IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST IMMIGRANT RIGHTS PROJECT, *et al.*, Plaintiffs, v. UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, *et al.*, Defendants.	Case No. 19-cv-03283-RDM

BRIEF OF NONPROFIT IMMIGRATION ADVOCATES AND LEGAL AND SOCIAL SERVICE PROVIDERS AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS

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INTEREST OF AMICI CURIAE

Amici curiae are national nonprofit immigration advocates and legal and social service providers that work closely with individuals who come to the United States fleeing persecution and violence, seeking humanitarian protection.[1] Amici provide critical legal and other services to thousands of vulnerable, indigent immigrants each year, including unaccompanied children, survivors of domestic violence, and LGBTQ people. The fee schedule, if allowed to take effect, will substantially inhibit their clients' ability to apply for and obtain protection for which they would otherwise qualify, and shift additional demand for assistance onto Amici's respective programs and budgets. Indeed, the fee schedule has already impaired Amici's ability to guide their clients.

INTRODUCTION

For decades, the United States led the world in offering humanitarian protection to persons fleeing persecution, torture, and violence. Nowhere was this commitment to humanitarian ideals more evident than in the laws Congress passed to implement the post-World War II treaties enshrining protections in the form of asylum, withholding of removal, and protection under the Convention Against Torture ("CAT"); protections under the Violence Against Women Act ("VAWA") and the Trafficking Victims Protection Act ("TVPA"); and special immigrant juvenile status ("SIJS") for abused, neglected, or abandoned youth.

[1] Amici are: ASISTA Immigration Assistance, AsylumWorks, the Center for Gender and Refugee Studies ("CGRS"), the Center for Victims of Torture, Immigration Equality, Kids In Need of Defense ("KIND"), the National Immigrant Justice Center ("NIJC"), Public Counsel, Tahirih Justice Center, and World Relief. A description of each organization is included in the Appendix.

The current administration has already acted to undercut longstanding commitments to protect individuals seeking status, including those fleeing persecution,[2] with many of its regulatory and policy changes having been found unlawful.[3] Now, the Department of Homeland Security ("DHS") seeks to erect additional deterrents and barriers to obtaining protection and permanent status by imposing a slate of staggering application fees for asylum, employment authorization, and adjustment of status—all while severely curtailing the availability of fee waivers. *U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigrant Benefit Request Requirements*, 85 Fed. Reg. 46,788 (Aug. 3, 2020) (the "Fee Rule"). For the first time in this country's history, asylum applicants will be required to pay a fee to have their applications considered. Children approved for SIJS and seeking lawful permanent residence (green cards) will be forced to pay what is, for a vulnerable child, a fortune—as much as $1,680 for applications to adjust status and receive employment authorization. As Plaintiffs explain in their motion, the Fee Rule was issued unlawfully, and many of its provisions are unfair and harmful to applicants for protection and associated benefits. Amici, who provide critical legal and social services and support to children and adults fleeing persecution and most of whom filed comments on the Fee Rule when it was proposed, thus focus here on ways that the Fee Rule erects

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[2] *See, e.g.*, Nat'l Imm. Justice Ctr., *A Timeline of the Trump Administration's Efforts To End Asylum*, https://bit.ly/35hPc9K (last visited September 8, 2020).

[3] *See, e.g.*, *Capital Area Imm. Rights Coalition v. Trump*, No. 19-cv-2117, 2020 WL 3542481 (D.D.C. June 30, 2020) (invalidating third country transit bar to asylum); *E. Bay Sanctuary Covenant v. Barr*, 950 F.3d 1242 (9th Cir. 2020) (affirming preliminary injunction against asylum bar applicable between designated points of entry); *J.L. v. Cissna*, 341 F. Supp. 3d 1048 (N.D. Cal. 2018) (temporary restraining order against unlawful restrictions on eligibility for SIJ status); *R.F.M. v. Nielsen*, 365 F. Supp. 3d 350 (S.D.N.Y. 2019) (summary judgment against related unlawful restrictions on SIJS eligibility).

impermissible barriers for vulnerable persons seeking relief through Congress' humanitarian immigration programs.

Expecting people fleeing persecution, violence, and abuse to pay hundreds or thousands of dollars in filing fees for humanitarian protections *before* being allowed to work to support themselves defies any realistic understanding of this vulnerable population. Indeed, the circumstances that lead Amici's clients to seek protection in the United States are in many cases the precise reason why they cannot now be expected to pay unaffordable fees. Under the Fee Rule, many applicants, unable to pay fees or to have them waived, will be forced to abandon or delay efforts to regularize their status purely for lack of economic means, requiring providers like Amici to substantially limit the number of individuals they can serve or reprioritize their work based on the overwhelming expense of many applications. In promulgating the Fee Rule, DHS arbitrarily failed to assess the substantial extent to which the rule will prevent individuals fleeing violence and persecution—Amici's clients among them—from applying for and obtaining protections for which they would otherwise qualify. Its failure to do so will have a devastating impact on this uniquely vulnerable population.

ARGUMENT

I. SURVIVORS OF PERSECUTION AND VIOLENCE FACE UNIQUE FINANCIAL CONSTRAINTS PARTICULAR TO THEIR CIRCUMSTANCES

DHS's analysis of the Fee Rule evinces no understanding that survivors of persecution and violence, whose challenges may follow them into unstable living situations in the United States, face particular and significant obstacles to paying application fees. Under earlier policy, most applicants for humanitarian relief readily qualified for fee waivers when filing related fee-based applications such as requests for work authorization, adjustment of status to lawful permanent residency, or waivers of possible bars to adjustment. This is so because the more flexible prior

policy recognized three alternative ways for applicants to demonstrate inability to pay: a household income below 150% of federal poverty guidelines, extreme financial hardship, or receipt of a means-tested benefit. *U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements*, 84 Fed. Reg. 62,280, 62,298 (Nov. 14, 2019) ("Proposed Fee Rule") (discussing existing waiver policy). The Fee Rule narrows the standards for fee waivers—and in some cases eliminates them altogether—while increasing the fees involved, sometimes by double- and triple-digit percentages. Fee Rule, 85 Fed. Reg. at 46,916-20 (new fees), 46,920-21 (new limited fee waivers). These changes, separately and in combination, impose unsustainable burdens on individuals whose claims for protection are inextricably linked to particular financial vulnerability.

A. DHS Fails to Appreciate the Extent to Which Asylum-Seekers' Means Are Limited by Hardship

Victims of persecution often arrive in the United States having spent all they had in fleeing to safety; some continue to be at risk from domestic abusers or traffickers even after reaching this country. They apply to U.S. Citizenship and Immigration Services ("USCIS," part of DHS) for asylum, or apply in immigration court proceedings for asylum and related relief,[4] which Congress created precisely because no other avenue for immigration would protect individuals in these positions of humanitarian need. The Fee Rule introduces for the first time a $50 fee for seeking asylum, which cannot be waived. The fee for a first-time application for a work permit ("EAD") by an asylum seeker (now available only after an entire year of waiting, *see Asylum Application, Interview, and Employment Authorization for Applicants*, 85 Fed. Reg. 38,532 (June 26, 2020)),

[4] Asylum and related protections may be raised as a defense to removal in proceedings; the immigration court administrator has indicated that it will follow the USCIS fee schedule for asylum applications. *Executive Office for Immigration Review; Fee Review*, 85 Fed. Reg. 11,866, 11,867–68 & n.6 (Feb. 28, 2020).

will be $550. Fee Rule, 85 Fed. Reg. at 46,791 tbl. 1. Under prior rules, asylum seekers could file both these applications without a fee. *See* Instructions for Application for Employment Authorization, 27 (Aug. 25, 2020), https://bit.ly/3mfPbJE (last visited September 8, 2020). For a family of four seeking asylum and EADs while the application is pending, new, non-waivable costs can be as much as $2,400. Fee Rule, 85 Fed. Reg. at 46,791 tbl. 1 ($50 I-589 fee, $550 I-765 fee for each applicant).[5] The government's claim that the $50 asylum fee is "not so high as to be unaffordable to even an indigent" person cannot be credited. Proposed Fee Rule, 84 Fed. Reg. at 62,320. As a staff social worker for an Amicus explained in a comment on the Proposed Fee Rule:

> Most of our clients have . . . no money. Our social workers brainstorm ways for clients to pay for $3 prescription co-pays. They help clients figure out how to access food shelves and get donated winter clothing. $50 is an enormous amount of money for someone who has none. $490 [as was initially proposed for the I-765 employment authorization application; in the final rule, $550] is impossible for most.[6]

Shifting more costs of administering USCIS programs to those least able to pay, and setting fees to *deter* filings, *see* Plaintiffs' Motion for Section 705 Relief and Preliminary Injunction at 41 (ECF No. 50), defies both common sense and the will of Congress, which has clearly opted to both provide substantive avenues to relief and expect USCIS to manage the costs of the programs in a way that will not chill access to them. DHS's approach to pricing these benefits has entirely failed to recognize this connection between the reasons asylum seekers seek protection and their limited ability to pay application fees.

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[5] Even if a principal applicant applies on behalf of himself/herself and three derivative beneficiaries, rather than filing four principal applications, the new fees would total $2250, provided all four seek an EAD.

[6] Letter from Andrea Carcamo, Center for Victims of Torture, 6 (Dec. 30, 2019), https://bit.ly/2Fgculp (last visited September 8, 2020).

B. Children Have Limited Ability to Raise Their Own Funds or to Direct Caregivers' Expenditures

Some of the most vulnerable migrants are children, many of whom seek safety in the United States each year unaccompanied by a parent or guardian.[7] Under the Trafficking Victims Protection Reauthorization Act ("TVPRA"), Pub. L. No. 110-457, 122 Stat. 5044 (Dec. 23, 2008), unaccompanied alien children ("UAC") apprehended by DHS must be transferred promptly to the Office of Refugee Resettlement, which has statutory responsibility for custody of these children and for identifying an adult family member or other "sponsor" in the United States to assume care of a child. 8 U.S.C. § 1232(b)(1), (3); *see also* 6 U.S.C. § 279(g)(2) (definition of UAC).

In recent years, UACs have largely originated in Mexico and northern Central America, countries with exceptional rates of gender-based violence against girls,[8] organized crime, and domestic violence.[9] Gangs recruit youth to join with death threats, force girls into abusive relationships with gang members, and traffic children into work for drug cartels across the region.[10] Such children are exceptionally unlikely to arrive with the means to support themselves.

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[7] *See, e.g.*, 153 Cong. Rec. S3004-05 (daily ed. Mar. 12, 2007) (statement of Sen. Dianne Feinstein) (noting that unaccompanied "children are the most vulnerable immigrants who come to this country" and identifying as a "[c]entral . . . concept[]" that "[i]n all proceedings and actions, the government should have as a priority protecting the interests of these children").

[8] *See* Kids in Need of Defense et al., Sexual and Gender-based Violence & Migration Fact Sheet (December 2018), https://bit.ly/2Fiqpb4 (last visited September 11, 2020).

[9] *See* United Nations High Commissioner on Refugees, *Children on the Run* (2014), https://bit.ly/2ZryvFj (last visited September 11, 2020); Kids in Need of Defense & Human Right Center Fray Matías de Córdova, *Childhood Cut Short: Sexual and Gender-based Violence Against Central American Migrant and Refugee Children* (June 2017), https://bit.ly/3bYiEDf (last visited September 11, 2020).

[10] Ruth Elizabeth Prado Perez, *Better Governance to Fight Displacement by Gang Violence in the Central American Triangle*, 9 Migraciones Internacionales 237, 238 (2017).

DHS acknowledges that unaccompanied children's sponsors may bear primary responsibility for paying application fees, *see* Fee Rule, 85 Fed. Reg. at 46,853, though they have no legal obligation to do so. However, DHS fails to draw the obvious conclusion that children's lack of financial and decision-making independence may foreclose them from applying for protection or benefits. The head of a child's household may prioritize other expenses, including food, housing, and immigration applications for other family members (*see* Part II.A *infra* on competing family immigration fee expenses), leaving a child vulnerable to the consequences of not filing a request, including removal and separation from his or her family.

Children, particularly those placed in removal proceedings as unaccompanied children, are entitled to retain counsel. Professional standards call for attorneys for children to respect a child's expressed wishes in the management of their cases.[11] Imposition of substantial application fees could endanger that independent representation, and otherwise prevent unaccompanied children from pursuing relief to which they may be entitled, independent of their family members.

C. Survivors of Abuse May Be Constrained from Paying Fees Due to the Financial Power of an Abuser.

There is no sign in the Fee Rule that DHS considered the ways its higher fees and stricter fee waiver standards would provide abusers with added leverage over victims. Although there are no fees for the principal applications for T and U visas or VAWA self-petitions,[12] *see* 8 U.S.C. § 1255(*l*)(7), the same cannot be said of the ancillary applications that generally accompany these

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[11] American Bar Ass'n, *Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States*, 10-13 (2018), https://bit.ly/339Mrog (last visited September 8, 2020).

[12] The "blanket fee exemption" is "consistent with the legislative intent to assist persons in these circumstances." USCIS, *Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule*, 72 Fed. Reg. 29,851, 29,865 (May 30, 2007). Congress codified its intent with 8 U.S.C. § 1255(*l*)(7).

principal applications. Narrower standards when requesting fee waivers for these ancillary applications under the Fee Rule will only harm survivors of abuse. This is because domestic abusers may withhold immigration or identity documents, threaten reports to immigration authorities,[13] and withhold economic resources needed to file applications if fees are nonwaivable to exert control over their victims.[14]

Because of higher fees and more restrictive fee waiver standards for applications ancillary to VAWA self-petitions, T visas, and U visas, *see* Part II.B *infra*, the Fee Rule makes survivors of abuse more financially vulnerable to their abusers.

II. THE FEE RULE WILL IRREPARABLY HARM THOSE SEEKING HUMANITARIAN PROTECTION BY DELAYING OR DETERRING ESSENTIAL APPLICATIONS

Since immigrants seeking humanitarian protection rarely arrive in the United States with significant means, the Fee Rule will delay, if not outright deter, countless individuals, including vulnerable children, from applying for and receiving humanitarian protection and related status and benefits. In some cases, delay can foreclose eligibility altogether: many protections come with time limits, most notably the one-year filing deadline applicable to most asylum claims by adults, *see* 8 U.S.C. § 1158(a)(2)(B). Other applications have substantial waits for visa numbers even after an individual qualifies for protected status, compounding the effect of a delay in initial application. *See, e.g.*, USCIS, *U Visa Filing Trends* at 3 (2020), https://bit.ly/33jldvC (last visited September 11, 2020) (explaining that the annual cap of 10,000 principal U visas has led to a five-

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[13] *See* Stacey Ivie et al., *Overcoming Fear and Building Trust with Immigrant Communities and Crime Victims*, Police Chief Magazine (2018), https://bit.ly/3ihBOpG (last visited September 8, 2020).

[14] *See* Sara J. Shoener and Erika A. Sussman, *Economic Ripple Effect of IPV: Building Partnerships for Systemic Change*, Domestic Violence Report (2013), https://bit.ly/2Re54lf (September 8, 2020).

to ten-year wait for adjudication and issuance of status). A predictable consequence will be that many applicants who are eligible for protection will be unable to request it, and therefore will face the choice of either leaving the United States to face dangers elsewhere, or remaining here while the opportunity to seek lawful status and permission to work remains out of reach.

A. Nonwaivable Fees Will Deter Applications for Asylum and Work Authorization

As noted, the Fee Rule introduces a new $50 asylum fee and $550 EAD fee, both largely nonwaivable. Commenters on the proposed rule explained the many ways that these fees will cause hardship—for example, that asylum seekers' limited resources are needed for survival (85 Fed. Reg. at 46,844); that detained asylum seekers and minor asylum seekers lack the earning power to pay fees (*id.* at 46,845); that some prospective asylum seekers are financially dependent on abusers (*id.* at 46,847); and that survivors of violence who lack support systems in the United States are at risk of homelessness and hardship (*id.*). In the final rule, these concrete concerns were met with repeated generalities about what DHS "believes": e.g., that a $50 fee will not "unduly burden[] or harm[] any applicants" (*id.* at 46,846), will not prevent applications (*id.* at 46,845 & 46,849), and is "not . . . unaffordable to an indigent applicant" (*id.* at 46,844). But these conclusory statements miss the point that a fee is not objectively reasonable or harmless when it competes with unmet basic needs.

As just one example of how the new fee schedule may affect asylum seekers, Dora[15] is a 47-year-old single mother and human rights attorney from Venezuela. She came to the United States in November 2018 with her daughter, then 13, to participate in a three-week training program at the InterAmerican Commission on Human Rights. During the program, colleagues in

[15] All client names in this brief are pseudonyms; details of each case are on file with amici.

Venezuela called to inform Dora that the severed head of a dog was delivered to her law office, with a letter stating that she would be "next." Marooned in the United States and terrified to return to Venezuela, Dora is unable to access her financial assets or sell property in Venezuela to generate funds. Under then-applicable rules, no fee was required for Dora's asylum application, and she was able to apply for work authorization—yet her financial situation remains dire. She recently lost her job as a dishwasher in a restaurant due to the pandemic. Imposing nonwaivable fees on her applications would have further delayed her ability to achieve self-sufficiency for herself and her daughter. Indeed, had the Fee Rule been in effect when she applied for asylum, Dora likely would not have been able to apply at all. Inability to pay the new fees could become the sole reason that meritorious claims are delayed or never filed in cases like hers.

This problem is particularly acute for families comprising multiple asylum seekers, whose cumulative fees may preclude children from requesting relief in their own right even though they are entitled by law to do so. Children and adults alike "may pursue an asylum application as a principal applicant and as a dependent on a parent or spouse's asylum claim." USCIS, *Affirmative Asylum Procedures Manual*, 49 (2016), https://bit.ly/35dV4AW (last visited September 8, 2020). A child's claim may be independent of, or stronger than, the claim of an adult applicant who names the child as a derivative. For example, if one of the statutory bars to asylum applies to a parent principal applicant, USCIS will deny relief to the parent as well as any derivative children; yet a similar principal claim by a child who has not triggered any of the bars could be approved. Alternatively, a child can succeed as a principal applicant on the basis of facts or legal theories inapplicable to the parent's claim. But since most children lack independent means to pay fees, if financial constraints limit the household to a single application, the child may be precluded from bringing a meritorious claim.

As one example, Cristina and her three daughters fled domestic violence and gang violence in Honduras. When the family first arrived in the United States, they lived in a dangerous and exploitative housing situation with a man who repeatedly threatened Cristina based on her immigration status and tried to evict the family despite a ban on evictions during the COVID-19 pandemic. Cristina and her three daughters have all applied for asylum, but if Cristina were required to pay $200 to file separate applications for herself and her daughters, she would likely have been unable to do so. Under the Fee Rule, Cristina could limit her cost to $50 by listing the children as derivative applicants on her own application, but this would deprive them of their respective opportunities to seek independent relief.

Many other asylum seekers will be unable to afford the application fee due to being homeless, living in shelters, or lacking in a support network. One such individual is Mary, an asylum seeker from the Democratic Republic of Congo ("DRC") who lost her legs after being hit by a military vehicle when she was young. Mary fled gender-based violence by government officials in the DRC, but when she came to the United States, she had no support or place to live and ended up in a shelter in Chicago. Mary has depended on her case manager at the shelter for assistance in meeting with and providing documents to her attorney. When Mary's one-year deadline for asylum was approaching, Mary was initially unable to pay for passport-style photographs for her asylum applications, a service that costs about $15. She eventually scraped together the money for the photos, but given Mary's disability and homelessness, it is unlikely that she could have timely filed for asylum if she needed to pay a nonwaivable $50 filing fee.

In addition, because asylum applicants may no longer request fee waivers when applying for work authorization, the $550 fee will keep lawful employment, as well as tuition assistance and other benefits dependent on the Social Security number that an EAD makes available, out of

reach for prolonged periods for applicants who need to work or otherwise need a government-issued ID. DHS observes that "[a]sylum applicants will pay no more and no less than any other EAD applicant," Fee Rule, 85 Fed. Reg. at 46,887. But asylum seekers served by Amici face materially different circumstances than "any other EAD applicant." They have generally fled under emergency conditions without adequate preparation, exhausted any available resources in their journey to reach safety, and been deprived of access to resources, including work, both abroad and within the United States. Combined with a newly imposed year-long waiting period to apply for a work permit, the amount of the EAD application fee will increase the existing hardships that asylum seekers face.

1. **The Fee for Asylum May Divert Meritorious Applications Toward Lesser Protections**

DHS notes that no fee is payable when filing an asylum application form solely to seek related but lesser protections in the form of withholding of removal or protection under CAT. *Id.* at 46,973 n.17. But neither withholding nor CAT protection can serve as a predicate for eventually pursuing lawful permanent residency or naturalization. Furthermore, both withholding and CAT protection come with substantial restrictions: recipients may not petition for family members and are permanently barred from foreign travel. *See, e.g.*, *Garcia v. Sessions*, 856 F.3d 27, 32 (1st Cir. 2017) (describing differences between asylum and withholding of removal). Accordingly, to the extent this provision serves as a safety valve for those who seek protection but cannot afford to pay $50, it raises the specter of what the Supreme Court has described as "a permanent caste" of persons entitled to a measure of protection yet "nevertheless denied the benefits that our society makes available to citizens and lawful residents." *Plyler v. Doe*, 457 U.S. 202, 218–19 (1982). And those granted asylum could be delayed or deterred in seeking adjustment of status because

fee waivers are no longer available, except under an extremely narrow emergency exception. *See* Fee Rule, 85 Fed. Reg. at 46,920.

2. **A Fee Exemption for Unaccompanied Children Is Insufficient**

An exemption from the $50 fee for Form I-589 in the final Fee Rule is limited to "unaccompanied alien children who are in removal proceedings." *See* Fee Rule, 85 Fed. Reg. at 46,829 tbl. 4. This exemption is necessary because, as DHS acknowledges, UACs are a "particularly vulnerable population" (*id.* at 46,845)—but it is far too narrow. DHS has no legitimate basis for precluding any child—accompanied or unaccompanied—from independently applying for asylum because of a fee.

Many children initially determined to be UACs will reach age 18 or reunify with a parent before filing or adjudication of their asylum claims. This should not vitiate their exemption from the new asylum fee. However, DHS and DOJ have repeatedly attempted to interpret UAC asylum seekers to include only those UAC who are not living with a parent or legal guardian and who remain under 18 when filing their asylum applications. A May 2019 USCIS memorandum designed to limit USCIS's jurisdiction over UAC asylum applications was halted only by litigation. *See J.O.P v. U.S. Dep't of Homeland Sec.*, 409 F. Supp. 3d 367, 380 (D. Md. 2019) (enjoining USCIS policy limiting adjudication for applicants previously determined to be unaccompanied). Likewise, litigation blocked implementation of 2019 regulations that would have, among other things, curtailed all UAC protections once a child no longer meets the statutory UAC definition. *See Flores v. Barr*, 407 F. Supp. 3d 909, 914 (C.D. Cal. 2019) (permanently enjoining regulations at 84 Fed. Reg. 44,392). Even earlier, the Executive Office for Immigration Review issued more restrictive policies toward children who arrived in the United States as UAC

but later reach 18 or join a parent.[16] If this restrictive reading is what DHS intends in describing its exemption as "narrow," Fee Rule, 85 Fed. Reg. at 46,887, then the exemption will reach only a small fraction of children who flee to the United States unaccompanied and who cannot afford any fee: many children initially determined to be UACs would, under these restrictive policies, become subject to the $50 fee.

B. Higher Fees and Limited Fee Waivers Harm Applicants for Other Protections Intended for Survivors of Violence

As discussed above, VAWA self-petitions and applications for U and T visas do not require a fee. 8 U.S.C. § 1255(*l*)(7). But applicants must often file ancillary forms that do have significant fees, which will increase under the Fee Rule. For example, the rule increases the fee for the I-192 Application for Advance Permission to Enter as a Nonimmigrant from $930 to $1,415, an increase of 52%. *See* Fee Rule, 85 Fed. Reg. at 46,791 tbl.1. This application is ubiquitous in U and T visa filings because all grounds of inadmissibility, including unauthorized entry into the United States, must be waived to receive relief, and form I-192 is the vehicle to seek such a waiver.

The case of Juliet, a client of an attorney member of one Amicus, is instructive. She suffered human trafficking and is currently unable to work as the sole caregiver for her young children, one of whom is immunocompromised and especially susceptible to COVID-19. Previously, Juliet's abusive ex-partner had extorted her for sexual services in exchange for providing rent money to her and her children. Juliet applied for a T visa and is seeking a fee waiver for the I-192 form she must file in support. If the fee waiver is denied, she will have to pay $930, a fee that will increase to $1,440 after October 2, 2020. With no access to funds other than through

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[16] EOIR, *Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children*, 8 (Dec. 20, 2017), https://bit.ly/3k03sbc (last visited September 8, 2020); *Matter of M-A-C-O-*, 27 I. & N. Dec. 477 (BIA 2018) (holding that an immigration judge may adjudicate an application that was filed with USCIS after the UAC applicant reached age 18).

her abusive ex-partner, Juliet may remain vulnerable to further exploitation even as she seeks to regularize her immigration status.

Veronica is a gender-nonconforming woman who fled physical and sexual violence in Mexico. When she arrived in the United States, she needed to work to support herself and her young child. She accepted a job doing cleaning and maintenance for a property manager. Soon after, however, the manager coerced her into having sex with him multiple times a week, and when she tried to refuse, he would threaten to terminate her. Veronica felt trapped, forced to have sex to keep her job and thus, provide for herself and her daughter. Veronica qualified for both asylum and a U visa, and ultimately received protection afforded by the latter. But if Veronica had been required to pay over $1,400 to seek protection, she likely would have been unable to do so. Depriving individuals like Veronica of access to lawful work *and* the ability to seek humanitarian protection will lead to countless examples of exploitation.

Contrary to Defendants' position, it is no answer that individuals like Juliet and Veronica can still seek a waiver of the fees associated with their applications. It is true that these applicants may request fee waivers. *See* Fee Rule, 85 Fed. Reg. at 46,920. But the criteria for granting a waiver have become so narrow—limited to applicants under 125% of the federal poverty guideline, *see id.*—that as Plaintiffs explain, Mot. at 19-20, 43-44, few applicants will satisfy them, even those with extremely limited means. In recent years, Amici have received numerous denials of fee waivers for individuals who clearly qualify. One Amicus organization sought a fee waiver for an individual who spent three years in immigration detention before he was granted protection under CAT. USCIS denied his fee waiver on the ground that his distant relatives should be required to pay his fees. In other cases, Amici have received fee-waiver denials based on the inability to produce documentation of indigence—e.g. proof of residence in a shelter, pay stubs

demonstrating poverty, or participation in food benefits—even though it is well known that the most vulnerable noncitizens will not have access to these services or the accompanying documentation.

If not waived, these fees would render many noncitizens unable to seek protection, and likely prolong the need for them to remain in dangerous living or working conditions.

C. Children Will Be Deterred from or Delayed in Seeking Protection and Benefits

The Fee Rule subjects children to the $550 EAD fee—which is nonwaivable in many types of cases—and a more restrictive fee waiver policy upon applying for adjustment of status and naturalization. DHS reasoning for the change is that children "should not need an EAD for an identity document" (but if they do a sponsor should pay), and that "[a]fter turning 18, the same policy considerations for charging them . . . apply as for charging all adults." Fee Rule, 85 Fed. Reg. at 46,853. Yet an unaccompanied child reaching age 18 may be particularly in need of an EAD and least able to pay. For example, a child in California turning 18 and graduating high school requires an EAD to continue eligibility for the state's Extended Foster Care program, as she must be in vocational education or working (which require an EAD) or post-secondary education (for which financial assistance almost invariably requires a Social Security number, which becomes available after getting an EAD).[17] The Fee Rule would place such children at risk of losing foster support by requiring them to pay filing fees in advance of having permission to work. DHS's suggestion that children could put the fees on credit cards—presumably to pay them

[17] Cal. Dept. of Social Servs., All County Letter No. 11-61 (Nov. 4, 2011), https://bit.ly/3fgjZF8 (last visited September 8, 2020). Other states have similar programs with similar requirements. *See, e.g.*, Wash. State Dept. of Children, Youth & Families, Extended Foster Care, https://bit.ly/3fee3g5 (last visited September 11, 2020).

off over time after obtaining work authorization—is similarly disconnected from reality, as few migrant children have access to credit. *See* Fee Rule at 46,906; 46,896; 46,807 ("[A] person can generally use a debit or credit card to pay their benefit request fee and does not have to delay their filing until they have saved the entire fee.").

Fees are barriers to regularizing immigration status, which in turn inhibit a child's ability to recover from past trauma and develop self-sufficiency. Some children will be unable to apply for relief or EADs, creating precisely the form of deterrence through fees that Congress excluded from USCIS's permissible factors in setting fees. *See* Mot. at 47-48. Others will have no choice but to leave school and work without authorization to pay fees, a situation plainly incompatible with the purposes of humanitarian protection.

Amicus client Alex's story is illustrative. He came to the United States from El Salvador at age 13, fleeing death threats after his uncle, who raised him from infancy, was abducted by gang members. The gang took the family's entire savings, then called seeking weekly payments to guarantee Alex's safety. Alex fled to the United States, where he initially struggled to focus on school because he could not see a future. But once he received legal assistance, applied for immigration status, and obtained employment authorization, his dedication to education was transformed: Alex entered a youth internship program that placed him in college-level classes and an internship with a major national bank. He now has a career in investment operations. Had he been forced to leave school early to work to raise fees for his immigration case, Alex's financial security and contribution to the United States economy over the course of his life would have been sharply diminished.

D. Without the Possibility of a Fee Waiver, Many SIJS Recipients Will Be Unable To Apply for Permanent Residency

SIJS is available to children under the age of twenty-one who cannot reunify with one or both of their parents due to abuse, abandonment, neglect, or a similar basis and whose best interests would not be served by return to their country of nationality. 8 U.S.C. § 1101(a)(27)(J). Congress "created SIJ status in 1990 to provide [recipients] a path to lawful permanent residency," precisely *because* it was concerned for their current and future well-being. *C.J.L.G. v. Barr*, 923 F.3d 622, 626 (9th Cir. 2019) (en banc).

The Fee Rule precludes fee waiver requests for all but a narrow category of SIJS recipients applying to become permanent residents. *See* 85 Fed. Reg. at 46,920. This makes little practical sense. SIJS recipients are first permitted to apply for an EAD only at the time they become eligible to apply for adjustment of status—something that may entail years of waiting even after approval of the SIJS petition. As with the other categories, DHS has therefore created a situation where substantial fees, with extremely limited fee waivers, form a closed door to the very work authorization that might provide the means to fund the applications. These new restrictions thus threaten to put lawful permanent residency and work authorization out of reach of some of the most vulnerable recipients of humanitarian relief, in direct contravention of congressional intent.

Under the Fee Rule, T and U visa holders may seek fee waivers when applying for adjustment of status. There is no principled reason why SIJS recipients should not be permitted to do the same. Although the TVPRA expressly mandates DHS to make fee waivers available to T and U visa holders applying for adjustment of status, *see* 8 U.S.C. § 1255(*l*)(7), many of the factors undergirding that mandate are present for SIJS recipients as well. While T and U visa holders are victims of human trafficking or other serious crimes that have caused them to suffer mental or physical abuse, SIJS recipients have been subject to parental abuse, abandonment, neglect, or

similar circumstances and are just as likely to lack adequate resources to pay the substantial fees. Indeed, because eligibility for SIJS requires a showing that reunification is not viable with one or both of a child's parents and because SIJS recipients are, by definition, young, *see* 8 U.S.C. § 1101(a)(27)(J), they often start from a place of unique financial vulnerability, and therefore should also be eligible for fee waivers.

The Fee Rule acknowledges that SIJS recipients are "vulnerable," yet makes fee waivers available only to those SIJS recipients "who are wards of the state" and have been "placed in out-of-home care under the supervision of a juvenile state court or a state child welfare agency." Fee Rule, 85 Fed. Reg. at 46,815. This distinction makes little sense and does not clearly align with the 50 states' varying approaches to child welfare and custody. Based on some Amici's extensive experience, SIJS recipients living with a court-appointed guardian may, in fact, be *less* able to afford the high adjustment fees compared to their counterparts placed in state care. This is because children placed in state custody may benefit from the more structured intervention that state supervision brings, and in some cases certain state agencies may make provisions to pay the application fees; in contrast, minors placed with private individuals are financially reliant on their caregivers, who are often themselves stretched thin on resources and who have complete discretion over whether they wish to pay.

Soraya, a 16-year-old from Guatemala represented by one Amicus, illustrates this problem. When she was an infant, her father passed away from AIDS. Shortly after his death, Soraya's mother discovered that she was living with HIV. Soraya's mother ultimately migrated to the United States for safety reasons and left Soraya in the hands of extended family members, who abused her. Soraya eventually sought refuge in the United States. She recently had her SIJS petition approved and is now awaiting her opportunity to apply for adjustment of status. In the

meantime, Soraya reunited with her mother, her mother's partner, and two younger half-siblings. Soraya's mother is unable to work due to HIV and other chronic health conditions; the entire family relies entirely on her mother's partner's modest income. During the COVID-19 pandemic, he was furloughed, and the family fell behind on rent. They now struggle to secure enough food to eat. Under the Fee Rule, which precludes fee waivers for SIJS recipients like Soraya, her family will likely have to choose between paying for her adjustment application and feeding the family. This is an untenable choice—one that gravely undermines the secure future that Congress sought to provide for children like Soraya when it enacted the SIJS statute.

Just as concerning, the Fee Rule's new limitation on fee waivers fails to recognize that nonparent guardians have voluntarily assumed the cost of raising a child, but were not necessarily prepared to assume the significant outlays associated with an adjustment of status application. Such costs may also be beyond the means of a single parent who is the sole custodian of a child who qualified for SIJS status. DHS addressed none of these concerns in the Fee Rule. The result is a fee structure for adjustment of status that blocks uniquely vulnerable children from obtaining the many benefits that lawful permanent residency can confer, "including eligibility for employment, the right to live permanently in the United States, the ability to vote in state and local elections that do not require U.S. citizenship, the ability to travel freely within and without the United States, and the ability to pursue U.S. citizenship" solely because they cannot afford, and cannot obtain a waiver from, the staggering fees associated with the application process. *Mercado-Zazueta v. Holder*, 580 F.3d 1102, 1110 (9th Cir. 2009), *abrogated on other grounds by Holder v. Martinez Gutierrez*, 566 U.S. 583 (2012).

E. The Fee Rule Threatens the Safety and Well-Being of LGBTQ and HIV-positive Applicants for Humanitarian Protection

The Fee Rule will negatively impact the safety and well-being of LGBTQ and HIV-positive ("LGBTQ/H") asylum seekers. In approximately 80 countries, it is either a crime or profoundly dangerous to be LGBTQ/H. Many LGBTQ/H asylum seekers have endured brutal persecution in their countries of origin on account of their sexual orientation, gender identity, or HIV status. They often flee to the United States with no safety net to speak of, in order to pursue asylum claims. Obtaining permanent legal status in the United States is a crucial lifeline, and the ability to work while awaiting a determination on an application is critical for survival.

Many LGBTQ/H asylum seekers exist at the intersection of two marginalized populations—LGBTQ people and undocumented immigrants. Even within the United States, both groups face hardships and inequities such as employment and income insecurity and discrimination, health coverage gaps, and mental health disparities.[18] LGBTQ non-citizens are frequent targets of violence.[19] For example, in a National Center for Transgender Equality study, nearly a quarter of undocumented transgender individuals reported being physically attacked in the previous year, and 68% reported experiencing intimate partner violence.[20] LGBTQ individuals also experience high rates of homelessness and "are often at a heightened risk of violence, abuse, and exploitation compared with their heterosexual peers. Transgender people are particularly at

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[18] *See generally* Crosby Burns, Ann Garcia, and Philip E. Wolgin, *Living in Dual Shadows: LGBT Undocumented Immigrants,* Center for American Progress (March 2013), https://ampr.gs/3im8tuf (last visited September 11, 2020).

[19] *See* Sharita Gruberg, *How Police Entanglement with Immigration Enforcement Puts LGBTQ Lives at Risk*, Center for American Progress (2017), https://ampr.gs/3mdXs0r (last visited September 11, 2020).

[20] S.E. James et al., *The Report of the 2015 U.S. Transgender Survey*, National Center for Transgender Equality at 6 (2016), https://bit.ly/2GQF8KM (last visited September 11, 2020).

physical risk due to a lack of acceptance and are often turned away from shelters . . . ."[21] Due to workplace and housing discrimination, some LGBTQ/H non-citizens are forced to rely on the survival economy, such as sex work, where they are subjected to further exploitation and abuse.

Moreover, because many LGBTQ/H individuals seek asylum as a result of persecution by their own families and communities, they often cannot rely on traditional family or community networks in the United States for financial support. Alternatively, they may be forced to rely on support from homophobic, transphobic, and/or serophobic family or community members, subjecting them to increased violence and abuse. In addition, many LGBTQ/H non-citizens have medical needs that will go unmet if all available resources need to be dedicated to immigration fees. For example, HIV treatment, known as anti-retroviral therapy, is prohibitively expensive. Making EADs more difficult to obtain will hamper efforts by asylum seekers living with HIV to access necessary medical treatment and medication. This is not only devastating to the health of the individual, but could also have negative public health implications. Similar considerations apply to transgender individuals, who are at risk of severe health consequences if they are forced to discontinue hormone therapy due to lack of financial resources.[22]

Many asylum seekers arrive without government-issued identification. For transgender individuals, having identification that properly reflects their gender identity and chosen name is necessary to avoid discrimination, trauma, and myriad forms of abuse. Since most transgender asylum seekers are not able to secure such identification documents in their countries of origin,

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[21] National Coalition for the Homeless, *LGBT Homelessness*, https://bit.ly/2FpzHBI (last visited September 11, 2020); *see also* James, *supra* note 20, at 6 ("[O]ne-half (50%) of undocumented respondents have experienced homelessness in their lifetime.").

[22] American Psychiatric Association, *What is Gender Dysphoria* (Feb. 2016), https://bit.ly/3il6zKC (last visited September 11, 2020).

they rely upon EADs for this. For many others, an EAD is often the only form of picture identification an asylee can provide to social services agencies in order to access desperately needed resources. For example, Afua, a gay man from Ghana, was in the United States when he was outed as gay to the Ghanaian community here and to his family in Ghana. Afua was unable to go back to Ghana, given that his life would be in greater danger now that he was outed. His sister kicked him out of her house and refused to return his identity documents to him. Scared of law enforcement due to his experiences in Ghana where he was beaten and tortured by the authorities, Afua did not report this to the police. Afua was rendered homeless and was desperately in need of mental health services. With an EAD, he could have accessed the shelter system. Because he was still in the EAD waiting period, however, Afua had no ID and was turned away from every shelter he approached. Although an Amicus organization advocated aggressively on Afua's behalf and eventually placed him with a shelter, many asylees who cannot afford to apply for an EAD will remain housing insecure.

III. THE NEW FEE SCHEDULE WOULD IRREPARABLY HARM HUMANITARIAN ORGANIZATIONS LIKE AMICI

Amici and Plaintiff organizations alike face irreparable harm as a result of the Fee Rule. The Rule will force many Amici to divert substantial resources to covering fees directly; to serve far fewer clients due to the insurmountable barrier of fees; or both. Amici organizations are not budgeted to pay client fees, and any such reallocation of resources would by definition require Amici to forego using those funds for client services. The Rule will thus cause "ongoing harm to [the] organizational missions" of refugee-serving organizations. *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013).

In addition to this budgetary impact, the Fee Rule is already causing irreparable harm because Amici are forced to rush to file applications before these fees take effect, knowing that the

fees will be prohibitive for many clients. For example, one Amicus organization represents Lucia, a woman from Mexico who fled to the United State with her daughter after both suffered years of physical and sexual abuse by Lucia's husband. Lucia and her daughter have until November 2020 to meet the one-year filing deadline for asylum, but knowing that the application could be subject to a fee by then, Lucia's counsel helped her file the application early to avoid the fee. Amici are being forced to make such decisions across the board, and this process of scrambling to file applications to spare clients unaffordable fees is already placing an onerous burden on Amici organizations.

CONCLUSION

For the foregoing reasons, Amici respectfully request that the Court grant Plaintiffs' Motion for Section 705 Relief and Preliminary Injunction.

DATED: September 11, 2020

KIDS IN NEED OF DEFENSE (KIND)

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APPENDIX: LIST OF AMICI

Amici are:

- ASISTA Immigration Assistance, a national nonprofit organization that trains and provides technical support to local law enforcement officials, civil and criminal court judges, domestic violence and sexual assault advocates, and legal services, non-profit, pro bono, and private attorneys working with immigrant crime survivors.

- AsylumWorks, a nonprofit organization that provides holistic services and support to asylum seekers and their families living in the Washington, D.C. metro region.

- The Center for Gender and Refugee Studies, an internationally respected resource for gender asylum and advocate for refugee women, children, LGBTQ individuals, and others.

- The Center for Victims of Torture (CVT) is an independent nongovernmental organization that provides interdisciplinary rehabilitative services to, and advocates on behalf of, survivors of torture in the United States and abroad.

- Immigration Equality, a national organization that provides legal services and advocacy for LGBTQ and HIV-positive immigrants.

- Kids in Need of Defense (KIND), a national nonprofit organization dedicated to providing free legal representation and protection to unaccompanied immigrant and refugee children in removal proceedings.

- National Immigrant Justice Center, (NIJC), a program of the nonprofit organization Heartland Alliance, provides direct legal services to, and advocates on behalf of, immigrants, refugees, and asylum seekers including more than 800 asylum seekers each year.

- Public Counsel, a pro bono law firm that provides representation to immigrants seeking asylum, Special Immigrant Juvenile Status, and other forms of humanitarian protection.

- Tahirih Justice Center, a national, nonpartisan and direct services organization that assists immigrant survivors of gender-based violence.

- World Relief, a global Christian nonprofit organization dedicated to resettling refugees and providing immigration legal services.

CERTIFICATE OF SERVICE

I, Scott Shuchart, hereby certify that on September 11, 2020, the foregoing document was filed and served through the CM/ECF system.

DATED: September 11, 2020

/s/ Scott Shuchart
Scott Shuchart