



**Washington, D.C.
Regional Office**
1016 16th Street, NW
Suite 100
Washington, DC 20036
Tel: 202.293.2828
Fax: 202.293.2849

**National
Headquarters
Los Angeles
Regional Office**
634 S. Spring Street
Los Angeles, CA 90014
Tel: 213.629.2512
Fax: 213.629.0266

**Chicago
Regional Office**
11 East Adams
Suite 700
Chicago, IL 60603
Tel: 312.427.0701
Fax: 312.427.0691

**San Antonio
Regional Office**
110 Broadway
Suite 300
San Antonio, TX 78205
Tel: 210.224.5476
Fax: 210.224.5382

**Sacramento
Policy Office**
1512 14th Street
Sacramento, CA 95814
Tel: 916.444.3031
Fax: 916.444.7207

Electronically Submitted through the Federal eRulemaking Portal

Submitted via www.regulations.gov

September 28, 2026

Department of Justice
Office of Policy, Executive Office for Immigration Review
5107 Leesburg Pike, Ste. 2500
Falls Church, Virginia 22041

RE: EOIR Docket No. EOIR–26–AB02 Civil Money Penalties for Actions in Contempt of an Immigration Judge’s Proper Exercise of Authority

Dear Office of the Principal Legal Advisor, Regulatory Affairs Unit:

MALDEF (Mexican American Legal Defense and Educational Fund) submits this public comment to urge the Executive Office for Immigration Review (“EOIR”) to rescind its Notice of Proposed Rulemaking found at 91 Fed. Reg. 47979 (“NPRM”), which seeks to implement a monetary sanctions regime for individuals (except for government employees) in immigration court.¹ For several reasons, EOIR lacks the statutory authority to implement its proposed regulations. The NPRM, moreover, is arbitrary and capricious in violation of the Administrative Procedure Act (“APA”). Accordingly, EOIR must rescind the NPRM.

I. Background

Under 8 U.S.C. § 1229a, an immigration judge (“IJ”) “shall have the authority (under regulations prescribed by the Attorney General) to sanction by civil monetary penalty any action (or inaction) in contempt of a judge’s proper exercise of authority under” the INA.² The NPRM attempts to impose such sanctions against: (1) an attorney or representative; (2) a noncitizen subject to proceedings before an IJ; and (3) witnesses in any proceeding before an IJ.³

It authorizes sanctions for five different acts of “contemptuous conduct,” including “[d]isorderly or abusive language in and around the courtroom and before the IJ[,]” and “[w]illfully misleading, misinforming, threatening, or deceiving any person

¹ *Civil Money Penalty for Actions in Contempt of an Immigration Judge’s Proper Exercise of Authority*, 91 Fed. Reg. 47979 (July 30, 2026) (“NPRM”).

² 8 U.S.C. § 1229a(b)(1).

³ NPRM at 47990.

(including a party to a case or an officer or employee of the Department of Justice), concerning any relevant matter relating to a case.”⁴

Before imposing a monetary fine, the IJ must issue “an oral warning on the record and memorialize the warning in writing as soon as practicable.”⁵ That warning remains in effect for one year from the date of issuance.⁶ If the individual engages in the same conduct during that time, the IJ must make a finding on the record that the individual continues to engage in the same contemptuous conduct they were warned about to initiate the sanctions process. The IJ must then serve the individual with a Notice of Intent to Impose Civil Money Penalty (“CMP Notice”), in which the IJ provides the specific alleged charge, the warning provided, and develops the factual record, among other information.⁷

The Chief IJ (or a designee) reviews the CMP Notice, and the individual in question may submit a written response for the Chief IJ’s review within 30 days of receiving the notice.⁸ In determining whether to impose a sanction, the Chief IJ or their designee “may only consider the contempt Record of Proceedings” developed by the IJ requesting the imposition of sanctions.⁹

If the Chief IJ determines the accused is guilty, for a first offense, he or she may impose a nonpurgable monetary fine of not less than \$1,000 and not greater than \$1,500.¹⁰ For a second offense, this nonpurgable fine increases to not less than \$1,500 and not more than \$2,500.¹¹ All subsequent contempt orders require nonpurgable fines of not less than \$2,500 and not more than \$3,000.¹² Practitioners who fail to pay these fines within 30 days will receive a notice from the EOIR disciplinary counsel that he or she will file a petition with the BIA to suspend the practitioner, if the fine is not paid within 15 days of issuance of the notice with a \$50 late fee.¹³

A contempt order may be appealed to the Board of Immigration Appeals (“BIA”) within 10 days from the date the order was issued.¹⁴ Unless the individual qualifies for a fee waiver, there is a \$675 appellate fee.¹⁵

II. Analysis

a. EOIR Lacks the Statutory Authority to Impose a Nonpurgable Fine for Prior Conduct and Must Rescind the NPRM

Under section 1229a(b)(1), Congress authorized IJs to impose a “civil money penalty” for “any action (or inaction) in contempt of the judge’s proper exercise of authority” under the INA.¹⁶ This provision places

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 47991.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 47993.

¹⁴ *Id.* at 47991.

¹⁵ *Id.* at 47993.

¹⁶ 8 U.S.C. § 1229a(b)(1).

two clear limits on IJs' contempt power. First, IJs can only impose monetary penalties; they cannot confine individuals for contemptuous conduct. Second, and most important, IJs only have a "civil"—not criminal—contempt power.¹⁷

In *Int'l Union, United Mine Workers of Am. V. Bagwell* (a case the NPRM cites for an unrelated reason),¹⁸ the Supreme Court provided clear guidance on how to determine whether an adjudicator exercises civil or criminal contempt power when imposing a fine.¹⁹ The inquiry turns on the "'character and purpose' of the" fine,²⁰ and in particular, "an examination of the character of the relief itself."²¹ When a court seeks "to vindicate [its own] authority" by imposing a sanction, it imposes a criminal penalty.²² In contrast, the "paradigmatic" feature of a civil contempt sanction is that it is "coercive[.]"²³ The penalty is imposed to coerce the contemnor, and the contemnor can "purge" the penalty by compliance with the court's demands.²⁴

Bagwell provided examples for when a fine is a civil or criminal contempt sanction. The Court explained that the classic civil contempt penalty is "a per diem fine imposed for each day a contemnor fails to comply with an affirmative court order."²⁵ "[S]uch fines exert a constant coercive pressure, and once the judicial command is obeyed, the future, indefinite, daily fines are purged."²⁶ In contrast, "a 'flat unconditional fine' totally even as little as \$50 announced after a finding of contempt is criminal if the contemnor has no subsequent opportunity to reduce or avoid the fine through compliance."²⁷ Such a penalty is criminal because it involves the "prior conduct" of a "prohibited act," and the "defendant ... cannot shorten the term [or reduce the fine] by promising not to repeat the offense."²⁸

The NPRM seeks to create a quintessential criminal contempt framework. When the Chief IJ finds the individual in question in contempt, he or she imposes a scheduled monetary fine for the contemnor's past prohibited conduct.²⁹ Upon imposition of this "'flat unconditional fine,' the contemnor has no subsequent opportunity to reduce or avoid the fine through compliance."³⁰

The initial IJ warning requirement does not change this conclusion. It is a mere warning; at that stage, the contempt power has not been exercised. It is only exercised later by the Chief IJ, and as *Bagwell* explains, the inquiry into whether the Chief IJ exercises a civil or criminal contempt power turns on the "'character and purpose' of the" imposed fine.³¹ The imposed fine is flat, unconditional, and nonpurgable—it punishes the contemnor for past conduct, which is a clear criminal contempt sanction.

¹⁷ *Id.*

¹⁸ NPRM at 47982.

¹⁹ 512 U.S. 821 (1994).

²⁰ *Id.* at 827 (quoting *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911)).

²¹ *Id.* at 828 (quoting *Hicks on Behalf of Feiock v. Feiock*, 485 U.S. 624, 636 (1988)).

²² *Id.* (quoting *Gompers*, 221 U.S. at 441).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 829.

²⁶ *Id.*

²⁷ *Id.* at 829 (quoting *Penfield Co. of Cal. v. SEC*, 330 U.S. 585, 590 (1947)).

²⁸ *Id.* (quoting *Gompers*, 221 U.S. at 442).

²⁹ See NPRM at 47989-94.

³⁰ *Bagwell*, 512 U.S. at 829 (quoting *Penfield Co. of Cal.*, 330 U.S. at 590).

³¹ *Id.* at 827 (quoting *Gompers*, 221 U.S. at 441).

Congress, however, only authorized EOIR to create a regulatory regime that provides “civil money penal[t]ies” for conduct “in contempt of the [IJ’s] proper exercise of authority[.]”³² EOIR thus lacks the statutory authority to impose a criminal contempt framework, and it cannot lawfully implement these regulations. EOIR, moreover, cannot enforce the provision authorizing suspensions of practitioners for failure to pay one of these criminal contempt fines, because EOIR lacks the statutory authority to impose these fines in the first place.

b. EOIR Lacks the Statutory Authority to Impose Fines for Three Categories of Covered Conduct

Congress did not provide EOIR the power to authorize IJs to issue contempt fines for any and all conduct. Instead, section 1229a(b)(1) only permits IJs to impose civil fines for conduct “in contempt of the judge’s proper exercise of authority” under the INA.³³ Three of the NPRM’s proposed categories of contemptuous conduct that IJs may sanction, however, fall outside of this grant of authority.

First, the NPRM permits the Chief IJ to issue a contempt fine for “[w]illfully misleading, misinforming, threatening, or deceiving any person (including a party to a case or an officer or employee of the Department of Justice), concerning any relevant matter relating to a case.”³⁴ This provision is substantially overbroad, as it covers conduct wholly unrelated to the IJ’s “proper exercise of authority.” Even if potentially abhorrent, a lie to a client, to opposing counsel, or to a DOJ or DHS officer about something never presented to the IJ is not in contempt of any action or authority of the IJ. Tellingly, this provision is nearly identical to a basis for finding that a practitioner has committed professional misconduct at 8 C.F.R. § 1003.102(c).³⁵ Of course, not all professional misconduct is in contempt of a judge’s authority. Thus, much of the conduct covered by this provision is not authorized by section 1229a(b)(1).

Second, the NPRM permits the Chief IJ to issue a contempt fine for “[d]isorderly or abusive behavior or language in and around the courtroom and before the Immigration Judge or abusive language in any filing with the court.”³⁶ This provision is also overbroad. Disorderly language not in, but around, the courtroom is not necessarily “in contempt” of the “judge’s proper exercise of authority[.]”³⁷ The NPRM attempts to explain away this overbreadth by citing an entirely unrelated statute that provides Article III judges the power to impose contempt sanctions for the “misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice[.]”³⁸ To the extent this statute is relevant, it is to demonstrate how the NPRM has not properly tethered this provision to the contempt power. Under section 401(1), the outside conduct, no matter how disorderly, must still “obstruct the administration of justice[.]”³⁹ The

³² 8 U.S.C. § 1229a(b)(1).

³³ 8 U.S.C. § 1229a(b)(1).

³⁴ NPRM at 47990.

³⁵ Compare NPRM at 47990, with 8 C.F.R. § 1003.102(c) (“Knowingly or with reckless disregard makes a false statement of material fact or law, or willfully misleads, misinforms, threatens, or deceives any person (including a party to a case or an officer or employee of the Department of Justice), concerning any material and relevant matter relating to a case, including knowingly or with reckless disregard offering false evidence. If a practitioner has offered material evidence and comes to know of its falsity, the practitioner shall take appropriate remedial measures[.]”)

³⁶ NPRM at 47990.

³⁷ 8 U.S.C. § 1229a(b)(1).

³⁸ 18 U.S.C. § 401(1).

³⁹ *Id.*

NPRM provision, however, does not require the covered conduct to have any nexus to the administration of justice or exercise of judicial authority under the INA. It is, accordingly, not authorized by section 1229a(b)(1).

Third, the NPRM permits the Chief IJ to issue a contempt fine for “[k]nowingly or recklessly making a false statement of material fact or law or offering false evidence.”⁴⁰ As the Supreme Court has explained, perjurious conduct alone does not amount to contemptuous conduct.⁴¹ “[I]n order to punish perjury ... as a contempt there must be added to the essential elements of perjury under the general law the further element of obstruction to the court in the performance of its duties.”⁴² This nexus between the contemnor’s conduct and the obstruction of an IJ’s authority under the INA, however, does not exist in this NPRM provision. Conduct covered by this provision is thus not “in contempt” of the IJ’s power under the INA, the only conduct for which section 1229a(b)(1) authorizes sanctions.

c. EOIR Lacks the Statutory Authority to Impose a \$675 Fee to Appeal a Contempt Fine to the BIA

EOIR seeks to impose a \$675 appellate fee for individuals found guilty of contempt by the Chief IJ seeking review before the BIA.⁴³ It is unclear what provisions EOIR believes authorize it to impose this fee, as no fee-authorizing statutes are cited in the legal authority section of the NPRM.⁴⁴ But EOIR appears to believe 8 U.S.C. § 1356(m), and possibly 31 U.S.C. § 9701, provide such authority.⁴⁵ EOIR is, for the reasons below, incorrect.

8 U.S.C. § 1356(m) authorizes fees for “adjudication and naturalization services[.]”⁴⁶ Under the associated-words canon, a statutory term must be given a meaning consistent with the words around it.⁴⁷ This canon “avoid[s] ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving ‘unintended breadth to the Acts of Congress.’”⁴⁸ “Naturalization” is the paradigmatic adjudication of an application for immigration status. Therefore, its statutory companion, “adjudication,” is best read to mean an adjudication of the same benefit-conferring kind, e.g., the examination and grant or denial of applications for an immigration benefit or status.

Appealing an EOIR-initiated punitive contempt proceeding is not such a benefit-conferring “service.” This is particularly true for individuals who appeal a contempt order issued in error by the Chief IJ. The \$675 fee for these individuals operates as a nonrefundable toll an appellant must pay to correct an error EOIR made in a proceeding that EOIR itself initiated. The appeal is accordingly not an “adjudication and naturalization service[.]” within the meaning of section 1356(m).

⁴⁰ NPRM at 47990.

⁴¹ *Ex parte Hudgings*, 249 U.S. 378, 383 (1911).

⁴² *Id.*

⁴³ NPRM at 47993.

⁴⁴ *Id.* at 47979-80.

⁴⁵ *See id.* at 47984-85.

⁴⁶ 8 U.S.C. §1356(m).

⁴⁷ *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 575 (1995).

⁴⁸ *Id.* (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)).

Nor does 31 U.S.C. § 9701 provide EOIR the authority to set this fee. Addressing then 31 U.S.C. § 483a,⁴⁹ the predecessor to section 9701, the Supreme Court explained that fees governed by this provision “presuppose[] an application” for “services[.]”⁵⁰ An appeal from an EOIR-initiated contempt proceeding is not an affirmative application for a service or benefit from the government. The costs EOIR incurred are instead attributable to a punitive action initiated in error by EOIR itself, requiring the BIA to step in and correct the Chief IJ. Again, for appellants who win their appeals, the nonrefundable fee operates as a toll the individual must pay to EOIR for its own decision to incur costs in error. Section 9701 accordingly does not authorize this fee either, and EOIR must remove it from these regulations.

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

The APA prohibits agencies from taking action that is “arbitrary” and “capricious.”⁵¹ This standard “requires agencies to engage in reasoned decisionmaking” and to explain “the bases for the actions they take and the conclusions they reach”⁵² that includes “a rational connection between the facts found and the choice made.”⁵³ 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.”⁵⁴ For several reasons, the NPRM is arbitrary and capricious.

First, the NPRM does not draw a rational connection between the \$675 appellate fee and the record. It states that it chose the \$675 fee because it is “the same amount as the fee currently charged for appeals from decisions of an adjudicating official in a practitioner disciplinary case under section 286(m) of the INA[.]”⁵⁵ But the procedures associated with those disciplinary proceedings are fundamentally different from those which the NPRM provides alleged contemnors.⁵⁶ Given how much larger and more developed the record can be in disciplinary cases, the NPRM must explain why adjudicating a contempt appeal will cost the BIA as much as a disciplinary appeal.

Second, the NPRM fails to consider an important aspect of the problem in assessing a \$675 nonrefundable appellate fee. As crafted, EOIR is incentivized to issue contempt fines in close cases, because if the alleged

⁴⁹ *Fed. Power Comm’n v. New England Power Co.*, 415 U.S. 345, 349 (1974) (providing that section 483a “authorizes the head of each federal agency to prescribe a ‘fee, charge, or price’ for any ‘benefit, privilege, . . . license, permit, certificate, registration or similar thing of value . . . provided . . . by (the) Federal agency . . . for any person (including groups, . . . corporations . . .)’ which he determines ‘to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts’”) (citing 31 U.S.C. § 483a (1974)).

⁵⁰ *Id.* at 349.

⁵¹ 5 U.S.C. § 706(2)(A).

⁵² *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)).

⁵³ *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁵⁴ *Id.*

⁵⁵ NPRM at 47984.

⁵⁶ Compare NPRM at 47983-84 (authorizing the IJ requesting the imposition of sanctions to create the factual record themselves and requiring the Chief IJ to decide the matter on the papers alone and based only on the record created by the IJ), with 8 C.F.R. §§ 1003.100-06 (requiring an independent investigation by an EOIR disciplinary counsel before any charge and a right to an evidentiary hearing when requested, and a right to a hearing when requested in summary disciplinary proceedings when there is a material issue of fact in dispute).

contemnor appeals, the agency gets to pocket \$675 regardless of the outcome. Moreover, as previously discussed, this fee compensates EOIR for making errors in contempt adjudications at the expense of the very individual against whom EOIR committed the error. EOIR must consider alternatives to this perverse fee structure.

Third, the NPRM fails to consider important due process concerns when it: (1) provides that the IJ requesting a contempt sanction create the factual record; (2) requires the Chief IJ to determine whether to impose a contempt fine based only on the factual record created by the accusing IJ, even when there is a dispute of material fact; and (3) prevents the Chief IJ from remanding for further clarifications or proceedings.⁵⁷ The Supreme Court has held that the Due Process Clause requires contempt proceedings to occur “before a judge other than the one reviled by the contemnor.”⁵⁸ It has, moreover, found that an accusing judge who relied upon unrecorded demeanor evidence he supplied violated due process.⁵⁹ The NPRM hardly allows for an independent adjudicator to address the contempt allegation, as the accusing IJ shapes the entire factual record. Confined to that record, the Chief IJ, just as the Court has taken issue with, must accept demeanor evidence summarized into the record by the accuser.⁶⁰ These procedures will violate due process for certain individuals and must be changed. But at a minimum, EOIR must consider this important aspect of the problem.

Last, the NPRM fails to consider obvious alternatives to its deficient procedural protections. It repeatedly analogizes to its disciplinary sanction procedures for support, yet fails to explain why it adopted significantly less process in the NPRM.⁶¹ Why, for example, does the NPRM not require a hearing as of right, or even a hearing as of right when there is a material fact in dispute, as the 2008 regulations require for summary disciplinary proceedings?⁶² EOIR must explain why it did not consider adopting some of these procedures it relies upon throughout the NPRM. The failure to do so violates the APA.

III. Conclusion

EOIR lacks the statutory authority to implement this sanction regime for several reasons, and the NPRM violates the APA several times over. It must withdraw these proposed regulations. Please feel free to contact us with any questions or concerns about these comments at (202) 559-1823 or jcalo@maldef.org.

Sincerely,



Jesse Calo
Legislative Staff Attorney

⁵⁷ NPRM at 47991-92.

⁵⁸ See *Mayberry v. Pennsylvania*, 400 U.S. 455, 466 (1971).

⁵⁹ *In re Murchison*, 349 U.S. 133, 138 (1955).

⁶⁰ *Id.*

⁶¹ *E.g.*, NPRM at 47981, 47984-85.

⁶² See *Professional Conduct for Practitioners—Rules and Procedures, and Representation and Appearances*, 73 Fed. Reg. 44178, 44185 (July 30, 2008).