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Principal Legal Advisor
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U.S. Immigration and Customs Enforcement
Department of Homeland Security
500 12th Street SW
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RE: ILRC Comment in Opposition to "Increasing the Fee for Certain [Individuals] Ordered Removed in Absentia as Established by the HR-1 Reconciliation Bill" - ICEB-2026-0034; RIN 1653-AA98

Dear Principal Legal Advisor,

The Immigrant Legal Resource Center (ILRC) submits this comment in strong opposition to the Department of Homeland Security ("DHS") U.S. Immigration and Customs Enforcement ("ICE") proposed fee increase for individuals who are ordered removed in absentia, published on May 20, 2026, ICEB-2026-0034; RIN 1653-AA98. The ILRC opposes the substantial fee increase for individuals removed in absentia—yet another tool to advance this administration's enforcement agenda. The proposed fee increase is unreasonable and based on a flawed analysis while exceeding statutory authority, thereby running afoul of the Administrative Procedure Act (APA) and the U.S. Constitution.

The ILRC is a national non-profit organization that provides legal trainings, educational materials, and advocacy to advance immigrant rights. The ILRC's mission is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. Since its inception in 1979, the ILRC has provided technical assistance on hundreds of thousands of immigration law issues, trained thousands of advocates and pro bono attorneys annually on immigration law and emerging issues, distributed thousands of practitioner guides, provided expertise to immigrant-led advocacy efforts across the country, and supported hundreds

of immigration legal non-profit organizations supporting in building their capacity to support immigrants and their families.

The ILRC is also a leader in interpreting immigration law as well as immigration relief for families, survivors, and youth, producing trusted legal resources including webinars, trainings, and manuals such as Removal Defense Updates, Motions to Reopen before EOIR, Immigration Relief Toolkits, Civil Penalties and Fines, HR1 Fees at USCIS and EOIR, Reopening Removal Proceedings Based on the Ineffective Assistance of Prior Counsel, Inadmissibility and Deportability, and many more.. Through our extensive network with service providers, immigration practitioners, and immigration benefits applicants, we have developed a profound understanding of the barriers faced by vulnerable immigrant and low-income communities of color – including children and young people, and survivors of domestic partner violence, sexual violence, human trafficking, or other forms of trauma. It is through this lens that we provide comment on the proposed fee increase to individuals removed in absentia.

As explained below, DHS's proposed increase to the fee imposed on individuals with in absentia removal orders raises significant legal and constitutional concerns. The proposal appears to exceed the agency's delegated authority, lacks a reasoned explanation for the magnitude and structure of the increase, and fails to adequately consider the practical and legal consequences for affected individuals. The proposed rule also raises serious questions regarding retroactive application, the applicable statute of limitations period, and compliance with constitutional protections, including the guarantees of due process under the Fifth Amendment and the prohibition against excessive fines under the Eighth Amendment.

The ILRC strongly opposes the proposed fee increase for the reasons detailed below.

I. The Proposed Fee Increase is Arbitrary and Capricious under the Administrative Procedure Act ("APA").

The Administrative Procedure Act ("APA") establishes the procedures by which federal agencies are held accountable to the public and subjects their actions to judicial review.[1] Under Supreme Court precedent, the agency is required to engage in "reasoned decisionmaking."[2] Further, an agency action is found to be arbitrary and capricious if:

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or

[1] *Dep't of Homeland Sec. v. Regents of the Univ. of California,* 140 S. Ct. 1891, 1905, 207 L. Ed. 2d 353 (2020).
[2] *Id* quoting *Michigan* v. *EPA*, 576 U.S. 743, 750, 135 S.Ct. 2699, 192 L.Ed.2d 674 (2015).

> it is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[3]

DHS's proposed fee increase fails to: 1) consider Congress's statutory scheme; 2) consider important aspects of the problem, including the dramatic change from past practice or offer a reasonable justification for the substantial fee increase[4], or 3) consider "significant reliance interests"[5] of immigrants and their families and children.

1) DHS's proposed fee increase for individuals removed in absentia exceeds the fee-setting authority delegated by Congress and is ultra vires.

The Supreme Court has long recognized that an agency "literally has no power to act…unless and until Congress confers power upon it."[6] Although Congress authorized the Secretary of Homeland Security to "require the payment of a fee" from any individual who "is ordered removed in absentia pursuant to" 8 U.S.C. § 1229a(b)(5) and subsequently "arrested" by U.S. Immigration and Customs Enforcement ("ICE"),[7] that authority is not without limits.

First, Congress authorized only "partial reimbursement" of "the cost of arresting" individuals ordered removed in absentia.[8] DHS's proposed fee increase, however, includes the "broader costs of identifying, detaining, processing, and removing [an individual], in addition to the direct cost of the arrest subsequent to the in absentia removal order."[9] By adopting this methodology, DHS relies on a ultra vires cost-calculation framework that is inconsistent with the plain language of the statute.

More specifically, DHS cites an Immigration Enforcement Lifecycle ("IEL") cost framework that includes direct costs, indirect costs, and overhead, resulting in a total cost of $18,042.[10] DHS further acknowledges that "these costs reflect the average cost of each stage of the IEL, not just those specific to [individuals] with final orders of removal." [11] The statute, however, only authorizes reimbursement of costs, not the imposition of punitive sanctions or deterrent measures or costs outside of the "cost of arresting" the individual, as DHS does here. DHS, by its own

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[3] *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto Ins. Co.,* 463 U.S. 29, 43 (1983).
[4] *FCC v. Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009) (a "reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."); *FCC v. Prometheus Radio Project,* 592 U.S. 414, 423 (2021) ("The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained.")
[5] *Encino Motorcars, LLC* v. *Navarro*, 579 U.S. ——, ——, 136 S.Ct. 2117, 2126, 195 L.Ed.2d 382 (2016) quoting *Fox Television*, 556 U.S. at 515, 129 S.Ct. 1800; *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.,* 591 U.S. 1, 33 (2020) (agencies are "required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns.")
[6] *La Pub. Serv. Comm'n v. F.C.C.,* 476 U.S. 355, 374 (1986).
[7] 8 U.S.C. 1814.
[8] 8 U.S.C. § 1814(a).
[9] 91 Fed. Reg. 29,380, at 29,382 (May 20, 2026).
[10] *Id.*
[11] *Id;* n. 32.

accounting, has provided that the cost of "arresting" an individual is $1,777[12]--a whopping $16,265 less than their $18,042 (or current $5,000) calculation which includes the cost to identify, detain, process, and remove individuals[13]—all actions Congress did *not* authorize for reimbursement.

Moreover, DHS has failed to establish any meaningful nexus between the proposed $18,000 fee and the recoverable statutory costs of arresting a particular individual. Nor is the fee individualized in any way. Nothing in the statute authorizes a fee of this extent. Accordingly, the proposed fee increase is not only ultra vires but exceeds DHS's authority and violates the Administrative Procedure Act[14].

2) DHS failed to reasonably explain or justify the fee increase or consider important aspects of the proposed fee increase.

DHS proposes increasing the fee for individuals ordered removed in absentia from $5,130 to $18,000.[15] This increase comes less than one year[16] after DHS raised the fee by $130 for Fiscal Year 2026, citing "inflation", and now asserts that the fee is "too low to sufficiently reimburse ICE for the cost of arresting an [individual] who has been ordered removed in absentia."[17] If that is the case, DHS has not explained why it failed to account for these costs during its most recent fee increase for Fiscal Year 2026. Further, inflation between Fiscal Years 2025 and 2026 has increased by 4.2%[18], not 240% as DHS's calculations would claim. Additionally, in attempting to justify the increase, DHS adopts an arbitrary IEL cost framework that seeks to recover costs beyond those authorized by Congress, as discussed above. DHS also advances a range of claims about recouping overinclusive costs[19]—despite having just received an additional $70 billion for enforcement.[20]

Further, DHS fails to grapple with the reality that immigrants are frequently unrepresented because there is no right to government-appointed counsel in immigration proceedings. As a result, many individuals do not receive adequate notice or lack the assistance necessary to navigate complex proceedings. A study by the American Immigration Council found that "83% of all nondetained immigrants with completed or pending removal cases from Fiscal Years (FY)

[12] 91 Fed. Reg. 29,380 at 29,383 (May 20, 2026).
[13] 91 Fed. Reg. 29,380 at 29,383 (May 20, 2026).
[14] 5 U.SC. 706(2).
[15] 91 Fed. Reg. 29,380, at 29,382 (May 20, 2026).
[16] 90 Fed. Reg. 52,425 (Nov. 20, 2025).
[17] 91 Fed. Reg. 29,380, at 29,382 (May 20, 2026).
[18] Jeff Cox, *CPI inflation report for May 2026 shows consumer prices rose less than expected,* CNBC (June 10, 2026), https://www.cnbc.com/2026/06/10/cpi-inflation-report-may-2026.html
[19] 91 Fed. Reg. 29,380, at 29,382-29,383 (May 20, 2026).
[20] Ximena Bustillo & Sam Gringlas, *House Passes Bill to Fund ICE and Border Patrol Through the Remainder of Trump's Term,* NPR (June 9, 2026), https://www.npr.org/2026/06/09/nx-s1-5851664/house-reconciliation-vote-immigration-enforcement-ice-border-patrol.

2008 through 2018 attended all their court hearings."[21] The study further found that represented individuals attended 96% of all their court hearings and 15% of those ordered removed in absentia "successfully reopened their cases and had their removal orders rescinded."[22] And as DHS, themselves, assert, there are individuals who depart the United States voluntarily and therefore are not subject to arrest and removal orders.[23] These facts expose the proposed fee increase as a blunt instrument that will penalize individuals for systemic failures DHS refuses to address.

Compounding these failures, DOJ recently introduced a change to the EOIR-33 form that eliminates the "in care of" field,[24] further obstructing notice for individuals who have moved, or whose attorney or caretaker would otherwise receive it. These cumulative policies, taken together with the fact that the Justice Department is also "drastically accelerating" hearings, some of which were scheduled a year or more from now, by consolidating them into "mega masters" calendars—in which 100 or more individuals are processed simultaneously—reveal a coordinated strategy to increase deportation orders while stripping away every meaningful avenue to challenge them.[25] Reports indicate that individuals have been arrested "directly from federal or immigration courtrooms in order to meet quotas set by the administration."[26] Such policies discourage individuals from appearing for proceedings and undermine any confidence in attending a hearing that will result in an arrest.

Finally, DHS fails to adequately consider the effect of this fee on vulnerable populations and their ability to pay. The proposal does not address how youth, survivors, individuals who have changed addresses and missed notices, or other vulnerable individuals would be expected to pay an $18,000 fee—particularly considering the recent $5,130 increase already imposed in these cases. Instead, DHS merely acknowledges that the rule may impose a burden without meaningfully analyzing that burden or its consequences.

These hardships would extend beyond the individuals assessed the fee and directly affect mixed-status families. Millions of children live in households with at least one immigrant parent. When a parent is subject to an $18,000 fee, the resulting financial strain can reduce a family's ability to meet children's basic needs, including adequate nutrition, healthcare, educational support, and stable housing. DHS fails to consider how diverting scarce household resources toward an

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[21] Ingrid Eagly & Steven Shafer, *Measuring in Absentia Removal in Immigration Court,* Am. Immigr. Council (Jan. 27, 2021), https://www.americanimmigrationcouncil.org/report/measuring-absentia-removal-immigration-court/.
[22] *Id.*
[23] 91 Fed. Reg. 29,380, at 29,386 (May 20, 2026).
[24] 91 Fed. Reg. 10,829 (Mar. 5, 2026)
[25] Ximena Bustillo, *Immigration courts are using a new tactic to speed up deportations,* NPR, (May 26, 2026) https://www.npr.org/2026/05/26/nx-s1-5830474/trump-immigration-courts-mega-masters.
[26] Ximena Bustillo & Rahul Mukherjee, *NPR analysis shows skyrocketing numer of 'no-shows' in immigration court,* (Dec. 22, 2025) https://www.mynspr.org/npr-news/2025-12-22/npr-analysis-shows-skyrocketing-number-of-no-shows-in-immigration-court.

unprecedented fee would negatively affect children's well-being. Despite these foreseeable consequences, DHS does not meaningfully analyze the impact of the proposed fee increase on family stability, child well-being or the ability of affected individuals to pay. This failure is not a minor procedural deficiency—it is a fundamental flaw that renders the proposal arbitrary and capricious.

II. The Proposed Fee Increase is Subject to a 5-Year Statute of Limitations as of the Date of the In Absentia Removal Order.

Neither the proposed fee increase or 8 U.S.C. § 1814 establish a specific statute of limitations period for the proposed civil penalties associated with in absentia removal orders. Therefore, the general federal statute found in 28 U.S.C. § 2462 should apply. Section 2462 provides a five-year statute of limitations for any civil fine, penalty, or forfeiture unless another statute expressly provides otherwise.

The proposed rule does not clearly explain when the statute of limitations would begin to run. It is unclear whether the limitations period would commence on the date the in-absentia removal order was issued, or only when DHS later arrests the individual. This ambiguity creates significant uncertainty and raises concerns regarding fair notice and due process as discussed in Sections IV and V of this comment. DHS should clarify that any statute of limitations begins on the date of the removal order and should not be indefinitely extended based on when the government later encounters or arrests an individual. Allowing penalties to be imposed decades after the underlying conduct would undermine the purpose of statutes of limitations, which exist to promote fairness and ensure timely enforcement. Additionally, many individuals unknowingly subject to in absentia removal orders may have lived in the United States for years or even decades after the order was entered. During that time, they may have established families, raised children, paid taxes, contributed to their communities and otherwise built stable lives. DHS should not be allowed to reach back in time as far as they want and issue a fine at their leisure.

III. The Proposed Fee Increase Is Impermissibly Retroactive as It Should Not Apply To Individuals Who Were Ordered Removed In Absentia Instead Of Merely To Individuals Who Were Not Arrested Before July 4, 2025.

The fee for noncitizens ordered removed in absentia, codified at 8 U.S.C. § 1814 was enacted on July 4, 2025, as Section 10016 of the One Big Beautiful Bill Act.[27] Section 1814 of volume 8 of the U.S. Code is not explicitly retroactive, and nothing in the section permits retroactive application. "[C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."[28] DHS in the NPRM recognizes that the statute is not retroactive.[29] However, DHS mistakenly uses the date of arrest as the trigger

[27] 39 Stat. 72, P.L. 119-21.
[28] *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (citations omitted).
[29] 91 Fed. Reg 29380 at 29384 n. 47.

date for retroactivity, rather than the date of the in absentia order.[30] DHS must correct this misinterpretation of the date that the statute went into effect. If the fines go into effect, they should only apply to cases where the in absentia order was entered after July 4, 2025.

If 8 U.S.C. § 1814 were to apply to individuals who were ordered removed in absentia before July 4, 2025, as proposed by the NPRM, this application would be unconstitutional. It would apply "new legal consequences" – a fee – to "events completed before its enactment," namely, in absentia orders entered on or before July 4, 2025.[31] It would increase liability for past conduct.[32] Retroactive application would be fundamentally unfair: noncitizens would be fined for past conduct that they have no ability to change, meaning that they had no way to avoid the fee.[33] In the proposed fee increase, DHS has stated that leaving the United States will not forgive the in absentia fee and that they intend to implement the fee for any person who has an outstanding in absentia order who is applying for admission to the United States. "The adjudicator may flag the outstanding debt such that collection would be further pursued upon readmission."[34] Moreover, DHS intends to use the outstanding fee as a negative factor implicating the public charge ground of inadmissibility under INA § 212(a)(4).[35] Under this rule, DHS plans to impose the $18,000 fine on any person who was ordered removed in absentia at any time and arrested on or after July 4, 2025. To apply this fee to in absentia orders entered before July 4, 2025, would be impermissibly retroactive and unconstitutional.

IV. The Proposed Fee Increase Violates The Fifth Amendment Guarantee Of Due Process.

This proposed fee increase violates the Due Process Clause of the Fifth Amendment to the U.S. Constitution. "[D]ue process requires that the courts provide notice and opportunity to be heard before imposing any kind of sanctions."[36]

Any individual placed in immigration proceedings before July 4, 2025, did not receive any notice that their failure to depart after being ordered removed in absentia would result in a fine of $5000, much less a fine of $18,000. Section 240(b)(7) lists the sanctions to be applied to individuals ordered removed in absentia. These sanctions include ineligibility for discretionary relief for a period of ten years. Specifically, the INA provides that a person who is ordered removed in absentia shall not be eligible for relief under INA §§ 240A (cancellation of removal),

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[30] "The new fee will apply to all aliens who are ordered removed in absentia pursuant to section 240(b)(5)(A). . . and are subsequently arrested by ICE on or after the effective date of the final rule." 91 Fed. Reg. at 29384.
[31] *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994).
[32] *IBID.*
[33] *Landgraf*, 511 U.S. at 265 ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly….")
[34] 91 Fed. Reg at 29386.
[35] 91 Fed. Reg at 29386 n. 50.
[36] *S.E.C. v. McCarthy*, 322 F.3d 650, 659 (9th Cir. 2003) (quoting *Ted Lapidus, S.A. v. Vann*, 112 F.3d 91, 96 (2d Cir. 1997) (quoting *In re Ames Dep't Stores, Inc.*, 76 F.3d 66, 70 (2d Cir. 1996). *See also, Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) (the fundamental requisite of due process of law is the opportunity to be heard).

240B (voluntary departure), 245 (adjustment of status), 248 (change of nonimmigrant status), or 249 (registry) for a period of 10 years. Nowhere in the statute does it state that an individual ordered removed in absentia would be required to pay a fee of $5000 for their failure to appear; much less a fee of $18,000. This provision does not appear until July 4, 2025, in 8 U.S.C. § 1814. Not only is it impermissibly retroactive to apply this fee to individuals ordered removed in absentia before July 4, 2025, but it is also a violation of due process to impose this fee on individuals who never received notice of the fee, should they fail to appear at their immigration hearing and were subsequently ordered removed in absentia.

The statute and the proposed fee increase, as written, violate the basic tenets of due process. Due process requires at a minimum the following elements: (1) timely and adequate notice; (2) an opportunity for the individual to defend themselves by confronting any adverse witnesses and presenting their own arguments; (3) retained counsel, if desired; (4) an "impartial" decisionmaker; (5) a decision resting "solely on legal rules and evidence adduced at the hearing"; (6) a statement of reasons for the decision and evidence relied on.[37] Neither the statute nor the proposed regulation ensures these safeguards guaranteed under the Due Process Clause.

There is No Timely and Adequate Notice. For individuals ordered removed in absentia before July 4, 2025, there is no notice that a fee of either $5000 or $18,000 could be imposed on them. The notice is not merely inadequate; it is nonexistent. Moreover, the regulation is silent on how individuals who are subject to the fee are to be informed of it. Will they receive the fee notice through personal service, by certified mail, by regular mail, or by electronic mail? The proposed fee increase is silent on the means of notice.

Individuals Do Not Have an Opportunity to Defend Themselves by Confronting Adverse Witnesses and Presenting Their Own Arguments. There is no process for these individuals to contest the fee. There is no provision for the individual to review the evidence purporting to establish that they are subject to this fee. There is no provision for the individual to confront any adverse witnesses who contend that they are subject to this fee.

There is no Impartial Decision-Maker Where the Decision-Maker Gets Half of the Fee Collected. There is no impartial decision-maker in these proceedings where the decision-maker gets 50% of the fees collected to be used at their own discretion. The statute provides that 50% of the fee collected "shall be credited to the U.S. Immigration and Customs Enforcement; and …shall be deposited into the Detention and Removal Office Fee Account; and … may be retained and expended by U.S. Immigration and Customs Enforcement without further appropriation."[38]

The Supreme Court has long recognized that due process requires impartiality from judges and quasi-judicial actors.[39] The requirement of a neutral arbiter is rooted in the guarantee "that life,

[37] *Goldberg v. Kelly*, 397 U.S. 254, 266-71 (1970).
[38] 8 U.S.C. § 1814(d).
[39] *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972); *Tumey v. Ohio*, 273 U.S. 510, 522 (1927).

liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or law."[40] In this way, the Due Process Clause "ensur[es] that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him."[41]

DHS cannot act as a neutral arbiter in these proceedings because it is unconstitutionally conflicted. Any arrangement that gives rise to even a "possible temptation" to act in a biased manner that benefits the decision-maker runs afoul of the Due Process Clause.[42]

Where the decision-maker and the decision-maker's agency get half of the fee collected to place in their coffers, unregulated by further governmental processes, there is no impartial decision-maker; there is no neutral arbiter. The decisionmaker has a very real stake in ensuring they receive the fee.

The Regulations Do Not Provide for a Decision Resting Solely on the Legal Rules and Evidence Adduced at the Hearing. This fee is being imposed on individuals with an in absentia order with no process for them to contest the validity of the order or of the fee.

Statement of Reasons for the Decision and the Evidence Relied On. There is no written decision issuing the fee, and no process for the government to issue a written decision. From the statute and the regulations, it appears that if the government believes that an individual was ordered removed in absentia, they can impose the fee.

V. The Proposed Fee Increase Violates Procedural Due Process.

The proposed fee increase violates the Procedural Due Process of the individuals ordered removed in absentia. The Supreme Court has held that to determine whether an individual's procedural due process rights are violated, the adjudicator must consider three factors: (1) the interests of the individual in retaining their property and the injury threatened by official action; (2) the risk of error through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; (3) the costs and administrative burden of the additional process and the interests of the government in efficient adjudication.[43]

Interests of the Individual in Retaining Their Property and the Injury Threatened by Official Action. A fee of $18,000 is a substantial amount of property for many immigrants in the United States. Presuming that the average worker works 2,000 hours in a year, the average immigrant workers earn between $22,000 to $32,000.[44] The proposed fee of $18,000 would be more than

[40] *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).
[41] *Id.*
[42] *Ward*, 409 U.S. at 60.
[43] *Mathews v. Eldridge*, 423 U.S. 319, 335 (1976).
[44] *See id; First Jobs and Wage Gain: U.S. and State-Level Data,* Immigrant Mobility Research Center, *available at* https://immresearch.org/wp-content/uploads/Final-First-Jobs-and-Wage-Gain-US-and-state-level-data92.pdf.

half of the individual's pre-tax income. The injury threatened by official action could result in a loss of half of an individual's annual income, with very few safeguards.

The Risk of Error Through the Procedures Used and the Probable Value, if Any, of Additional or Substitute Procedural Safeguards. As there is no guaranteed notice of the implementation of these fees and as there is no process to challenge the validity of these fees, there is a very high likelihood of error due to the lack of procedure. The value of any procedural safeguards would be huge, as it would avoid the risk of loss to an average noncitizen of half of their pre-tax income.

The Cost and Administrative Burden of the Additional Process and the Interests of the Government in Efficient Adjudication. It is impossible to tell from the data what the costs of the additional process would be to the government. However, since the loss to the individuals is so great, it appears that any cost to the government is of limited concern. At a minimum, these individuals should be given notice of the pending fee, the opportunity to contest the implementation of the fee, and the opportunity to examine any evidence and any witnesses that contend that they are subject to the fee.

VI. The Proposed Rule Violates The Excessive Fines Clause Of The Eighth Amendment To The U.S. Constitution.

The Eighth Amendment to the U.S. Constitution provides "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. amend. VIII. To violate the Eighth Amendment's prohibition on excessive fines, the required payment must be (1) a fine; and (2) excessive.[45] A fine or a fee falls under the Excessive Fines Clause where the government extracted the payments for purposes of a punishment, and (2) the extraction was excessive.[46] "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality."[47]

1) The Fee is a Fine For Purposes of the Eighth Amendment Because it is at Least Partially Punitive.

The fee under 8 USC § 1814 is a "fine" for purposes of the Eighth Amendment because it is at least partially punitive. "[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment" for purposes of the Excessive Fines Clause.[48] For example, a parking and impound fee of over $20,000 was found to violate the Excessive Fines Clause of the Eighth Amendment.[49]

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[45] *United States v. Bajakajian*, 524 U.S. 321, 334 (1998); *United States v. Binkundi*, 296 F.3d 761, 795 (D.C. Cir. 2019).
[46] *Bikundi*, 926 F.3d at 795 quoting *Consol. Commc'ns of Cal. Co v. FCC*, 715 F. App'x 13, 15 (D.C. Cir. 2018).
[47] *Bajakajian*, 524 U.S. at 334.
[48] *Austin v. United States*, 509 U.S. 602, 610 (1993) (quoting *United States v. Halper*, 490 U.S. 435, 447–448 (1989)). *See also Wright v. Riveland*, 219 F.3d 905, 914 (9th Cir. 2000).
[49] *Pimentel v. City of Los Angeles*, 115 F.4th 1062 (9th Cir. 2024) *cert denied sub nom, City of Los Angeles, California v. Pimentel*, 145 S. Ct. 2735, 222 L. Ed. 2d 1013 (2025).

The salient question in excessive fines cases is whether a payment is at least partially punitive, or entirely remedial. *See Id.* at 610–11.

While the statute clearly states that this fee is to be a partial reimbursement for the "arrest" of an individual with an outstanding removal order, the cost of an "arrest" according to DHS is $1777.[50] The proposed new fee is $18,000 that is a 913% increase over the cost of the "arrest". According to the proposed fee increase, the fee is a penalty intended to make it more difficult for a person with an outstanding in absentia order to return to the U.S. legally in the future. The NPRM notes,

> For example, [noncitizens] who were previously removed due to an in absentia removal order, and have outstanding fees, may seek lawful admission to the United States or an immigration benefit at a later point. In addition to considering prior unlawful presence, the prior removal order, and the prior failure to appear for proceedings, the adjudicator may consider the outstanding debt to affect the alien's admissibility. The adjudicator may flag the outstanding debt such that collection would be further pursued upon readmission.[51]

The NPRM provides that the individual with an outstanding in absentia order fee may be denied admission in the future under the public charge ground of inadmissibility. INA § 212(a)(4).[52]

Because the fees are intended to secure compliance with an in absentia order and to prevent the return of the individual, they are punitive. "Civil fines that seek to deter rule-breaking or enforce compliance are punitive in character." Just as imposing a fine to "secure compliance with toll obligations" is punitive, so too are the in absentia fees here, designed to encourage an individual to self-deport and never to return to the United States.[53]

2) The Proposed Fee Increase is Excessive Where it is a 913% Increase Over the Cost of Arrest

A fine is constitutionally excessive if it is "grossly disproportionate" to the gravity of the offense.[54] The Supreme Court in *Bajakajian* used a multi-factor analysis to determine gross disproportionality. *Id.* These factors generally include, but are not limited to: (1) the nature or essence of underlying offense, (2) the relation of the underlying offense to other illegal activities, (3) the amount of the fine and its relationship to authorized penalties, (4) the maximum sentence and/or fine that could be imposed, (5) other penalties that may be imposed, and (6) harm caused by underlying conduct. Importantly, economic sanctions historically must "be proportioned to the

[50] 91 Fed. Reg. at 29383.
[51] 91 Fed. Reg at 29386.
[52] 91 Fed. Reg. at 29386 n. 50.
[53] *Farina v. Metropolitan Transportation Authority*, 409 F.Supp.3d, 173, 198 (S.D. N.Y. 2019).
[54] *Bajakajian*, 524 U.S. at 334.

wrong" and "not be so large as to deprive [an offender] of his livelihood."[55] Looking at these factors, this proposed fee is excessive under the Eighth Amendment.

The Nature or Essence of Underlying Offense

Here, the fee of $18,000 is to be imposed on any individual who has been ordered removed in absentia. This fee would apply to all individuals who were ordered removed in absentia without any individualized consideration of the reason for their nonappearance in immigration court. There is no fee waiver available under the statute and the only way the fee can be forgiven is if the underlying in absentia order is rescinded.[56]

The Relation of the Underlying Offense to Other Illegal Activities

There is no relation between having been ordered removed in absentia and any other illegal activities. The act of being present in the United States in violation of the law is not a crime. Illegal entry may be a crime.[57] And being present in the United States after being ordered removed may also a crime.[58] But remaining in the United States after receiving an in absentia order is not a crime and is not related to other illegal activities.

The Amount of the Fee/Fine and Its Relationship to Authorized Penalties

The fee, according to the statute is $5000 to be increased for inflation or whatever fee DHS may establish by rule.[59] The fee is intended to provide a *partial* reimbursement for the cost of "arresting" individuals with outstanding in absentia orders.[60] According to DHS's own numbers, the cost of arresting an individual with an outstanding removal order is $1777.[61] A fee of $1777 would constitute full reimbursement for the cost of arresting an individual with an outstanding in absentia order. The proposed fee of $18,000 is 913% of this cost. It is a complete reimbursement of the cost of arrest plus an additional 813% to go to ICE.

The Maximum Sentence and/or Fine or Fee That Could Be Imposed

Under this proposed rule, there is no alternative to the $18,000 fee. There is no maximum fee, and there is no minimum fee. There is no discretion in imposing this fee based on the individual's circumstances.

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[55] *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 271 (1989); *see also Timbs v. Indiana*, 586 U.S. 146, 151–52 (2019) (citing 4 W. Blackstone, Commentaries on the Laws of England 372 (1769) ("[N]o man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear.").
[56] 8 U.S.C. § 1814(c).
[57] 8 U.S.C. § 1325.
[58] 8 U.S.C. § 1326.
[59] 8 U.S.C. § 1814(b).
[60] 8 U.S.C. § 1814(a).
[61] 91 Fed. Reg. 29383.

Other Penalties That May Be Imposed

The Immigration and Nationality Act provides several penalties that may be imposed and must be imposed on a person who has been ordered removed in absentia. For example, a person who is ordered removed in absentia is ineligible to apply for relief under INA § 240A (cancellation of removal); § 240B (voluntary departure); § 245 (adjustment of status); § 248 (change of status); or 249 (registry) for a period of ten years.[62] These are harsh penalties for a person who is ordered removed in absentia.

Harm Caused by Underlying Conduct

The rule does not point to any evidence of harm by the underlying conduct of failing to leave the United States after being ordered removed in absentia.

Economic Sanctions Must Be "Proportioned to the Wrong"

Under the Eighth Amendment, the fee or fine imposed by the government must be "proportioned to the wrong." Here, the government proposes to impose a fee of $18,000 on the individual ordered removed in absentia to cover the partial reimbursement for the cost of the arrest (which is $1777). The proposed fee increase provides that should the individual not pay the fee, if the individual applies for readmission, the adjudicator may consider the outstanding fee as a negative factor and can find that the individual is inadmissible under the public charge ground of inadmissibility under INA § 212(a)(4).[63] These economic sanctions are disproportionate to the "wrong."

Economic Sanctions Must Not Be So Large as to Deprive a Person of Their Livelihood

Finally, the Eighth Amendment provides that the economic sanctions must not be so large as to deprive an individual of their livelihood. As discussed above, this $18,000 fee would constitute 50% of the average immigrant worker's pre-tax income and deprive them of their livelihood.

The proposed fee increase not only violates the APA and the U.S. Constitution, but it increases fees in an absurd and unreasonable manner—raising them by 913% over the actual cost authorized by Congress. No mental gymnastics are required to understand that this rule is rooted in animus and reflects DHS's continued attempt to profit off immigrants through its anti-immigrant and racist policies.

For all of these reasons, the DHS should withdraw the proposed fee increase.

Respectfully submitted,

The Immigrant Legal Resource Center

[62] INA § 240(b)(7).
[63] 91 Fed. Reg. at 39386.