcouncil.org.

Respectfully submitted,

African Public Affairs Committee

Ahri Center

Alein Haro, University of California, Berkeley*

American Friends Service Committee

American Gateways

American Immigration Council**

American Immigration Lawyers Association

Americans for Immigrant Justice

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Anti-Defamation League (ADL)

Asian Americans Advancing Justice - Atlanta

Asian Americans Advancing Justice - Los Angeles

Asian Counseling and Referral Service (ACRS)

Asian Law Alliance

Asian Pacific Institute on Gender-Based Violence

Asian Resources, Inc

ASISTA

Asylum Seeker Advocacy Project (ASAP)

AsylumWorks

Bellevue Program for Survivors of Torture

Black and Brown United in Action

BPSOS Center for Community Advancement

Bridges Faith Initiative

Campeños Sin Fronteras

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Center for Victims of Torture
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Chicanos Por La Causa, Inc.
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Immigrant Action Alliance
Immigrant Defenders Law Center
Immigrant Legal Advocacy Project
Immigrant Legal Defense

Immigrant Legal Resource Center (ILRC)
Immigrant Welcome Center
Immigration Advocates Network
Immigration Equality
Immigration Hub
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Migrant Center for Human Rights
Minkwon Center
Mississippi Center for Justice
Mixteco/Indígena Community Organizing Project
National Center for Lesbian Rights
National Health Law Program
National Immigrant Justice Center
National Immigration Forum
National Immigration Law Center**
National Immigration Litigation Alliance

National Immigration Project (NIP-NLG)
National Network for Immigrant & Refugee Rights
NETWORK Lobby for Catholic Social Justice
New Mexico Immigrant Law Center
New Sanctuary Coalition
New York Immigration Coalition
New York Legal Assistance Group (NYLAG)
North Carolina Asian Americans Together
Northern Illinois Justice for Our Neighbors
Northern Manhattan Improvement Corporation
Northwest Immigrant Rights Project
Oasis Legal Services
OCA-Greater Houston
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UndocuBlack Network
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* The institutional affiliation listed for identification purposes only.

** The National Immigration Law Center and the American Immigration Council are counsel in *Cath. Legal Immigr. Network, Inc. v. Exec. Off. for Immigr. Rev.*, No. 20-CV-03812 (D.D.C.), which seeks to enjoin the EOIR Fee Rule that is the subject of this letter.

*** Catholic Legal Immigration Network, Inc., Coalition for Humane Immigrant Rights (CHIRLA), Community Legal Services in East Palo Alto, and Kids in Need of Defense (KIND) are plaintiffs in *Cath. Legal Immigr. Network, Inc. v. Exec. Off. for Immigr. Rev.*, No. 20-CV-03812 (D.D.C.), which seeks to enjoin the EOIR Fee Rule that is the subject of this letter.

cc: Susan Rice, Assistant to the President for Domestic Policy
Esther Olavarria, Deputy Director of the Domestic Policy Council for Immigration
Tyler Moran, Special Assistant to the President for Immigration, Domestic Policy Council
Margy O'Herron, Senior Counsel, Office of the Deputy Attorney General, Department of Justice