Nos. 05-547 and 05-7664

In the Supreme Court of the United States

JOSE ANTONIO LOPEZ, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL
OF THE UNITED STATES, RESPONDENT.

REYMUNDO TOLEDO-FLORES, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

**On Writ Of Certiorari To The United States
Court of Appeals for the Eighth and Fifth Circuits**

BRIEF FOR HUMAN RIGHTS FIRST AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the term "aggravated felony" as defined in 8 U.S.C. § 1101(a)(43)(B) encompasses a state felony conviction for simple possession of a controlled substance.

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Martin Gottwald, *Asylum Claims and Drug Offences: The Seriousness Threshold of Article 1F(B) of the 1951 Convention Relating to the Status of Refugees and the UN Drug Conventions*, 8 INT'L J. REFUGEE L. 81 (2006)...................... 24

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INTRODUCTION

Human Rights First, as *amicus curiae*,[1] submits this brief to alert the Court of the impact its decision may have on refugees and on this Nation's compliance with its international treaty obligations concerning refugees.

Under U.S. law, a refugee who is convicted of an "aggravated felony" is automatically barred from receiving asylum. Such a conviction is also a presumptive bar to "withholding of removal"—the form of protection granted to a refugee if there is a clear probability that her life or freedom would be at risk if she returned to her home country.

If the Government's position in this case is adopted, refugees who have fled political and religious persecution can be returned to nations where their lives and freedom are threatened, on the basis of a single state conviction for simple drug possession with no proof at all of an intent to engage in illicit drug trafficking. This is not what Congress intended. Indeed, to accept the Government's position would risk putting this Nation in violation of the Protocol Relating to the Status of Refugees, under which it agreed that it would not return a refugee to persecution as a consequence of her criminal conduct in this country unless she were convicted of a "particularly serious crime" and thus presented a danger to the community. This Court has long recognized that statutes should not be construed in a manner that would put the United States in violation of the law of nations, unless the language of the statute unambiguously compels such a result. See *Murray* v. *The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). The treaty

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[1] Counsel for all parties have consented to the filing of this brief. Letters evidencing consent are on file with the Clerk. No party or counsel for a party authored this brief in whole or in part, and no person or entity other than *Amicus* and its counsel has made a monetary contribution to the preparation or filing of this brief.

obligations discussed herein provide an additional reason to reject the Fifth and Eighth Circuits' reading of the statutes at issue, even assuming that their reading is permissible under those statutes.

INTEREST OF *AMICUS CURIAE*

Since 1978, Human Rights First (formerly known as the Lawyers Committee for Human Rights) has worked to protect and promote fundamental human rights and to ensure protection of the rights of refugees, including the right to seek and enjoy asylum.

Human Rights First grounds its refugee protection work in the standards set out in the 1951 Convention Relating to the Status of Refugees (the "Convention") and the 1967 Protocol Relating to the Status of Refugees (the "Protocol"), as well as other international human rights instruments. Human Rights First advocates that U.S. law and policy adhere to the standards set forth in these agreements.

Human Rights First operates one of the largest pro bono asylum representation programs in the country. With the assistance of volunteer attorneys, Human Rights First provides legal representation without charge to hundreds of indigent asylum applicants. Human Rights First has also conducted research, convened legal experts, and provided guidance to assist in the development of effective and fair methods for excluding from refugee protection those who are not entitled to the protection of the Convention and Protocol. See, *e.g.*, HUMAN RIGHTS FIRST, REFUGEES, REBELS & THE QUEST FOR JUSTICE (2002).

In order to protect the rights of the refugees it assists and to ensure that the protections guaranteed to them under the Convention and the Protocol remain available to refugees in the United States generally, Human Rights First addresses legal developments that would lead the United States to return refugees to persecution even though they are entitled

to protection as a result of the U.S.'s commitment to abide by these treaty obligations. Thus Human Rights First has a profound interest in the outcome of these cases.

Given Human Rights First's experience and perspective in this important area of law, it is uniquely well situated to assist the Court in understanding the relationship between the question presented here and the laws governing asylum and refugees, as well as the risk that the Fifth and Eighth Circuits' analysis poses to the United States' compliance with its international legal obligations arising under the Protocol and Convention.

STATEMENT

The cases before the Court concern the proper interpretation of the term "aggravated felony" as defined in the Immigration and Nationality Act ("INA"). As discussed further below, the Court's resolution of that question will have serious implications for some refugees because of how that term is incorporated into the statutes involving asylum and "withholding of removal."

The INA defines the term "aggravated felony" as including

> * * * illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, U.S. Code)

8 U.S.C. § 1101(a)(43)(B).[2] The term "aggravated felony" applies to an offense "whether in violation of Federal or State law." *Id.* § 1101(a)(43).

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[2] Section 102 of the Controlled Substances Act defines "controlled substance" in a manner not relevant here; it does not define the term "illicit trafficking." See 21 U.S.C. § 802.

Section 924(c)(2) of Title 18 in turn defines a "drug trafficking crime" as

> any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

18 U.S.C. § 924(c)(2). For the parties in the instant cases, the most relevant clause in this statute is the first one: "any felony punishable under the Controlled Substances Act." *Id.*

In the decisions under review, the Fifth and Eighth Circuits have interpreted this statutory scheme to mean that the category of "aggravated felonies" includes a state felony conviction for mere possession of a controlled substance—a crime that includes no element of "illicit trafficking" and that would generally be punished only as a misdemeanor under federal law. Thus those courts (as well as the Government) understand "any felony punishable under the Controlled Substances Act" to include "any ***state*** felony punishable under the Controlled Substances Act ***even as a misdemeanor.***"

Among other things, this interpretation ignores the fact that Congress referred to "drug trafficking" crimes under Section 924(c) as a subset of "illicit trafficking in a controlled substance." 8 U.S.C. § 1101(a)(43)(B). Thus, quite sensibly, Congress did ***not*** intend to include all drug-related offenses, however minor, in its definition of "aggravated felony," but instead focused on offenses that actually involve the sale or distribution of controlled substances. A state conviction for simple possession does not fit within this definition. As described further below, the interplay between these statutes and the Protocol supports a narrow reading of the statutory definition of "aggravated felony."

SUMMARY OF ARGUMENT

The definition of the term "aggravated felony" has important implications in the context of asylum, separate and apart from its implications for "cancellation of removal" (*Lopez*) and sentencing (*Toledo-Flores*). A refugee who has been convicted of an "aggravated felony" in the United States is automatically ineligible for asylum, without exception. 8 U.S.C. § 1158(b)(2)(B)(i). Additionally, an asylum applicant or other immigrant who has been convicted of an "aggravated felony" is presumptively ineligible for "withholding of removal"—the relief granted to a refugee if her life or freedom would be threatened if she were to be returned to her country of nationality. 8 U.S.C. § 1231(b)(3). And if the refugee received a sentence of five years or longer for the crime—even if it was a suspended sentence—the bar to "withholding of removal" becomes absolute. *Id.*

This issue has grave implications for this Nation's commitment to protect those who have fled from political, religious, and other kinds of persecution. Under the Fifth and Eighth Circuit's decisions, a possession conviction that may subject a U.S. citizen to probation and participation in a drug-treatment program would operate as a categorical bar for a refugee-seeking asylum. The immigration judge would have no discretion whatever to grant asylum, regardless of how great the risk of persecution the refugee faces in her home country. And a conviction for drug possession could mean that a person who has already been granted asylum will be returned to a country where she will face a threat to her life or freedom.

When it acceded to the Protocol, the United States committed to provide certain substantive protections to refugees, regardless of their legal status. Chief among these is the protection against "*refoulement*" to persecution—the return of the refugee to a place where her life or freedom would be threatened. Although the country of refuge may

deny protection against *refoulement* based on criminal convictions in that country, this bar is limited to those "who, having been convicted of a final judgment of a particularly serious crime, constitute[] a danger to the community of that country." CONVENTION, art. 33(2) (incorporated by reference and reproduction by the Protocol).

To accept the Government's position in this case would put the United States in violation of its commitments under the Protocol and the Convention—a result that Congress presumptively did not intend. Even under the restrictive federal Controlled Substances Act, it is difficult to imagine how a simple possession offense with no proof of "trafficking" could be considered a "particularly serious crime" that necessarily renders a person a "danger to the community." Indeed, even the federal government classifies nearly all first-time drug possession offenses as misdemeanors, 21 U.S.C. § 844(a)—a fact quite inconsistent with the suggestion that a simple possession conviction can be an "aggravated felony" and thus a "particularly serious crime."

A statute may not be construed in a manner that would put the United States in violation of its international treaty obligations unless its language unambiguously compels that result. *Murray* v. *The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). Thus, to the extent that this statutory scheme is susceptible to more than one meaning, this doctrine provides an additional reason to adopt a reading that limits "aggravated felon[ies]" to drug crimes involving "illicit trafficking"—or, at the very least—that excludes state convictions for simple possession.

ARGUMENT

I. The United States has agreed to protect refugees from *refoulement* to persecution, and its statutes were intended to reflect that commitment.

Almost 40 years ago, the United States acceded to the Protocol Relating to the Status of Refugees. In so doing, the United States made a commitment to comply with the substantive provisions of Articles 2 through 34 of the 1951 Convention Relating to the Status of Refugees, developed in the aftermath of World War II. See *Immigration & Naturalization Serv.* v. *Stevic*, 467 U.S. 407, 416 (1984); JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 8 (rev. ed. 1998). The United States was actively involved in drafting the Convention and creating an international refugee protection regime to ensure the protection of those who flee persecution.[3]

Article 33 of the Convention is incorporated into the Protocol by reference and reproduction. The first paragraph of Article 33 "provides an entitlement for the subcategory [of refugees] that 'would be threatened' with persecution upon their return." *Immigration & Naturalization Serv.* v. *Cardoza-Fonseca*, 480 U.S. 421, 441 (1987). Specifically, the first paragraph states:

> No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion,

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[3] See Report of the Ad Hoc Committee on Refugees and Stateless Persons, Second Session, Geneva, 14 August to 25 August 1950, at *http://www.unhcr.org/cgi-bin/texis/vtx/protect/opendoc.htm?tbl=PROTECTION&page=home&id=3ae68c248.*

> nationality, membership of a particular social group or political opinion.

PROTOCOL, art. 33, 19 U.S.T. 6223. This is commonly known as the protection of "non-*refoulement*." As the Secretary of State correctly explained when the Protocol was under consideration: "[F]oremost among the rights which the Protocol would guarantee to refugees is the prohibition (under Article 33 of the Convention) against their expulsion or return to any country in which their life or freedom would be threatened.'" *Stevic*, 467 U.S. at 428; see also CONVENTION, prbl. ¶ 2 (these provisions were intended to address the international community's "profound concern for refugees" and "to assure refugees the widest possible exercise of [their] fundamental rights and freedoms").

The second paragraph of Article 33 describes two narrow categories of refugees who are not entitled to this protection, in view of the danger they would present to the host country:

> The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, ***or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country***.

Id. art. 33(2) (emphasis added).

Congress enacted the Refugee Act in 1980 for the primary purpose of bringing the United States into conformance with the language and requirements of the Protocol and Convention. See *Cardoza-Fonseca*, 480 U.S. at 436. The Act reaffirmed this Nation's commitment to "one of the oldest themes in [its] history—welcoming homeless refugees to our shores." S. Rep. No. 96-256, at 1 (1979), *reprinted in* 1980 U.S.C.C.A.N. 141, 141.

As part of that effort, Congress amended the Immigration and Nationality Act ("INA") to add the provision codifying the method by which a refugee can obtain asylum. 8 U.S.C. § 1158; see *Cardoza-Fonseca*, 480 U.S. at 423. The United States will recognize a refugee's status and her eligibility for asylum if she can prove that she has suffered from past persecution or has a "well-founded fear of future persecution" based upon race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1101(a)(42)(A).

Congress also amended the provision in the INA permitting refugees to terminate removal proceedings against them, providing that the Attorney General will not return any alien to a country if he concludes that the alien's life or freedom would be threatened because of persecution. *Stevic*, 467 U.S. at 409. This form of protection—known as "withholding of removal"—is mandatory (not discretionary) and is intended to codify the non-*refoulement* obligation under the Convention. See 8 U.S.C. § 1231(b)(3)(A); *Stevic*, 467 U.S. at 421 (U.S. can meet its obligations under the Protocol by providing either asylum or withholding of removal to an alien who meets the definition of a refugee). Eligibility for withholding of removal requires a demonstration of a "clear probability" that the alien's life or freedom would be threatened. 8 U.S.C. § 1231(b)(3)(A) & (b)(3)(B). [4]

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[4] The United States, in contrast to other parties to the Protocol, requires a higher standard of proof to establish entitlement to withholding of removal than the "well-founded fear" standard that defines a refugee under Article I of the Convention (and that is the standard for asylum under U.S. law). GUY S. GOODWIN-GILL, THE REFUGEE IN INT'L LAW 136, 138 (1996); *Stevic*, 467 U.S. at 428. Withholding of removal is mandatory for refugees who meet this higher threshold, whereas asylum is formally discretionary. 8 U.S.C. § 1231(b)(3); 8 U.S.C. § 1158(b)(1); *see Stevic*, 467 U.S. at 428; *Cardoza-Fonseca*, 480 U.S. at 423.