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Comments on the Department of Homeland Security's Proposed Rule Regarding "Fee for Form I-589, Application for Asylum and for Withholding of Removal"

Samantha Deshommes, Office of Policy and Strategy
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20 Massachusetts Avenue NW
Washington, DC 20529-2140

Re: DHS, Draft Notice of Proposed Rulemaking, *Fee for Form I-589, Application for Asylum and for Withholding of Removal*, 84 FR 62280, DHS Docket No. USCIS-2019-0010

Dear Ms. Deshommes:

Lawyers for Civil Rights (LCR) writes to express its strong opposition to the above-referenced rule proposed by the U.S. Department of Homeland Security (DHS). As written, the rule would violate the constitutional and international treaty obligations of the United States government by abrogating the basic right of refugees to petition for asylum in the United States.

The proposed rule provides that a refugee must pay a $50, ***non-waivable*** fee to file a Form I-589 affirmative asylum application. Notwithstanding DHS's unsupported assertion that the fee will be affordable for most, it is inevitable that at least some applicants will not be able to afford the fee, and therefore will be unable to apply for asylum. This is particularly likely to be the case for family groups, where a $50/applicant fee could add up to a substantial sum. Not only is the proposed fee ill-advised and unprecedented[1] as a humanitarian matter in imposing an additional burden on some of the most vulnerable of those classified as refugees, the resulting likelihood that petitions for asylum will be denied for non-payment at their threshold step, even prior to any consideration of the merits of the petition, violates numerous legal protections including the Due Process and Equal Protection clauses of the United States Constitution as well as international law as expressed in the United Nations Convention Relating to the Status of Refugees.

[1] DHS notes that a higher fee was proposed in 1994 and not ultimately adopted. Critically, the fee proposed in 1994 would have been ***waivable***. At that time, the INS reviewed comments, including some that raised the same concerns identified in this letter, and abandoned the proposal. Its stated reasons for abandoning the proposal were that implementation would have imposed administrative burdens that would not have been outweighed by the revenue from charging the fee; that would offset the utility of charging the fee to begin with; and asylum applications could continue to be funded by fees from other immigration benefits (as had been historically the case). While many of the comments addressed the burden of administering requests for waiver of the fee in particular, the INS did not even consider making the fee non-waivable as an alternative, likely reflecting a recognition that such a provision would have been unlawful.

LCR, its Client Communities, and its Interest in the Impact of this Proposed Rule

For fifty years, LCR has promoted equal opportunity and fought discrimination on behalf of people of color and immigrants in Massachusetts through creative and courageous legal action, education, and advocacy in collaboration with law firms and community partners.

Many of LCR's immigrant clients would be directly affected by the proposed asylum fee regulations. In particular, since 2003, LCR has spearheaded a Medical Legal Partnership, an innovative collaboration between civil rights attorneys at LCR and healthcare providers at the Massachusetts General Hospital Health Care Center in Chelsea with the goal of improving the material well-being of low-income immigrants and refugees. Many of these clients and their family members would be impacted directly by the rule. The proposed rule threatens to eliminate the progress the Partnership has made over the past fifteen years.

More generally, if adopted, the proposed rule would have an enormous impact in Greater Boston. The Boston Metropolitan Statistical Area is a vibrant and diverse community, whose population growth is driven by increases in the nonwhite and immigrant population. In 2014, Boston's foreign-born residents accounted for 27.1% of the city's population; the city has the seventh highest share of foreign-born residents among the largest U.S. cities, and more than half of Boston children under the age of 18 lived with at least one foreign-born parent.[2] The most common countries of origin for these foreign-born residents are the Dominican Republic, China, Haiti, El Salvador, Vietnam, Jamaica, Cape Verde, Colombia, India, and Guatemala.[3]

LCR is gravely concerned about the impact of DHS' proposed rule on its constituents. As explained below, the proposed rule would threaten the ability of thousands of people to file for asylum—most of them people of color.

I. The Immigration and Nationality Act created a procedural due process right to petition for asylum.

The United Nations Convention Relating to the Status of Refugees ("1951 Convention") prohibits its adherents from expelling refugees except in accordance with due process of law, including a guarantee of the refugee's right to submit evidence to clear himself for asylum (Article 32). The Convention also embodies principles of equal protection throughout, providing that the contracting states apply all provisions of the Convention without discrimination as to race, religion, or country of origin (Article 3), and categorically prohibiting refoulement of any refugee if "his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion" (Article 33).

Although the United States is not a signatory to Articles 2 through 34 of the 1951 Convention, it adheres thereto via its accession to the United Nations Protocol Relating to the Status of Refugees ("1967 Protocol"). *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 430, 436 (1987). It is well-established that, when Congress passed the Refugee Act in 1980, one of its "primary

[2] Lima et al, *Boston by the Numbers 2015*, Boston Redevelopment Authority Research Division, at 8 (Dec. 2015).
[3] *Id*. (*citing* U.S. Census Bureau, 2014 1-year American Community Survey, Public Use Microdata Sample (PUMS), BRA Research Division Analysis).

purposes was to bring United States refugee law into conformance with [the 1967 Protocol]." *Id.* at 436-37. As codified at 8 U.S.C. § 1158(a), the Immigration and Nationality Act ("INA") now provides that "***[a]ny alien*** . . . irrespective of such alien's status, may apply for asylum in accordance with this section."

Looking to the principles of the 1951 Convention and 1967 Protocol, courts have interpreted "the federal regulations establishing an asylum procedure" and the INA as creating a constitutionally-protected right to petition the United States for asylum which "triggers the safeguards" of the Fifth Amendment's Due Process Clause. *See Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023, 1028 n.8 (5th Cir. 1982) (the INA, "when read in conjunction with the United States' commitment to resolution of the refugee problem as expressed in the United Nations Protocol Relating to the Status of Refugees," including via Articles 3, 32, and 33 of the 1951 Convention, manifests "a clear intent to grant aliens the right to submit and the opportunity to substantiate their claim for asylum"); *see also Azizova v. U.S. Atty. Gen.,* 442 F. App'x 531, 536 (11th Cir. 2011); *Qiang Wang v. U.S. Atty. Gen.,* 395 F. App'x 670 (11th Cir. 2010); *Ali v. I.N.S.*, 661 F. Supp. 1234, 1246 (D. Mass. 1986) (the "right to petition the INS for political asylum is constitutionally-protected liberty or property interest triggering due process guarantee even though grant of that benefit is discretionary and there is no constitutionally-protected right to political asylum itself").

Where imposition of a fee operates to effectively deny individuals the right to apply for asylum, such governmental action violates fundamental tenets of Due Process. *Mathews v. Eldridge*, 424 U.S. 319 (1976) provides a framework for analyzing such a claim, outlining three steps for analyzing due process in administrative procedures. First, it is necessary to identify the private interest that will be affected by the official action. Here, the proposed fee would directly affect the interests of indigent asylum seekers in seeking to petition for asylum, as expressed in the *Haitian Refugee Center* line of cases.

The second step of the *Mathews* analysis is assessment of the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards. DHS's proposal to implement a ***non-waivable*** fee of $50 for every affirmative asylum application impinges upon the constitutionally-protected right to petition for asylum by preventing those applicants who cannot afford to pay the fee even from filing a petition.[4] DHS argues, without any support, that this amount would not be "unaffordable to even an indigent alien" and "would not require an alien an unreasonable amount of time to save." This is not consonant with the reality reported by the immigrants' rights community that LCR serves. This also ignores the fact that many asylum seekers arrive in the United States with nothing beyond the clothes they are wearing, and they are not permitted to apply for permission to work legally until they already have a pending Form 1-589 or have been granted asylum. *See* USCIS Form I-765 instructions.[5] Without any hope of obtaining legal employment, DHS's cavalier assertion that $50 would not be "unaffordable" rings hollow for many asylum seekers.

[4] Depending on the specific procedures for waiver implemented, some, but not all, of the issues with the proposed fee could be satisfactorily addressed by making the fee a waivable one.

[5] Available at https://www.uscis.gov/i-765.

For those refugees who cannot afford to pay a $50 fee, the mandatory nature of the fee thus operates as a complete bar to applying.

The last step of the *Mathews* analysis is consideration of the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Historically, asylum has been funded by other immigration and naturalization fees, and in 1994 the INS determined that was a sufficient alternative to imposing a $130 fee. DHS contends that, today, there is a backlog for asylum applications and that the proposed fee would help to alleviate that pressure. However, the effect of the proposed fee on asylum applicants would far outweigh the minor benefit to the government. $50 is a *de minimis* sum in the eyes of the U.S. government, and DHS's own figures bely its claim that the fee would alleviate the backlog of applications awaiting processing;[6] but to an individual refugee who has no assets and no income, it may constitute a prohibitive amount. *See Boddie v. Connecticut*, 401 U.S. 371 (1971) (finding "the State's asserted interest in its fee and cost requirements as a mechanism of resource allocation or cost recoupment" not sufficient to justify court fees that foreclosed "only avenue" of access to divorce proceedings for indigent prospective litigants).

The government's other stated justification for the non-waivable fee, including the discouragement of "frivolous filings," falls flat. The assertion that there is either a) a significant number of "frivolous filings" or; b) that an application fee will impact the number of frivolous filings is without merit or evidentiary support. In *Boddi*e, the court reasoned there was "no necessary connection between a litigant's assets and the seriousness of his motives in bringing suit," such that the government's purported interest in preventing "frivolous litigation" was outweighed. Similarly, there is no necessary connection between the need and eligibility of a refugee to apply for asylum and his or her ability to pay a fee.

Because the proposed fee would, for some asylum seekers, operate as complete bar to their exercise of the constitutionally-protected right to petition for asylum, it violates the guarantee of due process that accompanies that right and therefore should be rejected. *Haitian Refugee Ctr.*, 676 F.2d at 1039 ("[T]he government violates the fundamental fairness which is the essence of due process when it creates a right to petition and then makes the exercise of that right utterly impossible.").

II. The proposed fee violates equal protection.

As persons within the jurisdiction of the United States, refugees are entitled to the same equal protection rights as U.S. citizens. *See Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (equal protection incorporated into Fifth Amendment due process guarantee).

[6] DHS projects that the proposed fee would generate an additional $8.15 million to process a total of 163,000 Forms I-589 in FY 2019-2020. Using DHS's own figure of $366 for the cost of adjudicating a single Form I-589, the total cost without accounting for the fee would be approximately $59.7 million. Therefore, the $50 fee would not substantially mitigate any difficulties, including application backlogs, that DHS faces due to the cost of adjudicating asylum applications.

The proposed fee violates this right to equal protection by denying the benefit of applying for asylum to certain refugees solely on the basis of their ability to pay. *See Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (where indigent criminal defendants could not afford cost of trial transcript necessary for appeal, effectively foreclosing their right to appeal solely on the basis of poverty, equal protection principles required that state provide alternate means of accessing appeal); *see also Smith v. Bennett*, 365 U.S. 708 (1961) (equal protection was denied to indigent prisoners by imposition of fees for filing application for writ of habeas corpus); *Burns v. State of Ohio*, 360 U.S. 252, 258 (1959) ("The imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law."). Similarly, the most impoverished refugees will be denied their right to review of their claim to asylum by operation of the proposed $50 fee. There is no rational reason for the DHS to limit asylum applications solely to those who can pay the assessed fee.

To the extent that the most indigent refugees tend to originate from certain countries, the fee can also be seen as a part of the Administration's anti-immigrant agenda, which courts in other contexts have noted implicate concerns of unconstitutional animus. *See, e.g.*, *Centro Presente v. United States Dep't of Homeland Sec.*, 332 F. Supp. 3d 393 (D. Mass. 2018).

III. The proposed fee violates U.S. treaty obligations and runs afoul of congressional intent.

The United Nations High Commission for Refugees has opined that a fee for application for asylum is in opposition to "international standards for adjudicating refugee claims." 142 Cong. Rec. S11886-01 (Letter from UNHRC stating that "any fee imposed for filing an asylum application may have the unintended effect of discouraging refugees from realizing their fundamental right to seek and enjoy asylum").

That DHS was able to identify only three other countries imposing such a fee—and only two that do not allow for fee waivers—speaks volumes about the legality of such a fee under international law. An examination of international principles through the lens of U.S. jurisprudence confirms what is already evident.

"[A]n Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804). Consequently, 8 U.S.C. § 1158(d) should not be read as overriding 1158(a) (providing that "***[a]ny alien*** . . . irrespective of such alien's status, may apply for asylum in accordance with this section"), and the obligation conferred by the 1951 Convention's Article 34 to "facilitate the assimilation and naturalization of refugees," and "***in particular make every effort to . . . reduce as far as possible the charges and costs of such proceedings.***"

DHS has also failed to consider Article 32 of the 1951 Convention, which provides that refugees shall be expelled only "in pursuance of a decision reached in accordance with due process of law." As explained above, U.S. courts have resoundingly held that the basic right to petition for asylum is a crucial ingredient of proper due process to be afforded to refugees. The United States cannot recognize the right to apply for asylum as a component of due process for the purposes of its own Constitution while contending that Article 32 of the 1951 Convention can be

satisfied without such a guarantee. Similarly, DHS neglects Article 3's guarantee of equal protection in its administration by facially discriminating among refugees on the basis of wealth, and running the risk of disparately impacting refugees on the basis of national origin or race.

Conclusion

DHS's proposed $50 non-waivable fee for asylum seekers is unconstitutional and contravenes the United States' international treaty obligations. A fee of $50 per asylum seeker is not the *de minimis* fee that DHS claims; rather, it will prevent many of the most vulnerable asylum seekers from ever accessing the rights afforded to refugees by the U.S. Constitution, the INA, and the 1951 Convention, in violation of U.S. and international law.

Respectfully,

Lawyers for Civil Rights