

**UNITED STATES OF AMERICA
BEFORE THE DEPARTMENT OF HOMELAND SECURITY**

U.S. Citizenship and Immigration Services) DHS Docket No. USCIS-2019-0010
Fee Schedule and Changes to Certain)
Other Immigration Benefit Request)
Requirements

Comments of the Immigrant Law Center of Minnesota, the Jewish Community Relations Council of Greater Washington, Jewish Council for Public Affairs, Minnesota Budget Project, Tubman, Community Health Service, Inc., Minnesota Literacy Council, Karen Organization of Minnesota, Asian Women United of Minnesota, Hmong American Partnership, Hmong Americans for Justice, The HLP Health Care Collaborative, International Institute of Minnesota, Tzedek DC and Immigrant Legal Center

INTRODUCTION

The Immigrant Law Center of Minnesota, the Jewish Community Relations Council of Greater Washington, Jewish Council for Public Affairs, Minnesota Budget Project, Tubman, Community Health Service, Inc., Minnesota Literacy Council, Karen Association of Minnesota, Hmong American Partnership, Asian Women United of Minnesota, Hmong Americans for Justice, The HLP Health Care Collaborative, Jewish Council for Public Affairs, International Institute of Minnesota, Tzedek DC and Immigrant Legal Center hereby submit their comments on the Department of Homeland Security's as-amended proposed rule in above-captioned proceeding (collectively ILCM et al.).¹ As discussed in more detail below, ILCM et al. oppose the proposed rule as illegally issued, as an unlawful change to immigration policy that only Congress can enact and as otherwise arbitrary and unsupported by the evidence.

At the outset, ILCM et al. are compelled to express our deep concern about the fundamental unfairness and injustice of the proposed rule. The rule, if adopted, would not only dramatically increase fees for naturalization, work authorization, and permanent residence

¹ On December 9, 2019, DHS issued a supplemental notice amending its November 14, 2019 proposed rule. FR Doc. 2019-26521.

applications – making them unaffordable for many. It would also eliminate entirely the ability of applicants to seek fee waivers based on inability to pay and would, for the first time, impose application fees on asylees. These changes are not only legally unsupportable, they are wholly arbitrary and unsupported by the record. And as part of a pattern of recent federal actions – among other things, a Public Charge rule that would cruelly put permanent residence status outside the reach of even those holding full time jobs, a dramatic slash in the number of refugees the government will admit, an executive order allowing local governments to veto resettlement of refugees within their boundaries – this proposed rule has the effect of discriminating against immigrants of low and moderate income and against persons of color.

As George Washington wrote in 1783, “[t]he bosom of America is open to receive not only the opulent & respectable Stranger, but the oppressed and persecuted of all Nations & Religions; whom we shall welcome to a participation of all our rights & privileges...”² His words two years later bear a striking similarity to those penned by Emma Lazarus and memorialized on the Statue of Liberty a century later:

Let the poor, the needy, & oppressed of the Earth; and those who want Land,
resort to the fertile plains of our western country, to the second Land of promise, & there
dwell in peace”³

² National Archives, Founders Online, *Letter from George Washington to Joshua Holmes* (Dec. 2, 1783) <https://founders.archives.gov/documents/Washington/99-01-02-12127>.

³ National Archives, Founders Online, *Letter from George Washington to David Humphreys* (July 25, 1785) <https://founders.archives.gov/documents/Washington/04-03-02-0142>. Compare President Washington’s words to those of Emma Lazarus:

Here at our sea-washed, sunset gates shall stand
A mighty woman with a torch, whose flame
Is the imprisoned lightning, and her name
Mother of Exiles. From her beacon-hand
Glows world-wide welcome; her mild eyes command
The air-bridged harbor that twin cities frame.
“Keep, ancient lands, your storied pomp!” cries she
With silent lips. “Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore.

The proposed rule is hardly worthy of the ideals expressed by President Washington and on which this Nation was founded. ILCM et al., hope that this agency will take President Washington's sentiments to heart as it considers these and other comments.

DESCRIPTION OF COMMENTERS

Immigrant Law Center of Minnesota

Immigrant Law Center of Minnesota provides immigration legal assistance to low-income immigrants and refugees in Minnesota, and works to educate Minnesota communities and professionals about immigration matters. ILCM also advocates for state and federal policies to promote respect for the universal human rights of immigrants.

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Asian Women United of Minnesota (AWUM)

AWUM's mission is to end domestic violence by supporting safe and healthy relationships in the Asian community and beyond. AWUM provides emergency shelter and advocacy services to Minnesota's growing Asian population, a large percentage of which is comprised of immigrants and refugees.

AWUM reaches individuals and families whose countries of origin include Laos, Thailand, Burma, India, Vietnam, Cambodia, Nepal, Tibet, China, and other nations of Asia and the Middle

Send these, the homeless, tempest-tost to me,
I lift my lamp beside the golden door! ”

National Park Service, *Statue of Liberty, The New Colossus*, (Last updated Aug. 14, 2019)
<https://www.nps.gov/stli/learn/historyculture/colossus.htm>.

East. AWUM focuses its efforts in the Twin Cities metro, however each year it provides support to several individuals living in Greater Minnesota.

The people it sees arriving from these countries typically have few resources and many barriers. Raising fees or eliminating waivers would impose undue hardship on people who have already endured trauma and fear and who have sound reasons for remaining in the US on a pathway toward citizenship.

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Tubman

Tubman helps women, men, youth and families who have experienced relationship violence, elder abuse, addiction, sexual exploitation or other forms of trauma. Throughout the Twin Cities, Tubman provides safe shelter, legal services, mental and chemical health counseling, elder abuse resources, youth programming and community education, including public information campaigns to provide community members the information and support they need to get help or give help.

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The Healthcare Legal Partnership (HLP) Collaborative

HLP is a group of 24 healthcare and legal providers that have joined together to provide holistic integrated healthcare and legal services in 16 locations throughout the Dakotas and Minnesota. These strategic and inter-professional partnerships address the social, economic, and racial inequities that adversely impact health by embedding legal services providers within

healthcare sites or systems. HLPs work to address health-harming legal needs by working “upstream” to stabilize families, improve health outcomes, and prevent medical crises by increasing access to legal services for marginalized communities.

HLPs have operated in Minnesota since 1993 and have expanded significantly in the last 4 years. Healthcare staff in clinics and hospitals, along with legal providers, are acutely aware of the impact that unaddressed health-harming legal needs have on patients. In the case of fee waivers for immigrants, the inability to access a fee waiver will negatively impact thousands of immigrants in Minnesota and the Dakotas by creating an unnecessary barrier to adjusting their immigration status. Delays or deterrents to obtaining rightful legal status impede timely access to medical care, foregoing of preventive services, and fostering additional stress and uncertainty for families. This will impact their overall health.

Ending the immigration fee waiver can reduce progress towards legal immigration, leaving people in fear and uncertainty. As described in the journal of the Twin Cities Medical Society, “Healthcare providers are ethically bound to protect the health and safety of those in their care. They occupy a unique and vital role in communities and often have greater contact with particularly vulnerable populations, including undocumented immigrants, refugees and asylees.” Healthcare professionals have reported fearful parents keeping children home from school, not signing consent forms for dental work, women not reporting violence to law enforcement, and people avoiding needed emergency care because they are afraid of hospital security guards. The overall community suffers when people don’t get necessary care to prevent or treat health problems.

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The Karen Organization of Minnesota (KOM)

KOM is a primary service hub for refugees and immigrants in Minnesota. KOM serves over 2,000 individuals each year through job placement and career training programs, social services access, community health education, youth academic and socio-emotional support, and walk-in services. Most of KOM's clients are refugees from Burma, and it has a growing number of refugees and immigrants from other countries enrolled in its programs. KOM partners with Arrive Ministries to complete status adjustments for hundreds of families each year. The majority of its clients currently qualify for USCIS fee waivers because of their incomes.

The proposed elimination of this fee waiver, together with the proposed increases in processing fees, would effectively prevent most of KOM's community members from becoming Permanent Residents and U.S. Citizens. This would have a profound impact on refugees' ability to find work, receive health care, visit family outside of the U.S., and participate in democracy, among other things. This decision would also harm more than 100 employers who partner with KOM to fill labor shortages with talented, reliable immigrant workers. More fundamentally, this decision creates a discriminatory barrier for low-income refugees and immigrants to fully participate in our society. We value the many skills, resources, connections, and dreams that immigrants bring to our community and stand in firm opposition to any policy that diminishes their worth.

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The Minnesota Literacy Council (soon to be renamed Literacy Minnesota)

The Minnesota Literacy Council has worked with immigrant and refugee populations since its founding in 1972, and it recognizes the immeasurable value they bring to communities. The Minnesota Literacy Council provides life-changing literacy education to adult immigrants and refugees and their children through its six Open Door Learning Center sites in Minneapolis and St. Paul, including citizenship classes and tutoring. In addition, it strengthens literacy programs in Minnesota and beyond by providing training, national service resources and technical assistance to other organizations. The Minnesota Literacy Council is able to reach nearly 70,000 children and adults each year thanks in great part to the more than 2,000 volunteers and 100 national service members we train annually. It opposes this drastic fee increase and elimination of fee waivers for those in need because the policy will prevent many of its vulnerable, low-income students and clients from becoming U.S. citizens and becoming full participants in our society and democracy.

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Jewish Community Relations Council of Greater Washington (JCRC)

The Jewish Community Relations Council of Greater Washington represents over 100 constituent Jewish agencies, organizations and synagogues in the District of Columbia, Northern Virginia and suburban Maryland. The JCRC serves as the chief advocate for the DC area Jewish community to elected officials, government agencies, other faith and ethnic communities, and the media. Among its other work, the JCRC has a long history of advocacy and community engagement on public policy issues directly impacting local refugee and immigrant populations. As an outgrowth of American Jews' history as an immigrant population fleeing devastating persecution and poverty, the Jewish community has consistently championed the rights of

refugees and immigrants to be treated with fairness and compassion as they seek safety and security in the United States. Over the last two years, JCRC has partnered with organizations such as HIAS, CASA, and VACALAO to: (1) support legislation that protects immigrant and refugee populations and the agencies that serve them; (2) mobilize Jewish lawyers to provide pro bono assistance to immigrants pursuing naturalization; and (3) sponsor programming highlighting its community's moral commitment to the core American value of being a welcoming society for all.

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Tzedek DC

Tzedek DC provides pro bono legal assistance and advocacy services to safeguard the legal rights of low-income D.C. residents dealing with often unjust, abusive, and illegal debt collection practices, as well as other consumer protection problems like credit reporting issues, identity theft, and predatory lending. Its interest in the proposed rule stems from its concern that the proposed rule would make applications for permanent residence status, citizenship and work authorizations unaffordable, unfairly adding to the debt burden of its clients.

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The Jewish Council for Public Affairs

The Jewish Council for Public Affairs is the national hub for more than 125 local Jewish Community Relations Councils, and 16 national Jewish agencies. Its mandate is to advance the interests of the Jewish people to, among other things, promote a just American society. In this

regard, and relevant to the proposed rule, it has adopted policies (1) to combat stereotypes about immigrants, (2) to maintain support for fair and generous legal immigration policies as an expression of our country's core values of refugee protection, family reunification and economic opportunity and (3) to work to ensure that those entering the country legally with the intention to settle here permanently are afforded a reasonable, effective, and judicious process, and that a rational and timely mechanism be developed to establish immigrants' status.

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Minnesota Budget Project

As part of our goal to create a more inclusive and equitable Minnesota by addressing structural racism and economic disparities, Minnesota Budget Project works for inclusive policies that allow immigrants and refugees to thrive, and address barriers that keep them from fully contributing to our communities and the economy. The Minnesota Budget Project works to support the half a million immigrants and refugees in the state of Minnesota. It is concerned that this proposal would continue the administration's work to increasingly make the US immigration system one only those who already have money and resources are welcome to use.

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Community Health Service Inc. (CHSI)

CHSI provides primary health care (medical, dental, behavioral health) services to communities across 40+ counties in North Dakota and Minnesota. Clinic locations are in Grafton, ND; Moorhead, Willmar, and Rochester, MN. All services are provided on a sliding fee

scale. Additionally, CHSI provides supportive and advocacy services for survivors of domestic violence and/or sexual assault at its Moorhead clinic and a satellite location in Crookston, MN.

CHSI's population is primarily migrant and seasonal agricultural workers. Over 95% of patients fall below 200% FPL, approximately 75% are Hispanic, and about 2/3 require services in a language other than English (usually Spanish). CHSI has, over the last few years, expanded services to reach the community at large and is seeing an increasing diversity in language needs. A considerable number of clients seeking advocacy services also face issues related to their immigration status. The Immigrant Law Center of MN and CHSI have entered into a medical-legal partnership to offer free services to patients who need assistance with items such as U-visas, citizenship applications, and others.

CHSI's population is overwhelmingly low-income, with nearly 95% having household incomes below 200% FPL. Our medical providers increasingly report seeing patients who present to the clinic with stress, anxiety, and depression. Not only can this be related to the immigration-related concerns of themselves, their friends, family members, or neighbors, but a lack of financial resources also is a major factor in a patient's health status and well-being. Incurring additional hardship unnecessarily puts our patients and community members at an additional disadvantage. Clients fleeing international violence, human trafficking, domestic violence, or any of the myriad issues our advocates handle on a daily basis are often leaving those situations with few, if any, resources at their immediate disposal. The increased financial burden only magnifies this instability.

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International Institute of Minnesota

For 100 years, the International Institute of Minnesota (the Institute) has been a leader in serving the changing needs of New Americans. The Institute serves approximately 4,000 individuals annually, most of whom live in Ramsey or Hennepin counties. Institute programs are divided into four primary areas: Refugee Services (including Anti-Human Trafficking and Unaccompanied Children Services), Education, Career Pathways, and Immigration Services. For more than two decades, the Institute has been a leader in workforce development and career advancement for low-income New Americans in the Twin Cities.

In fiscal year 2019 its immigration services program assisted over 2,000 immigrants and refugees to apply for various immigration benefits such as permanent residency and citizenship. Its clients are low-income New Americans, the majority having arrived as refugees and immigrants from East African and Southeast Asian countries such as Somalia, Ethiopia, Myanmar (Burma) and Bhutan. Over 70% of its clients are at or below 150% of the Department of Health and Human Services poverty guidelines. Clients have often experienced limited or disrupted education due to time spent in refugee camps. In addition, they are often fearful of government and legal systems and overwhelmed by the bureaucratic requirements that immigration procedures demand.

The increase in immigration fees would be an additional burden that the Institute's clients would have to bear over and above the already complex bureaucratic requirements that are demanded of them throughout the immigration application process. Furthermore the potential elimination of fee waivers would signify fewer and fewer applicants being able obtain the immigration benefit that they are eligible for and result in a loss of economic opportunities not only for these families but also for the communities that they live, work and contribute to financially.

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Hmong Americans for Justice (HAJ)

HAJ serves Hmong and other Southeast Asian Americans (SEA) in Minnesota. Southeast Asian Americans are Hmong, Lao, Karen, Karenni, Thai, Cambodian, and Vietnamese. HAJ advocates and organizes SEA communities to stand up against racism; it provides leadership development and civic engagement.

HAJ is concerned about the increase in fees because the SEA community is still very much low-income working class. When compared to the national data of Asians, the SEA median income is only \$30,000, whereas other Asians have a median income of \$60,000 and higher. This explains that SEA will be impacted by the increase of the fees. Also, the SEA are much recent immigrants than compare to other Asians.

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Immigrant Legal Center

Immigrant Legal Center (ILC) is a non-profit organization that welcomes immigrants into our communities by providing free high-quality legal services, education, and advocacy. ILC, formerly Justice For Our Neighbors-Nebraska, is an affiliate of the National Justice For Our Neighbors network and has operated in Nebraska and Southwest Iowa since 1999. ILC is committed to advocating for low-income immigrants.

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COMMENTS

I. Because Kenneth T. Cuccinelli Is Not Lawfully Serving as USCIS Director Adoption of DHS's Proposed Rule Would Be Unlawful.

DHS's proposed fee increases and changes to its fee waiver provisions are "not in accordance with law," 5 U.S.C. § 706(2)(A), because the agency action was taken while purported Acting Director of USCIS, Kenneth T. Cuccinelli, was unlawfully acting in such position in violation of the Appointments Clause, U.S. Const., art. II, § 2, cl. 2, and the Federal Vacancies Reform Act ("FVRA"), 5 U.S.C. §§ 3345(a), 3347(a). Accordingly, the proposed fee increases have no force or effect. *Id.* § 3348(d).

The Appointments Clause requires Senate confirmation of any individual who exercises "significant authority pursuant to the laws of the United States," *Buckley v. Valeo*, 424 U.S. 1, 126 (1976), unless federal law provides otherwise. Pursuant to the Appointments Clause, as well as a separate federal statute, 6 U.S.C. § 113(a)(1)(E), the President's nominee for the position of the Director of USCIS is subject to Senate confirmation. The FVRA creates limited exceptions to the requirements of the Appointments Clause. These include provisions specifying who may temporarily fill a federal office when that office subject to the Appointments Clause.

Under the FVRA, if an officer must be appointed by the President with Senate confirmation and that officer dies, resigns, or otherwise cannot perform the duties of the office, then the first assistant to such officer shall assume the responsibilities of the office. 5 U.S.C. § 3345(a)(1). The President may direct someone else to the position under only two circumstances: (1) if such person is serving in an office to which an appointment must be made by the President with Senate

confirmation; or (2) if such person is an officer or employee of such agency, provided that such officer or employee must have worked for the agency in specified positions for not less than 90 days during the 365-day period prior to the vacancy. *Id.* § 3345(a)(2)-(3). Interpreted together, the applicable FVRA provisions ensure that an acting officer of a federal agency have sufficient experience with such agency or have otherwise been approved by the Senate. Significantly, any agency action taken not in accordance with these FVRA provisions “shall have no force or effect.” *Id.* § 3348(d).

Prior to June 1, 2019, L. Francis Cissna was the Director of UCSCIS and Mark Koumans was the Deputy Director of USCIS. Cissna resigned effective June 1, 2019, and Koumans became the acting director pursuant to the USCIS order of succession, which is also consistent with the requirements of the FVRA.

On June 10, 2019, Kevin McAleenan, Acting Secretary of the Department of Homeland Security, appointed Cuccinelli to a newly-created position of “Principal Deputy Director” of USCIS. On the same day, McAleenan revised the USCIS order of succession and designated the new Principal Deputy Director of USCIS as the first assistant to the Director of USCIS. The purported effective result of these actions was that Cuccinelli became the Acting Director of USCIS in place of Koumans, who remains Deputy USCIS Director. To date, the President has not nominated a new Director of USCIS.

Cuccinelli’s appointment, however, is void because it does not meet the requirements of either (1) the Appointments Clause (because Cuccinelli has not been confirmed by the Senate), or (2) the FVRA (because he cannot serve as Acting Director of USCIS by operation of the FVRA default rule or either exception to the FVRA). Cuccinelli cannot succeed Cissna by operation of the default rule because he was not the first assistant to Cissna at the time of Cissna’s resignation;

Koumans held such position. Further, neither exception to the default rule applies: (1) Cuccinelli has not served in an office for which he was appointed by the President and confirmed by the Senate; and (2) Cuccinelli did not work for USCIS for 90 days in the 365-day period prior to the vacancy.

That Cuccinelli was acting unlawfully is the only logical conclusion to be drawn from Section 3345(a)(1). Cuccinelli's installation as the Acting Director of USCIS is not rendered lawful by McAleenan's manipulation of the USCIS organization chart. The FVRA's default rule applies only to the first assistant *at the time of resignation*. *Id.* § 3345(a)(1). Therefore, creating the position of "Principal Deputy Director" of USCIS and designating the Principal Deputy Director of USCIS as the first assistant to the Director of USCIS is insufficient to authorize Cuccinelli to function as the Acting Director of USCIS. If the FVRA were read otherwise to permit actions like those taken by McAleenan to appoint an individual to a first assistant position *after* a resignation, there would be no limitations on who could succeed a departing officer because anyone could be installed into the first assistant position. This interpretation of the default rule is not and could not be the intent of Congress; otherwise, Sections 3345(a)(2) and (a)(3) would be unnecessary and meaningless.

II. DHS's Proposed First-Ever Fee for Asylum Seekers is Arbitrary and Unwarranted.

In addition to the arbitrary increase in the majority of the fees discussed *infra*, DHS is implementing the first-ever fee for asylum applicants. The United States was one of the many countries that signed on to the 1951 U.N. Convention Relating to the Status of Refugees, an international treaty to address the imposition of fees on asylum seekers. 84 FR 62318. The treaty addressed the need for fees for asylum applicants to be lower than fees for other applicants in similar situations. Out of the 147 signees of the 1951 U.N. Convention Relating to the Status of

Refugees, only three other countries charge fees for asylum. 84 FR 62319. Australia charges an equivalent of \$25 U.S. dollars for asylum applications, a fee that is waived for detained applicants. Fiji charges the equivalent of \$221 U.S. dollars, but fee waivers are allowed. Finally, Iran charges the equivalent of \$293, but this fee is for a family of five and exceptions are allowed. *Id.*

USCIS is proposing a \$50 fee for all I-589 applicants, with only one exception: Unaccompanied alien child applicants who are in removal proceedings. 84 FR 62319. “As discussed in section V.C. of this preamble on fee waivers, DHS proposes that the \$50 Form I-589, Application for Asylum and Withholding of Removal, fee will not be waivable.” 84 FR 62319. In implementing this fee, USCIS relies heavily on the argument that it is not *prohibited* from assessing the fee under the Immigration and Nationality Act (8 U.S.C. § 1356(m)) and the 1951 U.N. Convention Relating to the Status of Refugees, and the 1967 U.N. Protocol Relating to the Status of Refugees. 84 FR 62318. “The statutory authorization for fees allows, but does not require, imposition of a fee equal to the full cost of the services provided.” Thus, USCIS reasons, it “retains authority to impose asylum fees that are less than the estimated cost of adjudicating the applications.” 84 FR 62318.

USCIS’s argument that the 1951 Convention and the Immigration Act do not bar the imposition of filing fees on asylees and refugees is the *only* reason DHS provides in support of its proposal other than its assertion that the new fee “would generate an estimated \$8.15 million in annual revenue.” 84 FR 62319. USCIS does not explain the basis of this figure. But if it is simply a matter of multiplying the number of asylum and refugee applications by \$50, the figure almost certainly would overstate the income these fees will generate. It ignores the fact that many of the applicants, given their desperate circumstances, will not be able to afford the filing fees. Nor does USCIS explain how its proposal to preclude fee waivers for asylees comports with its conceded

obligation under the 1951 Convention to ensure that fees for asylum applicants are lower than fees for other applicants in similar situations. For example, it exempts victims of human trafficking from “any fees associated with filing an application for relief through final adjudication of the adjustment of status.” 84 FR at 62298. (emphasis added). USCIS similarly preserves the fee exemption for Form I–765, Application for Employment Authorization, for individuals who were granted asylum (asylees) or who were admitted as refugees. *Id.*

More importantly, in placing the entire weight of its rationale on the limited money these new fees would generate, USCIS arbitrarily ignores both the reliance interests of asylees and refugees on the existing fee structure and their often dire plight. By definition, the applicants for asylum are fleeing persecution. Imposing a fee on asylum applications could result in the deportation and death of those seeking protection simply because they have no money to pay for their applications to be processed.

USCIS’s failure to take these factors into account is the height of arbitrary agency conduct. An agency may not “undermine democratic transparency and upset the settled expectations of [p]arties” without providing an explanation for the change. *Exelon Generation Co., LLC v. Local 15, Int’l Bhd. of Elec. Workers, AFL-CIO*, 676 F.3d 566, 578 (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). DHS has not made a showing that it considered potential reliance on the absence of a fee in the current rule. Asylum is designed to be relief granted to those who are fleeing violence and turmoil to seek refuge at our borders.⁴ The agency’s proposed policy arbitrarily grants this relief to only those who can afford it.

III. USCIS’s Proposal to Dramatically Hike Fees and to Eliminate Fee Waivers Amounts to An Agency-Established Change in U.S. Immigration Policy that Exceeds Its Delegated Authority.

⁴ See Zolan Kanno-Youngs and Caitlin Dickerson, *Asylum Seekers Face New Restraints Under Latest Trump Orders* (Apr. 29, 2019) <https://www.nytimes.com/2019/04/29/us/politics/trump-asylum.html>.

An agency's authority is limited to that delegated to it by Congress, and an agency cannot engage in policy-making in arenas outside that delegated authority. Instead, the authority to make major policy decisions, if not delegated to the agency, remains with Congress. *See, e.g., Chamber of Comm. of U.S. v. N.L.R.B.*, 856 F. Supp. 2d 778, 791–92 (D.S.C. 2012); *see also ATF v. FLRA*, 464 U.S. 89, 97 (1983) (“[W]hile reviewing courts should uphold reasonable and defensible constructions of an agency's enabling Act, they must not rubber-stamp administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.”) (citations and internal quotation marks omitted). Nor can an agency ask for deference in a given area if the agency is seeking to make major policy decisions that Congress did not entrust it to make. *See Nat'l Fed'n. of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000). The proposed rule fails these tests.

Congress has delegated to DHS the authority to develop fees for administration of various immigrant benefit programs. It may adjust fees to cover increases in program costs. It may, within reason, define hardship criteria and adjust those criteria over time. 8 U.S.C. 1356(m). But Congress has not entrusted DHS to develop policies that reflect a preference for one class of immigrant over another based on personal wealth. Yet that is exactly what DHS seeks to accomplish by the drastic increase in application fees and the elimination of fee waivers proposed in the current rule. Specifically, the effect of these unreasonable rule changes will be to (1) deter immigrants from seeking asylum, employment authorization, permanent residence and citizenship status to which Congress has determined they are entitled; (2) favor wealthy immigrants over less wealthy immigrants; and (3) reduce family-based migration. In doing so, the proposed rule, if implemented,

will frustrate decades of Congressional policy that favors immigrant access to lawful immigration and promotes family-based immigration.

A. The Proposed Rule Unlawfully Adopts *De Facto* Wealth Tests for Citizenship and Similar Immigrant Benefits, Contrary to Congressional Intent.

It is clear that the effect of the proposed rule will be to deter non-citizens from seeking lawful immigration statuses that Congress has determined they are entitled to receive. Indeed, a rule that increases immigration application fees from the hundreds to the thousands will, by definition, *prevent* poorer applicants from seeking lawful permanent residence, work authorization, and citizenship. For example, the fee for one of the most common applications, naturalization, will increase from \$640 to \$1,170. This is an increase of 82.81%. Roughly 40% of the applicants for naturalization in 2017 applied for fee waivers based on their ability to pay.⁵ The *certain* effect of this rule will be to establish wealth-based tests for citizenship, employment authorization, and permanent residence status. This *de facto* policy change, as noted above, is a decision only Congress can make.

B. The Effect of the Proposed Rule Will be to Significantly Deter Family-Based Immigration, Contrary to Congressional Intent.

Congress has long-endorsed family-based immigration. Indeed, “[f]amily reunification has been a key principle underlying U.S. immigration policy.”⁶ Long a part of United States immigration policy, the practice was codified with the passage of the INA in 1952.⁷ Family-based migration currently makes up two-thirds of all legal permanent immigration.⁸ Of the 1,182,505

⁵ See also Tovin Lapan, *New Rule Limiting U.S. Citizenship Application Fee Waivers Challenged in Federal Lawsuit* (November 8, 2019), <https://fortune.com/2019/11/08/us-citizenship-application-fee-uscis-waiver-lawsuit/>.

⁶ William A. Kanel, *U.S. Family-Based Immigration Policy*, Congressional Res. Serv. (Feb. 9, 2018), available at <https://fas.org/sgp/crs/homsec/R43145.pdf>.

⁷ *Id.*

⁸ *Id.*

foreign nationals admitted to the United States in FY2016 as lawful permanent residents, 70% were admitted as immediate relatives of U.S. citizens.⁹ Nearly half of new arrivals in FY2017 were immediate relatives of U.S. citizens, and another 38% were other family-sponsored immigrants.¹⁰ Nearly half of all non-citizens seeking an adjustment of status were family-based immigrants.¹¹ In contrast, 12 percent of all new lawful permanent residents in FY2017 were employment-based immigrants.¹²

The effect of proposed rule will be to promote employment-based immigration at the expense of family-based immigration. This is because immigrants who arrive in the United States on employment-based visas are typically well-educated, can speak English proficiently, have sufficient assets, and have solid employment prospects.¹³ Although the proposed rule does not by its express terms favor highly skilled individuals over other immigrants, this is its plain effect. And it violates a long-settled principle: “That which cannot be accomplished directly cannot be accomplished indirectly.” *Home Ins. Co. v. New York*, 134 US 594, 594 (1890).

The Trump Administration’s disdain for family-based immigration is no secret. The Administration failed to garner the necessary support for the RAISE Act,¹⁴ which would have significantly reduced family-based immigration by limiting visa sponsorship to spouses and minor children. The legislation also would have also created a points system that, like the fee increases proposed by DHS, would have favored immigrants of a certain wealth class, English proficiency,

⁹ *Id.*

¹⁰ See Jeanne Batalova et al., *Chilling Effects: The Expected Public Charge Rule and Its Impact on Legal Immigrant Families’ Public Benefits Use* at 13, Migration Policy Institute (June 2018), available at <https://www.migrationpolicy.org/research/chilling-effects-expected-public-charge-rule-impact-legal-immigrant-families>.

¹¹ *Id.*

¹² *Id.* at 14.

¹³ *Id.* at 30.

¹⁴ See Reforming American Immigration for a Strong Economy Act, S. 354, 115th Congres. (1st Sess. 2017).

age, education, and other characteristics.¹⁵ The administration is now turning to DHS to accomplish through agency action what it could not in Congress. When taken as a whole with the recent Fee Waiver Restriction rule¹⁶ and DHS's Public Charge rule, the effect of the proposed rule will be to favor wealthy or higher-skilled immigrants over families, and in turn reverse over a half century of bedrock immigration policy in the United States. Congress did not delegate DHS the authority to implement such sweeping reform of our immigration laws.

IV. USCIS's Elimination of Fee Waivers for Citizenship Applications Is an Unexplained Departure from the Fee Waiver Provisions It Just Adopted.

Earlier this month DHS placed into effect new rules governing the documentation required from applicants seeking waiver of immigration application fees, including those for naturalization. Previously, anyone who received a means-tested government benefit, such as Supplemental Nutrition Assistance Program or Medicaid, automatically qualified for a waiver of the combined \$725 filing and biometrics fee for naturalization.¹⁷ Others could demonstrate an inability to pay by producing copies of tax returns showing a low income. Under these procedures, roughly 40 percent of citizenship applicants were found eligible for waiver of the application fee. Now, participation in a means-tested program will no longer be sufficient to obtain a fee waiver. In addition, applicants for a fee waiver could previously submit a tax return that was already in their

¹⁵ See Julia Gelatt, *The RAISE Act: Dramatic Change to Family Immigration, Less So for the Employment-Based System* (Aug. 2017), <https://www.migrationpolicy.org/news/raise-act-dramatic-change-family-immigration-less-employment-based-system>.

¹⁶ See USCIS Policy Manual, Volume 1: General Policies and Procedures as of December 2, 2019, available at: <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-1067/0-0-0-1582.html#0-0-0-288>. See also Tovin Lapan, *New Rule Limiting U.S. Citizenship Application Fee Waivers Challenged in Federal Lawsuit* (November 8, 2019), <https://fortune.com/2019/11/08/us-citizenship-application-fee-uscis-waiver-lawsuit/>.

¹⁷ See U.S. Citizenship and Immigration Services, Executive Summary, USCIS Stakeholder Engagement: Fee Waiver Form and Final Fee 2019 Rule (Jan. 5, 2011) ("2011 Policy Memorandum"), available at <https://bit.ly/2y6HRrO>. (hereinafter 2019 Final Rule).

possession as proof of income but are now required to obtain a tax transcript from the Internal Revenue Service for that purpose.¹⁸

The stated purpose and the factual predicate for these changes is to “curtail[]” the growing use of fee waivers in order “to reduce annual forgone revenue from fee waivers.” 84 Fed. Reg. 26137, 26139. As DHS has conceded, moreover, the effect of this rule change will be to reduce the number of waivers granted. *Id.* This is unsurprising because the combined effect of (1) the elimination of the *automatic* waiver for those reliant on certain benefits and (2) the requirement of obtaining a tax transcript will make the process of applying for a fee waiver substantially harder. Indeed, as the plaintiffs in the *City of Seattle* case have argued, the changes that went into effect on December 2, 2019 (and now suspended) will make it virtually impossible for immigrants applying for citizenship to obtain waivers of the application fee.

The ink on this new “Restrictive Fee Waiver” rule has not even dried. Indeed, the rule *had not even gone into effect* before USCIS proposed its brand new “Fee Increase and Fee Waiver Elimination” rule declaring that no fee waivers based on ability to pay would even be entertained. This is the height of arbitrariness.

In proposing the Fee Increase and Fee Waiver Elimination rule, USCIS cited no change in the facts that prompted the tightening of longstanding and uncontroversial eligibility requirements announced in the new Restrictive Fee Waiver rule. To the contrary, USCIS claims that it “is *not* basing the proposed changes to USCIS fee waiver policies upon factual findings that contradict those underlying the prior policy.” *Id.* at 62300. Nor has it offered any explanation why, after determining just a few months ago that those facts required a tightening of the waiver requirements,

¹⁸ See *City of Seattle, et al. v. Dept. of Homeland Security, et al.*, No. 3:19-cv-07151-MMC, Plaintiffs’ Motion For Preliminary Injunction And Memorandum Of Points And Authorities (filed Nov. 6, 2019 N.D. Ca.).(hereinafter Seattle Complaint)

a tightening was no longer sufficient. Even where the agency has been granted broad discretion to implement a statutory scheme, it must explain the reasons for its change in policy and must take into account how a significant change might affect the public reliant on its longstanding policy. *FCC v. Fox Television Stations, Inc.*, 556, U.S. 502, 515 (2009). As important, where its prior rule rests on factual predicates, the agency does not write on a “clean slate,” but must demonstrate that the underlying facts have changed. *Id.* at 537 (Kennedy, J., concurring). This USCIS has not even tried to do in its explanation of the proposed rule. And for good reason. It is not even remotely possible that the facts in existence when it issued the Fee Waiver Restriction rule in October changed between then and the release of the proposed Fee Increase and Fee Waiver Elimination rule a month later. Nor *could* it know, before the Restrictive Fee Waiver rule even went into effect, that the rule would not accomplish its stated purpose.

V. DHS’s Proposed Fee Hikes Have No Factual Basis.

A. DHS Has Not Explained Why Applicants For Citizenship, Green Cards, And Work Permits Should Be Paying More For Less.

As part of its rationale for the sharp fee increases it proposes, DHS maintains that it needs more staffing to handle its workload. 84 FR 62286. But DHS fails to acknowledge that the rate of new applications filed with USCIS has *fallen* in recent years. Nor does it explain why, if it needs more personnel to process applications, it has sent literally hundreds of employees to perform work for Immigration and Customs Enforcement (“ICE”) and U.S. Customs and Border Protection (“CBP”) in FY 2019.

B. The Math Behind the Fee Increases Is Faulty. It Ignores the Lower Processing Costs DHS will Incur As a Result of the Decrease in Immigrant Benefits Applications Likely to Result from Other Changes in the Administration’s Immigration Policies

In proposing the various fee increases for immigrant benefits services, DHS arbitrarily ignores the impact of other administration policies that would tend to mitigate the increase in the

expense of running the various USCIS benefits programs. More specifically, the proposed rule fails to take account of the following changes in federal immigration policy: the President's decision to cut the refugee quota in half, DHS's Public Charge rule, the State Department's changes to its definition of "public charge," the changes in information requirements for citizenship applications that DHS put into effect on December 2, 2019 and the effect of eliminating waivers of fees based on ability to pay.

Consider first, the President's recent decision to cut the refugee quota in half.¹⁹ That number, in turn, is a reduction in the refugee quota that the President already cut significantly earlier in his Presidency.²⁰ And by at least one news account, the Administration had planned to cut the refugee quota to *zero* by next year.²¹ By definition, if there are fewer (and perhaps no) refugees entering the country there will be fewer applications for work permits, green cards and citizenship for DHS to process. That should reduce its costs, but the proposed rule fails to take this factor into account.

Second, DHS's Public Charge rule, by design, will reduce the number of persons who may qualify for green cards. While the lawfulness of the rule has been challenged in the courts and DHS has been enjoined from enforcing the new rule, it is nonetheless reasonable to assume that DHS believes the rule is lawful. Yet, although the agency itself expects the rule to cut down on the number of persons applying for permanent residence status, in proposing an increase in immigrant benefits fees DHS arbitrarily fails to factor in the reduction in the number of persons

¹⁹ "Trump Slashes Refugee Cap to 18,000, Curtailing U.S. Role as Haven," Michael D. Shear and Zolan Kanno-Youngs, New York Times (September 26, 2019), available at <https://www.nytimes.com/2019/09/26/us/politics/trump-refugees.html>.

²⁰ *Id.* The refugee quota was 110,000 when President Trump took office.

²¹ "Trump officials pressing to slash refugee admissions to zero next year," Ted Henson, Politico (July 18, 2019) available at <https://www.politico.com/story/2019/07/18/trump-officials-refugee-zero-1603503>.

who will be applying for permanent residence status and the effect this will have on the costs of administering the benefits programs.²²

Third, the State Department's redefinition of "public charge" is expected to have a similar effect. That is, an expected result of its new policy is that fewer persons will qualify for entry into the country. As with the DHS Public Charge rule, the effect will be to reduce the number of persons applying for various immigrant benefits and to reduce the costs of administering the various benefits programs since there will be fewer benefits applications to process. The lawfulness of the State Department's rule is also being challenged in court. But, as with DHS's own Public Charge rule, it is reasonable to assume that DHS believes the State Department's actions are lawful.

Fourth, on December 2, 2019, USCIS put into effect a new rule governing the information applicants for waiver of the naturalization application fee must provide. The effect of this rule, as noted earlier, is to make it harder for would-be applicants to produce the necessary documentation for these fee waiver applications. This almost certainly will reduce the number of naturalization applications that will be filed. Again, while the lawfulness of this new rule is also being challenged in court, commenters assume that USCIS believes its actions to have been lawful. But in proposing the new fee increases, USCIS arbitrarily ignores that its December 2 rule will reduce the number of citizenship applications it will have to process and the associated costs it would have incurred at the higher rate of applications that would have occurred in the absence of its December 2 rule.

Finally, in proposing the fee increase provisions of the proposed Fee Increase and Fee Waiver Elimination rule, USCIS arbitrarily ignores the savings it will accrue by eliminating fee

²² While refugees may be eligible for fee waivers for naturalization applications, USCIS will still have to process these applications. With fewer refugees there will be fewer applications to process.

waivers based on an applicant's ability to pay. USCIS claims that by performing fraud detection services, ICE is supporting the USCIS benefits program. And it relies on this rationale to justify allocating over \$100 million dollars in fee collections to ICE – a decision that raises the fees that must be collected from applicants. As we note later in these comments, that aspect of the USCIS rule arbitrarily ignores that ICE already has historically received an appropriation from Congress to perform its fraud detection activities. As with other Administration immigration policy changes, we assume that USCIS believes its allocation of a significant share of the revenues it collects for USCIS services to ICE is lawful. But USCIS has arbitrarily ignored the fact that, if it no longer grants waivers of fees based on ability-to-pay, by definition there will be no fee waiver applications for ICE to investigate. The elimination of fee waivers, moreover, is likely to cause tens of thousands of low- and moderate-income immigrant families to forego applying for permanent residence or citizenship. Again, unfiled applications for immigration benefits and citizenship mean less work investigating fraud for ICE. Thus, ICE's costs of fraud detection should decline, but DHS has not taken that factor into account in setting the new, higher fees.

C. The Proposed Rule Would Arbitrarily Divert Funds from USCIS to Fund ICE Enforcement Activities, Thereby Artificially Inflating USCIS Fees.

Where an administrative agency is acting within the scope of its existing authority it is permitted to change existing policy, provided that it acknowledges it is doing so, takes meaningful account of any reliance interests in the status quo that may have developed over time and offers a sound and logical reason for its change in position. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). And, where the original policy was predicated on particular facts, the agency “cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate.” *FCC v. Fox Television, supra*, 556 U.S. at 537 (Kennedy, J., concurring).

Among the reasons DHS cites for the fee increases is DHS's proposal to transfer \$112,287,417 of USCIS's funds to a separate component of DHS, Immigration and Customs Enforcement ("ICE"), to fund the President's FY 2019 and FY 2020 budget requests. 84 FR 62286-62288; 84 FR 67243. DHS proposes to recover, via increased USCIS fees, the full amount of the proposed transfer to ICE. *Id.*

The Immigration and National Act provides that "all adjudication fees . . . shall be deposited as offsetting receipts into a separate account entitled "Immigration Examinations Fee Account" ["IEFA"]." 8 U.S.C. § 1356(m). Further, all deposits into the IEFA shall remain available until used to pay expenses in providing "immigration adjudication and naturalization services." *Id.* § 1356(n).

This transfer of funds is problematic for several reasons. First, DHS provides no rationale for its new interpretation of section 1356(n) that ICE fraud investigations are related in any way to the costs of providing immigration and adjudication services such that use of IEFA funds is authorized. Second, for the reasons stated in section III. B. of these comments, even assuming it was permissible to transfer *any* of the USCIS fee revenues to ICE, DHS will likely not require the full amount of the funds proposed to be transferred to ICE for fraud investigation activities because, as a result of the significant reduction in fee waivers proposed, there will be less of a need for enforcement-related activities for fraud. Finally, ICE's fraud investigation and enforcement activities have been fully funded through congressional appropriation in prior years and, as a result, ICE does not need the IEFA funds for such purposes. Each of these reasons are explained below.

1. The Proposed Rule Fails to Explain Why USCIS's New Interpretation of 8 U.S.C. § 1356(n) Is Justified.

In the proposed rule, DHS states with respect to the transfer of funds from the IEFA to ICE:

DHS believes that ICE investigations of potential immigration fraud perpetrated by individuals and entities who have sought immigration benefits before USCIS and efforts to enforce applicable immigration law and regulations with regard to such individuals and entities constitute direct support of immigration adjudication and naturalization.

84 FR 62287. Thus, according to DHS, “the IEFA may fund ICE enforcement and support positions, as well as ancillary costs, to the extent that such positions and costs support immigration adjudication and naturalization services.” *Id.* But this “explanation” is entirely circular. DHS simply states that it has determined that ICE fraud investigation activities support immigration adjudication and naturalization without identifying any underlying change in facts. It purports to tie ICE activities to an increase in the number of hours “spent providing immigration adjudication and naturalization services.” 84 FR 67245. But it never shows that its ICE enforcement activities serve to reduce the number of hours processing naturalization-related services, e.g., applications for citizenship, green cards or work authorizations. Put another way, DHS offers no meaningful explanation for the newly-found nexus between ICE fraud investigation activities and the costs of performing immigration naturalization adjudication services. On the contrary, the proposed rule ignores that Congress has been fully funding ICE investigative services for many years. DHS’s new interpretation of 8 U.S.C. § 1356(m), which would transfer revenues generated from USCIS fees to ICE for activities Congress has consistently seen as distinct, is unreasonable and arbitrary.

2. Even Assuming Any Transfer of USCIS Fee Revenues to ICE Would Be Lawful, the Transfer Amount is Inflated Because DHS Ignores that Elimination of Fee Waivers Means ICE Will Need Less Money for Fraud Investigation Activities.

Even assuming DHS has the authority to transfer fees generated by USCIS benefits services to ICE, the proposed rule is nonetheless arbitrary. Under the rule DHS initially proposed, it would have transferred \$207.6 million of the IEFA funds to ICE is based on the President’s FY 2019 and FY 2020 budget requests, notwithstanding its admission that such amount may be more funding

to ICE “than is needed to fund activities that are reimbursable through the IEFA.” 84 FR 62288. Compounding the illogic of its proposal, DHS further stated that to the extent the cost estimates are lower than \$207.6 million, USCIS would adjust the fees downward accordingly. *Id.* Even assuming DHS does have the authority to use IEFA funds for ICE fraud investigation activities, this approach – setting fees to cover specific costs and then later determining the amount of such costs – defies logic, is arbitrary, and not based in fact. As originally proposed, DHS failed to provide any estimate of the actual amounts of DHS costs that are reimbursable by IEFA funds or to explain the methodology of how it will determine the amount of DHS costs that are reimbursable, and, as noted above, why such DHS costs are properly reimbursable under Section 1356(n). A sound and logical rationale would require, at a minimum, a determination of the specific, identifiable DHS fraud investigation activities that are reimbursable under Section 1356(n) and the estimated costs based on expected costs associated with such activities given recent changes in agency immigration policy. The proposed rule provides neither.

DHS’s decision to cut the transfer amount in half was no doubt prompted by its recognition of the logical infirmities in its original proposal. But the agency’s stated justification for the reduced transfer is equally flawed.

DHS states in its revised proposed rule that the cost estimates for fraud investigation activities are based on an estimated 5.2 percent growth rate for FY 2020 and a 1.9 percent constant rate to FY 2021, which is based on “recent trends in the hours spent providing immigration adjudication and naturalization services.” 84 FR 67245. If, however, current ICE enforcement activities include fraud investigation and enforcement in connection with fee waivers, the significant reduction in availability of fee waivers in the proposed rule should be logically expected to result in a similarly significant reduction in related ICE enforcement activities. Put another way,

there cannot be fraudulent requests for fee waivers based on inability to pay if such waivers are not even available.

Compounding the error in the agency's assumptions is that the elimination of fee waivers and the increase in fees for USCIS services means, as we have noted earlier, that there will be fewer applications for USCIS services – fewer naturalization applications, fewer applications for permanent residence status, and fewer work authorizations. This too will reduce ICE's fraud investigative burden. Accordingly, projecting costs based on past trends yields a completely irrelevant cost estimate.

Finally, the agency's reliance on historical data, results in a double whammy for applicants. Those who have to pay the fees will see the fees go up (because some of revenues are going to ICE) and those who can't afford the fees will be denied waivers altogether. So not only will the latter group be unable to get hardship waivers, the fees they will have to pay will be higher because ICE is getting revenues to investigate fraudulent fee waiver requests that could no longer occur under the proposed rule. And, because those fees will be higher they will put USCIS benefits applications out of the reach of even more immigrants.

3. DHS Has Not Provided an Explanation Why the IEFA Funds – as Opposed to Congressional Appropriation Consistent with ICE Budgets from Prior Years – Are Necessary to Fund Fraud Investigation and Enforcement Activities.

The fee-based receipts USCIS receives from citizen and green card applicants are the primary source of USCIS's funding; in contrast, ICE's budget is provided primarily through congressional appropriation. There is simply no justification for transferring the IEFA funds – and as a result increasing application fees – to ICE to pay for costs that have another source of funding.

With respect to USCIS's costs, the proposed rule notes that the IEFA comprised "approximately 95 percent of total funding for USCIS in FY2018." 84 FR 62284. USCIS's website further provides:

USCIS is funded primarily by immigration and naturalization benefit fees charged to applicants and petitioners. Fees collected from individuals or organizations filing immigration benefit requests are deposited into the Immigration Examinations Fee Account (IEFA). Congress created the IEFA in 1988, establishing the authority to recover the full cost of immigration benefit processing. This account represents approximately 95 percent of USCIS' fiscal year (FY) 2016 total budget authority.²³

In contrast, DHS's ICE FY 2020 budget provided that approximately 94% of ICE funding was from congressional appropriation and the remainder is funded through fees. Department of Homeland Security, U.S. Immigration and Customs Enforcement, Budget Overview, Fiscal Year 2020 Congressional Justification, ICE-11 ("ICE FY 2020 Budget"). The ICE FY 2020 Budget accounts for the proposed transfer of \$206.7 million of IEFA funds,²⁴ citing the President's FY 2019 and FY 2020 budgets. *Id.* at ICE-IFEA-1 *et seq.* In years where DHS's ICE budget did not include any transfer of IEFA funds, the congressional appropriation levels were consistent with the FY 2020 budget that does account for the IEFA funds transfer. *See, e.g.*, Department of Homeland Security, U.S. Immigration and Customs Enforcement, Budget Overview, Fiscal Year 2018 Congressional Justification, ICE-18 (reflecting that congressional appropriation accounted for approximately 95% of ICE funding). DHS's ICE FY 2020 budget provides further that the \$112,287,417 of IEFA funds proposed to be transferred from USCIS to ICE will support funding for ICE's Homeland Security Investigation ("HSI") program. ICE FY 2020 Budget at ICE-IEFA-3. HSI conducts criminal investigations to protect the United States against terrorist and criminal organizations through criminal and civil enforcement of federal laws, including immigration laws.

²³ USCIS, *Budget, Planning & Performance*, available at <https://www.uscis.gov/about-us/budget-planning-performance>

²⁴ The revised proposed rule, as noted *supra*, cuts the transfer payment in half.

Id. at ICE-O&S-4. Among the immigration violations HSI investigates is immigration benefit fraud. *Id.* DHS has provided no explanation as to why these ICE activities require funding through the IEFA funds transfer rather than through congressional appropriation, as has been the funding source in prior years. It is both arbitrary and capricious – to say nothing of grossly unfair— to require green card and naturalization applicants to pay for ICE funding through increased application fees when there is an alternative source of funding available.

VI. DHS’s Reason for Eliminating Waivers – That They Are Inconsistent With the “Beneficiary Pays Principle” (84 FR 62299) – Is Not a Reasoned Basis for Virtually Eliminating Fee Waivers Based on Inability to Pay.

Where an administrative agency is acting within the scope of its existing authority it is permitted to change existing policy, provided that it acknowledges it is doing so, takes meaningful account of any reliance interests in the status quo that may have developed over time and offers a sound and logical reason for its change in position. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). And, where the original policy was predicated on particular facts, the agency must demonstrate that those predicate facts have changed. *Id.* at 537 (Kennedy, concurring). DHS’s proposal to eliminate all but a small class of statutorily-required fee waivers fails to meet these tests.

USCIS acknowledges that its proposed Fee Increase and Fee Waiver Elimination rule, if finalized, “would be a significant change from past fee waiver regulations and policies” (84 FR 62299). But it claims that elimination of ability-to-pay waivers is necessary to conform the fee system to its “beneficiary pays principal [sic]” (84 FR 62299). The problem with this conclusion is threefold. First, it is predicated on a plain fact that has not changed – that paying applicants subsidize fee waivers. Second, the proposed rule abandons without acknowledgment or explanation its existing policy of *balancing* the beneficiary pays and ability-to-pay principles.

Finally, even assuming *some* rebalancing would be appropriate, DHS has exaggerated the size of the ability-to-pay subsidy. These points are discussed below.

A. The Fact That Paying Applicants Subsidize Fee Waivers Is Not A Changed Circumstance.

USCIS’s reason for eliminating waivers – that they are inconsistent with the “beneficiary pays principal [sic]” (84 FR 62299) -- is not a changed circumstance. As the agency notes, “[u]nder the beneficiary-pays principle, the beneficiaries of a service pay for the cost of providing that service. See GAO–08–386SP at pp. 7–12.” *Id.* at 62298. USCIS argues that granting waivers of fees means that those who do not qualify for waivers pay more than the costs of providing them services. 84 FR 62300. But a fee structure with no ability-to-pay waivers is simply a pure beneficiary pays system – something USCIS admits is *not* its existing policy. See Section IV. B. *infra*. In short, the fact that fee-paying applicants subsidize those who are exempt is not a changed circumstance and cannot form the predicate for a change in agency policy.

B. The Proposed Rule Abandons Without Explanation The Balancing of Beneficiary Pays and Ability-to-Pay Principles.

USCIS “acknowledges that the proposed changes to the fee waiver policies would be a significant change from past fee waiver regulations and policies.” 84 FR 62300. Those policies, as USCIS also acknowledges, effectuate a balancing between two principles:

The U.S. Government Accountability Office (GAO), an independent, nonpartisan agency that works for Congress, describes equity of federal user fees as a balancing act between two principles:

- Beneficiary-pays; and
- Ability-to-pay.

Id. at 62298. As USCIS notes, “[u]nder the beneficiary-pays principle, the beneficiaries of a service pay for the cost of providing that service. See GAO–08–386SP at pp. 7–12.” *Id.* By contrast, “[under the ability-to-pay principle], those who are more capable of bearing the burden

of fees should pay more for the service than those with less ability to pay.” *Id.* USCIS claims that its proposed rule merely “*emphasizes* the beneficiary-pays principle.” *Id.* (emphasis added) But it does nothing of the sort. Rather it *abandons* the ability-to-pay principle altogether – and without explanation or acknowledgment.

By definition, *any* fee waiver would violate a strict beneficiary pays fee system. While an agency might legitimately alter the balance between a pure beneficiary pays fee structure and a pure ability-to-pay structure, DHS’s proposal retains *no* balancing. It would eliminate all but a tiny handful of exceptions to the fee structure. And even in such cases the proposed exemptions have *nothing* to do with ability to pay.

For example, USCIS proposes to continue to grant fee exemptions Related to International Organization Officers and to Agreement Between the U.S. Government and Other Nations. 84 FR 62302. But these exemptions on their face have nothing to do with ability to pay. Indeed, the beneficiaries may be quite well off.

Similarly, quoting the Trafficking Victims Protection Reauthorization Act (“TVPRA”), USCIS would continue exemptions for “any fees associated with filing an application for relief through final adjudication of the adjustment of status.” *Id.* USCIS interprets the provision to mean that “applicants *must* have the opportunity to request a fee waiver for any form associated with the main benefit application up to and including the adjustment of status application.” *Id.* (emphasis added) Again, it is clear on its face that the agency has not justified fee exemptions in these cases on the basis of ability to pay since these waivers are required by law and not part of any balancing of beneficiary-pays and ability-to-pay principles.

Finally, USCIS also preserves the fee exemption for Form I-765, Application for Employment Authorization, for individuals who were granted asylum (asylees) or who were

admitted as refugees. *Id.* As with the other fee exemptions cited above, USCIS permits this fee exemption, not based on the applicant's ability to pay, but on its conclusion that Article 17(1) of the 1951 Convention relating to the Status of Refugees requires it to offer such an exemption. *Id.* at 62302-62303.

But even assuming that fee waivers for asylees or refugees were based on ability to pay, the result would still be arbitrary because the proposed rule would preclude other similarly situated immigrants from even *applying* for fee exemptions. An agency's unexplained conflicting treatment of similar situations is "unworthy of deference." *Port of Seattle, Wash. v. FERC*, 499 F.3d 1016, 1034 (9th Cir. 2007). "A long line of precedent has established that an agency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently." *Transactive Corp. v. United States*, 91 F.3d 232, 237 (D. C. Cir. 1996). "[A]n agency's justifiably disparate treatment of two similarly-situated parties works a violation of the arbitrary and capricious standard." *Federal Election Comm'n v. Rose*, 806 F.2d 1081, 1089 (D. C. Cir. 1986).

The foregoing notwithstanding, USCIS maintains that its change in policy is reasonable because the agency itself had recognized that it might "revisit the USCIS fee waiver guidance on what constitutes *inability* to pay because of the increasing cost of providing fee waivers." *Id.* (emphasis added) But this is a *non-sequitur*. Redefining what constitutes ability-to-pay is completely different from a rule that says inability to pay is *irrelevant*. The fact that those with the ability-to-pay subsidize those who cannot describes the existing system. It would be different if USCIS was trying to strike an alternative balance by reducing the subsidy or providing relief from fees on a sliding scale based on ability-to-pay and providing record-based reasons for doing so, but eliminating ability-to-pay considerations altogether is arbitrary.

C. Even Assuming Some Rebalancing Would Be Appropriate, DHS has Exaggerated the Size of the Ability-to-Pay Subsidy.

As is evident on the face of the proposed rule, USCIS places the blame for a significant part of the fee increase it proposes on the size of the subsidy it claims that fee-paying applicants are providing to those granted fee exemptions: “Without changes to fee waiver policy,” it maintains, “fees would increase by a weighted average of 31 percent, which is 10 percent more than in the proposed fee schedule.” 84 FR 62298. But the proposed rule, even with the elimination of waivers, will still result in fee increases for green cards of 79% and fees increases for citizenship applications of 83%.²⁵ An increase of this magnitude will make applications unaffordable even for those previously ineligible for inability-to-pay waivers. As important, attributing roughly half of the increase in fees to fee waivers ignores that DHS is improperly shifting over \$100 million in revenues to ICE enforcement. That, as we note earlier, is not only arbitrary, but ignores that ICE has historically received Congressional appropriations for its fraud-detection activities. Eliminating this revenue transfer would reduce both the size of the fee increase and the claimed need to eliminate ability-to-pay waivers.

VII. Proposed Limitations on the Director’s Discretion to Grant Fee Waivers are Arbitrary and Unsupported by any Evidence.

The proposed rule would limit the discretion granted to the Director of USCIS to grant fee waivers. 84 FR 62300. Under the agency’s existing rules, the Director of USCIS has the authority to grant a fee waiver “if the Director determines that such action would be in the public interest and the action is consistent with other applicable law.” 8 CFR § 103.7(d). The proposed rule would limit the Director's authority to grant discretionary waivers to a narrow class of circumstances: asylees; refugees; national security; emergencies or major natural disasters declared in accordance with 44 CFR part 206, subpart B; a diplomatic agreement or to further relations

²⁵ Based on DHS's revised proposal to reduce the size of the revenue transfer to ICE, these increases will be somewhat smaller, but still very steep.

between the U.S. Government and other nations; or USCIS error. 84 FR 62301. And, because DHS proposes to remove fee exemptions for initial requests for an employment authorization form (Form I-765), *Id.* the Director will not even have discretion to waive these fees.

Agencies are expected to provide “explanations of the facts and policy concerns relied upon by the Agency in making its decisions; second, to see if those facts have some basis in the record; and finally, to decide whether those facts and those legislative considerations by themselves could lead a reasonable person to make the judgement that the Agency has made.” *Mid-Tex Elec. Co-op., Inc. v. F.E.R.C.*, 773 F.2d 327, 338 (D.C.Cir.), *citing Weyerhaeuser Co. v. Costle*, 590 F.2d 1011 (D.C.Cir. 1978). If an agency fails to support its conclusions with fact findings, then its decision is not supported by substantial evidence and is an arbitrary act of the Agency. *Id.* DHS provides neither a basis for this change in policy nor explains why the change is warranted.

What exactly is the driver behind this portion of the proposed rule? The agency provides no data detailing how many discretionary waivers have been granted by the Director each year or how much revenue has been lost as a result, much less whether any revenue loss was material. And it certainly hasn't explained – if it considered the issue at all – why its interest in generating a limited amount of additional revenue outweighs preserving the Director's discretion to grant fee waivers “in the public interest.” Is the agency concerned that its Director will be too profligate in handing out discretionary fee waivers? This seems implausible given the Director's strong support for eliminating inability-to-pay waivers altogether. Is the aim rather to hamstring future Directors who might conclude that hardship waivers in given circumstances are appropriate? That is surely inappropriate.

Not only is this aspect of the proposed rule unexplained, it will certainly do more harm than good. The agency is already proposing to eliminate inability-to-pay waivers of applications for employment authorization. While this might save the agency a few dollars, denying an applicant for work authorization might prevent that person from obtaining a job that would generate tax revenues for the government. Presumably, a fee waiver for an employment authorization would result in an immigrant providing labor that would result in income taxes being paid to the Treasury. USCIS admits as much: “This could result in lost wages for the workers and lost productivity for the sponsoring employers. The lost wages and productivity can be considered as costs of the forgone benefits. This may be a very small population, and USCIS believes they will find some way to pay for their EAD filing fee.” 84 FR 62333. Through this statement, it is evident that DHS has considered that its proposal will likely adversely affect employers and employees, but assumes (without factual basis provided) that the effect will be small and that the affected individuals will find “some way” to come up with the money. It is clear that DHS has arbitrarily eliminated this exception in an effort to generate more revenue without evaluating the actual effect on employers, laborers, or the industries that depend on them. DHS has substituted pure speculation for reasoned analysis.

CONCLUSION

ILCM et al. urge USCIS to withdraw its proposed rule as unlawfully issued. Assuming USCIS elects to proceed, ILCM et al. urge the agency to restore fee waivers for asylees and for those unable to pay, to consider bona fide sliding scale fees based on ability-to-pay, to withdraw its proposal to shift of revenues generated by fees for USCIS immigration services to ICE, to recalculate its fee structure taking into account the effect of the Administration’s other

immigration policies on the costs of administering immigration benefits services and otherwise to give reasoned consideration to the comments of ILCM et al.

Respectfully submitted,

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