HARVARD IMMIGRATION AND REFUGEE CLINICAL PROGRAM

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Via Federal e-Rulemaking Portal

Lauren Alder Reid
Assistant Director
Office of Policy
Executive Office for Immigration Review, Department of Justice
5107 Leesburg Pike, Suite 2600
Falls Church, VA 22041

RE: EOIR Docket No. 18-0101, RIN 1125-AA90; Fee Review

Dear Assistant Director Reid:

The Harvard Immigration & Refugee Clinical Program ("HIRC") writes to express our strong opposition to the above-referenced Proposed Rule of the Executive Office of Immigration Review ("EOIR") to increase the fees charged for the filing of certain EOIR forms ("Rule").

HIRC is one of the oldest clinical programs in the country that focuses on the advancement of immigrants' rights while teaching students important lawyering skills. HIRC includes two distinct clinics that represent individuals seeking various forms of immigration protection as well as deportation defense. The largest and oldest clinic of the program, the Immigration & Refugee Advocacy Clinic, represents clients seeking humanitarian protections in a range of different fora, including administrative tribunals and federal appellate courts. HIRC's second clinic, the Crimmigration Clinic, is the first and only clinic of its kind that focuses on the growing intersection of criminal law and immigration law. HIRC faculty and staff also teach a range of courses concerning immigration policy, refugees and trauma, the intersection of immigration law and labor law, and the intersection of criminal law and immigration law. They also regularly publish scholarship concerning asylum adjudication, due process protections in removal proceedings, working with traumatized refugees, crimmigration, and immigration detention.

HIRC has worked with thousands of immigrants and refugees since its founding in 1984. HIRC's advocacy includes representation of individual applicants for asylum and other forms of immigration relief and the development of theories and policy relating to asylum law, crimmigration, and immigrants' rights. HIRC has an interest in the proper application and development of U.S. immigration law to ensure that the claims of individuals seeking asylum and

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other forms of relief receive fair and proper consideration under standards consistent with both domestic law and international treaties.

EOIR proposes to increase the fees for filing applications for certain forms of immigration relief, appeals to the Board of Immigration Appeals ("BIA" or "Board"), and motions to reopen or reconsider.[1] Notably, EOIR seeks to increase the fee for filing a BIA appeal from a decision of an immigration judge from $110 to $975—a 786 percent increase.[2] Under the Rule, the fee for filing a motion to reconsider or reopen with the BIA will also increase from $110 to $895—a 714 percent increase.[3] And for the first time in U.S. history, EOIR proposes to charge applicants for asylum a fee to file I-589 Forms, running afoul of the United States' obligations under the Refugee Act of 1980.[4] In this comment, HIRC strongly urges EOIR to reconsider and withdraw its proposals that would render appeals, motions, and applications for relief less accessible to many noncitizens.

I. The proposed fees for filing appeals and motions are unreasonable and excessive.

The Rule's proposed fees for filing appeals and motions with the BIA are unconscionably high, and they would impose an onerous burden on many noncitizens with meritorious claims. The new fee schedule would require noncitizens to pay a fee of $975 to appeal an immigration judge's decision to the BIA and a fee of $895 to file a motion to reconsider or reopen with the BIA.[5] According to a Federal Reserve report, four out of ten adults living in the U.S., "if faced with an unexpected expense of $400, would either not be able to cover it or would cover it by selling something or borrowing money."[6] In light of this fact, it is highly likely that most noncitizens seeking to file an appeal or a motion with the BIA could not afford a filing fee of $975 or $895, which is more than double of $400. Generally, noncitizens who seek humanitarian or other immigration relief in the U.S. arrive with little financial means, work low-paying jobs, and have only modest savings at any given time.[7] Many of HIRC's past and current clients, especially those seeking humanitarian relief such as asylum or a T-visa, lack the means to pay such steep fees.

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[1] *See* 85 Fed. Reg. 11866 (Feb. 28, 2020).
[2] *See id.* at 11871.
[3] *See id.*
[4] *See id.* at 11871–72.
[5] *See id.* at 11871.
[6] *See* Federal Reserve Board, Report on the Economic Well-Being of U.S. Households in 2017, at 2, https://www.federalreserve.gov/publications/files/2017-report-economic-well-being-us-households-201805.pdf.
[7] The Federal Reserve report also notes that a $400 expense would have an even greater financial impact on racial and ethnic minorities. *See id.* at 22.

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The proposed fee increases would have a disproportionately harsh impact on noncitizens earning low incomes. In 2019, the "effective minimum wage" in the United States—*i.e.* the average minimum wage paid per hour based on federal, state, and local laws—was $11.80 per hour.[8] The table below illustrates how many hours a noncitizen earning minimum wages would need to work to pay off some of the proposed filing fees.

Forms	**Proposed filing fee**	**# of hours that must be worked to pay the fee[9]**	**# of weeks that must be worked to pay the fee[10]**
EOIR 26	$ 975	83 hours	2.4 weeks
EOIR 29	$ 705	60 hours	1.7 weeks
Motion to Reopen (BIA)	$ 895	76 hours	2.2 weeks
Motion to Reconsider (BIA)	$ 895	76 hours	2.2 weeks

As this table demonstrates, the fee for filing an appeal or a motion with the BIA could easily exceed two weeks' worth of earnings of a minimum-wage worker. Indeed, the figures above underestimate the actual number of hours that must be worked, as they do not take into account any basic living expenses that must be paid from the earnings or any federal, state, and local income taxes. After meeting their essential expenses, many, if not most, noncitizens would simply be unable to afford the filing fee, especially given that they have only 30 calendar days to file an appeal or a motion to reconsider with the BIA. And those without jobs or employment authorization and those held in immigration detention would face even greater difficulty.

A comparison of EOIR's proposed fees for filing an appeal with the BIA to analogous fees, or lack thereof, in other contexts further demonstrates that the Rule's proposed fee increases are unreasonable and excessive. The proposed $975 fee for appealing an immigration judge's decision to the BIA is nearly double the $500 fee for filing a petition for review with a federal court of

[8] *See* Ernie Tedeschi, *Americans Are Seeing Highest Minimum Wage in History (Without Federal Help)*, N.Y. TIMES, Apr. 24, 2019, https://www.nytimes.com/2019/04/24/upshot/why-america-may-already-have-its-highest-minimum-wage.html.
[9] Proposed filing fees divided by $11.80 per hour.
[10] The average number of hours worked per week for private nonfarm workers in the U.S. was 34.4 hours in February 2020. *See* U.S. Bureau of Labor Statistics, Employment Situation Summary (Feb. 2020), https://www.bls.gov/news.release/empsit.nr0.htm.

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appeals,[11] and more than three times the $293 fee for filing an appeal in U.S. bankruptcy courts.[12] Furthermore, the Social Security Administration imposes no filing fees whatsoever for any of the four levels of administrative appeal from a denial of welfare benefits.[13] These comparisons suggest that EOIR's proposed filing fees are disproportionately high.

Under 31 U.S.C. § 9701(b), any "charge for a service or thing of value provided by [a federal] agency" must be "fair." For the reasons described above, EOIR's proposed fees can hardly be deemed fair, given that many, if not most, noncitizens seeking to file an appeal or a motion with the BIA will not be able to afford the excessive fees. And as acknowledged in the proposed Rule, EOIR has relied primarily on Congressional appropriations to fund its operations.[14] Unlike the U.S. Citizenship and Immigration Services, EOIR is not a fee-funded agency. Yet, the Rule neither explains why EOIR needs to increase filing fees, nor states that Congressional appropriations cannot cover the operating costs. HIRC therefore urges EOIR to reconsider and withdraw its proposed fee increases for appeals, applications, and motions.

II. The discretionary fee waivers are inadequate to offset the financial burden imposed by the unreasonable and excessive fees proposed by the Rule.

The discretionary fee waivers would do little to alleviate the onerous burden created by the proposed fee increases. For example, noncitizens who seek to file an appeal or a motion to reconsider with the BIA but cannot afford the proposed filing fee would need to prepare not only a notice of appeal or the motion, but also additional forms and supporting financial documents within the short timeframe of 30 days. This will create an especially high barrier for noncitizens appearing *pro se* and noncitizens held in detention. And even if a fee waiver request is filed on time, such waivers are only discretionary and the BIA may simply deny the application in many cases. If a fee waiver request is denied and a payment does not accompany the filing, "the appeal or motion will not be deemed properly filed" and may be dismissed.[15]

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[11] *See* United States Courts, "Court of Appeals Miscellaneous Fee Schedule", https://www.uscourts.gov/services-forms/fees/court-appeals-miscellaneous-fee-schedule.
[12] *See* United States Courts, "Bankruptcy Court Miscellaneous Fee Schedule", https://www.uscourts.gov/services-forms/fees/bankruptcy-court-miscellaneous-fee-schedule.
[13] *See* Social Security Administration, "Appeal A Decision", https://www.ssa.gov/benefits/disability/appeal.html.
[14] *See* 85 Fed. Reg. at 11870 (noting that "EOIR is an appropriated agency"); *see also* Executive Office for Immigration Review, Dep't of Justice, "FY 2020 Budget Request", www.justice.gov/jmd/page/file/1142486/download.
[15] 8 C.F.R. § 1003.8(a)(3).

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Moreover, the proposed fee increases would cause the number of fee waiver requests to skyrocket, given that many, if not most, noncitizens would likely be unable to afford the new fees.[16] Given the inevitable flood of waiver requests, it is hard to imagine that the BIA would grant the discretionary waiver to all noncitizens who cannot afford the filing fee. And if the number of waivers granted were to rise significantly, the fee increases may do little to boost EOIR's revenue. For example, it is possible that many noncitizens could afford the current $110 fee for BIA appeals and motions but not the $895 and $975 fees proposed by the Rule, and if a significant number of those individuals were granted the fee waiver, the agency would not be able to collect even the $110 from them. Furthermore, the increasing number of fee waiver requests would only divert valuable and already-stretched agency resources to adjudicating fee waivers rather than substantive claims, exacerbating our immigration system's backlog that has already exceeded a million cases. Therefore, HIRC requests that EOIR reconsider and withdraw its proposed fee increases to avoid rendering our immigration system not only less fair but also less efficient.

III. The excessive and unreasonable fees proposed by the Rule would deny many immigrants access to justice and violate their right to due process.

Equal access to courts is a fundamental requirement of both due process and equal protection under the Fifth and Fourteenth Amendments to the United States Constitution. The Supreme Court has recognized time and again that "[p]roviding equal justice for poor and rich, weak and powerful alike" is "an age-old problem."[17]

While there is no constitutional right to an appeal, it is "fundamental that, once established, the[] avenues [for appeal] must be kept free of unreasoned distinctions that can only impede open and equal access to the courts."[18] In the foundational case of *Griffin v. Illinois*, the Court invalidated an Illinois rule requiring criminal defendants seeking appellate review of their convictions to pay for and obtain a transcript of the trial proceedings.[19] Relying on the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the plurality explained: "to deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside."[20] Therefore, "[d]estitute defendants must be afforded as adequate appellate review as defendants who have money enough

[16] *See infra.*
[17] *M.L.B. v. S.L.J.*, 519 U.S. 102, 110 (1996) (quoting *Griffin v. Illinois*, 351 U.S. 12, 16 (1956)).
[18] *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966).
[19] *Griffin*, 351 U.S. at 13–14, 16–19.
[20] *Id.* at 19.

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to buy transcripts."[21] Importantly, the Supreme Court later extended *Griffin*'s principle to criminal cases involving other types of court fees,[22] appeals that are "quasi-criminal in nature,"[23] and civil appeals involving "state controls or intrusions on family relationships."[24]

Based on these legal principles, HIRC believes that EOIR's proposed fee increases would violate the Fifth Amendment's due process requirements. First, noncitizens have a statutory right to appeal a decision of an immigration judge or a Department of Homeland Security officer to the Board of Immigration Appeals.[25] They also have a statutory right to file a motion to reconsider or a motion to reopen with either an immigration court or the BIA.[26] Once these rights are established, all noncitizens should be afforded equal opportunities to exercise them, regardless of ability to pay the filing fee.[27]

The Supreme Court has long held that "the Fifth Amendment entitles aliens to due process of law in deportation proceedings."[28] Removal proceedings, though technically civil, must be deemed quasi-criminal in nature, as deportation is a "particularly severe"[29] deprivation of liberty that "may result in the loss of all that makes life worth living."[30] In *Padilla v. Kentucky*, the

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[21] *Id.*
[22] *See, e.g.*, *Bums v. Ohio*, 360 U.S. 252, 258 (1959) (state supreme court docket and filing fees); *Smith v. Bennett*, 365 U.S. 708, 714 (1961) (filing fees for habeas corpus petitions).
[23] *M.L.B.*, 519 U.S. at 124 (quoting *Mayer v. City of Chicago*, 404 U.S. 189, 196 (1971)); *see also Williams v. Oklahoma City*, 395 U.S. 458, 459 (1969).
[24] *M.L.B.*, 519 U.S. at 116; *see also Boddie v. Connecticut*, 401 U.S. 371, 374 (1971).
[25] *See* 8 U.S.C. § 1229a(c)(5) ("If the immigration judge decides that the alien is removable and orders the alien to be removed, the judge shall inform the alien of the right to appeal that decision"); 8 C.F.R. § 1003.1(b) (establishing the Board's appellate jurisdiction over various types of immigration decisions); *see also* 8 C.F.R. § 1240.15.
[26] *See* 8 C.F.R. § 1003.2(a) (motions filed with the BIA); 8 C.F.R. § 1003.23(b)(1) (motions filed with an immigration court).
[27] Again, although the discretionary fee waivers may provide equal access to some indigent noncitizens, it is unlikely that every noncitizen in need of the waiver would actually obtain one. Indeed, if the agency did grant significantly more waivers, that could undercut the very purpose behind the proposed fee increases. *See infra* Part II.
[28] *Reno v. Flores*, 507 U.S. 292, 306 (1993).
[29] *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010).
[30] *Bridges v. Wixon*, 326 U.S. 135, 147 (1945) (internal quotation marks omitted); *see also Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) ("[Deportation] may result also in loss of both property and life; or of all that makes life worth living."); Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289, 295, 338, 346 (2008) (discussing the serious deprivation of liberty that accompanies deportation).

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Supreme Court hinted at such an understanding by expressly acknowledging that preserving an individual's right to remain in the United States may be "more important" to the individual "than any potential jail sentence."[31]

As explained above, the Court has held that access to appellate review in cases that are quasi-criminal in nature may not turn on ability to pay.[32] Yet the Rule's newly proposed fees—especially those charged for filing an appeal or a motion with the BIA—would do just that. Unaffordable for many noncitizens, such fees would impermissibly deny equal access to justice based on ability to pay. And given that a noncitizen seeking judicial review in federal court must exhaust "all administrative remedies available,"[33] including a BIA appeal, inability to afford the filing fee would leave that individual with no opportunity for review of an adverse immigration decision at all, absent a grant of the discretionary fee waiver.

The hefty proposed fees for filing an appeal or a motion to reconsider/reopen with the BIA raise particularly grave fairness concerns, as it is not uncommon for immigration judges or the Board to make errors. Every year, hundreds of immigration judge and BIA decisions are reversed by the Board and the federal courts of appeals, respectively, and the number amounts to thousands over the years.[34] Furthermore, over the past 36 years, HIRC has successfully appealed various erroneous decisions of immigration judges and the BIA on behalf of its clients.[35] Recently, HIRC also filed a BIA appeal from the decision of an immigration judge who failed to apply the correct legal standard even after the Board's order for a rehearing. The excessive and unreasonable fees proposed by the Rule would significantly hinder many noncitizens' ability to seek justice by correcting errors made by an immigration judge or the BIA, thus denying them equal access to justice and violating their Fifth Amendment right to due process.

Administrative appeals and motions to reconsider or reopen are valuable tools that help ensure the accuracy and fairness of immigration decisions, and they promote both the noncitizens'

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[31] 559 U.S. at 368 (2010) (quoting *INS v. St. Cyr*, 533 U.S. 289, 322 (2001)).
[32] *M.L.B.*, 519 U.S. at 124.
[33] 8 U.S.C. § 1252(d)(1).
[34] *See, e.g.*, David Hausman, *The Failure of Immigration Appeals*, 164 U. PA. L. REV 1177, 1196 n.67 (2016); Executive Office for Immigration Review, Dep't of Justice, *Immigration Law Advisor*, Vol. 10, No. 9, at 5 (Dec. 2016), https://www.justice.gov/eoir/page/file/921726/download.
[35] *See, e.g.*, *Ordonez-Quino v. Holder*, 760 F.3d 80, 83 (1st Cir. 2014) (finding the BIA's and the immigration judge's determinations to be erroneous and remanding the case); *Mejilla-Romero v. Holder*, 614 F.3d 572, 573 (1st Cir. 2010) (holding that both the BIA and the immigration judge erred by failing to address a key argument raised by the noncitizen and remanding the case).

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and the government's shared interest in promoting those goals. HIRC urges EOIR to ensure equal and full access to these processes for all noncitizens regardless of ability to pay.

IV. Charging asylum seekers an application fee contravenes the purpose of the Refugee Act of 1980.

Throughout its history, the United States has played a role in protecting the world's refugees, regardless of socioeconomic status. In 1968, the United States became a signatory to the 1967 United Nations Protocol Relating To The Status of Refugees, which broadened the scope of refugee status under international law.[36] In 1980, Congress enacted the Refugee Act, which codified into law U.S. obligations under the 1967 Protocol to the Refugee Convention. In the Act, Congress declared it "the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands."[37] Section 208 of the Immigration and Nationality Act directs the Attorney General to "establish a procedure for the consideration of asylum applications" and gives to the Attorney General the authority to grant asylum to qualified refugees.[38] The regulations establishing the procedure for applying for asylum are codified at 8 C.F.R. § 208 (1981).

Therefore, by treaty, statute, and regulations, the United States has manifested a clear intention to hear the petitions of immigrants who come to this country fearing persecution in their homelands. Adding a monetary barrier to the right to apply for asylum will effectively nullify the protections provided by the aforesaid treaties and statutes for many persons who might otherwise seek protection here. Many HIRC clients applying for asylum have recently arrived in the U.S. after fleeing violence, threats, and other forms of persecution in their home countries. They often lack resources and a preexisting support network, and HIRC provides pro bono legal services because they could not afford legal representation otherwise. Moreover, our clients often arrive in the U.S. with few belongings and rely primarily on nonprofit and community resources for housing, basic toiletries, and school supplies, as well as clothing drives that enable them to dress warmly for the winter and reimbursements for the cost of taking public transportation to our offices. Thus, not only is charging a fee for asylum applications unlawful under both U.S. and international law, but it also unjustly burdens immigrants who are most in need of resources and support.

[36] 19 U.S.T. 6223, T.I.A.S. No. 6577.
[37] Pub. L. 96-212, 94 Stat. 102 (March 17, 1980).
[38] 8 U.S.C. § 1158.

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V. Charging asylum seekers an application fee violates Article 29 of the 1951 Convention Relating to the Status of Refugees.

In construing treaties, the U.S. government uses principles analogous to those that guide statutory construction.[39] Rather than having evolved from judge-made common law, however, principles of treaty construction are themselves codified in Article 31 of the Vienna Convention on the Law of Treaties, of which the United States is a signatory.[40] U.S. courts apply the Vienna Convention in interpreting treaties.[41]

As with statutes, treaties are to be construed first with reference to their terms' "ordinary meaning in their context" and "in light of their object and purpose."[42] The plain meaning of treaty terms controls unless "application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories."[43] To stray from clear treaty language, there must be "extraordinarily strong contrary evidence."[44] According to Article 32 of the Vienna Convention, "supplementary means of interpretation," which consist primarily of the preparatory and conclusory circumstances of a treaty (the international equivalent of legislative history), are to be turned to only as a last resort, and only if the primary tools of interpretation enumerated in Article 31 of the Vienna Convention "leave[ ] the meaning ambiguous or obscure" or lead to a "manifestly absurd or unreasonable result."[45]

The Proposed Rule directly contravenes the plain language of Article 29 of the 1951 Convention Relating to the Status of Refugees. The United States ratified the 1967 Protocol to Convention, which it incorporated into U.S. law through the Refugee Act of 1980. In the Article titled "Fiscal Changes," the Convention states, "Contracting States shall not impose upon refugees duties, charges or taxes, of any description whatsoever, other or higher than those which are or may be levied on their nationals in similar situations." Presently, only three countries out of the 145 signatories to the Convention charge fees for asylum seekers, and even those countries allow

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[39] *See United States v. Stuart*, 489 U.S. 353, 371(1989) (Scalia, J., concurring) (If "the Treaty's language resolves the issue presented, there is no necessity of looking further to discover 'the intent of the Treaty parties'").
[40] 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969).
[41] *See Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 36 (2d Cir. 1975) (Warsaw Convention), *cert. denied*, 429 U.S. 890 (1976); *see also* Letter from Edwin D. Williamson, Legal Adviser, Dep't of State, to Timothy E. Flanigan, Acting Assistant Att'y Gen. 2 (Dec. 11, 1991) (regarding *HRC v. Baker*).
[42] Vienna Convention on the Law of Treaties, art. 31(1).
[43] *Stuart*, 489 U.S. at 365–66 (citations omitted).
[44] *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 (1982).
[45] *See* Vienna Convention on the Law of Treaties, art. 32, 1155 U.N.T.S., at 340.

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for waivers of the fee.[46] The Proposed Rule, therefore, will impose on refugees a burden that those seeking asylum in other countries do not face. Moreover, given that the U.S. was founded by those who sought freedom from an oppressive regime, charging a fee to apply for asylum contravenes America's own history.

This reading of Article 29 is further supported by the "object and purpose" not only of that article, but also of the Refugee Convention as a whole. It is clear that the purpose of Article 29 is to prevent all refugees from being put into the hands of those who would persecute them. One of the considerations stated in the Preamble to the Convention is that the United Nations has "endeavored to assure refugees the widest possible exercise of fundamental rights and freedoms." Article 29 has been construed as part of the bundle of rights "attributed to 'refugees' without qualifications of any kind."[47]

Any application fee would be prohibitive for many asylum seekers and would impermissibly abridge their rights. Preventing individuals from applying for asylum due to their inability to pay would not only contravene the plain language and the object and purpose of longstanding U.S. and international law, but also betray the history of the United States and unjustly burden those most in need of protection. We strongly urge EOIR to reconsider and withdraw this portion of the Rule.

Thank you for your consideration.

Sincerely,

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[46] Zolan Kanno-Youngs and Miriam Jordan, *New Trump Administration Proposal Would Charge Asylum Seekers an Application Fee*, N.Y. TIMES, Nov. 8, 2019, https://www.nytimes.com/2019/11/08/us/politics/immigration-fees-trump.html.

[47] *See* James C. Hathaway & Anne K. Cusick, *Refugee Rights Are Not Negotiable*, 14 GEO. IMMIGR. I.J. 481, 493 (2000).