**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

CATHOLIC LEGAL IMMIGRATION NETWORK, INC., et al.,

*Plaintiffs*,

v.

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, et al.,

*Defendants*.

**Case No. 1:20-cv-03812-APM**

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

**ORAL ARGUMENT REQUESTED**

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## INTRODUCTION

Plaintiffs move for summary judgment to vacate and permanently enjoin Defendants' final rule with respect to six fee increases for Executive Office for Immigration Review ("EOIR") proceedings because it is arbitrary, capricious, and violates the Administrative Procedure Act ("APA") and the Regulatory Flexibility Act ("RFA").[1] That final rule would raise up to eight-fold the fees that noncitizens must pay to file the applications, motions, and appeals they need to defend themselves from deportation in removal proceedings brought by the government. *See* Final Rule, EOIR; Fee Review, 85 Fed. Reg. 82,750 (Dec. 18, 2020) ("Final Rule") (AR1–46).

This Court already concluded that Plaintiffs are likely to show that the six fee increases were arbitrary and capricious, and enjoined the Rule as to those fees. Since then, despite repeatedly promising to issue a new fee rule, Defendants have done nothing to correct the errors made in issuing the Final Rule. The Certified Administrative Record ("AR") confirms what was already evident from the Final Rule—that Defendants ignored the weight of available evidence submitted by many legal practitioners (including Plaintiffs) about the Final Rule's adverse impacts. For example, legal service providers submitted significant evidence based on their experience representing clients in Immigration Courts and before the Board of Immigration Appeals ("BIA") concerning the adverse impact of the Final Rule on *their* ability to provide legal representation to noncitizens, and on their clients. These providers explained that increasing fees would significantly raise the number of fee waiver requests they would need to prepare, detracting from their work on the merits of their cases; reduce or eliminate their ability to cover the fees for indigent clients; cause them to lose clients who could not afford to pay both counsel and the fees; and divert

[1] Plaintiffs are moving for summary judgment on their Administrative Procedure Act and Regulatory Flexibility Act claims (Counts I–IV of the Complaint, Dkt. 1) because a grant of summary judgment to Plaintiffs as to any one of these claims will dispose of the entire case.

funds from their other projects. The overall impact would limit practitioners' ability to provide comprehensive services. Commenters also explained that many noncitizens could not afford the higher fees, causing them to forego meritorious claims in Immigration Courts. Many comments also addressed the inadequacy of fee waivers in practice to offset the adverse impact of the Final Rule. The AR shows that instead of considering this evidence, Defendants unreasonably dismissed it as speculative, and based the Final Rule on conclusory assumptions and incomplete data.

The AR also confirms that the "comprehensive" fee study on which Defendants claimed to rely for the Final Rule was incomplete and based on several untested assumptions. The AR does not even contain the complete fee study or the data underlying it—showing that Defendants not only failed to timely produce this information, they did not consider or rely on it. In short, the Final Rule is arbitrary, capricious, and violates the APA's standards for reasoned decision-making. EOIR lacked data or other evidence to support the Final Rule and did not adequately respond to the bulk of the comments that provided evidence contradicting the agency's assumptions.

In addition, Defendants did not meet their notice-and-comment obligations. The comment period was too short—as it was just 30 days, coming at the start of the global COVID-19 pandemic. Defendants gave the public no opportunity to understand or comment on the methodology and data underlying their fee study. And their staggered rulemaking concealed the Final Rule's full impact.

The Rule also fails because neither Section 286(m) of the Immigration and Nationality Act ("INA") nor the Independent Offices Appropriations Act ("IOAA") authorized Defendants to increase the challenged fees as they did.

Finally, the Rule violates the RFA because Defendants failed to consider (or even acknowledge) its effect on small entities, including Plaintiffs. This Court should grant summary judgment to Plaintiffs, and vacate and enjoin the Final Rule as to the six fees in dispute.

## STATEMENT OF FACTS

As Plaintiffs explained in their Preliminary Injunction brief ("PI Motion," Dkt. 19-10), EOIR is an agency within the Department of Justice ("DOJ") that is responsible for adjudicating removal proceedings prosecuted by the Department of Homeland Security ("DHS") to remove (i.e., deport) noncitizens from this country. *See* PI Motion at 3–5; 8 U.S.C. § 1229a. EOIR oversees and enacts regulations that bind the nation's network of more than 60 Immigration Courts and the agency's appellate body, the BIA. *See* PI Motion at 3; 8 C.F.R. §§ 1003.0, 1003.1(a)(1).

Although EOIR operations are fully funded by congressional appropriation, *see* AR4, EOIR requires noncitizens to pay filing fees as a condition of access to certain proceedings. EOIR last raised its filing fees in 1986, when it promulgated a rule (the "1986 Fee Rule") that raised the cost for filing appeals, motions to reopen, and motions to reconsider from $50 to $110, and raised or decreased other fees by smaller amounts. *See* Powers and Duties of Service Officers; Availability of Service Records, 51 Fed. Reg. 39,993 (Nov. 4, 1986). The 1986 Fee Rule set "several fees for administrative appeals processes . . . at less than full recovery recognizing longstanding public policy and the interest served by these processes." *Id.* at 39,993. EOIR fees have not changed since the 1986 Fee Rule.

### I. The Proposed Fee Rule and the Notice of Proposed Rulemaking

On February 28, 2020, Defendants published a Notice of Proposed Rulemaking ("NPRM") that proposed to increase eight fees for filings before Immigration Courts and/or the BIA. Notice of Proposed Rulemaking, Fee Review, 85 Fed. Reg. 11,866 (Feb. 28, 2020) ("Proposed Fee Rule").

Defendants published a Final Rule on December 18, 2020, that incorporated the increased fees with no change from the NPRM. *See* AR1–46. Plaintiffs filed this action four days later and, on Plaintiffs' motion for preliminary relief, on January 18, 2021, the Court enjoined implementation of the following six fee increases (collectively, the "Challenged Fees"):

- The fee for filing a Notice of Appeal to the BIA from a decision of an Immigration Judge (Form EOIR-26) (an increase from $110 to $975);
- The fee for filing a Notice of Appeal to the BIA from a decision of a DHS officer (Form EOIR-29) (an increase from $110 to $705);
- The fee to apply for suspension of deportation (Form EOIR-40) (an increase from $100 to $305);
- The fee for cancellation of removal (Form EOIR-42A) (an increase from $100 to $305);
- The fee that certain nonpermanent residents must pay to seek cancellation of removal and adjustment of status (Form EOIR 42-B) (an increase from $100 to $360); and
- The fee for filing Motions to Reopen or Reconsider before the BIA (an increase from $110 to $895).

*See* Dkt. 34 ("PI Order") at 1, 35. Since the Court's preliminary injunction order, Defendants have not acted to address the APA deficiencies underlying the Final Rule by, for example, initiating a new rulemaking. Plaintiffs now seek summary judgment vacating the Final Rule with respect to these Challenged Fees based on the APA violations committed during the rulemaking.

**A. The NPRM Fails to Justify the Challenged Fees**

The NPRM stated that the fee increases were needed despite EOIR's nine-figure appropriation and without any explanation for how the increased fees would be used. 85 Fed. Reg. at 11,870. The agency explained that it set its fee increases primarily based on the results of a "comprehensive" "fee study" that EOIR conducted nearly two years earlier, in spring 2018. *Id*. at 11,869. But the agency withheld the fee study itself—the NPRM contained vague information about the study's methodology and none of the underlying data—and disclosed only final calculations based on unspecified "assumptions" supposedly validated by unnamed persons. *Id*. at 11,869; 11,872. Despite requests from Plaintiff CLINIC to the Office of Management and Budget ("OMB") on March 6, 2020, and to both OMB and EOIR on March 18, 2020, EOIR did not disclose during the comment period the fee study, its underlying data, or any additional information about the agency's methodology. Mendez Decl., Dkt. 19-5, ¶¶ 19–20; PI Order at 5;

AR9564 (CLINIC letter to EOIR). Indeed, Plaintiffs received what purports to be the end-product of the fee study when Defendants produced the AR—years after the abbreviated comment period—but EOIR has still failed to disclose the underlying data in the AR.

The NPRM stated "EOIR recognizes that the new fees will be more burdensome," and proposed that the burden would be offset because "fee waivers are still possible for those who seek them." 85 Fed. Reg. at 11,874. The NPRM did not explain how the "possib[ility]" of fee waivers would offset the impact of the fee increases. For example, the NPRM did not provide any information related to the current number or frequency of fee waiver requests, the grant or denial rates for such requests, how respondents proceeded when requests are denied, or the time involved to adjudicate fee waiver applications. The NPRM also did not discuss any expected effect the combination of fee increases and waivers would have on revenue. Even after Plaintiff CLINIC made a FOIA request to EOIR for records related to fee waiver applications, the agency provided no responsive documents during the comment period. Mendez Decl., Dkt. 19-5, ¶ 18.

The NPRM also did not disclose that, after the comment period, the agency planned to propose new rules governing removal proceedings that would directly affect the impact of the fee increases. *See* Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 81,588 (Dec. 16, 2020) ("Appellate Procedures and Closure Rule"); Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 80,274 (Dec. 11, 2020) ("Asylum Rule"); Procedures for Asylum and Withholding of Removal, 85 Fed. Reg. 81,698 (Dec. 16, 2020) ("Asylum and Withholding of Removal Rule"). For example, the NPRM did not disclose that by the combined operation of the fee increases and the subsequent Appellate Procedures and Closure Rule, the BIA would be

stripped of authority to accept timely filed appeals and motions that are rejected because the BIA denies the accompanying fee waiver request after the filing deadline.

### B. EOIR Set an Abbreviated Comment Period and Refused to Extend It Despite the Early Stages of the COVID-19 Pandemic

Defendants took nearly two years after completing their "fee study" in 2018 to propose the fee increases but gave the public only 30 days—from February 28 to March 30, 2020—to comment on the Proposed Fee Rule. 85 Fed. Reg. at 11,866. The NPRM did not explain why EOIR offered a comment period half as long as generally considered reasonable and recommended by executive orders. *See id.*; Executive Order 12,866, 58 Fed. Reg. 51,735, 51,740 (Sept. 30, 1993); Executive Order 13,563, 76 Fed. Reg. 3,821, 3,821–22 (Jan. 18, 2011). On March 5, 2020, Plaintiffs, 87 other organizations, and individual practitioners requested that EOIR extend the comment period to 60 days. *See, e.g.*, AR9566–9570. CLINIC underscored the need for a 60-day period given the importance of the proposed rule to the public, especially as the fees had not been raised in 34 years, and described the "grave consequences" and "significant implications on access to due process and justice." AR9567. EOIR did not respond.

CLINIC again wrote to EOIR on March 18, 2020, asking to extend the comment period in light of the COVID-19 pandemic. AR9564. CLINIC also asked the agency to disclose the actual fee study, pointing to miscalculations that likely overly inflated the proposed fee increase. *Id.* On March 20, 2020, the Chairs of the House of Representatives Judiciary Committee and the Subcommittee on Immigration and Citizenship also wrote to EOIR to request an extension of the deadline, as did a national immigration legal services organization, HIAS. AR9571–9573; AR9574–9575. The Committee Chairs emphasized the proposed rule's "dramatic increases to routine immigration court filing fees" and raised concern that the COVID-19 pandemic had disrupted routine activities. AR9572. The letter noted "that proposed rule's comment period . . .

overlaps with the temporary closure of several immigration courts and the nationwide delay of all non-detained [noncitizens'] master calendar and individual hearings." *Id.*[2]

CLINIC again wrote EOIR on March 23, 2020, explaining that the COVID-19 pandemic was affecting not only their work, but also that of the 108 organizations that signed the letter. AR9576–9579. CLINIC explained that "[m]ost stakeholders are currently working from home and are unable to access hard copies of resources or background materials they may need to fully comment on the proposed rule." *Id.* at 9576. The pandemic was affecting their staff's ability to gather client stories without "access [to] physical client files or contact information." *Id.* The letter also highlighted that CLINIC's staff, and the staff of signatory organizations, were managing childcare and online learning in those early days of the pandemic. *Id.*

The AR contains no response to any of these requests, nor does it contain anything indicating that these requests were even considered.[3] The Final Rule merely concluded that the agency "is not obligated" to set a comment period longer than 30 days because it received sufficient comments and so "believes that the COVID-19 pandemic has no effect on the sufficiency of the 30-day comment period." AR22.

## II. The Public Comments Near-Uniformly Opposed the Proposed Fee Rule

With the truncated comment period, Defendants received only 601 comments, significantly fewer than are submitted for other proposed immigration rules. *See* AR7572–9506. Nearly all of the comments were opposed to the proposed rule—of the 596 published comments,[4] only 16

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[2] By mid-March of 2020, government and businesses were in a chaotic scramble to implement a public health response to the COVID-19 pandemic. Normal operations ceased and curfews and closings sprang up in all sectors. *See* Patricia Cohen & Jim Tankersley, *America's Economy Begins to Shut Down as Pandemic measures Take Hold*, N.Y. Times, March 16, 2020, http://tinyurl.com/pcxnm5hr.

[3] There appears to be a one-sentence email redacted on AR 9580, but because Defendants failed to provide a privilege log, the author and subject of the email are not discernible.

[4] Five of the comments were duplicates, blank, or unrelated to the Proposed Fee Rule. AR3.

supported the rule. *See* AR3. Of those sixteen, most voiced concern about the financial burden of EOIR proceedings on taxpayers. *See id*. All other comments opposed the Proposed Fee Rule, detailing a host of significant problems and gaps in EOIR's explanations and justifications for it.

### A. Commenters Provided Evidence of the Adverse Impact of the Fee Increases on Plaintiffs and Other Legal Services Providers

Legal service providers, small firms providing pro bono or low-cost removal defense services, and other legal practitioners who practice regularly on the front line in Immigration Courts and before the BIA commented on how the fee increases would adversely affect their work.

Commenters explained that the fee increases would force many noncitizens to choose between paying the fee and obtaining counsel, reducing practitioners' ability to provide legal services. *See, e.g.*, AR7626 (comment of attorney Theodore M. Davis) (explaining that his clients "will, in all likelihood, be unable to pay the increased filing fees *and also* afford counsel to advocate the appeal"); AR7838 (comment of attorney Diana Chamberlain) (the higher fees would force "[r]espondents . . . to choose between paying the fee but not hiring counsel . . .; between paying the fee and counsel but not being able to provide for their families; or not appealing at all").

Commenters further explained that practitioners who previously paid filing fees for their clients would be unable to cover the increased costs, thus reducing overall pro bono representation of noncitizens facing removal. *See, e.g.*, AR7699 (comment of The North Suburban Legal Aid Clinic) ("Attorneys seeking to provide pro bono immigration services will be unable to absorb the increased EOIR fees for their clients."); AR8085 (comment of Capital Area Immigrants' Rights Coalition) (describing how the nonprofit legal services provider and its pro bono partners cover client fees to avoid the risk and uncertainty of the fee waiver process but will be unable to continue this practice with the higher fees); AR8768 (comment of Samantha Smith, clinical fellow at the St. Mary's School of Law Center for Legal and Social Justice) ("With the level of proposed

increases, we would no longer be able to absorb costs of filings where no fee waiver is available."); AR8876 (comment of Centro Legal de la Raza) ("As a nonprofit organization serving almost entirely indigent clients, we cannot afford to pay these filing fees and additional filing fees for our clients in defensive proceedings."); AR9375 (comment of Association of Pro Bono Counsel) (fee increases "would greatly limit these firms' ability" to take on client filing fees, resulting in reduced availability of pro bono representation, "at the expense of indigent and underserved immigrants"); AR8846 (comment of National Immigrant Justice Center) (same).

Practitioners explained that the increased fees would force them to divert funds and time from other programs and services to cover these higher fees for those who could not afford them. *See, e.g.*, AR7607 (comment of Julie Schwietert, co-founder and director of an immigrant advocacy organization) (explaining that funds "will be diverted" from other line items "simply to prop up these exponential increases"). Practitioners observed that the increased fees would force them to spend more time on individual cases (for example, to prepare fee waiver requests), limiting the number of clients these practitioners can serve. *See, e.g.*, AR7953–54 (comment of The Law Office of Karenina Wolff, Esq.) (increased fee waiver work "would not only divert our already limited resources from focusing on the facts of our clients' cases, it would also make the entire process financially burdensome for our office and our clients in general"); AR7643 (comment of attorney Rebecca Rojas) (noting that fee waiver work is "so considerable that it will in practice cause attorneys to refuse pro bono cases where indigent individuals, often children, are not immediately able to come up with the large fees," thereby "severely limit[ing] the number of cases that are able to find pro bono representation"); AR7707 (comment of Kentucky Refugee Ministries) (fee waiver work would reduce overall capacity to provide pro and low-bono representation because "fee waivers introduc[e] more uncertainty to each case," which in turn

"creates an additional variable in taking cases and representing clients that must be screened at the outset and can ultimately discourage some attorneys and clients from pursuing meritorious cases"); AR8376 (comment of World Relief) (explaining that the Proposed Fee Rule "will also increase the work of immigration advocates," who "will now have to obtain financial evidence of fee waiver need, increasing the work to prepare an immigration appeal, limiting the total number of immigrants [advocates] can serve as immigration appeals will involve a greater time commitment"); AR8380 (comment of the Migrant & Immigrant Community Action Project) ("[O]ur organization would probably have to turn away clients . . . simply because we don't have the human capital required to complete a fee waiver within the timeframe allotted.").

### B. Commenters Provided Evidence Concerning the Inability of Respondents to Pay the Proposed Fees

Multiple commenters also provided first-hand accounts of how "noncitizens in removal proceedings are particularly likely to struggle with the proposed fees." AR7812 (comment of American Immigration Council ("AIC")/American Immigration Lawyers Association ("AILA")); *see also, e.g.*, AR8894 (comment of Legal Aid Society) (describing how increased fees will "effectively foreclose[ ]" appellate review for clients who earn below 200% of the federal poverty guidelines as well as working poor clients); AR7952 (comment of Law Office of Karenina Wolff, Esq.) (explaining that majority of her clients work in low-wage restaurant and construction jobs earning about $10/hour and thus cannot afford the increased fees); AR7764–7765 (comment of Law Office of Amanda Harris) (describing clients' lack of disposable income, necessitating extended payment plans for legal services); AR8213–8217 (comment of N.Y. Legal Assistance Group) (offering examples of clients who would be priced out of various forms of Immigration Court relief under the new fee schedule); AR9798 (comment of Legal Services NYC) (providing examples of impact on low-income client population); AR8186 (comment of Jewish Family &

Community Services East Bay) (discussing client who won reversal of asylum denial who would have been prevented from appealing had the fee been $975, and who would "now be in a country experiencing persecution because of his identity"). Commenters also pointed out that noncitizens "already struggle to retain counsel" and that even 40% of all Americans would struggle to pay an unexpected bill of $400—much less a bill of $975. AR7812 (comment of AIC/AILA).

Commenters even described specific categories of noncitizens' inability to pay, such as unaccompanied children fleeing violence. *See, e.g.*, AR7713–7714 (comment of attorney Katharine Campen) (describing minors lacking resources for whom an 800% increase "will make it cost-prohibitive" to file appeals); AR8425 (comment of attorney Susan G. Roy) ("[The fee increase] weighs heavily against minors and those of lower incomes, and violates the concepts of due process and fundamental fairness."); AR9096 (comment of attorney Jose Hernandez) ("The children I represent, many of whom are in foster care, simply cannot afford such an exorbitant increase in order to appeal a deportation order which should be reviewed on the merits, not an asylum seeking child's ability to pay what represents several months wages in their home country."). Other commenters addressed the financial burden on families. *See, e.g.*, AR7659 (comment of attorney Alexandra Blodget) ("Increasing the fees to nearly $1,000 will make filing an appeal impossible . . . when more than one family member must also pay."). Additional commenters discussed the burden on noncitizens proceeding *pro se*, especially those in detention. *See, e.g.*, AR 7851 (comment of Florence Project); AR 8978 (comment of Southern Poverty Law Center). These were not generic comments. Commenters spoke from first-hand knowledge about the scant financial resources of their actual clients and their clients' inability to afford higher fees.

### C. Many Commenters Provided Specific Examples Showing the Mere Possibility of Fee Waivers Does Not Mitigate the Impact of the Fees

Many commenters explained why the mere "possibility" of fee waivers did not address concerns about the devastating impact of EOIR's fee increases. They noted the discretionary nature of waivers, inconsistent (and inexplicable) waiver decisions, the lack of statutory or regulatory criteria for determining fee waiver eligibility, that fee waiver denials are not clearly appealable, that the need for a fee waiver can weigh against a noncitizen when discretion is exercised in adjudicating the underlying application, the additional burden on legal service providers of preparing more fee waiver requests, and the increased burden on Immigration Courts of adjudicating additional fee waiver requests that would result from the Proposed Fee Rule. *See, e.g.*, AR8309–8310 (comment of Kids in Need of Defense ("KIND")).

Attorney Rebecca Rojas commented that "EOIR is inconsistent in its determination of fee waivers" and gave examples where "several courts grant fee waivers as a matter of course and other courts almost never grant fee waivers," including for unaccompanied children and "where the individual is indeed indigent." AR7643. The North Suburban Legal Aid Clinic similarly stated that fee "[w]aivers are not granted uniformly throug[h]out the EOIR system" and so "practitioners and their clients cannot rely on fee waivers to be granted in many EOIR courts." AR7699; *see also* AR8020–8022 (CLINIC comment on problems with the existing fee waiver process); AR7870 (UNLV Law Immigration Clinic comment on the discretionary nature of fee waivers and the "gamble" that respondents must take when they seek a waiver); AR9301 (Community Legal Aid SoCal comment on the discretionary nature and lack of guidance for fee waivers); AR8213–8214 (N.Y. Legal Assistance Group comment providing example of asylum-seeking client whose BIA appeal fee waiver request was denied despite having income below 100% of federal poverty guidelines); AR8115–8117 (The Bronx Defenders, a public defender non-profit organization,

commenting that counsel "routinely see fee waivers denied for [their] clients who clearly meet the statutory eligibility" because their "clients must be at or below 200% of the federal poverty guidelines"); AR8082–8086 (Capital Area Immigrants' Rights Coalition's comment detailing barriers to filing fee waivers for detained clients who often have just "24–48 hours to file motions . . . with the BIA to avoid imminent deportation"; providing examples of Immigration Courts denying fee waivers when a noncitizen was plainly indigent); AR8802 (comment of the Neighborhood Christian Legal Clinic) (explaining that their "clients fleeing domestic violence are unable to qualify for a fee waiver because they cannot prove their lack of income" as a "a result of the horrendous abuse many have suffered"); AR9200–9202 (comment of the Texas RioGrande Legal Aid) (explaining the various inadequacies of fee waivers and observing that their staff will need to "invest substantial additional time" assisting clients in preparation of fee waiver requests).

In addition to these other concerns, commenters highlighted the risk of filing a fee waiver and why they "are not usable in practice": there are "NO exception[s]" to the 30-day appeal deadline, and when a notice of appeal is filed "with a fee waiver request, rarely is a decision made in time for the respondent to then turn around and pay the fee if the fee waiver is not granted," which "is particularly problematic because the BIA only communicates through the mail." AR7594 (comment of attorney Rachel Wilson); *see also* AR7930 (comment of attorney Gianfranco de Girolamo) (explaining that because of the 30-day appeal deadline, "a denial of [a fee waiver] would frequently be tantamount to the forfeiture of the appeal"); AR7603 (comment of Eric Pavri) (explaining that "filing a fee waiver is often a risky strategy" because "[b]y the time that [a fee waiver request is decided], [a respondent] may often have missed the 30-day window."); AR7992 (comment of Ayuda) ("[A] waiver request comes with the enormous risk of not being able to re-file in time in the event of a denial, since 8 CFR § 1003.24(d) stipulates that applications

and motions are not considered properly filed in the event of a denied fee waiver"); AR9180 (comment of Immigrant Legal Resource Center) ("[P]ursuing a fee waiver [is] risky [or] impossible" because "[i]f the Board rejects the fee waiver, the statutory deadline for appeal could lapse resulting in the inability to file an appeal altogether.").

Given the risk that a noncitizen's appeal could be denied as untimely if the fee waiver is denied after the appeal deadline, commenters suggested that EOIR restart the 30-day appeal filing deadline if the fee waiver is denied, along with other proposed safeguards to ensure predictable adjudication of fee waivers. *See, e.g.*, AR8206 (Comment of National Immigration Project of the National Lawyers Guild); AR9301 (Comment of Legal Aid SoCal). EOIR ignored this suggestion.

## III. The Final Rule and EOIR's Responses to Comments

The Final Rule issued on December 18, 2020. It adopted all the fee increases proposed in the NPRM. *See* AR1. The Final Rule stated the purpose for the increases was "to update the fees in accordance with the processing costs identified by the EOIR fee study so that the fee amounts more accurately reflect the costs for EOIR's adjudications of these matters." AR2 (cleaned up). Just like the NPRM, the Final Rule relied on the EOIR fee study, but did not disclose the underlying data (but promised disclosure down the road). *See* AR6. The Final Rule also did not substantively address comments questioning the need to increase the fees or the level of increase in view of EOIR being an appropriated agency. *See, e.g.*, AR5.

In promulgating the Final Rule, Defendants ignored evidence in the comments from legal service providers, small firms providing pro bono or low-cost removal defense services, and other front-line practitioners concerning the detrimental impact the increased fees would have on their own organizations' abilities to provide direct legal services and on noncitizens' ability to obtain counsel. EOIR dismissed these concerns as "speculative" and "decline[d] to respond." AR26. The agency claimed that commenters' discussion of burdens on legal service providers fell outside

the "limited scope" of the rulemaking. *Id.* EOIR reiterated the "continued availability of fee waivers" in response to the concerns that the increased need for fee waiver work would impact access to counsel. *Id.* Apart from this discussion, there is no evidence in the administrative record—in the form of memorandums, studies, or communications—indicating that EOIR even considered the impact of the increased fees on legal service providers who provide critical representation at pro bono and low-cost rates to noncitizens facing removal.

The Final Rule also dismissed comments that the new fees would be burdensome or insurmountable for many noncitizens defending against removal. EOIR responded that it "does not generally have [noncitizens'] financial records at its disposal for review," AR7, ignoring the wealth of real-world facts submitted by practitioners during the comment period.

EOIR also appeared to infer from the rates of noncitizen representation and the ability of noncitizens to pay fees for entirely separate DHS applications that the new EOIR fees would be affordable. AR7. EOIR pointed vaguely to a "general ability to obtain work authorization" while in removal proceedings, "general ability to obtain representation," and "general ability to pay existing fees" to respond to commenters' concerns about noncitizens' inability to pay increased fees. AR10. EOIR acknowledged that those who could not afford the current rates "presumably" would also be unable to pay the higher fees but then concluded that it was "speculative" to assume that all those who could afford the current rates would be unable to pay the new fees. *Id.* Instead, it suggested that "a particular subset" of individuals may be unable to afford the fees, but—citing no data or information at all—discounted commenters' concerns that the inability to pay would be widespread. *Id.* EOIR admitted that "it is possible—and perhaps even probable—that the increased fees may lead more [noncitizens] to seek a fee waiver than would without this rule," but insisted that "the ultimate total volume of fee waiver applications that EOIR will receive are

speculative." AR9–10. The agency further speculated—without any evidence—that noncitizens in fact had access to financial resources and would find a way to pay the fees given "the ultimate importance of the benefit they seek (i.e., legal status or being able to remain in the United States indefinitely)." AR10. Beyond this bare speculation in the Final Rule, the administrative record is devoid of material showing that EOIR considered *facts* regarding whether noncitizens in removal proceedings could afford the increased fees.

EOIR repeatedly emphasized the existence of fee waivers as sufficient to address any concern about noncitizens' inability to pay higher fees, and largely dismissed comments about the inadequacy of the fee waiver process. EOIR conceded that it does not track fee waiver grants and denials at the Immigration Court level and does not separately track fee waiver denials at the BIA level. *See* AR30 & n.45. EOIR relied on fee waiver data from the BIA to extrapolate from the overall case volume and number of fee waiver grants that purportedly only 53 requests were denied. AR30. How this "methodology" produces data that fits with the Final Rule is not explained. EOIR further stated that it had "no evidence or data . . . regarding the specific adjudications of fee waivers" to support comments about inconsistent treatment of fee waivers around the country, AR11—ignoring evidence *in the comments* describing just such inconsistencies. EOIR further disagreed that the discretionary nature of fee waivers was problematic, stating that while "differences in adjudicatory outcomes are inherent in any system rooted in adjudicator discretion, there is no evidence that Board members or immigration judges would be unable or unwilling to adjudicate fee waiver requests consistent with applicable law and their respective independent judgment and discretion." AR10. As to commenters' request that EOIR create transparent and consistent standards for fee waiver adjudication like U.S. Citizenship and Immigration Services ("USCIS"), EOIR insisted that, because USCIS handles many more

types of applications and is fee-funded, the agencies were not "similarly situated in terms of the impact of such waivers." AR11. EOIR promised that it "may consider the issue further in a future rulemaking" if needed following the implementation of the fee increases. *Id.*

The administrative record reflects no further consideration of the concerns about the inadequacy of fee waivers as a solution to the myriad of problems identified.

Defendants did not dispute that the fee increases represent a significant change from long-standing policy, but did not provide a reasoned justification for departing from a 34-year-old policy by putting the burden of one gigantic fee increase on noncitizens. Nor did Defendants dispute that Plaintiffs and members of the public had a reliance interest in the existing policy and fee structure. More fundamentally, Defendants refused to acknowledge that they are promulgating fees for quasi-judicial filings that are the only means by which individuals can defend against potentially life-threatening removals and seek to have agency errors reviewed and corrected.

## IV. The Administrative Record

On January 17, 2024, Defendants served on Plaintiffs an electronic copy of the AR for the Final Rule. The AR lacks facts or analysis sufficient to support the Final Rule. The AR contains virtually no evidence of internal deliberation and no privilege log indicating that such deliberations occurred but were withheld. Much of the AR's 9,616 pages appears to be filler—copies of case law and statutes, many of which are not cited or discussed in the Final Rule or which have no apparent significance to determining the amount of the fee increases. Record material that does bear on the fee hikes is inadequate to support the Final Rule.

### A. The 2018 EOIR Fee Study

The AR contains 65 pages purporting to be what the NPRM and Final Rule called a "comprehensive study" of agency costs and fees EOIR conducted in 2018 (the "EOIR Fee Study"). *See* AR7507–7571. That study purports to derive figures for the personnel cost of each processing

step in asylum adjudications. The Final Rule's fees reflect those calculated personnel costs. While these 65 pages of the AR reflect arithmetic—salary rate figures multiplied by estimated average time to execute adjudicative tasks—performed to arrive at the stated costs, the AR does not contain the underlying data. Starting with the NPRM, commenters complained about the failure to disclose "the data underlying [EOIR's fee] study," PI Order at 5; *see also, e.g.*, AR7775 (comment of CLINIC). The Final Rule states that the agency "is publishing" the data in light of comments received, AR6; *accord* PI Order at 9—a concession that the data that purportedly justified the increases was not published or available to the public during the comment period.

As presented in the AR, the EOIR Fee Study begins with a high-level description of the work. AR7507–007515. This description is essentially the same as what was published in the NPRM. *Compare* AR7507–7509 *with* 85 Fed. Reg. at 11,869 (both detailing how EOIR used its staff's "average salary" to calculate a rate, created "step-by-step process maps, with assigned times and staff levels," and then calculate the supposed cost of each step based on its duration and the previously calculated salary rate). But, as with the NPRM, the AR fails to provide the data.

The fee-study-related portion of the AR concludes with two pages that Defendants describe as "Of. Of Mgmt. and Budget, Fee Study Materials," Certified Index to Administrative Record, Dkt. 51-1 ("AR Index") 16 (citing AR7570), and which appear to contain two tables with revenue calculations based on assumptions concerning the amount of fees Defendants expect to collect. AR7570–7571. These tables have an asterisk notation in several column headers that indicates the data came "[f]rom pg. 123" or "[f]rom pg. 136." Thus, these two tables seem to indicate on their face that material comprising the EOIR Fee Study *is not* included in the AR—because those pages (123 and 136) do not appear to be contained in the AR. The AR material comprising the EOIR

Fee Study runs to 65 marked pages, so the referenced page numbers seem to be outside the range of anything produced.

**B. The Remainder of the Administrative Record**

The bulk of the AR appears to be unrelated to the subject matter of the Final Rule and it is unclear how (or if) any of these materials were considered, directly or indirectly, by EOIR. For example, the AR contains 1,340 pages of legal opinions (and some briefing), many of which have nothing to do with the subject matter of the Final Rule (indeed, many are not even cited in the Final Rule). *See* AR Index 1–6; *see, e.g.*, *Araujo Buleje v. Barr*, 140 S. Ct. 2720 (2020) (AR70; not cited in the Final Rule); *United States v. Hasan*, 718 F.3d 338 (4th Cir. 2013) (AR1266; same); *Jin v. Mukasey*, 538 F.3d 143 (2d Cir. 2008) (AR1347; same); *Matter of Agour*, 26 I&N Dec. 566 (BIA 2015) (AR778; same). The AR also contains 3,307 pages of constitutional and statutory authority, most of which again appears to be unconnected to the Final Rule.[5] *See* AR Index 6–13.

In short, a significant portion of the AR contains materials that appear to be irrelevant to the subject matter of the Final Rule and thus were unlikely to have been considered by EOIR in promulgating that Final Rule.

[5] The inclusion of many other materials in the AR is outright perplexing. For example, the AR contains a 2013 statement by Representative James P. Moran of Virginia voicing his support for reauthorizing the Violence Against Women Act ("VAWA"), AR6635–6636 (citing 159 Cong. Rec. E236–02 (daily ed. Mar. 4, 2013)); The Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, 119 Stat. 231, AR2483–2553; the First Amendment, AR2142; Article III, § 1, AR2149; and a 2004 law review article about non-immigrant visas, AR7465–7474. Although these sources take up considerable space in the AR, their connection to the Final Rule is not evident.

## PROCEDURAL HISTORY

### I. The Court Preliminarily Enjoins the Challenged Fees

Plaintiffs filed their complaint on December 23, 2020 (Dkt. 1) and moved for a preliminary injunction on December 30, 2020 (Dkt. 19). The Court granted in part and denied in part Plaintiffs' motion, staying the effective date of the Final Rule as to the six fees at issue in this motion (described in Statement of Facts Section I, *supra*). PI Order at 35.[6]

The Court concluded that Plaintiffs were likely to succeed on their claim that the Final Rule was arbitrary and capricious "because Defendants failed to consider 'the Final Rule's impact on legal service providers.'" PI Order at 24 (cleaned up). The Court found that EOIR's deeming the legal service providers' concerns "speculative" was arbitrary and capricious. *Id.* at 27–28. The agency "utterly failed to consider an important aspect of the problem, and to respond to relevant and significant public comments, when it ignored the impact that the Final Rule would have on legal service providers and their capacity to provide representation." *Id*. at 26. The Court held that EOIR erred when it dismissed concerns that multiple legal service providers raised by deeming them outside the scope of the rulemaking or "speculative," where Congress had made clear its concern about access to counsel and the providers' articulated concern about the rule's impact was based on "deep institutional knowledge and experience." *Id*. at 26–27. Finding the other requirements for preliminary relief met, the Court enjoined the six Challenged Fees. *Id.* at 32–35.[7]

### II. Stay of Proceedings and Subsequent Developments

Following its ruling on Plaintiffs' preliminary injunction motion, the Court stayed the case from January 2021 through December 2023. In a series of joint status reports filed during that

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[6] In its ruling, the Court also found that Plaintiffs established Article III standing and satisfied the "prudential standing, zone-of-interests inquiry." PI Order at 19, 22. The government did not seek reconsideration of, or appeal from, that ruling.

[7] Plaintiffs do not seek vacatur of the three fees the Court declined to enjoin. PI Order at 32–33.

period, the parties continued to recommend that the matter remain stayed in view of: (1) the change in DOJ and EOIR leadership (Dkt. 35); (2) an executive order directing agency heads to review immigration-related actions to ensure effectiveness and efficiency and elimination of "sources of fear and other barriers that prevent immigrants from accessing government services available to them" (Dkt. 37); and (3) repeated EOIR promises to "rescind or modify various portions of the [Final Rule]" with an eye toward publication of a new NPRM (Dkt. 39, 40, 42, 43, 44, 48). Despite those representations, EOIR has not promulgated a new fee rule, disclosed any new fee study, or taken any other public actions that demonstrate it plans to do so in the near future.

Accordingly, on December 13, 2023, and in light of Defendants' inaction on publishing a new NPRM, Plaintiffs filed an unopposed request for the Court to lift the litigation stay. Dkt. 49. The Court lifted the stay on December 15, 2023, and set a schedule for summary judgment briefing.

## STANDARD OF REVIEW

"Judicial review of agency action" under the APA "is generally limited to the administrative record." *Chiayu Chang v. USCIS*, 254 F. Supp. 3d 160, 161 (D.D.C. 2017).

In evaluating "final agency action under the APA, the standard set forth in Rule 56(a) does not apply. . . . Instead of reviewing the record for disputed facts that would preclude summary judgment," a district court must "determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Ardmore Consulting Grp., Inc. v. Contreras-Sweet*, 118 F. Supp. 3d 388, 393 (D.D.C. 2015) (cleaned up).

## ARGUMENT

Plaintiffs request that the Court vacate the Final Rule because the Final Rule is arbitrary, capricious, an abuse of discretion, unsupported by the AR, and contrary to law.

## I. The Final Rule Is Arbitrary, Capricious, an Abuse of Discretion, and Unlawful

### A. Defendants Ignored Evidence of Significant Concerns with the Final Rule

The APA requires a rule to be the product of "reasoned decisionmaking." *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998). An agency must "examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). As the Court noted in its PI Order, "[i]t is black letter law that an agency acts arbitrarily and capriciously when it 'entirely fails to consider an important aspect of the problem.'" PI Order at 26 (quoting *State Farm*, 463 U.S. at 43). This requires agencies to respond to "relevant" and "significant" public comments. *Id.*

The Court concluded that EOIR likely violated the APA when it "utterly failed to consider an important aspect of the problem, and to respond to relevant and significant public comments." PI Order at 26. Plaintiffs' analysis focuses on three areas where the EOIR acted arbitrarily:

(1) EOIR's dismissal of the Final Rule's impact on legal service providers and the corresponding impact on noncitizens' access to counsel;

(2) EOIR's dismissal of the Final Rule's impact on noncitizens when EOIR concededly had no information on noncitizens' finances and its failure to provide a reasoned response to commenters' first-hand accounts of noncitizens inability to pay; and

(3) EOIR's reliance on the existence of fee waivers to mitigate the impact of the Final Rule when EOIR had limited or no data about its fee waiver process and its failure to provide a reasoned response to commenters' examples of errors and failures in that process.

#### 1. Defendants Ignored Evidence of the Adverse Impact of the Fee Increases on Legal Service Providers, Such as Plaintiffs

This Court previously concluded that EOIR "ignored the impact that the Final Rule would have on legal service providers and their capacity to provide representation." PI Order at 26. The AR does not undercut that finding—instead, it confirms that the agency disregarded evidence from legal service providers concerning the adverse impact the Final Rule would have on their ability to continue to provide legal services to noncitizens. *See* Statement of Facts Section II.A, *supra*.

Rather than meaningfully address the information from legal service providers that the fee increases would wreak havoc on their ability to provide services to noncitizens in removal proceedings, the Final Rule instead dismissed those concerns as "speculative" and outside the "limited scope" of the rulemaking. AR26. On that basis, the agency "decline[d] to respond" to commenters' concerns and instead touted the "continued availability of fee waivers" as a panacea to all problems legal service providers identified. *Id.*

The comments submitted by legal service practitioners opposing the proposed rule were anything but speculative. Commenters' articulated concerns were grounded in "deep institutional knowledge and experience," PI Order at 27—particularly given the many comments from actual practitioners working regularly in Immigration Courts. For example, both nonprofit organizations and small immigration law firms that provided pro bono and low-cost immigration services explained that the fee increases would drive up the number of fee waiver requests, reduce the ability of pro bono attorneys to cover filing fees, force noncitizens to choose between paying for low-cost counsel and the fees (thereby likely foregoing representation), and reduce the overall volume of clients the legal service providers could serve. *See, e.g.*, AR7626; AR7838; AR7953–7954; AR7643; AR7707; AR7699; AR8085; AR8768; AR8876; AR9375; AR8846; AR7607; AR8376; AR8380; AR9080; *see also* Statement of Facts Section II.A, *supra*.

The comments reflected these practitioners' actual experience representing clients in Immigration Courts and addressed how the Final Rule would impact their ability to represent clients in EOIR proceedings. Given Congress's concern for access to counsel in removal proceedings as expressed in the INA, *see* PI Order at 26–27, EOIR was required "to acknowledge [commenter's] concerns and respond to them in a meaningful way, not blithely dismiss them as outside the limited scope of this rulemaking." *Id.* at 27 (quoting AR26); *see Encino Motorcars,*

*LLC v. Navarro*, 579 U.S. 211, 221 (2016) ("[W]here the agency has failed to provide even [a] minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law."); *see also* 8 U.S.C. § 1229a(b)(4)(A); *id.* § 1229(a)(1)(E), *id.* § 1229(b)(1)–(2). EOIR's erroneous characterization of these comments as "speculative"[8] and outside the scope of the rulemaking demonstrates that the agency had no reasoned basis for discounting the Final Rule's impact on those who provide legal services to noncitizens. *See Butte Cnty. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010) ("[A]n agency's refusal to consider evidence bearing on the issue before it constitutes arbitrary agency action within the meaning of § 706."); *Citizens for Resp. & Ethics in Washington v. Nat'l Archives & Recs. Admin.*, 2022 WL 2064831, at *3 (D.D.C. June 8, 2022) (explaining that although an agency "did not *completely* ignore" comments, its "response was far from adequate" and "its one-sentence answer was not substantially justified" because it did not "grappl[e]" with commenters' evidence). Here, EOIR did *completely* ignore the concerns raised by legal service providers, thereby acting arbitrarily and capriciously in violation of the APA.

**2. Defendants Ignored Evidence About Respondents' Inability to Pay**

EOIR also failed to give a reasoned response to comments that the new fee schedule would erect a financial barrier to noncitizens pursuing routine steps in an EOIR or BIA adjudication, including making motions and applications, or filing appeals. EOIR admitted that it did not collect data about respondents' financial condition. *See* AR10. On the other hand, multiple commenters with extensive experience working with the impacted population explained how the Final Rule would make the process unaffordable for large swaths of noncitizens and provided specific

[8] The Court already found that, by arguing Plaintiffs could ask their funders to increase Plaintiffs' budgets, Defendants "implicitly concede[d] that the Final Rule may squeeze the budgets of legal service providers and that, rather than speculation, the legal service providers' concerns about lacking the funds and resources to meet the additional fees are very much grounded in reality." PI Order at 28.

examples of the impact. *See, e.g.*, AR7812; AR8894; AR7952; AR7764; AR8213–8217; AR8798; AR8186–8187; AR7987; AR8863; *see also* Statement of Facts Section II.B, *supra*. EOIR's admission that it "does not generally have [noncitizens'] financial records at its disposal for review," AR7, explains its failure to offer a reasoned response to the comments. But that failure doubles as a concession that the agency had no explanation for ignoring "evidence bearing on the issue before it," *Butte Cnty.*, 613 F.3d at 194—the many comments like those described above from real practitioners detailing the extremely limited financial resources of their indigent clients, which is the very sort of financial evidence EOIR professed to lack.

Many of the submitted comments also explained that the proposed fee would be particularly difficult for their clients to raise in the 30 days allowed for an appeal. *See, e.g.*, AR7681; AR7684; AR8065; AR8096; *see also* AR12. Indeed, commenters spoke of their "first hand" experience that "[v]ery few respondents have the ability to raise $1000 in 30 days with the economic positions they are in." AR8107. Others explained that their clients often have to "forego meals, medicine, public transit, and other critical necessities" just to afford the prior $110 fee and certainly could not afford fees that increased up to eight-fold. AR8152. EOIR's response that noncitizens who may wish to appeal "should, accordingly, use that time between the initiation of the proceeding and the immigration judge's issuance of a final decision to begin arranging funds for the future payment of the appeal," AR14, is no response to the unrefuted facts that the commenters submitted.

Commenters raised still more concerns that Defendants dismissed: that the increased fees would diminish the integrity of EOIR Proceedings, *e.g.*, AR8310, undermine due process, *e.g.*, AR7699, reduce access to counsel, *e.g.*, AR7643, subject respondents seeking to defend themselves in removal proceedings to abusive lending practices, *e.g.*, AR8988, and "have cumulative negative, and in some cases irreversible, effects on [noncitizens] who would be unable

to afford the fees, those [noncitizens'] families, and their communities," AR25; *see* AR11–12. Defendants conclusorily stated that they "disagre[e] with commenters' concerns about the rule's extensive negative impact," and peremptorily dismissed inevitable harms as "too speculative to warrant changes to the NPRM." AR25; *but see Sorenson Commc'ns Inc. v. FCC,* 755 F.3d 702, 708 (D.C. Cir. 2014) (agencies must justify rule changes based on some "logic and evidence") (cleaned up). By disregarding this significant direct evidence and engaging in its own speculation that noncitizens wanting to challenge removal might scrounge up the money for the fees from somewhere, EOIR's promulgation of the Final Rule lacked a reasoned basis and violated the APA. *See Am. Radio Relay League, Inc v. FCC*, 524 F.3d 227, 241 (D.C. Cir. 2008).

### 3. Defendants Ignored Evidence That the Mere "Possibility" of Fee Waivers Would Not Mitigate the Impact of the Increased Fees

EOIR's insistence that fee waivers could mitigate the impact of fee increases is speculative and not a reasoned basis for the Final Rule. EOIR assumed a regular process that produces correct outcomes with few errors. The commenters undermined that. They explained the discretionary nature of the fee waivers and lack of any statutory or regulatory criteria for deciding them, and recited extensive experience with inconsistent and erroneous decisions.[9] They also described the risks associated with filing for a waiver during the appeals period—that denial of the waiver would result in a procedural default precluding consideration of the merits of a motion or appeal. *See* AR7643; AR7699; AR8020–8022; AR7870; AR9301; AR8082–8086; AR8213; AR8116–8117; AR8802; AR9200–9202; *see also* Statement of Facts Section II.C, *supra*.

EOIR made no reasoned response to these facts. Instead, EOIR stated that its failure to track and evaluate financial information in fee waiver requests—that is, an *absence* of evidence—left it

[9] A decision by the Immigration Court or by the BIA to grant or deny a fee waiver request is entirely discretionary. *See* 8 C.F.R. §§ 1003.8(a)(3), 1003.24(d) (2020).

unable to predict whether higher fees would lead to a greater numbers of fee waiver requests. AR10. As to the inconsistent adjudication of fee waivers, EOIR noted that it had "no evidence or data" about such inconsistency and suggested that it was commenters' burden to provide this data that only the agency could possess. AR11. But commenters *did* provide evidence—from their own experience—of erroneous fee waiver denials for indigent clients. *See, e.g.*, AR7643 (describing and providing examples of the inconsistency in fee waiver adjudications); *see also* Statement of Facts Section II.C, *supra*.

Defendants appear to recognize that higher fees could have a significant adverse impact on noncitizens in the removal process. If they wanted to rely on the waiver process to mitigate that impact, they should have gathered evidence, considered it, and put it in the administrative record. Instead, the administrative record reflects the *commenters'* submissions on the adverse economic impact of the fee hikes, with no reasoned response from Defendants. That violates the APA. "[A]n agency cannot ignore evidence that undercuts its judgment; and it may not minimize such evidence without adequate explanation." *Genuine Parts Co. v. EPA*, 890 F.3d 304, 312 (D.C. Cir. 2018).

EOIR also had no response to commenters' most-oft-repeated complaint concerning fee waivers—that by the time a fee waiver request is adjudicated and "an appealing respondent learns that his or her fee appeal may be rejected, they may often have missed the 30-day window" to re-file their motion and pay the fee. AR7603; *see also, e.g.*, AR7594; AR7930; AR7603; AR7992; AR9180; Statement of Facts Section II.C, *supra*. EOIR did not address commenters' requests that EOIR restart the 30-day appeal filing deadline if the fee waiver is denied, along with other proposed safeguards to ensure predictable adjudication of fee waivers. *See, e.g.*, AR8206; AR9301–9302. Instead, EOIR deflected the comments by stating that it "may consider the issue further in a future rulemaking" if needed following the implementation of the fee increases. AR11.

That is a startling statement: the agency acknowledged a significant problem with the Final Rule while simultaneously avoiding any reasoned response to the comments. Defendants' "shoot-first-and-fix-later" approach violates the APA. *Cf. Biodiversity Legal Found. v. Babbitt*, 943 F. Supp. 23, 26 (D.D.C. 1996) ("[An agency] cannot use promises of proposed future actions as an excuse for not making a determination based on the existing record.").

### B. Defendants Failed to Disclose the Methodology and Data Underlying Their Analysis

The APA requires an agency to "identify and make available technical studies and data that it has employed prior to the comment period" including "the models and methodology used by an agency to support its action." *Shands Jacksonville Med. Ctr. v. Burwell*, 139 F. Supp. 3d 240, 262 (D.D.C. 2015) (cleaned up); *see* 5 U.S.C. § 553(b); *Engine Mfrs. Ass'n v. EPA*, 20 F.3d 1177, 1181 (D.C. Cir. 1994) (APA "requires the agency to make available to the public, in a form that allows for meaningful comment, the data the agency used to develop the proposed rule"). "An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary." *Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 199 (D.C. Cir. 2007). Defendants here committed precisely this "serious procedural error." *Id.*

#### 1. Defendants Did Not Disclose the EOIR Fee Study or Its Underlying Data

Defendants failed to provide—either in the NPRM or in response to direct requests during the abbreviated comment period—any data from the EOIR Fee Study on which they claimed to have relied in formulating the Proposed Fee Rule and on which they purport to base the Final Rule. *See* 85 Fed. Reg. at 11,872–74; AR9564 (request from Plaintiff CLINIC for methodology and pointing out potential error in calculations). The study was available: the NPRM states that it was performed in 2018 to determine the cost to EOIR for each type of application, motion, and appeal

for which the NPRM proposed to increase fees. 85 Fed. Reg. at 11,872. The Defendants simply chose to keep the fee study and the underlying data secret during the entire rule promulgation process. Thus, the public had no opportunity to see and comment on that critical purported support for the fee hikes.

For example, the AR states that the EOIR Fee Study began with the collection of "survey data and Subject Matter Experts (SME) input to determine appropriate staff levels and time required to process and adjudicate each form/motion." AR7507; *see also* 85 Fed. Reg. at 11,869 (NPRM) (claiming that the first phase of the "comprehensive study" entailed "gather[ing] survey data and consult[ing] with staff"). But the survey data and the input from these unidentified "SMEs" and staff is not disclosed. That is significant, because the data may have been incomplete (as commenters noted) because it seems that the study at least did not 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. *See, e.g.*, AR8795–8797 (comment of Legal Services NYC); AR8305–8306 (comment of KIND). To give another example: the EOIR Fee Study states that "process step times" were "validated" with unidentified personnel, AR7507, but the validation process is not discussed further. The EOIR Fee Study presents the results of this "validation" process in tables. *See, e.g.*, AR7509. The tables, however, are no substitute for providing the data itself.

Defendants failed to provide that information even after Plaintiffs and other organizations requested it during the comment period. *See, e.g.*, AR7775 (comment of CLINIC); AR7823 (comment of American Immigration Council). And, despite Defendants' promise to "publish[] the data collected in its spring 2018 study," AR6; *see* PI Order at 9, the AR suggests that the whole EOIR Fee Study was not even considered by EOIR because it is not included in the AR, *see* AR7570–7571 (referencing pages 123 and 136 from the study although the AR contains only 65

pages of study materials). EOIR's failure to disclose the study and its underlying data, and to explain the study's methodology violates the APA. *See Shands*, 139 F. Supp. 3d at 261–63.

#### 2. Defendants Did Not Disclose Data or Evidence Underlying Their Assumptions Concerning Fee Waivers and Noncitizens' Ability to Pay

Defendants violated the APA by not disclosing the basis (if any) for their conclusions concerning fee waivers and noncitizens' financial means. The NPRM and the Final Rule assert repeatedly that the availability of fee waivers mitigates the impact of the fee requests. *See, e.g.*, 85 Fed. Reg. at 11,874 (NPRM); AR6 (Final Rule) (same). Neither the NPRM nor the Final Rule provided any data justifying or otherwise relating to that assertion—such as the number and outcome of fee waiver requests submitted under the existing fee schedule, or the expected number of fee waiver requests if the fee increases went into effect and the additional cost burdens they would impose. *See, e.g.*, AR7586 (comment of David Light) ("[T]he Administration has provided no evidence to suggest that it's considered the impact of fee waivers on its revenue projections."); AR9564 (email from CLINIC asking "if fee waivers will increase as a result of the proposed fee increases, won't there be new cost burdens expected as a result of fee waiver adjudications?"); AR8134 (comment of the Mayor of the City and County of Denver, Colorado) (observing that the increased fees "would mean that even more respondents . . . would request a waiver, which in turn would result in less revenue for EOIR, not more"). If the Defendants had contrary evidence, they should have disclosed it so the public could provide robust comments. If they had none (or did not consider what they had), that undermines both the NPRM *and* the Final Rule.

EOIR did not respond to CLINIC's FOIA request for fee waiver data before the comment period closed. *See, e.g.*, AR22 (acknowledging that EOIR "has not responded to commenters' FOIA request(s)"). EOIR partly responded *after* the comment period closed, but that response highlighted the importance of the data to assessing the rule: it revealed that EOIR's records

included facially inaccurate entries (such as dates that precede EOIR's existence), and entries showing that Defendants have not consistently maintained fee waiver data and do not know the number or rate of fee waiver denials. Mendez Decl., Dkt. 19-5, ¶ 22. Had Defendants provided the shoddy records on which they purported to rely, the public could have confronted Defendants' statements that the "possibility" of fee waivers would soften the impact of the fee increases—and put Defendants to the burden of a response. Defendants did not even include EOIR's FOIA response to CLINIC in the AR. The only logical conclusion is that Defendants did not account for, or even consider, these flaws before issuing the Final Rule and thus did not have a reasoned basis to assume that fee waivers would mitigate the concerns identified by commenters.

The NPRM did not disclose any data Defendants had about the financial resources of respondents in removal proceedings, or their ability to pay the current or proposed fees. Only in the Final Rule did Defendants reveal that their assumptions that respondents would "be able to afford EOIR's proposed fees" were based on the ability of some respondents to retain representation in removal proceedings or to pay application fees set by DHS. *See* AR7. EOIR also assumed that noncitizens could afford the higher fees because some could "obtain work authorization," others were able to "obtain representation," still others could afford "to pay existing fees," and still others would somehow make do given "the ultimate importance of" prevailing in removal proceedings and obtaining legal status. AR10. But EOIR disclosed *no evidence* supporting these assumptions. For example, the agency did not explain how the ability to pay *existing* fees meant that noncitizens could also pay *increased* fees—particularly when some fees increased eight-fold. Such lack of evidence violates the APA. *See Nat. Res. Def. Council, Inc. v. EPA*, 859 F.2d 156, 210 (D.C. Cir. 1988) (holding that an agency violated the APA by failing to discuss "any record evidence" in its reasoning and offering "no more than mere speculation to

support its conclusion”); *D.C. v. U.S. Dep’t of Agric.*, 444 F. Supp. 3d 1, 27–29 (D.D.C. 2020) (vacating a final rule because the agency “provided no evidence” and “speculation [could not] substantiate the [agency’s] assumption”).

Defendants’ assumptions concerning immigrants’ ability to pay and their professed ignorance concerning the financial condition of typical noncitizen respondents before EOIR are particularly problematic, because Defendants received comments from practitioners who practice regularly before EOIR, describing the financial condition of noncitizens in these proceedings. *See, e.g.*, AR7812; AR8894; AR7952; AR7764; AR8213–8218; AR8798; AR8186–8187; AR7987; AR8863; *see also* Statement of Facts Section II.B, *supra*. Commenters even described financial struggles for specific classes of noncitizen filers, like children, multi-member family groups, *pro se* respondents, and detained respondents. *See, e.g.*, AR7713–7714; AR8425; AR9096; AR7659; AR7851; AR8978. Defendants’ paltry response characterizing this information as “speculative,” AR10, simply ignored and failed to assess that evidence, which is the definition of arbitrary agency action. *See Butte Cnty*., 613 F.3d at 194 (explaining that “an agency’s refusal to consider evidence bearing on the issue before it constitutes arbitrary agency action within the meaning of § 706” because “[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight” (cleaned up)).

### C. The Final Rule Does Not Provide a Reasoned Basis for Increasing Fees

Defendants have not articulated a reasoned explanation for increasing the Challenged Fees. The Final Rule merely asserts that it is necessary to update EOIR fees to “more accurately reflect the costs for EOIR’s adjudications of these matters,” AR5, but does not explain *why* it was necessary to do so given that—as commenters repeatedly pointed out, *see, e.g.*, AR7686; AR7694; AR7903 & n.4—EOIR is a congressionally appropriated agency, not a fee-funded agency like USCIS, and there is no evidence in the AR of any shortfalls in appropriations. Defendants cite no

evidence and provide no justification for suddenly seeking to—after three decades—shift the costs of an appropriated agency to indigent respondents whom the government has targeted for removal. *See State Farm*, 463 U.S. at 43 (explaining that an agency's explanation must demonstrate a "rational connection between the facts found and the choice made" (cleaned up)).

The AR does not explain how EOIR plans to use the increased fee income (which would be deposited into a fund controlled by DHS, not EOIR). Thus, Defendants' statement in the Final Rule that the fee increases are necessary to ensure "taxpayers do not bear a disproportionate burden in funding the immigration system," AR2, is doubly problematic: first, the Final Rule cites no evidence that taxpayers' burden is disproportionate (particularly given the acknowledged public interest in the just administration of the nation's immigration laws, 85 Fed. Reg. at 11,870); and second, the Final Rule does not demonstrate that taxpayers would save anything at all. The Final Rule's unsupported premise that it is necessary to recoup EOIR's costs through fees, AR32, does not define a legitimate purpose, particularly where the cost and burden of the rules fall so heavily on those whose liberty is at stake. *See, e.g.*, AR7890 (comment of the Round Table of Former Immigration Judges) ("Expecting non-citizen respondents who are required to appear and have a right to defend themselves to supplement the funding of the agency to such a degree is unnecessary and unjust."). Conclusory statements like those Defendants offered in the Final Rule are insufficient to establish the problem or to justify the solution, *see Allied-Signal, Inc. v. U.S. Nuclear Reg. Comm'n*, 988 F.2d 146, 152 (D.C. Cir. 1993), and explanations that "ru[n] counter to the evidence before the agency" must fail. *State Farm*, 463 U.S. at 43.[10]

[10] Moreover, despite over 90 comments citing EOIR's own 2020 annual appropriations performance budget submitted to Congress, *see, e.g.*, AR8236; AR8308; AR8844; AR9012; AR9181 (each citing EOIR, DOJ, *FY 2020 Budget Request*, https://tinyurl.com/2s824ek9), and despite including congressional appropriations legislation in the AR, AR Index 12 (citing

Other flaws with the agency's reasoning abound. For example, Defendants did not provide a reasoned response to the acknowledged problem that increased fees would foreclose otherwise-eligible individuals from seeking relief from removal. The contradiction is in the Final Rule, in black and white: Defendants assert that there is "no evidence that filing fees discourage individuals from filing for lawful immigration status," but acknowledge *in the same sentence* "commenters' concerns that fees may affect an individual's decision to file an application." *See* AR11. Defendants' professed lack of evidence—and disregard of real-world evidence of noncitizens' inability to pay in many circumstances, *see* Statement of Facts Section II.B, *supra*—is the quintessential "arbitrary or capricious" action: Defendants hypothesize that the increase would not have an adverse effect, but ignore contrary evidence. *See State Farm*, 463 U.S. at 43.

**D. The Final Rule Offers No Justification or Rationale for Departing From Longstanding Agency Policy and Practice Regarding Fees**

"A central principle of administrative law is that, when an agency decides to depart from decades-long past practices and official policies, the agency must at a minimum acknowledge the change and offer a reasoned explanation for it." *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 923 (D.C. Cir. 2017) (cleaned up). If an agency "abandon[s] its decades-old practice," a summary discussion that "may suffice in other circumstances" is inadequate in light of "decades of industry reliance on [the agency's] prior policy." *Encino Motorcars*, 579 U.S. at 218–23.

Fees for EOIR filings remained unchanged for the past 34 years. Defendants explain away this "lack of action" as a departmental failure to be remedied by the fee increases, *see* AR1–2, 23, but provide no reasoned explanation for why noncitizens seeking immigration relief should bear

AR2155), Defendants not only failed to include that EOIR congressional budget submission in the AR, but also failed to identify any gaps between it and the costs calculated in the EOIR Fee Study, AR7507–7571. It is patently unreasonable for EOIR to fail to consider its own congressionally mandated budget reporting in assessing its costs or any need for fee increases.

the full burden of this *agency* failure—particularly given that many noncitizens are indigent and simply cannot afford the cost of the increased fees. *See* Statement of Facts Section II.B, *supra* (providing examples of many comments that detailed the financial hardships many noncitizen filers face). The APA requires Defendants to provide a reasoned explanation for their departure from longstanding agency policy and practice in the Final Rule. *See Perdue*, 873 F.3d at 923–24. Here, Defendants gave none.

**E. The Final Rule is Unlawful Because Neither the Immigration and Nationality Act Nor the Independent Offices Appropriations Act Authorize the Fees**

The Final Rule is unlawful for another, independent reason: it is not supported by the statutes on which Defendants relied to promulgate it. Defendants cited two laws in support of increasing the Challenged Fees—INA Section 286(m) (codified at 8 U.S.C. § 1356(m)), and the IOAA, 31 U.S.C. § 9701. AR2, AR5. Neither statute authorizes EOIR to increase these fees.

**1. The INA Does Not Grant EOIR Authority to Charge Fees for Immigration Courts and Appeals**

Defendants' reliance on 8 U.S.C. § 1356(m) to authorize EOIR fees is misplaced. In 1988, Section 1356(m) created the Immigration Examinations Fee Account ("IEFA") to *deposit* adjudication fees, but the statute said nothing about the authority to charge or set fees. INA 286(m), codified at 8 U.S.C. § 1356(m) ("[A]ll adjudication fees as are designated by the Attorney General in regulations shall be deposited as offsetting receipts into a separate account entitled 'Immigration Examinations Fee Account . . . .'"); *see* Conf. Report on H.R. 4782, 134 Cong. Rec. H8297-01, 1988 WL 176092 (Sept. 26, 1988); Pub. L. No. 100-459, § 209(a), 102 Stat. 2186, 2203 (1988). Moreover, that the IEFA receives deposits of only *adjudication* fees is important because it demonstrates that Section 1356(m) was never meant to apply to EOIR.

At the time Congress created the IEFA in 1988, DOJ housed both EOIR and the Immigration and Naturalization Service ("INS"). Then, as it does now, EOIR administered

adversarial proceedings initiated by the government to deport or exclude people. *See* BIA, Immigration Review Functions, 48 Fed. Reg. 8,038, 8,039 (Feb. 25, 1983) (creating EOIR to consolidate all "quasi-judicial functions"); 8 C.F.R. § 1240.1 (authority of immigration judges); 8 C.F.R. § 1003.1 (authority of BIA). EOIR has never *adjudicated* naturalization applications. *See* 8 C.F.R. § 1240.1(a)(ii). Instead, it is the INS (and later USCIS) that adjudicated affirmative immigration benefits, including naturalization applications. *See* Homeland Security Act ("HSA"), Pub. L. No. 107-296, § 451(b), 116 Stat 2135, 2196 (2002), codified at 6 U.S.C. § 271(b).

Trying to bolster their authority, Defendants cite language that Congress added to Section 1356(m) as part of a 1990 amendment to the INA, providing that "fees for providing *adjudication and naturalization services* may be set at a level that will ensure recovery of the full costs of providing all such services, including the costs of similar services provided without charge to asylum applicants or other immigrants." 8 U.S.C. § 1356(m) (emphasis added). But this language does not save the Final Rule because it does not apply to EOIR.

Congress added this language in 1990 to ensure that IEFA fees would fund "the entire cost of operating the *Adjudications and Naturalization* program," referring to the legacy affirmative benefits and naturalization operations of the *INS* (now housed within DHS and USCIS). *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1991: Hearings on H.R. 5021 Before a Subcomm. of the Comm. on Appropriations, Part 2*, 101st Cong. 72 (1990) (emphasis added). This amendment was necessary because the affirmative benefits Adjudications Branch of the INS had just ceased to be an appropriated program and was newly made to be "self-sustaining." INS and the EOIR; Fee Review, 55 Fed. Reg. 20,261, 20,261 (May 16, 1990). When the HSA transferred the INS affirmative benefits adjudications and naturalization services to USCIS as a fee-funded—i.e., not appropriated—sub-agency of DHS,

Section 1356(m)'s reference to "adjudication and naturalization services" became directed to those services administered by USCIS. EOIR never provided such services, and Defendants cannot claim otherwise. The HSA explicitly maintained EOIR as a separate *appropriated* agency within the DOJ, unlike USCIS, which is part of DHS and is fee funded. 6 U.S.C. § 521; s*ee also* 8 U.S.C. § 1103(g)(1) (Attorney General authority over EOIR); *cf.* AR8309 (comment of KIND) ("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."). Thus, Congress's 1990 amendment to Section 1356(m) did not confer authority on EOIR to raise the Challenged Fees. *See Am. Libr. Ass'n. v. F.C.C.*, 406 F.3d 689, 691 (D.C. Cir. 2005) ("It is axiomatic that administrative agencies may issue regulations only pursuant to authority delegated to them by Congress.").[11]

**2. The IOAA Does Not Support the Final Rule's Fee Increases**

Defendants also rely on the IOAA to support their authority to raise fees. AR1–2, AR4. Assuming *arguendo* that the IOAA would authorize the collection of the fees at issue here, the Final Rule does not satisfy IOAA's requirements because the Challenged Fees are not "fair" and EOIR avoided considering the totality of "the costs to the Government," "the value of the service or thing to the recipient," "public policy or interest served," and "other relevant facts." 31 U.S.C. § 9701(b).[12]

Defendants improperly calculated fees by focusing only on the government's personnel costs for covered processes. Their assertion that they also considered "the public interest," AR22–23, is belied by the AR, which contains no detail as to how the agency purportedly weighed the

[11] Defendants also rely on 8 U.S.C. § 1356(n), which permits reimbursement from the IEFA for "any appropriation . . . for expenses in providing immigration adjudication and naturalization services." Because Section 1356(m) does not apply to EOIR, neither does Section 1356(n).

[12] *Ayuda, Inc. v. Attorney General*, is not to the contrary, because that case only addressed whether IOAA, if *properly followed*, authorized the 1986 fees. 848 F.2d 1297, 1299 (D.C. Cir. 1988).

public interest. That EOIR manifestly did *not* consider the adverse impact the Challenged Fees would have on legal service providers and noncitizens' continued access to Immigration Courts, shows an abject failure to consider public interest concerns. *Compare id. with*, *e.g.*, AR8845–8846 (comment of NIJC); AR8963–8966 (comment of MALDEF); AR9021–9023 (comment of DC-MD JFON); *see also* Statement of Facts Sections II.A–II.B, *supra*.

Defendants claim they did factor public interest concerns into the Final Rule because the fee hikes do not include any amount for employee overhead and benefits costs. AR5. This falls well short of satisfying the requirements of both 31 U.S.C. § 9701(b) and the APA, because those overhead and benefits amounts are nowhere even estimated. Defendants based the fee hikes on personnel salaries calculated down to the penny, but provided no information on the overhead and benefits costs—indeed, they only "assume[d]" that if those costs were included, EOIR fees would "have been higher." AR14. While those figures presumably are greater than "zero," the absence of valuation makes it impossible to know (or comment on) how those costs were actually weighed for public interest purposes in formulating the Final Rule. The Chairs of the House Committees on the Judiciary and Appropriations and Ranking Member of the Senate Judiciary Immigration Subcommittee explained succinctly the flaw in EOIR's reasoning: "Beyond a few vague references to 'public interest' and 'public policy,'" (i.e., the purported exclusion of undefined overhead and benefits costs) "there is simply nothing to substantiate EOIR's claims that it considered anything other than costs to the government, which is contrary to the balanced approach required by the IOAA." AR9173. By claiming to rely on the IOAA but failing to weigh the IOAA factors, Defendants violated the APA. *See Transp. Div. of Int'l Ass'n of Sheet Metal, Air, Rail v. Fed. R.R. Admin*., 40 F.4th 646, 662 (D.C. Cir. 2022) (rejecting a final rule where the agency failed to comply with statutory requirements to appropriately weigh and address safety concerns).

## II. Defendants Violated the APA's Notice and Comment Requirements

### A. The 30-Day NPRM Comment Period, at the Onset of the Global COVID-19 Pandemic, Was Unreasonable

Agency rulemaking must "give an opportunity for interested persons to participate in the rulemaking through submission of written data, views, or arguments." *Sugar Cane Growers Co-op. of Fla. v. Veneman*, 289 F.3d 89, 95 (D.C. Cir. 2002). "The purpose of the comment period is to allow interested members of the public to communicate information, concerns, and criticisms to the agency during the rule-making process." *Conn. Light & Power Co. v. Nuclear Regul. Comm'n*, 673 F.2d 525, 530 (D.C. Cir. 1982). Accordingly, "in most cases" a "meaningful opportunity to comment on [a] proposed regulation" must "include a comment period of not less than 60 days." Executive Order 12866, 58 Fed. Reg. 51,735 (Sept. 30, 1993); *see also* Executive Order 13563, 76 Fed. Reg. 3,821 (Jan. 18, 2011). Defendants gave the public just 30 days to comment on the Proposed Fee Rule. That was insufficient standing on its own, but coinciding with the global pandemic that completely disrupted society, that abbreviated period deprived the public of a meaningful opportunity to participate in the rulemaking process.

The COVID-19 pandemic rendered a 30-day period covering March 2020 (when workplaces slammed shut) especially inadequate, as multiple commenters, including CLINIC, HIAS, and the Chairs of the House Judiciary Committee explained in their letters requesting an extension. *See, e.g.*, AR9566–9570; AR9564; AR9571–9572; AR9576–9579. CLINIC's request, in particular, detailed COVID-related challenges, including telework issues, childcare concerns, and difficulty reaching clients who could share illustrative examples for their comments. *Id.* at 9576. Neither the AR nor the Final Rule addresses those requests. Instead, Defendants' response was conclusory and feckless, stating (without support) "that the COVID-19 pandemic has no effect on the sufficiency of the 30-day comment period," and EOIR is "not obligated to extend the notice

and comment period at the public's request." AR22. Defendants' refusal to extend, freeze, or reopen the comment period was simply out of touch with reality.

No justification exists for the truncated comment period here. Comment periods of short duration are usually only appropriate where there are "exigent circumstances in which agency action was required in a mere matter of days." *N. Carolina Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 770 (4th Cir. 2012). Here, there was no urgent need to hike fees—and neither the NPRM nor the Final Rule claims that there was. The fees at issue had been unchanged for 34 years, and Defendants dawdled for almost two years after conducting the EOIR Fee Study before publishing the NPRM. Further, since the Court's PI Order, Defendants have made no public progress towards a new fee rule, confirming the lack of urgency here. *See* Joint Status Reports at ECF No. 35, 37, 39, 42, 43, 44 (stating EOIR's intent to issue a new fee rule, which it never did).[13]

EOIR rationalized in the Final Rule that because *some* organizations were able to comment, the shortened comment period must have had no prejudicial effect. *See* AR22. But, without doubt, Plaintiffs and other members of the public were unable to provide fulsome comments, or—as with Plaintiff CLSEPA and nearly 100 other organizations who requested more time—make any comments at all. *See* dos Santos Decl., Dkt. 19-9, ¶¶ 27–29. There were just 601 comments submitted in total, on a subject that ordinarily draws thousands. AR3. By comparison, EOIR received double that number of comments in September 2020 in response to a rule concerning immigration court and appellate procedure. *See* DOJ, Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 88 Fed. Reg. 62,242, 62,243 n.3 (Sept. 8, 2023) (1,284 comments received during a 60-day comment period). And DHS received

[13] By contrast, USCIS recently issued a new fee final rule. *See* 89 Fed. Reg. 6,194 (Jan. 31, 2024). Unlike USCIS, which "is primarily funded by fees charged to applicants and petitioners," *id.* at 6,195, EOIR is fully appropriated and does not need to collect fees to provide its services.

*more than 40,000 comments* when it proposed to increase USCIS fees. *See* DHS, USCIS Fee Schedule and Changes to Certain Other Immigrant Benefit Request Requirements, 85 Fed. Reg. 46,788, 46,794 (Aug. 3, 2020); *cf. N. Carolina Growers' Ass'n*, 702 F.3d at 770 (holding that a 10-day comment period was inadequate despite 800 comments received because when the agency "earlier engaged in rule making related to the [same] regulations, the agency received about 11,000 comments over a 60–day comment period"); *Pangea Legal Services v. U.S. Dep't of Homeland Security*, 2020 WL 6802474, at *20–22 (N.D. Cal. Nov. 19, 2020) (finding a 30-day comment period for a DHS rule inadequate and noting that longer comment periods for similar and related rules drew "many more comments, some an order of magnitude more"). More comments on the NPRM could have shown that an even wider public had interest in this matter, likely provided additional evidence, and shown even greater breadth and depth of public concern—whether for or against the proposal.

Other courts have recognized that COVID-19 interfered with the public's ability to submit comments, rendering a 30-days comment period inadequate under the APA. *See Centro Legal de la Raza v. EOIR*, 524 F. Supp. 3d 919, 956–57 (N.D. Cal. 2021) (finding that it was improper for "EOIR [to] disregar[d] the numerous comments from people and organizations who discussed the particular strains imposed by the COVID-19 pandemic" including technological challenges of remote work, closures of the immigration court, USCIS, and Immigration and Customs Enforcement, "COVID-19 spreading in jails and ICE detention facilities," and "the increased burdens associated with new and heightened family and childcare obligations, including employees whose children were distance learning from home"). This Court should do the same.

### B. Defendants Violated the APA's Notice and Comment Requirements By Closing the Comment Period Before Providing Notice of Additional Rules that Would Magnify the Impact of the Fee Increases

EOIR's truncated comment period was additionally inadequate because it closed before the agency informed commenters of the substance of three forthcoming rules—also proposed and quickly finalized by EOIR in 2020—that would exacerbate the harms of the Final Rule. *See* Appellate Procedures and Closure Rule, 85 Fed. Reg. 81,588 (Dec. 16, 2020); Asylum Rule, 85 Fed. Reg. 80,274 (Dec. 11, 2020); Asylum and Withholding of Removal Rule; 85 Fed. Reg. 81,698 (Dec. 16, 2020). The public, therefore, could not assess the overall impact of the fee increases.

The Appellate Procedures Rule would have eliminated self-certification and *sua sponte* reopening—the mechanisms the BIA used to accept appeals that were late-filed because of a denied fee waiver,[14] and strictly curtailed motions to remand at the BIA (for which no fee was required), increasing the need for motions to reopen (made exponentially more expensive under the Final Rule). Mendez Decl., Dkt. 19-5, ¶¶ 62–63, 66. The Asylum Rule and the Asylum and Withholding of Removal Rule dramatically heightened the substantive and procedural requirements for pursuing asylum claims before the immigration courts, necessarily increasing the need to file notices of appeal to the BIA, made eight-fold more expensive by the Final Rule. *Id.* ¶¶ 60–61, 67–69. The impact of these rules in combination is significant, and should have been articulated in the NPRM for commenters to address. *Portland Cement Ass'n v. EPA*, 665 F.3d 177, 185 (D.C. Cir. 2011) (agency acted arbitrarily when "[i]nstead of treating . . . two rules as truly interdependent efforts and acknowledging their close correlation, [it] let each run its own course

[14] *See Matter of Liadov*, 23 I. & N. Dec. 990 (BIA 2006) (finding no authority to toll the 30-day appeal deadline and limiting review of late-filed appeals to the self-certification process), *overruled by Matter of Morales-Morales,* 28 I. & N. Dec. 714 (BIA 2023); 8 C.F.R. § 1003.8(a)(3) (2020) ("If the fee waiver request does not establish the inability to pay the required fee, the appeal or motion will not be deemed properly filed.").

regardless of the collateral impact"); *see also Centro Legal de la Raza*, 524 F. Supp. at 959–62; *Casa de Maryland, Inc. v. Wolf*, 486 F. Supp. 3d 928, 964 (D. Md. 2020); *N. Carolina Growers' Ass'n*, 702 F.3d at 769–70. It is of no matter that litigation and further rulemaking caused none of these rules to go into effect. The APA required EOIR to provide sufficient notice of these related rulemakings in the NPRM to allow for comment, but it did not do so.

## III. The Final Rule Was Promulgated in Violation of the Regulatory Flexibility Act

### A. Plaintiffs CLINIC, CLSEPA, and CHIRLA are "Small Entities"

The RFA entitles small entities adversely affected by final agency action to obtain judicial review of agency compliance with the RFA. 5 U.S.C. § 611(a)(1); *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 869 (D.C. Cir. 2001) ("[A]pplication of the RFA . . . turn[s] on whether particular entities are the 'targets' of a given rule").

Plaintiffs CLINIC, CLSEPA, and CHIRLA are each "small entities" within the meaning of the RFA: they are not-for-profit organizations that are independently owned and operated and are not dominant in their field of operation. Mendez Decl., Dkt. 19-5, ¶¶ 5, 7; Salas Decl., Dkt. 19-8, ¶ 4, 11–12; dos Santos Decl., Dkt. 19-9, ¶¶ 3–5, 33; *see also* 5 U.S.C. § 601(6) (defining small entities); 15 U.S.C. § 632; 13 C.F.R. § 121.201; Small Business Size Standards, 85 Fed. Reg. 72,584, 72,595 (Nov. 13, 2020). The status of CLINIC, CLSEPA, and CHIRLA as small entities is consistent with EOIR's acknowledgment that "most" immigration "attorneys and accredited representatives" that practice before it "qualify as 'small entities' under the [RFA]." *See* EOIR Electronic Case Access and Filing, 85 Fed. Reg. 78,240, 78,246 (Dec. 4, 2020).

### B. The Rulemaking Process Failed to Comply With Requirements of the RFA

The Final Rule fails to comply with Sections 604 and 605(b) of the RFA because EOIR failed to consider the Final Rule's impact on small entities. Section 604 requires the agency to provide "a description of and an estimate of the number of small entities to which the rule will

apply or an explanation of why no such estimate is available" and "a description of the steps the agency has taken to minimize the significant economic impact on small entities . . . ." 5 U.S.C. §§ 604(a)(4), (6). Section 605(b) exempts an agency from Section 604's requirements "if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities" and the agency publishes "a statement providing the factual basis for such certification." 5 U.S.C. § 605(b). EOIR took neither action.

The AR contains no indication that the agency conducted the required regulatory flexibility analysis or has any factual basis for believing that the Final Rule would have no significant economic impact on those practitioners. Instead, EOIR (incorrectly) concluded that the RFA does not apply at all because "[o]nly individuals, rather than entities, are responsible for paying the fees" implicated in the Final Rule. AR36. This ignored the many comments that detailed the significant adverse economic impacts on small entity practitioners, discussed above. *See, e.g.*, AR7626; AR7838; AR7953–54; AR7643; AR7707; AR7699; AR8085; AR8768; AR8876; AR9375; AR8846; AR7607; AR8376; AR8380; AR9080; *see also* Statement of Facts Section II.A and Argument Section I.A, *supra*. Comments also showed that practitioners *do* pay filing fees for indigent clients, and the fee hikes would adversely impact that practice. Defendants turned a blind eye to these concerns and failed to demonstrate "a reasonable, good-faith effort to carry out RFA's mandate." *U.S. Cellular Corp. v. FCC*, 254 F.3d 78, 88 (D.C. Cir. 2001).

**IV. The Final Rules Should Be Vacated and Enjoined As to the Challenged Fees**

Because the Final Rule is arbitrary and capricious, contrary to law, in excess of statutory authority, unsupported by the AR, is not a product of reasoned decisionmaking, and issued without an adequate opportunity for notice and comment, the Court should grant summary judgment to Plaintiffs, vacate the Final Rule with respect to the Challenged Fees, and permanently enjoin Defendants from applying the Challenged Fees. *See* 5 U.S.C. § 706(2)(A), (C), (D); *Nat'l Min.*

*Ass'n v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1409–10 (D.C. Cir. 1998) ("When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." (cleaned up)); *Bhd. of Locomotive Engineers & Trainmen v. Fed. R.R. Admin.*, 972 F.3d 83, 117 (D.C. Cir. 2020) ("Vacatur 'is the normal remedy' when we are faced with unsustainable agency action." (quoting *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014))); *see also Asylumworks v. Mayorkas*, 590 F. Supp. 3d 11, 25 (D.D.C. 2022) (same).

There is no cause to depart from the "normal remedy" of vacatur. *See Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 985 F.3d 1032, 1051–52 (D.C. Cir. 2021) (noting that remand without vacatur is an exception to the "default response" of vacatur). The deficiencies in the Final Rule are significant and there will be no disruption from vacating fees that never went into effect. *See Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993) (holding that courts consider "the seriousness of the [agency action]'s deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed" when vacating agency action (cleaned up)); *see also Standing Rock*, 985 F.3d at 1052 (noting that *Allied-Signal* must not be used to encourage "agencies seeking to [act] first and conduct comprehensive reviews later").

**CONCLUSION**

Plaintiffs respectfully ask the Court to vacate the Final Rule and permanently enjoin Defendants from enacting it as to the Challenged Fees.

Dated: March 1, 2024

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 1, 2024, a true and correct copy of the attached **PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT,** the **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**, and the accompanying **PROPOSED ORDER**, to be filed and served pursuant to the Court's electronic filing procedures using the Court's CM/ECF System.

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