



The Latino Legal Voice for Civil Rights in America.

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June 22, 2026

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RE: DHS Docket No. ICEB–2026–0034 Increasing the Fee for Certain Aliens Ordered Removed in Absentia as Established by the HR–1 Reconciliation Bill

Dear Office of the Principal Legal Advisor:

MALDEF (“Mexican American Legal Defense and Educational Fund”) submits this public comment to urge the Department of Homeland Security (“DHS”) to rescind its Notice of Proposed Rulemaking found at 91 Fed. Reg. 29380 (“NPRM”), seeking to raise the fee for noncitizens ordered removed in absentia who fail to depart the United States and are subsequently arrested by ICE from \$5,130 to \$18,000. For the reasons given below, DHS lacks the statutory authority to make this fee change, and its underlying analysis is arbitrary and capricious in violation of the Administrative Procedure Act (“APA”), several times over. Accordingly, it must rescind the NPRM and maintain the \$5,130 fee.

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I. Background

8 U.S.C. § 1814 governs the assessment of the fee for noncitizens ordered removed in absentia who are arrested by Immigration and Customs Enforcement (“ICE”).¹ Subsection (a) dictates that this fee is only a “partial reimbursement for the cost of arresting” a noncitizen in absentia.² The fee applies only if a noncitizen is “ordered removed in absentia ... and ... is subsequently arrested by [ICE].”³ If, however, the detainee’s removal order is rescinded under section 1229a(b)(5), the fee no longer applies to them.⁴

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The fee is the greater of (A) \$5,000, adjusted annually for inflation (“statutory floor”), or (B) such amount as the DHS Secretary may establish, by rule.⁵ In other words, if the statutory floor is greater than the value DHS determines constitutes

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¹ 8 U.S.C. § 1814.

² *Id.* at § 1814(a).

³ *Id.*

⁴ *Id.* at § 1814(c).

⁵ *Id.* at § 1814(b)(1), (2).

“partial reimbursement” for the cost of “arresting” a noncitizen removed in absentia, the statutory floor applies and DHS cannot implement an alternative fee via rulemaking.

To make its partial reimbursement determination, DHS relied on ICE’s immigration enforcement lifecycle cost framework (“IEL”).⁶ The IEL determines the average per-person cost of each stage of the immigration lifecycle (not just for those ordered removed in absentia).⁷ There are five stages of the IEL: (1) identification; (2) arrest; (3) detention; (4) processing; and (5) removal.⁸ For each category, the IEL splits costs into three subcategories: (a) direct costs; (b) indirect costs; and (c) overhead costs.⁹ These indirect and overhead costs include, but are not limited to, “training, vehicles, and support staff.”¹⁰ This IEL data shows that the average *complete* cost of arrest, including indirect and overhead costs, is \$1,777 per-person.

Despite the fact that the complete cost of arrest was well below the statutory floor (and thus should have precluded this rulemaking), DHS proceeded. It did so by concluding that the remaining four non-arrest categories of the IEL constitute costs of arresting an individual under section 1814(a). This total per-person cost of the IEL, as represented in the NPRM, is \$18,042.¹¹ Based on that number, DHS proposes an \$18,000 fee as partial reimbursement for the cost of arresting an individual removed in absentia.

II. Analysis

a. DHS Lacks the Statutory Authority to Assess its Proposed Fee Against Those Ordered Removed in Absentia Who Are Subsequently Arrested

DHS’ proposed \$18,000 fee is inconsistent with section 1814(a) for two independent reasons. First, subsection (a) only allows DHS to seek costs associated with the “arrest”—that is, the discrete enforcement action of taking an individual into custody. Second, it only allows DHS to seek a “partial” reimbursement for those costs. As discussed below, the proposed fee includes costs outside of the scope of the arrest. Moreover, under any theory of the scope of “arrest,” the proposed fee is not a partial reimbursement. DHS thus lacks the statutory authority to make this change and must rescind the NPRM.

i. The Proposed Fee Impermissibly Includes Costs That Are Not Part of the Discrete Enforcement Action of “Arresting” the Individual Removed in Absentia

As used in section 1814(a), “arrest” carries its ordinary legal meaning—a legal authority seizing a person and taking them into custody.¹² This discrete enforcement event is complete upon taking the individual into custody. Any unrelated costs—such as costs associated with detention or removal—fall outside of section 1814(a)’s partial reimbursement provision.

⁶ NPRM at 29383-84.

⁷ *Id.* at 29383.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 29383.

¹² *E.g.*, *Arrest*, Black’s Law Dictionary (12th ed. 2024) (defining arrest as a “seizure or forcible restraint, esp. by legal authority”).

The existence of the statutory floor has no effect on the meaning of “arrest” as used in subsection (a). Congress’ choice to fix a statutory floor is a legislative judgment—not a calculation under subsection (a). Because this statutory floor does not reflect a cost-matching analysis from Congress, it says nothing about the scope of “arrest” as used in the statute. DHS’ authority to set a fee by rule, however, is cabined by an obligation to cost-match consistent with subsection (a). And subsection (a) only permits DHS to assess a partial reimbursement for the cost of seizing a person and taking them into custody, nothing more.

Three canons of statutory construction confirm interpreting “arrest” in this manner. First, the presumption of consistent usage dictates that the word “arrest” should be interpreted consistently within section 1814.¹³ This presumption is “at its most vigorous when a term is repeated within a given sentence.”¹⁴ Subsection (a) uses arrest twice in one sentence, once in the general text of subsection (a) and again in subsection (a)(2). Congress clearly employed the ordinary legal meaning of the word “arrest” in subsection (a)(2) when it explained that the fee attaches to an individual ordered removed in absentia when they are “subsequently arrested by [ICE].”¹⁵ For this trigger clause to make sense, the “arrest” must end upon the taking of the individual into custody. Otherwise, the fee could not attach to the arrested individual ordered removed in absentia until some undefined later point in the removal process. Because Congress applied the ordinary legal meaning of the word “arrest” within the same sentence as subsection (a), the presumption of consistent usage further dictates using this definition of the word to determine the relevant costs for the partial reimbursement calculation.

Next, “under the *in pari materia* canon of statutory construction, statutes addressing the same subject matter generally should be read ‘as if they were one law.’”¹⁶ Thus, “arrest” in section 1814(a) should be interpreted consistently with how it is used throughout Title 8 of the U.S. Code. Title 8 repeatedly uses “arrest,” “detention,” and “removal” in the same sentence or statute, and consistently treats these terms as representing distinct phases of the immigration enforcement process.¹⁷ Even the IEL framework DHS relies upon in the NPRM recognizes these as distinct phases.¹⁸ Section 1814(a), as a result, must be understood to provide partial reimbursement only for costs associated with the “arrest” portion of the IEL.

Lastly, when “Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”¹⁹ Subsection (a) and (a)(2) use variations of the word “arrest,” whereas subsection (a)(1) specifically references “removal”—all of which occur in one sentence.²⁰ Congress thus used the word “removal” as distinct from “arrest” in subsection (a), yet chose not to draft subsection (a) to provide partial reimbursement for the “cost of arrests and removals,” or “costs of arrests, removals, and detentions.” This decision to reference removal in subsection (a)(1), but omit it from the partial

¹³ See *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (citation omitted).

¹⁴ *Id.*

¹⁵ 8 U.S.C. § 1814(a)(2).

¹⁶ *Wachovia Bank v. Schmidt*, 546 U.S. 303, 315-16 (2006) (quoting *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972)).

¹⁷ *E.g.*, 8 U.S.C. § 1226(a) (governing the “[a]rrest, detention and release” of noncitizens before a removal order is issued); 8 U.S.C. § 1231(a) (governing the “[d]etention, release, and removal” of noncitizens after a removal order is issued).

¹⁸ NPRM at 29383.

¹⁹ *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation and quotation omitted).

²⁰ See 8 U.S.C. § 1814(a).

reimbursement provision in subsection (a), indicates that the reimbursement provision covers only arrest-related costs, not the broader costs of detention or removal.²¹

Because DHS seeks to assess costs beyond those associated with arrests, its proposed fee does not meet the requirements of section 1814(a). It thus lacks the statutory authority to set its proposed fee.

ii. Under Any Interpretation of “Arrest,” the Proposed Fee is Not a Partial Reimbursement as Required by the Statute

Section 1814(a) allows for a “partial reimbursement for the cost of arresting” a non-U.S. citizen removed in absentia.²² The word “partial” means “not complete.”²³ It is thus an antonym of the word “complete.” Under the correct interpretation of the word “arrest” in section 1814(a), full reimbursement for relevant costs, according to DHS, is \$1,777.²⁴ Its \$18,000 proposed fee is more than 10 times higher. This is not a partial reimbursement—it is an extreme penalty that likely violates the Excessive Fines Clause of the U.S. Constitution.²⁵

Even if one incorrectly concludes, as DHS has, that costs associated with identification, processing, detention, and removal are reimbursable under section 1814(a), the proposed \$18,000 fee still exceeds a partial reimbursement. DHS estimates that the average total cost of the immigration lifecycle, including all those cost categories, is \$18,042 per-person.²⁶ The proposed fee is thus 99.8% of a complete reimbursement for those costs. It is absurd to read a statute authorizing partial reimbursement to permit an agency to seek 99.8% of the relevant costs.²⁷ Thus, even under DHS’ errant interpretation of “arrest” in section 1814(a), it still lacks the statutory authority to impose an \$18,000 fee.

b. The NPRM is Arbitrary and Capricious in Violation of the APA

The APA prohibits agencies from taking action that is “arbitrary” and “capricious.”²⁸ This standard “requires agencies to engage in reasoned decisionmaking,” and “to reasonably explain to reviewing courts the bases for the actions they take and the conclusions they reach.”²⁹ An agency acts arbitrarily and capriciously when it “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 is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”³⁰ DHS has committed several errors, which are discussed below.

²¹ See *Russello*, 464 U.S. at 23.

²² 8 U.S.C. § 1814(a).

²³ *Partial*, Cambridge Dictionary, <https://dictionary.cambridge.org/dictionary/english/partial> (last visited June 1, 2026).

²⁴ NPRM at 29383.

²⁵ See, e.g., *Austin v. United States*, 509 U.S. 602, 621-22 (1993) (explaining that civil sanctions that “can only be explained as also serving either retributive or deterrent purposes, is punishment” subject to the Excessive Fines Clause).

²⁶ NPRM at 29383.

²⁷ See, e.g., *United States v. Paulson*, 68 F.4th 528, 544 (9th Cir. 2023) (explaining that statutes must be interpreted to avoid absurdity if doing so yields a rational result consistent with the text).

²⁸ 5 U.S.C. § 706(2)(A).

²⁹ *Bhd. of Locomotive Eng’rs & Trainmen v. Fed. R.R. Admin.*, 972 F.3d 83, 115 (D.C. Cir. 2020) (quoting *DHS v. Regents of the Univ. of Cal.*, 591 U.S. 1, 16 (2020)).

³⁰ *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

First, the \$18,000 proposed fee is self-contradictory and runs counter to the evidence before the agency. DHS' own IEL data states that the cost of arrest is \$1,777 per-person.³¹ Its failure to rely upon that data in assessing a fee for the cost of arresting individuals removed in absentia runs counter to the evidence before it. Even if section 1814(a) allowed DHS to consider the full costs of its IEL data (it does not), the total cost per-person would be \$18,042.³² The NPRM repeatedly states that \$18,042 is the estimated full cost of the IEL.³³ But it proposes a "partial reimbursement" of 99.8% of that cost, without attempting to explain this contradiction.³⁴ This violates the APA.

Second, DHS failed to consider an important aspect of the problem in failing to analyze what IEL costs are relevant under section 1814(a). Even if DHS were correct that some downstream secondary costs of arrest are covered by section 1814(a) (they are not), the NPRM never explains why all the costs in its IEL framework should be included in the partial reimbursement fee.³⁵ The NPRM's analysis is pure *ipse dixit*: it simply asserts that the cost of arrests must include all other immigration-enforcement lifecycle costs, without offering any reasoning to support that conclusion.³⁶ The APA requires DHS to provide a reasoned explanation for including all these costs in its calculation, and the NPRM's conclusory assertion does not meet this requirement.

Last, DHS failed to adequately consider whether its IEL data is accurate for calculating its partial reimbursement fee. DHS acknowledges that its IEL data is just an average estimate.³⁷ It asserts that it is justified in using this data, because "locating and arresting [noncitizens] who have failed to comply with a final order of removal can involve additional time and operational steps[.]" so the "actual costs for these cases may exceed the IEL average."³⁸ This, however, is likely not true.

Again, assuming DHS can consider costs not associated with arrests, location and arrest costs combined make up only 13.4% of the total cost of the IEL model.³⁹ Detention costs, on the other hand, make up roughly 60% of the total model cost.⁴⁰ The partial reimbursement fee only applies to those ordered removed in absentia who are arrested and do not succeed in having their removal order rescinded.⁴¹ These individuals are detained under section 1231 rather than section 1226.⁴² This distinction is significant: while section 1226 detention can last for years,⁴³ the Supreme Court has placed strict restrictions on section 1231 detention lasting longer than six months.⁴⁴

³¹ NPRM at 29383.

³² *Id.*

³³ *See id.* at 29382-83.

³⁴ *See generally* NPRM.

³⁵ *See generally id.*

³⁶ *Id.* at 29382.

³⁷ *Id.* at 29382 n.32.

³⁸ *Id.*

³⁹ *Id.* at 29383.

⁴⁰ *Id.*

⁴¹ 8 U.S.C. § 1814.

⁴² *Compare id.* at § 1226 (providing pre-final order of removal detention authority), *with id.* at § 1231 (providing post-final order of removal detention authority).

⁴³ *E.g., Rodriguez v. Robbins*, 804 F.3d 1060, 1079 (9th Cir. 2015) (noting that 1226(c) detainee class members spent, on average, 427 days in immigration detention), *rev'd sub nom. Jennings v. Rodriguez*, 583 U.S. 281 (2018).

⁴⁴ *Zadvydas v. Davis*, 533 U.S. 678 (2001).

Moreover, once an individual fails to have their in absentia order rescinded, they can no longer contest removability. The ability to contest removability is one of the main drivers of prolonged and costly detention under section 1226.⁴⁵ By contrast, individuals detained solely under section 1231—without any ability to extend proceedings—are predictably detained for shorter periods and at significantly lower cost than the IEL average.

Because this narrow subpopulation is likely far less costly than the IEL average, DHS must better explain why IEL-wide cost data is an appropriate proxy for these individuals. Its failure to do so violates the APA.

III. Conclusion

The NPRM's proposed \$18,000 fee exceeds DHS' statutory authority and its analysis violates the APA. This unlawful \$18,000 fee serves only to needlessly punish those who are already likely to face the severe consequences of removal. MALDEF thus respectfully asks DHS to rescind the NPRM and retain the current fee.

Please feel free to contact us with any questions or concerns about these comments at (202) 559-1823 or jcalo@maldef.org.

Thank you.

Sincerely,



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Legislative Staff Attorney

⁴⁵ See *supra* n.43.