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CITY BAR

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IMMIGRATION & NATIONALITY LAW**

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Submitted via www.regulations.gov

**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,

On behalf of the Immigration and Nationality Law Committee of the New York City Bar Association (“City Bar”), we respectfully submit this comment in response to the above-referenced proposed rules to publish regulations relating to fees for the Executive Office for Immigration Review (“EOIR”), published in the Federal Register on February 28, 2020.¹ For the reasons detailed in the comments that follow, the New York City Bar opposes the proposed changes to EOIR fees and urges that the proposed rule be withdrawn in its entirety.

With 24,000 members, the City Bar has a longstanding mission to equip and mobilize the legal profession to practice with excellence, promote reform of the law, and advocate for access to justice in support of a fair society. In doing so, the City Bar uses its voice to address a broad range of policy issues, which includes civil rights, housing law, immigration and nationality law, social welfare law, disability law, and laws affecting children and families.

¹ The complete list of proposed fee increases is: (i) Increase the fee for Form EOIR-26, Notice of Appeal from a Decision of an Immigration Judge, from \$110 to \$975; (ii) Increase the fee for Form EOIR-29, Notice of Appeal to the Board of Immigration Appeals from a Decision of a DHS Officer, from \$110 to \$705; (iii) Increase the fee for Form EOIR-40, Application for Suspension of Deportation, from \$100 to \$305; (iv) Increase the fee for Form EOIR-42A, Application for Cancellation of Removal for Certain Permanent Residents, from \$100 to \$305; (v) Increase the fee for Form EOIR-42B, Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents, from \$100 to \$360; (vi) Increase the fee for Form EOIR-45, Notice of Appeal from a Decision of an Adjudicating Official in a Practitioner Disciplinary Case, from \$110 to \$675; (vii) Increase the fee for filing a motion to reopen or reconsider with the immigration court from \$110 to \$145; (viii) Increase the fee for filing a motion to reopen or reconsider with the BIA from \$110 to \$895.

The proposed rule would dramatically increase EOIR fees at the expense of access to justice, particularly with regard to appeals. This comment addresses the critical role of appeals, the lack of meaningful fee waivers, the effects on specific applications, and concerns that the proposed rule will undermine due process and place further roadblocks in front of meritorious cases.

I. THE IMPORTANCE OF APPEALS

The proposed rule would increase fees for several types of appeals, most notably increasing the fee for appealing an immigration judge decision to the Board of Immigration Appeals (“BIA”) from \$110 to \$975.² These increases undoubtedly will mean fewer noncitizens can afford appeals—with devastating implications for access to justice. This is especially true for asylum seekers, children, and other vulnerable groups who may have fled their homes with nothing and do not yet have employment authorization.³ For these individuals, the fee increase represents, quite plainly, an effective loss of due process.

Appeals are essential to any adjudicative system. Appellate bodies promote consistency, accountability, and fairness. The due process safeguards provided by appeals are especially important within the immigration context, where respondents far too often appear *pro se* or are victims of ineffective assistance of counsel.⁴ This lack of effective representation can be particularly devastating given the complexity of immigration law and language and cultural barriers. Noncitizens in immigration court also often are survivors of severe trauma, torture, and domestic violence, and more than 90,000 are unaccompanied children.⁵ These conditions create an environment ripe for error, exploitation, and the miscarriage of justice.

Appeals serve as a check against such hurdles, and that role has become more critical amidst the increasing politicization of the immigration court system. While it is not unusual for an administration to seek to leave its mark on the immigration courts, the current administration has created several dramatic new challenges for due process at the Immigration Court level.⁶

² See 85 Fed. Reg. 11866 at 11870 (Feb. 28, 2020).

³ In fact, with recent proposed changes to employment authorization document (EAD) rules for asylum seekers, most asylum seekers will never be eligible for an “asylum pending” EAD because the court’s decision will be issued before the asylum seeker accrues the 365 day waiting period which will be required once the changes go into effect. See New York City Bar Association, *Opposition to Proposed Rule Governing Employment Authorizations for Asylum Seekers*, Jan. 13, 2020, <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/opposition-to-proposed-rule-governing-employment-authorizations-for-asylum-seekers>. (All links were last visited on March 30, 2020).

⁴ During the 2019 fiscal year, 19 percent of asylum seekers in Immigration Court were not represented by an attorney or BIA-accredited representative. *Asylum Decisions by Custody, Representation, Nationality, Location, Month and Year, Outcome and more*, Transactional Records Access Clearinghouse (last accessed Mar. 15, 2020), <https://trac.syr.edu/phptools/immigration/asylum/>. See also Lam Thuy Vo, *She Paid A Lawyer Thousands Of Dollars To Apply For A Green Card. She Got A Deportation Order Instead.*, BuzzFeed News (Sept. 29, 2018), <https://www.buzzfeednews.com/article/lamvo/undocumented-immigrants-10-year-green-card>.

⁵ See *Pending Unaccompanied Alien Child (UAC) Cases*, Executive Office for Immigration Review (Jan. 23, 2020), <https://www.justice.gov/eoir/page/file/1060871/download>.

⁶ See New York City Bar Association, *House Testimony, The State of Judicial Independence & Due Process in U.S. Immigration Courts: Written Testimony*, Jan. 29, 2020, <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/the-state-of-judicial-independence-and-due-process-in-us>.

For example, the hiring of new immigration judges, mostly from government backgrounds, grew the ranks of immigration judges to a record 465 by late 2019.⁷ Meanwhile, judges with experience and knowledge of the law have been quitting or retiring early in the face of untenable conditions.⁸ The increase in new judges, many of whom have never practiced immigration law, means that legal error is likely to be more common. Judicial and appellate appointments also have noticeably favored individuals who deny relief at high rates, as exemplified by the recent placement of six judges with some of the highest denial rates in the country on the BIA.⁹

EOIR has also set case quotas and other restrictions on judges that the National Association of Immigration Judges has argued sacrifice accuracy for speed.¹⁰ Attorneys have increasingly reported that judges appear to be rushing cases without fully developing the record or without allowing time for meaningful individualized assessments. In addition, the reliance on tent courts near the border, remote hearings, and detention make it more difficult for noncitizens to obtain meaningful advice from an attorney prior to their hearings.¹¹

These changes already have had a visible effect. Four years ago, immigration judges denied about half of asylum applications, but that rate has shot up and now more than two thirds of cases are being denied.¹² With cases being rushed and denials increasing, it is unsurprising that appeals have skyrocketed under the current administration. The BIA saw the filing of 17,547 case appeals

[immigration-courts-written-testimony](#); *Legal Associations Call for Independent Immigration Court System*, American Immigration Lawyers Association, the American Bar Association, the National Association of Immigration Judges, and the Federal Bar Association (July 11, 2019), <https://www.aila.org/advo-media/aila-correspondence/2019/legal-associations-call-independent-court-system>; Christian Farias, *The Trump Administration Is Gagging America's Immigration Judges*, *The Atlantic* (February 28, 2020), <https://www.theatlantic.com/ideas/archive/2020/02/immigration-judges-first-amendment/607195/>; Louis C. LaBrecque, *Immigration Judges Not Meeting DOJ Production Goals, House Told*, *Bloomberg* (Jan. 29, 2020), <https://news.bloomberglaw.com/daily-labor-report/immigration-judges-not-meeting-doj-production-goals-house-told>; Kate Brumback, Deepti Hajela and Amy Taxin, *AP visits immigration courts across US, finds nonstop chaos*, *AP* (Jan. 19, 2020), https://apnews.com/7851364613cf0afb67cf7930949f7d3?fbclid=IwAR2zaAFEdwiX_wCdPOnETVhSHSzNAVvtSVQnO_zahJfgYw-kR4t0OXPrHy0; Eric Katz, *Trump Administration Makes Its Case to Break Up Immigration Judges' Union*, *Government Executive* (Jan. 7, 2020), <https://www.govexec.com/management/2020/01/trump-administration-makes-its-case-break-immigration-judges-union/162288/>.

⁷ Priscilla Alvarez, *Immigration judges quit in response to administration policies*, *CNN* (Dec. 27, 2019), <https://www.cnn.com/2019/12/27/politics/immigration-judges-resign/index.html>.

⁸ Molly Hennessy-Fiske, *Immigration judges are quitting or retiring early because of Trump*, *Los Angeles Times* (Jan. 27, 2020), <https://www.latimes.com/world-nation/story/2020-01-27/immigration-judges-are-quitting-or-retiring-early-because-of-trump>.

⁹ See Tanvi Misra, *DOJ changed hiring to promote restrictive immigration judges*, *ROLL CALL* (October 29, 2019), <https://www.rollcall.com/2019/10/29/doj-changed-hiring-to-promote-restrictive-immigration-judges/>.

¹⁰ Yaganeh Torbati, *Head of U.S. immigration judges' union denounces Trump quota plan*, *Reuters* (Sept. 21, 2018), <https://www.reuters.com/article/us-usa-immigration-judges/head-of-u-s-immigration-judges-union-denounces-trump-quota-plan-idUSKCN1M12LZ>.

¹¹ See Oliver Laughland, *Inside Trump's tent immigration courts that turn away thousands of asylum seekers*, *The Guardian* (Jan. 16, 2020), <https://www.theguardian.com/us-news/2020/jan/16/us-immigration-tent-court-trump-mexico>.

¹² *Asylum Decisions by Custody, Representation, Nationality, Location, Month and Year, Outcome and more*, Transactional Records Access Clearinghouse, <https://trac.syr.edu/phptools/immigration/asylum/>.

in 2016 compared with 55,860 in 2019.¹³ These appeals also increasingly come from Latin American cases, suggesting that appeals may need to play a role in addressing disparate racial impacts of recent immigration policies.¹⁴

The proposed fee increase for appeals undoubtedly will have the intended effect of discouraging appeals in the face of an increased need for appellate review. Indeed, it will erect a financial barrier to review at the same time that government policies are creating the very environment that calls for more review.

Also, because the Department of Homeland Security (DHS) may appeal cases for free,¹⁵ higher fees for respondents would skew the balance of appeals to ones in which the Government is attempting to overturn decisions favorable to immigrants. With DHS challenging nearly every case in a respondent's favor and respondents often unable to appeal, substantive legal challenges would become increasingly one-sided. Since the administration has largely restricted prosecutorial discretion in immigration court,¹⁶ nearly any favorable outcome for a noncitizen would be appealed, while DHS would increasingly go unchallenged.¹⁷ In short, precedential decisions would predominately arise in appeals initiated by DHS, letting DHS set the litigation agenda and reshape case law in its favor.

Furthermore, cutting off access to the Board of Immigration Appeals cuts off access to the Circuit Courts and the U.S. Supreme Court.¹⁸ This allows the administration to both set immigration policy and adjudicate it without meaningful review by an independent judiciary. Without the threat of being overturned, immigration judges and BIA members may be emboldened to depart from precedent. Even now, there is concern over a developing culture of impunity, exemplified by a recent decision from an incredulous U.S. Court of Appeals for the Seventh Circuit stating: "We have never before encountered defiance of a remand order, and we hope never to see it again. Members of the Board must count themselves lucky that Baez-Sanchez has not asked us to hold them in contempt, with all the consequences that possibility entails."¹⁹

In this climate, EOIR should not be taking steps to decrease access to appellate review.

¹³ *Case Appeals Filed, Completed, and Pending*, Executive Office for Immigration Review (Jan. 23, 2020), <https://www.justice.gov/eoir/page/file/1248501/download>.

¹⁴ *Statistics Yearbook FY 2018*, U.S. Dept. of Justice at 37 (Aug 30, 2019), <https://www.justice.gov/eoir/file/1198896/download>.

¹⁵ 8 CFR § 1003.8(a)(2)(vi).

¹⁶ *See Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018) (holding that immigration judges do not have general authority to administratively close cases.)

¹⁷ *See Enhancing Public Safety in the Interior of the United States*, Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

¹⁸ *See* INA § 242(d)(1), stating that respondents must exhaust "all administrative remedies" before pursuing appeals of individual cases before federal court.

¹⁹ *See Baez-Sanchez v. Barr*, No. 19-1642 at 3-4 (7th Cir. 2020).

II. THE EFFECTS ON SPECIFIC APPLICATIONS

The proposed rulemaking raises the cost of applications for relief by nearly three times the current cost and raises the cost of appeals by nearly nine times the current cost.²⁰ Under the proposal, individuals least likely to have the resources to afford the drastic fee increase *i.e.*, minors, asylum seekers, battered immigrants, and individuals in mixed-status families, are being prevented from obtaining basic protections and opportunities envisioned by Congress.

a. Impact on Cancellation of Removal

Individuals who qualify for cancellation of removal have established roots in the U.S., are most commonly in mixed-status families, and present compelling cases about their family situation.²¹ Hence, a fee increase of as much as 205 percent²² burdens eligible applicants who have been in the United States for years and whose removal would result in family separation and hardship. Most notably, this affects battered immigrants eligible for Violence Against Women Act (VAWA) cancellation.²³ The proposed rule would increase the filing fee for cancellation of removal, including VAWA cancellation, to \$360. By way of contrast, affirmative applications to the United States Citizenship and Immigration Services (USCIS) for relief under VAWA (*e.g.*, I-360, I-918, and I-914), have no filing fee. This fee increase, which may put VAWA benefits out of reach for many, is contrary to congressional intent to strengthen protections for victims of intra-familial violence.

Furthermore, most applicants do not obtain employment authorization until after the filing of their initial application. People present in the United States who do not have work authorization are at the mercy of potentially abusive spouses, or unscrupulous employers only willing to “employ” them at exploitative wages. Many live in daily fear of being separated from their families through removal simply because they lack the financial ability to seek benefits for which they qualify. Thus, a fee increase from \$100 to \$360 would inevitably lead families to choose between obtaining necessities, such as food and housing, or paying this fee.

b. Impact on Asylum

Like DHS’s recent proposed \$50 fee charge for affirmative asylum applications,²⁴ EOIR is proposing an unprecedented \$50 charge for defensive asylum applications filed in immigration

²⁰ See 85 Fed. Reg. 11866 at 11870 (Feb. 28, 2020).

²¹ See, *e.g.*, *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001) (interpreting congressional intent when expressing that cancellation for nonpermanent residents is mostly established in the most compelling cases); *Mater of Recinas*, 23 I&N Dec. 467 (BIA 2002) (considering hardship to two undocumented children affecting four U.S. citizen children).

²² See 85 Fed. Reg. 11866 at 11874 (Feb. 28, 2020).

²³ See generally INA §240A; 8 U.S.C. 1229b(b)(2).

²⁴ The City Bar similarly opposed the recent proposed rule increasing fees for affirmative immigration benefits, including, but not limited to, asylum. See, New York City Bar Association, Opposition to Fee Increases for USCIS

court. This fee contradicts congressional intent and U.S. commitments under international law. The United States is a signatory to the 1967 Protocol to the 1951 Convention Relating to the Status of Refugees (Protocol).²⁵ Under this binding treaty obligation, the United States must offer protection to those who have suffered persecution or fear future persecution or torture. Coupled with President Trump’s statement that “our country is full,”²⁶ this proposed rule appears to undermine the international obligation of the United States under the Protocol and furthers the administration’s efforts²⁷ to curb the right to refugee protection. Currently, Fiji, Australia and Iran are the only three out of 146 countries that are parties to the Protocol and impose a fee to apply for asylum;²⁸ the fee is a significant departure from established practice in the United States.

While the proposed rulemaking states that the \$50 fee will not be required for those who are solely seeking withholding of removal and protection under the Convention Against Torture (CAT),²⁹ it does not acknowledge that these forms of protection do not provide applicants with legal status and a path to citizenship and are more difficult to win. Asylum seekers are specifically vulnerable since often they flee persecution with little to no financial means or support. By limiting the possibility of applying for asylum—a reality that is the inevitable consequence of the proposed fee—asylum seekers would face the decision of applying only for “free” forms of relief, which offer far less protection to vulnerable people seeking protection. For family units with no means of paying multiple application fees, family members will need to decide who gets the possibility of benefiting from asylum, essentially limiting the entire family’s opportunity to obtain resettlement opportunities and benefits.

Applications: Comments, Dec. 19, 2019, <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/opposition-to-fee-increases-for-uscis-applications-comments>.

²⁵ U.N. High Comm’r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection*, art 25.4 (2019), <https://www.unhcr.org/en-us/publications/legal/5ddfcdc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html>.

²⁶ Philip Bump, *Trump says ‘our country is full,’ but we could actually add a few trillion more people*, Washington Post (April 5, 2019), <https://www.washingtonpost.com/politics/2019/04/05/trump-says-our-country-is-full-we-could-probably-squeeze-few-more-people/> (“The system is full. We can’t take you anymore. Whether it’s asylum. Whether it’s anything you want. It’s illegal immigration. Can’t take you anymore. Can’t take you. Our country is full.”)

²⁷ See, e.g., *Al Otro Lado, Inc. v. McAleenan*, 394 F. Supp. 3d 1168, 1180 (S.D. Cal. 2019). *Barr v. East Bay Sanctuary Covenant*, 588 U.S. ___ (Sept. 11, 2019) (J. Sotomayor, dissenting) (“In effect, the rule forbids almost all Central Americans—even unaccompanied children—to apply for asylum in the United States if they enter or seek to enter through the southern border, unless they were first denied asylum in Mexico or another third country.”); see also Lauren Carasik, *Trump’s Safe Third Country Agreement With Guatemala Is a Lie*, Foreign Policy (July 30, 2019), <https://foreignpolicy.com/2019/07/30/trumps-safe-third-country-agreement-with-guatemala-is-a-lie/> (noting that the “agreement with Guatemala is part of broader attempt by the administration of President Donald Trump to render almost all migrants ineligible for asylum in the United States”).

²⁸ Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267; Global Legal Research Center, Law Library of Congress, *Fees Charged for Asylum Applications by States Parties to the 1951 Refugee*, <https://www.loc.gov/law/help/asylum-application-fees/asylum-application-fees.pdf>.

²⁹ See 85 Fed. Reg. 11866 at 11869 n.11 (Feb. 28, 2020).

The imposition of an asylum filing fee further causes hardship to individuals wanting to file a motion to reopen or reconsider an adverse decision from EOIR. Most notably, asylum applicants who wish to file a motion to reopen or motion to reconsider before the BIA will now need to pay a drastic fee increase of \$895 while such motions have, until now, been free.³⁰

The United States has long been a world example to other countries in providing protection to refugees. However, imposing a fee for asylum which will affect the asylum process for applicants not only undermines the international obligation of the United States but contradicts congressional intent³¹ to provide the same protection and resettlement opportunities to all refugees.

c. Impact on Agency Appeals – I-360 & I-130

The proposed fee schedule would impose a 605% increase for appeals of a decision by a USCIS officer for family-based petitions, leaving family members of U.S. citizens and lawful permanent residents in a state of uncertainty. With the new fee, a widower of a U.S. citizen spouse, for example, who files an I-360, will now have the added burden of paying \$705 instead of the current \$110 if he wishes to appeal the petition decision. This dramatic fee increase contradicts the principle of family unity, a hallmark of the U.S. immigration policy for decades.³² This added fee will also cause greater delays both for family members inside the United States hoping to regularize their status and for those outside the United States who are waiting to physically reunite with U.S.-based family members. Given the benefits of family unity and the significant negative consequences of family separation, this added financial hurdle is another means of undermining the bedrock values of family unity in immigration law.

III. THE JUSTIFICATIONS FOR THE PROPOSED RULE ARE UNCONVINCING AND MAKE PLAIN THAT THE FEE INCREASE IS PART OF ONGOING EFFORTS TO DENY IMMIGRANTS WITH MERITORIOUS CASES ACCESS TO THE COURTS

As discussed above, the administration's policy changes have consistently acted to decrease low-income immigrants' access to counsel and to the courts, and, similarly, this draconian fee increase puts BIA appeals virtually out of reach for low income, desperate and deserving asylum seekers. The increase for Form EOIR-26, which is used to appeal a decision by an Immigration Judge to the BIA, is the sharpest and least possible to justify. While the administration attempts to justify the fee increases by pointing out that the current fee structure has "remained static, without accounting for inflation," the proposed increase for the EOIR-26 from \$110 to \$975 is more than triple what it would be had it simply accounted for inflation. Adjusted for inflation

³⁰ 8 CFR 1003.8 (a) (2) (ii)-(iii).

³¹ S. Rep. No. 96-256, p. 3 (1979).

³² See generally, Gubernskaya, Z., & Dreby, J. (2017). US Immigration Policy and the Case for Family Unity. *Journal on Migration and Human Security*, 5(2), 417–430. <https://doi.org/10.1177/233150241700500210>.

over 33 years, the \$110 fee would be only \$250.48 today.³³ By tripling what the fee would have increased to over time had it accounted for inflation, EOIR betrays what appears to be its actual motive: to decrease drastically the number of appeals filed by asylum seekers and other Immigration Court litigants who cannot come up with the \$975 fee in the 30-day window that they have to file an appeal.

Moreover, there is no reason to believe that the fee increase will improve the functions of the immigration courts or the BIA. Rather, a review of EOIR statistics reveals that over the decade from 2008-2018 (the most recent for which statistics are available), the BIA has become markedly less efficient. The current Adjudication Statistics show that in 2008, 23,784 appeals were filed and 29,433 appeals were completed.³⁴ Yet in 2018, 55,860 appeals were filed and only 19,449 appeals were completed. In addition, the Adjudication Statistics make clear that 2008 was the last year that the BIA managed to complete almost 30,000 of its pending appeals. Instead, in every year the number was significantly lower and was under 20,000 most years. The Proposed Rule does not address in any way why the BIA dropped its rate of deciding appeals by one third during this time period. More crucially, the Proposed Rule does not explain how the proposed nine-fold fee increase will fix its operational issues. Indeed, the rulemaking never gives any reason for EOIR, an appropriations-funded agency, to need this money, nor does it specify that money collected through this fee increase would go to improve EOIR functioning rather than to general government funds.

Indeed, the exorbitant proposed \$975 fee as well as the other increased fees, are drastically higher than fees charged by similar federal agencies serving low income individuals in other contexts. Many other federal administrative applications for social benefits for individuals are free. Internal administrative appeals are also often free. Individuals may apply for benefits like Social Security Disability Insurance, Supplemental Security Income, and the Supplemental Nutrition Assistance Program without paying a fee.³⁵ Applicants for these benefits who have been denied benefits may initially appeal decisions for free.³⁶ Only when applicants have exhausted all of their administrative remedies and decide to appeal to a federal court are they required to pay filing fees.

For example, the Veterans Association 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'

³³ See, e.g., <https://www.in2013dollars.com/us/inflation/1987?amount=110> (using U.S. Department of Labor inflation statistics that find that today's prices are 127% higher than in 1987).

³⁴ See Executive Office for Immigration Review Adjudication Statistics, available at <https://www.justice.gov/eoir/page/file/1248501/download>.

³⁵ *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>.

³⁶ *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>.

Appeals for free.³⁷ 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.³⁸ This external appeal to the judicial branch costs \$50 to file, and may be waived if applicants submit a Declaration of Financial Hardship.³⁹

IV. THE LACK OF MEANINGFUL FEE WAIVERS

The proposed rulemaking does not meaningfully address the issue of fee waivers. It states, "Consistent 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)."⁴⁰ Yet nowhere does it account for the fact that fee waiver requests would increase dramatically with these fees that are potentially nine times higher than current fees. Moreover, the focus of the rulemaking in saving the taxpayer money rather than on ensuring justice for vulnerable noncitizens, gives little assurance that fee waivers will be granted more generously once the cost increases. Further, EOIR fails to identify a grant or denial rate for fee waivers, making it harder to determine whether fee waivers are reasonably attainable for those who cannot afford the filing fees.⁴¹

An increase in fee waiver requests also would likely have another negative side effect. Respondents have only 30-days to file an appeal and no extension is granted when a fee waiver is denied. As a result, when someone is denied a fee waiver, they often do not have enough time remaining to then file the fee before the appeal window closes. If a family is unable to collect \$975 in 30 days, they completely lose the opportunity to pursue an appeal, no matter how meritorious.

³⁷ *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>.

³⁸ *Id.*

³⁹ *Court Forms*, United States Court of Appeals for Veterans Claims, http://www.uscourts.cavc.gov/forms_fees.php.

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

⁴¹ *See* 85 Fed. Reg. 11866 at 11870 (Feb. 28, 2020).

V. CONCLUSION

While EOIR is permitted to assess fees based on the cost of adjudication, it should not wield that power in a way that actively discourages benefits applicants from low income populations from seeking those benefits or from appealing adverse decisions that are contrary to law. To do so would fly in the face of congressional intent in enacting legislation that gives protection to asylum seekers, battered spouses and children of U.S. Citizens and permanent residents, unaccompanied alien children, survivors of crime, survivors of human trafficking and longtime resident members of mixed-status families. The drastic fee increases proposed by the rule are nothing but another attempt to build a fence to keep out immigrants. We respectfully urge EOIR to withdraw the rule in its entirety.

Respectfully submitted,

Immigration and Nationality Law Committee
Victoria F. Neilson, Chair
Jennifer Colyer
Elizabeth Gibson
Cecilia Lopez