March 30, 2020
Ms. Lauren Alder Reid
Assistant Director, Office of Policy
Executive Office for Immigration Review
5107 Leesburg Pike
Suite 2600
Falls Church, Virginia 22041

RE: EOIR Docket No. 18-0101; A.G. Order No.4641-2020, RIN 1125 AA90: Executive Office for Immigration Review, Fee Review

Dear Ms. Alder Reed:

Kids in Need of Defense (KIND) respectfully submits this comment on the February 28, 2020 announcement of Fee Review and other changes to rules governing the assessment of filing fees before the immigration court and the Board of Immigration Appeals (85 Fed. Reg. 11,866) (Proposed Rule).[1] On average, the Executive Office for Immigration Review (EOIR) proposes raising filing fees generally by a rate that far outstrips inflation and increasing the cost of filing appeals and motions to reconsider or reopen cases before the Board of Immigration Appeals by more than $800. Such increases represent an arbitrary and capricious use of filing fees and threaten to close the review process to many immigrants, including unaccompanied children, who may be returned to harm, danger, or even death if unable to seek review of errors made in adjudicating their cases. While the Proposed Rule seeks to justify these increases as necessary to cover the agency's costs, it disregards the impact of extraordinary fees on respondents and the significant public interest played by all courts in providing access to justice rather than generating revenue. Despite assurances that fee waivers remain available, EOIR offers no clear guidance on how such requests will be determined and no assurance that they will be granted for even the most vulnerable of applicants, such as children alone in the immigration system. Finally, the rule seeks to charge a fee for applications for asylum, following in the footsteps of U.S. Citizenship and Immigration Services' (USCIS) recently proposed fee rule. By charging a fee for asylum applications, particularly in the context of immigration court proceedings in which individuals are filing for relief from removal, the rule not only runs contrary to U.S. law and international treaty obligations but undermines access to protection for thousands who are fleeing threats to their lives and safety.

[1] Executive Office for Immigration Review; Fee Review and Proposed Rule, 85 Fed. Reg. 11866 (February 28, 2020).

KIND is a national nonprofit organization dedicated to providing free legal representation and protection to unaccompanied immigrant and refugee children in removal proceedings. Since January 2009, KIND has received referrals for more than 20,000 children from 70 countries. KIND has field offices in ten cities: Los Angeles, San Francisco, Atlanta, Baltimore, Boston, Houston, Newark, New York City, Seattle, and Washington, DC. Legal services professionals who serve children through KIND provide defense in removal proceedings and pursue immigration benefits and relief for which their clients may be eligible. KIND also employs social services coordinators throughout the country, providing unaccompanied children with the support they need outside of the courtroom. KIND promotes protection of children in countries of origin and transit countries and works to address the root causes of child migration from Central America. KIND also advocates for laws, policies, and practices to improve the protection of unaccompanied children.

Many of KIND's clients have fled severe violence and threats to their lives in their countries of origin and may be eligible for asylum, Special Immigrant Juvenile Status, or other forms of humanitarian protection. Other clients are members of families separated at the border whose cases may ultimately be joined with those of their parents. While cases may differ in their initial posture, they often share similarly high stakes. If unsuccessful in obtaining relief from removal, unaccompanied children may face return to the harm, abuse, or neglect from which they initially fled. For clients whose cases are denied at the immigration court level, the right to appeal or in some cases reopen their claims serves as a significant check on errors before the immigration court and a critical safeguard of due process. Raising filing fees for appeals, for instance, from $110 to $975 represents not only an exorbitant increase that is outside the reach of most of our clients, their sponsors, or families, but also a significant impediment to their rights to appeal—conditioning justice, and in some cases protection, on one's ability to pay. EOIR makes no special provisions for unaccompanied children in the rule nor does it offer guidance that will reassure our clients that they will have a meaningful opportunity to seek redress of any mistakes made in their cases, and full and fair consideration of their claims for relief.

I. The Proposed Fee Rule Potentially Puts Justice Out of Reach for Vulnerable Individuals, Including Unaccompanied Children.

Unaccompanied children and other migrants seeking humanitarian protection should not be priced out of the right to pursue review before the immigration courts and the BIA, and ultimately before the federal courts, as administrative exhaustion is a pre-requisite to federal review. The substantive issues raised in immigration court by KIND clients are often on the cutting edge, involving definitions of particular social groups for asylum claims, the nature of persecution based on sexual- and gender-based violence, the status of children in particular societies, or the role of criminal and gang violence in forcing children to flee their homes. Such issues are complex, novel, and often matters of first impression before the immigration courts, and they may not be correctly resolved in the first instance.

In our experience, some cases involve not only appeals but remands back to the immigration court and ultimately a grant of asylum to a child whose case was initially denied. The potential consequences of these cases for children are far from theoretical. Without meaningful access to administrative or judicial

review, the erroneous denial of a child's claim for protection may result in a child's return to harm, or worse.

Changes in asylum and immigration law, country conditions, and circumstances affecting a child's safety and well-being may occur while appeals are still pending, and only underscore the need to fully and fairly consider children's cases. In some cases, administrative errors on the part of the government necessitate reopening a child's case. In such cases, waiver of any fees would be appropriate, especially if the Proposed Rule is adopted. In other cases, a client's changed circumstances—such as medical injuries incurred while a case was on appeal—may require filing motions to reopen and remand based on new circumstances.

Rapidly changing administrative policies may also amplify the need for such motions. One such example is the processing of families and children at the border pursuant to the Migrant Protection Protocols (MPP)—a policy under which certain asylum seekers are made to wait in Mexico for proceedings in their U.S. asylum cases. KIND is now seeing cases in which children who were placed into MPP with their families were forced to return to the United States to request protection as unaccompanied children following a parent's disappearance or as a result of life-threatening conditions in Mexican border towns where they were sent to wait for their U.S. asylum cases. These children effectively have two immigration cases—one with their families under MPP, and a separate case as an unaccompanied child. As a result, unaccompanied children may be ordered removed *in absentia* in their MPP cases, as they may lack knowledge about hearings involving their families or be unable to attend them following their transfer from the border to Office of Refugee Resettlement facilities sometimes hundreds of miles away. These circumstances threaten the child with deportation without consideration of their claim for protection and remedying them generally requires a motion to reopen and/or an appeal. The higher costs associated with these filings will be borne by respondents who have virtually no resources to put towards their court cases. EOIR should consider waiving the fee for children's motions to reopen in such cases.

The Proposed Rule only compounds the burdens on respondents by creating additional uncertainty about if and when EOIR will grant fee waivers while essentially requiring respondents who request them to simultaneously submit astronomical filing fees, or risk having their appeals deemed improperly filed.[2] In the past, where necessary, legal service providers and even pro bono attorneys have fronted filing fees in the expectation that a fee waiver will be granted. The dramatic increases in fees will make providing such backup difficult, if not impossible, for non-profits and volunteers to continue .The 30-day deadline for filing a notice of appeal to the BIA leaves respondents with little time to come up with funds for the filing fee; increasing this fee to more than $900 leaves respondents with little hope of ever doing so.

Finally, the fee increases for appeals would further heighten the existing imbalance in access to appeals between respondents and the Department of Homeland Security (DHS), which faces no fee barrier to

[2] *See* Proposed Rule at 11874, FN21.

appealing a decision unfavorable to it. Accordingly, DHS may continue to appeal unfavorable decisions at approximately the same frequency, whereas the higher fee barriers will foreseeably reduce the frequency of appeals by respondents. This dynamic may influence the development of the law in unpredictable ways.

The dramatic increase in fees represents a potentially devastating denial of due process for thousands of individuals in immigration court proceedings. The failure of EOIR to explain its methods for calculating the increase, the lack of any genuine discussion on the public policy benefits of ensuring access to courts, and the failure to provide a fair mechanism to ensure that everyone who merits a fee waiver will receive it, lead to one inescapable conclusion. These fee increases are not designed to benefit the public but are an effort to suppress the exercise of individual rights and curtail access to protection before EOIR. For these reasons alone, EOIR should rescind its proposed fee increases.

II. The Proposed Fee Rule Fails to Provide a Transparent, Clear, or Logical Justification for the Proposed Fee Schedule, Abandoning Decades of Public Policy Designed to Ensure that Due Process Remains Accessible

As the supplemental discussion to EOIR's Proposed Rule notes, filing fees for a range of motions before both the Immigration Courts and the Board of Immigration Appeals have remained unchanged for 33 years.[3] The government asserts that a new assessment of the actual costs and reasonable fees associated with filing is long overdue, but fails to justify the dramatic increases proposed, particularly for appeals and motions to the BIA. The fee study itself appears flawed, as the rationale for increasing filing fees relies heavily on justifications more appropriate to a fee-funded agency and neglects to evaluate numerous public policy considerations that support the maintenance of modest filing fees to ensure access to review.

A. The government has failed to provide a complete accounting of its fee study, appears to rely on questionable assumptions in conducting its analysis, and has refused to give the public ample time to analyze the proposal independently

One of the immediate challenges to addressing the propriety of EOIR's proposed fee increase is the lack of information about the fee study the government conducted. The supplemental discussion describes in only the most general of terms how the study was conducted, what costs were factored in, and what costs are appropriately attributed to those who file motions or notices of appeal. A far more detailed review and analysis is warranted to explain the dramatic departure from fees that have been in place for more than three decades.

In many instances, it is virtually impossible to understand how EOIR attributed costs. For instance, the study does not appear to consider the costs associated with processing an appeal filed by the government, which under 8 C.F.R. 1003.8(a)(2)(vi), may be filed without any fee. The supplemental

[3] Proposed Rule at 11869

discussion provides a list of filings and the revenue generated but omits information about how costs associated with motions or appeals filed by the government factor in. Instead, the proposed rule suggests that taxpayers "subsidized" the costs of processing motions by $44,379,247 in FY 2018 alone.[4] Without greater information on receipts and distribution of costs, it appears that EOIR may have unfairly attributed additional costs to the respondent, ignoring the role of government filings. Similarly, in choosing to follow the lead of USCIS in proposing a $50 filing fee for asylum cases, but declining to charge the fee for withholding of removal requests making use of the same Form I-589, EOIR fails to explain how the processing costs are calculated, or how it can justify charging a fee for asylum when the process of adjudicating withholding claims requires substantially similar adjudication, analysis, and processing. Such failures, coupled with the failure to disclose the full fee study analysis, warrant rescinding the current proposal and conducting a more balanced assessment of costs versus public interest.

Unfortunately, the opportunity to more fully dissect and analyze the fee waiver proposal has been denied to the public. Contrary to common practice, EOIR has provided only a thirty-day period in which to submit public comments. This is insufficient to fully and independently analyze the proposal, particularly given the lack of full information provided. KIND was among a group of more than 90 organizations that petitioned the government to extend the comment period, a request that has, at the time of this filing, been ignored. A second request to delay the filing based on the extraordinary disruptions caused by the global COVID-19 pandemic has similarly been ignored. This is an unconscionable dereliction of responsibility that in and of itself merits withdrawal of the proposal. The public has not had a fair opportunity to critique and respond to a fee proposal that could have long-term and devastating consequences for millions of immigrants. For cases involving unaccompanied children, the failure to provide specific considerations will be disastrous.

B. The Proposed Fee Increase Ignores Critical Distinctions Between Fee-Funded and Appropriated Agencies, Improperly Interpreting EOIR's Responsibilities in Setting Reasonable Fees

Not only are the fee increases based on a questionable fee study, but the increases appear to have been calculated without any genuine analysis of the hardship such drastic increases would cause for the majority of those who are challenging decisions that, if upheld, will most likely result in their removal. The government acknowledges the special role that motions to reopen and reconsider, as well as notices to appeal, play in ensuring a check on the administrative judicial system, but pays only lip service to the necessity of ensuring that the cost of filing does not prevent individuals from receiving due process. For instance, the cost of filing a motion to reopen or reconsider before either the immigration court or the BIA is currently $110, but the new rule proposes increasing the filing fee before the immigration court to $145 and before the BIA to $895.[5] It justifies this new distinction in one sentence: "Due to differences in the processing steps for these motions between the OCIJ [Office of Chief

[4] Proposed Rule at 11869.
[5] Proposed Rule at 11870.

Immigration Judge] and the BIA, and different staff costs across the components, these fee differences more accurately reflect the substantially higher processing costs of a motion to reopen or a motion to reconsider before the BIA *while not assigning an unduly high fee as a matter of public policy* on parties who wish to file a motion to reopen or a motion to reconsider with the immigration courts."[6] (emphasis added).

The Proposed Rule's characterization of the fee increases differs significantly from the realities facing KIND's clients and others appearing before the immigration courts. Many of KIND's clients are forced to flee their countries of origin to escape immediate threats to their lives and safety and arrive to the U.S. with little to no financial resources. Children may also be victims of trafficking or abuse or have faced other harm in their search for protection or following their arrival to the United States. These children are uniquely vulnerable in the immigration system and must navigate a host of hurdles to prepare their cases for legal protection, from healing from trauma and obtaining medical care to securing legal services. These challenges are only compounded by lacking access to resources and limited earning capacity—difficulties that may also face family members and caregivers on whom children rely for support. Despite the Proposed Rule's assertions to the contrary, fees of more than $800 are indeed "unduly high" and are decidedly beyond the ability of most unaccompanied children to pay. Lacking the means to pay these exorbitant fees, children may be unable to seek reviews of judicial errors in evaluating their claims for protection and be returned to peril—a grave result that cannot be dispensed with through the Proposed Rule's passing reference to public policy.

Moreover, simply invoking the concept of public policy does not explain exactly what EOIR weighed in reaching its decision on fees, nor does it explain how EOIR weighed the importance of providing access to the courts against the cost of administering different motions. The rule appears to assume that, over the course of the last 33 years, EOIR officials never weighed whether a fee increase was necessary. One could just as easily assume that EOIR officials over the years made explicit decisions to keep filing fees low, as a matter of public policy. By failing to provide a thorough and transparent analysis of the public policy issues weighed throughout the history of EOIR, the rule makes unwarranted assumptions that keep the public in the dark about the process by which the new proposed fees were set.

If anything, the primary impetus appears to be a misplaced effort to follow the lead of USCIS, which has recently proposed exorbitant increases to many of its benefit applications on the grounds that it must recover its costs.[7] In its fee review, USCIS attempted to justify its fee increases as a necessity, arguing that Congress has historically relied on the 286(m) authority "to support the vast majority of USCIS programs and operations conducted as part of adjudication and naturalization service delivery," providing only limited appropriations to the agency.[8] In the EOIR Fee Review, the government notes that the Department of Justice, like the Department of Homeland Security, is authorized under section

[6] *Id.*
[7] U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 84 Fed. Reg. 62280 (Nov. 14, 2019) (USCIS Proposed Rule).
[8] *Id.* at 62284.

286(m) of the INA, 8 U.S.C § 1356, to charge fees that recover the full cost of providing adjudication and naturalization services, including the services provided at no charge to asylum applicants and other immigrants. And while USCIS, at this time, is primarily fee funded, EOIR can make no such claim.[9] Since its inception in 1983 as a separate division of the Department of Justice, EOIR has operated under appropriated funds. In fiscal year 2019, EOIR's operating budget was $504.5 million.[10] Congress has historically provided funds to increase personnel and services at EOIR, even though EOIR has not raised its filing fees in 33 years. The critical takeaway from that historic record is that filing fees are not, and have never been, an important part of EOIR's funding stream.

Nonetheless, EOIR now seeks to justify its increased filing fees by arguing that it has an obligation to taxpayers to reduce the burden of supporting EOIR operations. The emphasis throughout the rule is not on preserving access to justice, but on the costs of providing mechanisms for individuals to challenge EOIR decisions. According to the supplemental discussion, given an increase in the rate of filing over the years and because the filing fees are insufficient to meet the costs of adjudications, taxpayers are therefore subsidizing motions and filings at an estimated cost of $47 million.[11] Because Congress funds EOIR, however, and has shown no sign that it will not continue to do so, these cost saving arguments fall flat. It is difficult to view this escalation in fees as anything other than an attempt to penalize immigrants who seek to pursue their rights in court.

Moreover, the government's reliance on the authority residing in section 286(m) fails to take into account the long history of interpreting that provision of the statute as providing not only the authority to charge fees that recover costs but also the permission to set fees substantially below costs to address the greater needs of the community. This is best illustrated in looking at legacy Immigration and Naturalization Service's (INS) past practice, as INS and now USCIS have substantially more experience weighing the implications of section 286(m) than does EOIR, by its own account. For instance, with the creation of the Immigration Examination Fee Account (IEFA)[12] in 1989, Congress instructed INS to reimburse any appropriation for expenses in providing immigration adjudication and naturalization services. In 1990, Congress further instructed the INS that it may set fees at a level that would ensure the recovery of the full costs of providing all such services, including the cost of similar services provided without charge to asylum applicants or other immigrants.[13] As the General Accounting Office noted in a 1994 assessment of proposed fee increases, the INS had the discretion to set fees within the context of

[9] As numerous commenters, including KIND, have noted, USCIS could seek additional appropriations to defray the costs of services, and thus the argument that charging higher fees is a "necessity" should largely be read in the context that USCIS has, since its inception, been primarily fee funded and traditionally looks to its stakeholders, rather than Congress, to fund its operations. Invoking this clause in the context of this rule is designed only to show the clear distinction between USCIS operations and those of EOIR. It is a "necessity" only in the fact that thus far DHS has not sought to change the funding stream for USCIS. From this perspective, the issue is clearly one not just of financial costs, but of public policy considerations.

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

[11] Proposed Rule at 11874.

[12] Department of Justice Appropriation Act, 1989, Pub. L. No. 100-459, 102 Stat. 2186, 2203 (1988).

[13] Department of Justice Appropriation Act, 1991 Pub. L. No. 101-515, 104 Stat. 2101, 2121 (1990).

identifying a fair fee, taking into account the impact on applicants. INS chose, for example to charge a naturalization fee that would not recover its full costs at the time, because INS officials determined it would not have been a "fair or equitable fee because it could discourage aliens from applying for naturalization."[14] Although fees have continued to climb since then, DHS in the past has at least acknowledged the level of hardship this may impose on applicants, and has attempted to mitigate costs in other ways, such as making some applications available at a reduced fee, bundling interim benefits (employment authorization and travel authorization) with adjustment of status applications, the use of fee exemptions, and wide use of fee waivers.[15]

If this type of balancing and mitigation is expected in the context of fee reviews by an agency that is primarily fee funded, an agency that is funded through appropriations has absolutely no excuse for relying upon section 286(m) as a basis for dramatically increasing its fees. Additionally, it is unclear that, following the dissolution of the INS and the separation of its legacy adjudication and naturalization functions from DOJ, section 286 is even fully applicable, despite the government's assertion to the contrary.[16]

Clearly the more appropriate approach for funding additional court services and personnel is to petition Congress for additional funds. Placing that burden on the very people seeking a fair review of their claims is contrary to the spirit of balancing the good of the community against the costs of providing government services.

C. The availability of fee waivers does not justify the dramatic escalation in fee increases

Throughout the discussion of the proposed increases, the government seeks to reassure the public that fee waivers are available to those who cannot afford increased filing fees, but this provides little comfort absent transparency about how fee waivers will be decided. There is little data available on outcomes of fee waiver requests before individual judges or the BIA, and there is no guarantee of consistent or fact-based approaches to deciding these requests. It is inevitable that far more respondents would need to seek such waivers if the increased fees were to go into effect, significantly increasing the time and effort that would be required for fee waiver adjudications, rather than substantive decision-making. There is no evidence that the government has factored these additional costs and potential delays into account. Taken together, the government seeks to use the mere existence of a fee waiver mechanism as a justification for setting fees at a rate far above what most individuals in immigration proceedings can easily pay. This is particularly disturbing in light of the trend at USCIS to both eliminate fee waivers for

[14] *INS User Fees, INS Working to Improve Management of User Fee Accounts*, General Accounting Office, GAO/GGD-94-101, April 1994 at 7.

[15] Chad C. Haddal, *US Citizenship and Immigration Services' Immigration Fees and Adjudication Costs: The FY2008 Adjustments and Historical Context*, CRS Report for Congress, CONGRESSIONAL RESEARCH SERVICE, (June 12, 2007), at 8, 22-26.

[16] The government relies only on a judicial opinion issued long before the creation of the Department of Homeland Security, which resulted in the removal of the Attorney General's authority of adjudication and naturalization services conducted by legacy INS.

many benefits and to significantly tighten its requirements and income thresholds for granting fee waivers. Absent specific assurances that EOIR will provide a generous and fair system for providing waivers, the existence of such waivers is meaningless. Indeed, as the Proposed Rule references, a respondent's motion to reopen or appeal may be rejected as improperly filed if a fee waiver is ultimately denied but the respondent's motion is not accompanied by the very fee from which they sought relief. [17]

III. The proposed fee increases are contrary to the principle that courts should never become a vehicle for generating revenue

The temptation to increase fees and fines as a means to increase revenue is felt at the local, state, and national level, but it places the integrity of courts in jeopardy. EOIR has stated that for FY 2018, if the increased fees had been in place, EOIR would have received approximately $47 million in additional revenue that could be used to reduce the cost to the taxpayer of running the immigration courts and BIA.[18] Thus, EOIR hopes to generate significant revenue from the fee increase to fund its operations, irrespective of the appropriations it receives from Congress. But a survey of principles guiding court practice around the country affirms that access to the courts should never become conditioned on ability to pay. In fact, if anything, courts must jealously guard the principle that filing fees should never become a means for generating revenue. EOIR's proposed fee rule is in direct violation of this widely accepted principle, and the agency fails to articulate how or why the immigration court system—which adjudicates cases with particularly high stakes for respondents--should be viewed differently.

At the state court level, the National Task Force on Fines, Fees, and Bail Practices, a joint project of the Conference of Chief Justices and the Conference of State Administrators, has written eloquently and persuasively against attempting to generate revenue through increased fees. Its document of principles makes it clear that a court should not be in the business of raising revenue:

> Principle 1.1. Purpose of Courts. The purpose of courts is to be a forum for the fair and just resolution of disputes, and in doing so to preserve the rule of law and protect individual rights and liberties. States and political subdivisions should establish courts as part of the judiciary and the judicial branch shall be an impartial, independent, and coequal branch of government. It should be made explicit in authority providing for courts at all levels that, while they have authority to impose Legal Financial Obligations and collect the revenues derived from them, they are not established to be a revenue-generating arm of any branch of government—executive, legislative, or judicial.[19]

The consequences of turning court fees into revenue-generating vehicles can be significant. As a Brennan Center for Justice report on the imposition of fines and fees in criminal courts notes, "[u]sing

[17] *See* Proposed Rule at 11875, FN 21.
[18] Proposed Rule at11870-71.
[19] National Task Force on Fines, Fees, and Bail Practices, Principles, available at https://www.ncsc.org/~/media/Files/PDF/Topics/Fines%20and%20Fees/Principles%201%2017%2019.ashx

fee and fine revenues to fund the judiciary can create perverse incentives with the potential to distort the fair administration of justice." [20]

This may be particularly true in a system in which the government is not required to pay filing fees, as is the practice before EOIR. Should the proposed fee rule be implemented, there will be respondents who seek to challenge adverse asylum decisions who must ponder whether they can afford to continue to seek a positive outcome. In contrast, the government has no limitations on challenging asylum decisions, leading to a situation in which the BIA, and ultimately the federal courts, are likely to render decisions based disproportionately on cases in which the government seeks to uphold narrow interpretations of law. Given the rapid changes that have taken place to asylum law in the last three years, ensuring that the immigration courts remain a truly open forum, and the new policies and interpretations are fully reviewed, is essential to ensuring that the integrity of our immigration court system remains intact.

Thus, the very premise on which the proposed fee increases are based—that the taxpayers should not "subsidize" the courts—is contrary to the fundamental purpose of a court to ensure the lawful performance of executive authority. As the Brennan Center has noted in the context of criminal courts, courts should be funded primarily by taxpayers, rather than by defendants, because everyone is served by a working justice system.[21] That argument is equally true within the immigration courts, where the possibility of removal in some cases is literally a life or death decision.

IV. The Proposed Fee Rule Arbitrarily Imposes Burdens on Asylum Applicants Without Considering Associated Effects,

The proposed rule also seeks to follow USCIS's decision to charge a $50 fee for asylum applications, disregarding U.S. law and international obligations.[22] The United States is a signatory to international treaties protecting the rights of refugees[23]; its obligations are codified under the Refugee Act of 1980.[24] Central to those protections is the guarantee of access to the asylum process, such that "[a]ny alien who is physically present in the United States or who arrives in the United States . . . irrespective of such

[20] Matthew Menendez, et. al, The Steep Costs of Criminal Justice Fees and Fines, the Brennan Center for Justice, NYU School of Law, Nov 21, 2019 at 5.
[21] Menendez at 6.
[22] Proposed Rule at 11871-72, USCIS Proposed Rule at 62317 to 62320.
[23] UN High Commissioner for Refugees (UNHCR), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, September 2011, available at: https://www.refworld.org/docid/4ec4a7f02.html [accessed 22 December 2019].
[24] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of titles 8 & 22, U.S.C.).

alien's status, may apply for asylum."[25] Historically, one of the measures of this guaranteed access has been the ability to apply for asylum without cost.[26] The proposed rule jettisons this principle.[27]

Under the USCIS fee rule proposal, unaccompanied children in removal proceedings for whom USCIS has initial jurisdiction to hear their asylum claim would not be charged a fee.[28] KIND seeks clarification from EOIR that it will, at a minimum, apply the same approach to asylum claims filed by unaccompanied children, as the fee proposal does not provide a clear articulation of this principle, only noting that EOIR does not intend to interfere with the filing fees charged by USCIS. In addition, we request that any child previously determined an "unaccompanied alien child" continue to be able to apply for asylum without a fee. This request is necessary given DOJ and DHS directives asserting that unaccompanied children who have been reunited with parents or who have turned 18 during pending proceedings are no longer eligible to have their asylum claims heard initially before USCIS.[29] While KIND objects to these practices, we believe it is important that, regardless of the jurisdictional issues, unaccompanied children are not further burdened by the imposition of a fee and the greater uncertainty attached to the necessity of filing a fee waiver.

In addition, levying a $50 filing fee in order to apply for asylum before the immigration court creates additional public policy concerns that the government has failed to consider or address. Asylum applications in removal proceedings are considered defensive filings which, if granted, provide relief from removal. This appears to be the primary distinction that USCIS used in declining to impose a fee for unaccompanied children whose cases originated in immigration court while continuing to charge the $50 fee to unaccompanied child applicants who filed affirmatively, noting that it did not wish to create any delays for children in removal proceedings. While KIND believes this is an unavailing distinction in terms of the right to apply for asylum, it suggests that USCIS at least considered the fact that an individual is applying for asylum in removal proceedings weighs against charging any fee. It is difficult to understand, therefore, how EOIR, relying on the USCIS decision to charge a fee for affirmative asylum filings, could justify charging the same fee for defensive filings. This lack of independent analysis is yet another example that EOIR cannot justify imposing, for the first time, a new barrier to humanitarian protection by assessing a fee for asylum applications. Moreover, the government failed to take into account the extraordinary public comments against charging for asylum, including Congress's own

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[25] 8 USC § 1158(a)(1).

[26] As part of an Asylum Reform initiative proposed in 1994, the Department of Justice initially sought to impose a $130 fee on asylum applicants, but withdrew the proposal following extraordinary opposition from the public which argued then, as now, that charging for an asylum application is contrary to our international obligations to permit refugees to seek asylum in the United States and violates 8 U.S.C. § 1158(a)(1).

[27] Proposed Rule at 11870.

[28] USCIS Proposed Rule at 62319.

[29] *See, e.g.,* USCIS, Memorandum from John Lafferty, Chief, Asylum Division, to All Asylum Office Staff (May 31, 2019), https://www.uscis.gov/sites/default/files/USCIS/Refugee%2C%20Asylum%2C%20and%20Int%27l%20Ops/Asylum/Memo_-_Updated_Procedures_for_I-589s_Filed_by_UACs_5-31-2019.pdf; Memorandum from Jean King, General Counsel of Executive Office for Immigration Review, to James R. McHenry III, Acting Director of EOIR, Legal Opinion re: EOIR's Authority to Interpret the Term Unaccompanied Alien Child for Purposes of Applying Certain Provisions of TVPRA (Sept. 19, 2017), http://i2.cdn.turner.com/cnn/2017/images/10/10/eoir-uac-memo.pdf.

admonition to USCIS that it should refrain from charging a fee for humanitarian applications, including asylum, consult with the USCIS Ombudsman's office before imposing any such fees, and brief Congress on the possible impact of moving forward with such plans.[30] It is hard to believe that in light of this direct rebuke that EOIR would believe that it should move forward with charging a fee for asylum.

Moreover, as we have previously noted, EOIR inexplicably distinguishes between those who file the Form I-589 for purposes of asylum and those who file solely for purposes of consideration of withholding or deferral of removal under section 241 of the INA or under the Convention Against Torture. The lack of a clear and well-articulated explanation for this distinction is telling, as in practice, the adjudication mechanisms for these forms of relief are indistinguishable. Withholding and deferral determinations place a higher burden of proof on the applicant but result in far fewer benefits or rights. The unfortunate conclusion that must be drawn from this distinction is that EOIR is making it more difficult for those fleeing persecution to secure the full range of rights, forcing them in some instances to choose between asylum at a cost or withholding without rights.

Similarly, there is an absurdity to setting a $50 fee to apply for asylum but charging $995 to appeal an adverse asylum decision. This fee appears to apply to any asylum applicant, including unaccompanied children. USCIS's rationale for setting the fee at a nominal level-- recognition of the unique circumstances of asylum seekers –applies with equal force to appeals.[31] This is particularly true in light of additional proposals USCIS has made to restrict work authorization documents for asylum seekers and to increase substantially the EAD filing fees, both of which would make it far more difficult for asylum seekers to acquire the funds necessary to pay to file an appeal before the BIA.

In short, EOIR has provided no justification for charging a fee to apply for asylum—not even the scant activity-based analysis it offered for increasing the cost of filing motions and appeals. Simply accepting the USCIS fee schedule in this case ignores the special duties of a court to consider whether relief from removal is available, ignores the obligations under our laws and treaty agreements, and even ignores the contradictions inherent in charging a fee when USCIS specifically declined to do so.

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[30] "Further, USCIS is encouraged to refrain from imposing fees on any individual filing a humanitarian petition, including, but not limited to, individuals requesting asylum; refugee admission; protection under the Violence Against Women Act; Special Immigrant Juvenile status; a T or U visa; or requests adjustment of status or petitions for another benefit after receiving humanitarian protection. USCIS shall consult with the CIS Ombudsman on the impact of imposing such fees and provide a briefing to the Committees within 60 days of the date of enactment of this Act., HR 1158, Consolidated Appropriations Act 2020, Pub-L 116-93, (December 20, 2019), Conf. Report, Div. D, Department of Homeland Security Appropriations Act, p 28. https://docs.house.gov/billsthisweek/20191216/BILLS-116HR1158SA-JES-DIVISION-D.pdf.

[31] This principle is already at play in some aspects of filing requirements before the BIA. For example, a motion to reopen or reconsider filed before the BIA requires no fee if the underlying request for relief did not require a fee. 8 CFR 1003.8(a)(2)(ii), (iii). Charging a $50 fee to apply for asylum would invalidate these provisions of the regulation for asylum seekers.

KIIND urges the government to rescind the proposal to charge a $50 filing fee to asylum applicants, and urges the government to reconsider its fee increases for asylum appeals and related motions, on the grounds that providing access to asylum must include access to the full range of post-decision procedures.. We also urge the government to ensure that all unaccompanied children are treated fairly and equally and to clarify that unaccompanied children will not be charged a fee for applying for asylum.

Conclusion

The Executive Office for Immigration Review has proposed extraordinary fee increases that will make it difficult for unaccompanied children to pursue justice before the immigration court. The fee increases are poorly justified, lack transparency, and inappropriately rely on the need to recoup agency costs through fees, despite the agency's funding through appropriations. The necessity of fully engaging in a balancing of costs versus other policy considerations is almost completely ignored—as are the significant hardships that would fall upon unaccompanied children and other vulnerable populations as a result of the proposed rule. Although it would bring about sweeping shifts in policy—among them charging a fee to apply for asylum—EOIR appears to have merely adopted the analysis of another agency, without elaboration, setting in motion a series of contradictions that make it clear EOIR did not independently analyze its obligations in setting fees or consider the public or congressional outrage caused by USCIS's similar effort. The lack of justification for these fee increases suggests that the proposed rule uses fee increases as a mere pre-text for achieving troubling policy ends: decreasing access to the courts, discouraging appeals, and preventing asylum seekers from truly having their day in court. The proposal not only undermines the institutional integrity of EOIR but puts the safety and well-being of the most vulnerable at risk. KIND urges the Department of Justice to withdraw this rule completely and to immediately engage with stakeholders to discuss and consider more responsible and fair means of assessing fees and ensuring access to the immigration courts.

Finally, the failure to extend the deadline for submitting comments, particularly in light of the global pandemic that has literally upended the nation, is an abrogation of the public trust. Robust public engagement is essential to the rulemaking process; for many, the restrictions imposed on all aspects of public life have made it impossible to meaningfully address the serious changes EOIR proposes. In the interest of the public good, rescinding this rule and revisiting its fundamental premises is the right thing to do.

Thank you for the opportunity to comment upon this rule. Should you have further questions, please contact Mary Giovagnoli at mgiovagnoli@supportkind.org.

Sincerely,

Jennifer Podkul
Vice President for Policy and Advocacy
Kids in Need of Defense