14-2146-ag

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ADELAIDE ABANKWAH, AKA Kuukuah Norman,
AKA Regina Norman Danson
Petitioner,
v.
Eric HOLDER, Jr., Attorney General, Department of Justice,
Respondent.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

BRIEF OF *AMICI CURIAE*
HUMAN RIGHTS FIRST, IMMIGRANT DEFENSE PROJECT, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD
IN SUPPORT OF PETITIONER

Counsel for Amici
Nancy Morawetz, Esq.
Antonia House, Legal Intern
Tianyin Luo, Legal Intern
Washington Square Legal Services
Immigrant Rights Clinic
245 Sullivan Street, 5th Floor
New York, NY 10012
(212) 998- 6430
nancy.morawetz@nyu.edu

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, counsel for amici, HUMAN RIGHTS FIRST, IMMIGRANT DEFENSE PROJECT, and NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, submits the following identification of corporate parents, subsidiaries and affiliates: NONE.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

CONSTITUTIONAL PROVISIONS

STATEMENT OF INTEREST

Amici are organizations specializing in immigration and human rights law, who have a direct interest in ensuring that the "particularly serious crime" bar to withholding of removal is interpreted consistently and in conformity with the language of the relevant provisions in the Refugee Act of 1980 and with international treaties to which the United States is a party and from which the language in the Refugee Act originates. Detailed descriptions of amici are attached as Appendix A.

SUMMARY OF ARGUMENT

As a party to the 1967 United Nations Protocol Relating to the Status of Refugees ("Protocol"), which incorporates the 1951 Refugee Convention ("Convention"), the United States has a binding obligation of *non-refoulement*—the customary international law principle that precludes a state from returning a refugee to persecution. Congress conformed U.S. domestic laws to the Protocol and Convention by passing the Refugee Act of 1980, which enacted 8 U.S.C. § 1231(b)(3), the statutory provision that enacts withholding of removal and the "particularly serious crime" ("PSC") exception to withholding. However, the Board of Immigration Appeals ("BIA") has deviated from the mandates of both the Refugee Act and the Convention in its interpretation and application of the PSC exception.

Congress enacted the Refugee Act of 1980 to conform domestic law to U.S. international treaty obligations. By incorporating the language of the Refugee Convention into the Refugee Act, Congress unambiguously indicated its intent to fulfill the purpose of the Convention, which prohibits the expulsion of a refugee to a country where she faces persecution and potentially death, unless she both has committed a PSC and currently constitutes a "danger to the community." This conclusion is further supported by traditional canons of statutory interpretation. In addition, the plain text and purpose of the Protocol and Convention, the practices of other signatory states and the commentary of leading international refugee scholars all support the conclusion that the PSC exception requires analysis of two distinct elements, one based on past conduct and the other assessing the risk of future conduct, before the exception may be applied.

The BIA's current interpretation and application of the PSC exception to cases involving withholding of removal contradict the plain language of both 8 U.S.C. § 1231(b)(3)(B)(ii) and the Refugee Convention, which requires that the offense fall in a class of exceptional and grave crimes. Additionally, in applying the PSC bar to withholding in this case, the BIA failed to consider the "danger to the community" that a refugee currently poses—a factor that this Court has treated as an essential part of the PSC bar analysis. *See Nethagani v. Mukasey*, 532 F.3d 150, 155 (2d Cir. 2008). To the extent that recent BIA precedent allows the agency

to omit consideration of a refugee's current "dangerousness," that new standard runs contrary to the unambiguous meaning and purpose of the statute.

ARGUMENT

I. CANONS OF STATUTORY CONSTRUCTION AND LEGISLATIVE HISTORY DEMONSTRATE CONGRESS' UNAMBIGUOUS INTENT TO BRING THE UNITED STATES INTO COMPLIANCE WITH ITS INTERNATIONAL TREATY OBLIGATION OF NON-REFOULEMENT.

The United States has a binding obligation of *non-refoulement*—not to return a refugee to face persecution—under the 1951 United Nations Convention Relating to the Status of Refugees ("Convention"). In 1968, the United States acceded to the 1967 United Nations Protocol Relating to the Status of Refugees ("Protocol"), becoming party to the Refugee Convention, which is incorporated into the Protocol. *See* Jan. 31, 1967, 19 U.S.T. 6223. As a result, the duty of *non-refoulement* imposed by the Refugee Convention is binding law in the United States. *See* U.S. Const. art. VI, cl. 2; Convention Relating to the Status of Refugees art. 33(1), *opened for signature* July 28, 1951, 189 U.N.T.S. 150. The exceptions to this categorical duty are narrow, and the "particularly serious crime" ("PSC") exception to *non-refoulement* requires the United States to find that a refugee both has been convicted of a PSC and poses a current "danger to the community," before sending that refugee back to her persecutor. *See* Point II, *infra*. The scope of that statutory exception is at issue in this case.

In passing the Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 ("Refugee Act"), Congress unambiguously expressed its intent to "bring United States refugee law into conformance with [its treaty obligations under] the 1967 [Protocol]." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987) ("The 1980 Act made withholding of deportation…mandatory in order to comply with Article 33(1) [of the Refugee Convention]."); *see also I.N.S. v. Stevic*, 467 U.S. 407, 426 (1984); *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999). The plain language of the Refugee Act demonstrates Congressional intent to create a two-pronged PSC inquiry that conforms to the mandates of the Refugee Convention. Moreover, by explicitly using the language of the Refugee Convention in drafting the Refugee Act, Congress incorporated the Convention's obligation of *non-refoulement* into the Immigration and Nationality Act ("INA").

The relevant statutory provisions in this case were enacted with the passage of the Refugee Act in 1980 and are now codified at 8 U.S.C. § 1231(b)(3). Sub-section (A) implements the United States' duty of *non-refoulement* by prohibiting the Attorney General from "remov[ing] an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." Sub-section (B)(ii) implements the PSC exception to *non-refoulement*, by exempting from the protection of section (A) "any alien if the

Attorney General determines that…the alien, having been convicted of a particularly serious crime is a danger to the community of the United States."[1]

When construing these provisions, this Court must begin its analysis with the language of the statute. *Chevron U.S.A., Inc., v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). The words of the PSC exception to withholding of removal, as expressed in § 1231(b)(3)(B)(ii), require that two separate and distinct prongs be considered before the exception can apply. First, by using the Convention's double qualification, "particularly serious," to modify "crime" in Section (B)(ii), Congress required that a refugee must have committed an especially grave crime to trigger that provision. Second, the final clause of Section (B)(ii) references a completely separate requirement that the refugee must also be "a danger to the community of the United States." It is well-settled that courts must "give effect, if possible, to every clause and word of a statute." *United States v. Manasche*, 348 U.S. 528, 538-39 (1955) (quoting *Inhabitants of Montclair Twp. v. Ramsdell*, 107 U.S. 147, 152 (1883)). "[A] statute ought, upon the whole, be so construed that…no clause, sentence, or word shall be superfluous, void, or insignificant," *Duncan v. Walker*, 533 U.S. 167, 174 (2001), and courts must "construe a statute to give every word some operative effect," *Cooper Indus., Inc.*

[1] As originally adopted, this provision said "constitutes" rather than "is" a danger to the community. Refugee Act, § 203(e).

v. Aviall Servs., Inc., 543 U.S. 157, 167 (2004). Although it is sometimes permissible "to give a word limited effect" in a statute, it is "quite another [thing] to give it no effect whatsoever." *Solid Waste Agency v. U.S. Army Corps. of Eng'rs*, 531 U.S. 159, 172 (2001). As Judge Henry of the Tenth Circuit observed, merging "the 'danger to the community' inquiry [with] the 'particularly serious' offense inquiry seems to run afoul of the clear language of the statute. The statute mentions both a 'danger to the community' inquiry and a 'particularly serious' offense inquiry; ignoring one of those inquiries does not give full effect to the meaning to the statute." *N-A-M- v. Holder*, 587 F.3d 1052, 1061 (10th Cir. 2009) (Henry, J., concurring).

Even if the meaning of the (B)(ii) PSC exception, read in isolation, were not clear, a court must construe the provision in the overall context of its adoption, because "the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007). In implementing the principle of *non-refoulement* in U.S. asylum law, Congress lifted the language of the Refugee Convention nearly verbatim.[2] Congress also adopted the language of the

[2] *See* 8 U.S.C. § 1231(b)(3)(A) ("[T]he Attorney General may not remove an alien to a country if…the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion."); *cf.* Refugee Convention, art. 33(1) ("No Contracting State shall expel or return…a refugee…to…territories where his life or freedom

Convention's limited exceptions to the *non-refoulement* principle.[3] By using language that is substantively identical to that of the Convention, Congress manifested its intent to implement the obligation of *non-refoulement* as it is envisioned in the Convention: it is a "cardinal rule of statutory construction" that where Congress adopts language from another source, or uses specialized terms that have acquired an accepted meaning, "absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them." *Molzof v. United States*, 502 U.S. 301, 307-08 (1992).

Adopting the language of the Convention was an *extra* precaution to ensure that courts would interpret the withholding provisions consistently with U.S. treaty obligations. Even if the language of the Refugee Act had not mirrored the Convention's language, the *Charming Betsy* canon of statutory construction would have mandated an interpretation of the Refugee Act that does not conflict with international law or U.S. treaty obligations. *See Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) ("It has been a maxim of statutory construction since the decision in

---

would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.").

[3] *See* 8 U.S.C. § 1231(b)(3)(B)(ii) ("[Section A does not apply] to any alien if the Attorney General determines that…the alien, having been convicted of a particularly serious crime is a danger to the community of the United States."); *cf.* Refugee Convention, art. 33(2) ("The benefit of [*non-refoulement*] may not…be claimed by a refugee…who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.").

Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804), that 'an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains[.]'"); *see also Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (noting the "firm and obviously sound" sound principle of interpretation that a treaty will not be considered "abrogated or modified by a later statute, unless such purpose on the part of Congress has been clearly expressed") (citations omitted).

The legislative history of the Refugee Act confirms that Congress intended the Act "to bring United States refugee law into conformance with the [Refugee Convention]." *Cardoza-Fonseca*, 480 U.S. at 436 (citing "abundant evidence of an intent to conform…our asylum law to the United Nation's Protocol"). Both the 1979 House Judiciary Committee Report and the Senate Report specifically stated that the Refugee Act was designed to bring our domestic law into conformity with our obligations under the Refugee Convention. H.R. Rep. No. 96-608 at 17 (1979) (noting that proposed asylum and withholding provisions were designed to "conform[] United States statutory law to our obligations under Article 33 [of the Refugee Convention]."); S. Rep. No. 96-256, at 4 (1979) ("[The Refugee Act] will bring United States Law into conformity with our international treaty obligations under the United Nations Protocol…and the Convention."). Legislative history also confirms that Congress' intent to comply with the treaty obligations imposed by

the Refugee Protocol motivated it to adopt the Refugee Convention's language. The House Judiciary Committee reported that "the Committee feels it is desirable, for the sake of clarity, to conform the language of that section to the Convention.…[T]he Committee feels that [this] is necessary so that U.S. statutory law clearly reflects our legal obligations under international agreements." H.R. Rep. No. 96-608, at 18. The Senate Committee expressed similar views. S. Rep. No. 96-256, at 4. Lastly, the House Conference Report explained that the asylum and withholding provisions had been "adopted…with the understanding that [they are] based directly upon the language of the Protocol and it is intended that the provision[s] be construed consistently with the Protocol." H.R. Rep. No. 96–781 (1980), at 20.

Because fundamental canons of statutory interpretation and legislative history demonstrate that Congress' unambiguous intent in enacting the § 1231(b)(3)(B)(ii) PSC bar was to conform U.S. law to the Refugee Convention, this Court must not construe it more broadly than the equivalent provision in the Refugee Convention.[4] As the following section explains, the Convention's PSC

[4] Although the PSC bar to withholding is sometimes applied more broadly under domestic law than under the Refugee Convention, this should occur only where domestic law clearly requires it—for example, where a refugee was convicted of an aggravated felony and sentenced to five or more years. *See* 8 U.S.C. § 1231(b)(3)(B). Where the conviction does not fall within such a clear statutory requirement, the statute must be read in conformity with the Convention. *See Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) ("It has been a maxim of statutory

exception applies only to refugees who both have been convicted of an exceptionally grave crime and, in addition, currently constitute a danger to the community of the country of refuge.

II. THE "PARTICULARLY SERIOUS CRIME" EXCEPTION TO THE UNITED STATES' INTERNATIONAL TREATY OBLIGATION OF *NON-REFOULEMENT* APPLIES ONLY TO REFUGEES WHO HAVE BEEN CONVICTED OF AN EXCEPTIONALLY GRAVE CRIME AND, IN ADDITION, CURRENTLY CONSTITUTE A DANGER TO THE COMMUNITY.

In adopting the phrase "particularly serious crime" from the Refugee Convention, Congress chose terminology with an accepted meaning relating to a narrow exception to the duty of *non-refoulement*. These words therefore must be interpreted in light of the Convention's paramount purpose to prevent the return of refugees to persecution and danger. *Non-refoulement* is the cornerstone of the Convention and reflects the international community's commitment to ensuring that all persons can enjoy fundamental human rights, including the rights to life, to freedom from torture or cruel, inhuman or degrading treatment, and to liberty and security of the person. UN High Commissioner for Refugees, *UNHCR Note on the*

---

construction since the decision in *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), that 'an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains[.]'").

Principle of Non-Refoulement (1997) [hereinafter *UNHCR Note*].[5] These rights are nullified when a refugee is returned to persecution or danger.

A. Non-refoulement is the cornerstone of the Refugee Convention, to which exceptions are rarely made.

Article 33 of the Refugee Convention codifies the principle of *non-refoulement*, by prohibiting States Parties to the Convention from "expel[ling] or return[ing] 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, nationality, membership of a particular social group, or political opinion." According to the United Nations High Commissioner for Refugees ("UNHCR")—the international body responsible for supervising the implementation of the Refugee Convention and Protocol—the principle of *non-refoulement* is "an essential and non-derogable component" of that treaty. UNHCR, *Extraterritorial Application of* Non-Refoulement *Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, Advisory Opinion, ¶12 (Jan. 26, 2007).

Given the Refugee Convention's purpose "to assure refugees the widest possible exercise of…fundamental [human] rights and freedoms [, and] to extend the scope of and protection accorded [to refugees]," the Convention's drafters were

[5] Available at: http://www.refworld.org/docid/438c6d972.html (last visited Nov. 1, 2014).

reluctant to include any exception to the *non-refoulement* provision. *See Ad Hoc Committee on Refugees and Stateless Persons, Second Session: Summary Record of the 40th Meeting*, UN Doc. E/AC.32/SR.40 (Aug. 22, 1950) [hereinafter *Ad Hoc Committee: Summary Record*]. The United States delegate stated that "it would be highly undesirable to suggest in the text of that article that there might be cases, even highly exceptional cases, where a man might be sent to death or persecution." *Id.*; *see also Report of the Ad Hoc Committee on Refugees and Stateless Persons, Second Session*, UN Doc. E/1850; E/AC.32/8 ¶30 (Aug. 25, 1950). However, the Convention's drafters ultimately created narrow exceptions to allow a State Party to expel a refugee whose presence in the country would pose a "menace to public security" that outweighed "the danger entailed to [the refugee] by expulsion." *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the 16th Meeting*, UN DOC. A/CONF.2/SR.16 (Nov. 23, 1951) [hereinafter *Conference of Plenipotentiaries: Summary Record*].

The exception for a refugee "who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of [the country of refuge[,]" may be expelled from that country was drafted to apply only in "extreme cases," *UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, ¶¶154-55 (Jan. 1, 1992) [hereinafter *UNHCR*

Handbook]; *see also Cardoza-Fonseca*, 480 U.S. 421 at 438-39 (looking to a previous edition of the *UNHCR Handbook* for guidance in interpreting the Refugee Protocol). It therefore must be interpreted restrictively, and consistently with the UNHCR instruction to apply this exception "with the greatest caution[,] tak[ing] fully into account all the circumstances of the case and…the possibilities of rehabilitation and reintegration within society." *UNHCR Note*, *supra*.

To aid contracting states in determining whether an extraordinary situation justifies the exception to *non-refoulement*, the Convention requires two distinct elements to be considered. First, the refugee must have been convicted of an exceptionally grave crime (see Point II.B, *infra*) and, second, the refugee must pose a danger to the community (see Point II.C, *infra*).

B. The Convention's use of the unique phrase "particularly serious crime" only applies to exceptionally grave crimes and extreme circumstances.

Both the text and authoritative commentary on the PSC exception to *non-refoulement* limit its application to exceptional and very grave crimes. In writing Article 33(2), the drafters of the Refugee Convention made the standard for expelling a refugee higher than the standard for denying refuge in the first place. While refuge can be denied because of "a serious non-political crime," in Article 33(2) the term "crime" is doubly qualified—requiring that the crime be more than just serious, but particularly serious. UNHCR defines a "serious crime" as "a capital crime or a very grave punishable act," *UNHCR Handbook*, *supra*, ¶155. It

follows that that the phrase "particularly serious crime" refers to even graver crimes and must be reserved for only the most extreme cases.

Leading international refugee law experts agree that *refoulement* is contemplated only in the most exceptional of circumstances. *See*, *e.g.*, Sir Elihu Lauterpacht & Daniel Bethlehem, *The scope and content of the principle of non-refoulement: Opinion*, in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* 87, 139 ¶186 (Erika Feller et al. eds., 2003). The consensus among those experts is that this double qualification—"particularly" and "serious"—restricts the definition of crimes warranting an exception to *non-refoulement* to exceptionally grave crimes "committed with aggravating factors, or at least without significant mitigating circumstances." James C. Hathaway & Colin J. Harvey, *Framing Refugee Protection in the New World Disorder*, 34 Cornell Int'l L.J. 257, 292 (2001). Thus, "whether the crime is a particularly serious one would depend on the merits of the case, [although] the offence must normally be a capital crime [such as] murder, arson, rape, armed robbery, etc." *See* Atle Grahl-Madsen, *Commentary on the Refugee Convention 1951*, Article 33, 142 ¶9 (UNHCR Div. of Int'l Prot. ed. 1997) (1963).

States Parties to the Refugee Convention have also emphasized that the inquiry into whether a crime is "particularly serious" must take into account mitigating as well as aggravating circumstances. *See*, *e.g.*, *Betkoshabeh v. Minister*

for Immigration and Multicultural Affairs, [1998] 157 ALR 95 (Austl.) (observing that the PSC inquiry is intensely fact specific); *IH (s. 72 "Particularly Serious Crime") Eritrea*, [2009] UKAIT 00012 (U.K.) [hereinafter *IH Eritrea*, U.K.] (same); *see also* Guy Goodwin-Gill, *The Refugee in International Law* 239-40 (3d ed. 2007). ("[A]s a matter of international law, the [PSC inquiry must] involve an assessment of all the circumstances, including the nature of the offense, the background to its commission, the behavior of the individual, and the actual terms of any sentence imposed.") For example, murder will usually be considered a PSC, but a mercy killing may not be. *IH Eritrea*, U.K. ¶76. Similarly, theft will usually not be a PSC—especially if the refugee stole in order to meet her basic needs—but an armed bank heist may be "particularly serious." *Id.* The practices of signatory states are "entitled to considerable weight" in the judicial interpretation of treaties. *Air France v. Saks*, 470 U.S. 392, 405 (1985). This approach is consistent with the UNHCR's directive that the PSC label, which can lead to the return of a refugee to persecution and possibly death, applies only to the most extreme crimes. *See UNHCR Note*, *supra*.

C. The Convention requires a separate and individualized assessment of the refugee's current danger to the community before the "particularly serious crime" exception can apply.

The Refugee Convention's use of the present tense in Article 33(2) ("a refugee who…constitutes a danger to the community") signifies that courts must

make an individualized assessment of a refugee's *current* threat to the community before it applies the PSC exception. It is necessary, but insufficient, that an individual was convicted of a PSC. In addition, the individual must also currently pose a danger to the community. In applying the exception only to refugees who meet both criteria, the Refugee Convention distinguishes past convictions from current dangerousness.

The commission of an exceptionally grave crime serves as the threshold trigger that alerts the state that a refugee, through an act, may constitute a danger to an individual or to the community. However, the ultimate determinant is whether the refugee poses a current danger to the community that would justify sending her to persecution and possibly death. Therefore, a court cannot ignore mitigating factors—such as the commission of a crime in a state of emotional distress— and must consider facts post-dating the crime that might lessen or eliminate the danger the refugee poses—such as a later-acquired disability, or a long record demonstrating a lack of dangerousness. *See* Gunnel Stenberg, *Non-Expulsion and* Non-Refoulement*: The Prohibition Against Removal of Refugees with Special Reference to Articles 32 and 33 of the 1951 Convention Relating to the Status of Refugees* 228 (1989).

Grahl-Madsen, whose views on the Convention the Supreme Court has cited, *see Cardozo Fonseca*, 480 U.S. 421, 431 & 440 n.24, unequivocally

describes Article 33(2) as requiring a two-part inquiry. *See* Grahl-Madsen, *supra*, ¶¶9-10. The term "danger to the community," he notes, cannot logically refer to past danger, but "only to a present or future danger." *Id.* at 139 ¶7. Grahl-Maden explains that "a single crime will in itself not make a man a danger to the community." *Id.* at 143 ¶10. While "acts the refugee has committed…may serve as an indication [of future] behavior…and thus indirectly justify his expulsion,…return to a country of persecution may only be effected if the refugee 'constitutes a danger to the community.'" *Id.* at 139 ¶7, 142 ¶9. Thus, on the "extremely rare occasions" that the provisions of Article 33(2) are applied, it is the "danger [the alien] constitutes which is the decisive factor." Grahl-Madsen, *supra*, 139 ¶7, 144 ¶10. Similarly, Nehemiah Robinson, one of the foremost authorities on the Refugee Convention, wrote in 1953 that a refugee "may not be expelled except on grounds of national security and public order…[and so] the refugee shall [ordinarily] be allowed to submit evidence to prove that he does not represent a threat to national security or public order." *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation* 29-30 (1953). These commentaries predate the United States' accession to the Refugee Protocol, providing evidence of how the Convention was understood when the United States

became party to it, and when Congress passed the 1980 Refugee Act, implementing its provisions.[6]

The consistent practices of States Parties to the Refugee Convention and Protocol further confirm the importance of a separate "dangerousness" requirement. Tribunals in signatory nations consistently address the refugee's potential "danger to the community" as a distinct inquiry when determining whether the PSC exception to *non-refoulement* applies in a given case. *See*, *e.g.*, *Plaintiff M47/2012 v. Director-General of Security*, [2012] HCA 46 n.457 (Austl.) (Article 33(2) of the Refugee Convention permits States Parties to expel "a refugee who has been convicted by a final judgment of a particularly serious crime *and* who constitutes a danger to the community of that country.") (emphasis added); *EN (Serbia) v. Secretary of State for the Home Department*, [2010] Q.B. 633 (U.K.) ("Article 33(2) of the Refugee Convention imposed on a state wishing to

---

[6] *See also* Paul Weis, *The Refugee Convention, 1951: The Travaux Preparatoires Analysed with a Commentary* 245 (1995). ("Two conditions must be fulfilled: the refugee must have been convicted [of] a particularly serious crime, and he must constitute a danger to the community of the country."); Lauterpacht & Bethlehem, *supra*, at 140 ¶191 (The 'danger to the community' "requirement is not met simply [because] the person concerned has been convicted of a particularly serious crime. An additional assessment [of dangerousness] is called for."); Guy Goodwin-Gill, *supra*, at 239-40 (The refugee's danger to the community is a fundamental part of the inquiry into whether the PSC exception applies in a given case.); James C. Hathaway, *The Rights of Refugees Under International Law* 344 (2005) (In addition to a determination that the refugee's conviction was for a PSC "there must also be a determination that the offender 'constitutes a danger to the community.'").

[expel a refugee] both the requirement that the person had been convicted by a final judgment of a particularly serious crime and the requirement that he constitute a danger to the community."); *Pushpanathan v. Minister of Citizenship & Immigration*, [1998] 1 S.C.R. 982, ¶12 (Can.) (After finding that a refugee has been convicted of a PSC, the government must "make the added determination that the person poses a danger to the safety of the public or to the security of the country…to justify *refoulement*."). This consistent practice of other signatories to the Refugee Convention is "entitled to considerable weight" in determining the requirements of the Convention. *See Air France v. Saks*, 470 U.S. 392, 405 (1985).

III. THE BIA'S "PARTICULARLY SERIOUS CRIME" DETERMINATION IN THIS CASE VIOLATES THE STATUTE AND REFUGEE CONVENTION BECAUSE IT IGNORES THE REQUIREMENT THAT THE OFFENSE FALL IN A CLASS OF EXCEPTIONAL AND GRAVE CRIMES.

The BIA's application of the words "particularly serious" in this case ignores the Refugee Convention's—and therefore the statute's—requirement that the first prong of the PSC exception be limited to crimes of extreme gravity. The Refugee Convention's use of "particularly serious" to twice qualify the word "crime" imposes an extremely high threshold that includes only the most exceptional and grave crimes. Given that the Refugee Convention's reference to "serious…crime" refers to "capital crime or…very grave punishable act[s]," *UNHCR Handbook* ¶155, a crime only becomes "particularly serious" when it is

the equivalent of a capital crime committed with aggravating factors, or in the absence of mitigating circumstances. *See, e.g.*, Hathaway & Harvey, *supra*, 292. Examples of crimes that may meet such an exacting threshold include cases of aggravated murder, arson, rape, and armed robbery, where there are no significant mitigating factors. *See* Grahl-Madsen, *supra*, 142 ¶9.

At least one circuit has explicitly recognized that the "particularly serious" qualifier means that the crime at issue must meet a heightened standard beyond that of an ordinary serious crime. The Ninth Circuit recently stated: "That there are *two* modifiers to 'crimes'…signifies [that] the crime must be not just any crime, and not just any *serious* crime—already a subset of all crimes—but one that is '*particularly* serious[,' that is, serious] 'in a special or unusual degree,' or 'to an extent greater than in other cases or towards others." *Alphonsus v. Holder*, 705 F.3d 1031, 1048-49 (9th Cir. 2013) (emphasis in original) (citations omitted); *see also Delgado v. Holder*, 648 F.3d 1095, 1109 (9th Cir. 2011) (en banc) (Reinhardt, J., concurring) ("a particularly serious crime must be one that is *more* than serious—one that stands clearly apart from the broader category of 'serious' crimes."). Generally, these crimes must involve "the intentional use or threatened use of force, the implication being that the perpetrator is a violent person." *Id.* at 1110. This is because the determination that a crime is "particularly serious" can lead to a refugee's expulsion and return to a country where he "faces persecution

or even death…[and t]he INA reserves such severe consequences for those [crimes] that make an alien so 'danger[ous] to the community of the United States' that we are not willing to keep him here, notwithstanding the persecution he may face at home." *Id.* at 1009. Accordingly, although the BIA has suggested that it is possible for a crime against property to meet the threshold of a PSC, it has declined to characterize a crime as "particularly serious" where it did not involve a serious danger to persons. *See Matter of Frentescu*, 18 I. & N. Dec. 244 (BIA 1982) (concluding that burglary without danger to persons was not a PSC).

While perjury and passport fraud (the underlying offenses in this case) may be serious matters, that can—and in this case did—lead to serious criminal consequences, they cannot qualify as PSCs within the meaning of the Refugee Convention or the Refugee Act. Neither offense is the equivalent of a capital crime with aggravating factors as required under established international law standards. See Point II.B, *supra*. Furthermore, they would not qualify as "particularly serious" under domestic standards because lying does not involve "intentional use or threatened use of force," and does not imply "that the perpetrator is a violent person" who is "so dangerous to the community of the United States that we are not willing to keep him here, notwithstanding the persecution he may face at home." *Delgado*, 648 F.3d at 1009-10.

Because the BIA's determination that the Ms. Norman's crime can be classified as "particularly serious" cannot be squared with the mandates of U.S. treaty obligations under the Refugee Convention, this Court should vacate the BIA's determination as manifestly contrary to the statute, and remand it for review under the proper standards.

IV. IN ADDITION, THE BIA'S "PARTICULARLY SERIOUS CRIME" DETERMINATION IN THIS CASE VIOLATES THIS COURT'S PRECEDENT, THE REFUGEE STATUTE AND REFUGEE CONVENTION BECAUSE IT FAILS TO CONSIDER CURRENT "DANGEROUSNESS"

By failing to consider the "danger to the community" that Ms. Norman *currently* poses, the BIA departs from the PSC exception standard that this Court has applied to crimes that are not per se PSCs. *See Nethagani v. Mukasey* 532 F.3d 150, 155 (2d Cir. 2008) (applying the *Frentescu* factors, the fourth of which requires consideration of "whether the type and circumstances of the crime indicate that the alien will be a danger to the community."); *see also Steinhouse v. Ashcroft*, 247 F.Supp.2d 201, 210 (D. Conn. 2003) ("The fourth *Frentescu* factor has traditionally been regarded as the most important consideration in determining whether a crime is particularly serious. The BIA's failure to consider the fourth *Frentescu* factor constitutes an unjustified deviation from the standard applied in prior BIA cases); *Yousefi v. I.N.S.*, 260 F.3d 318, 330 (4th Cir. 2001) ("Because the Board failed to consider the two most important *Frentescu* factors [including danger to the community] and relied on improper considerations, we conclude that

the Board's decision was arbitrary and capricious."). In light of this Court's precedent, which has treated consideration of current "dangerousness" as a necessary factor in determining when the PSC exception applies, this Court should vacate the BIA's decision and remand with instructions for the BIA to consider whether Ms. Norman currently poses a "danger to the community." To the extent that the BIA relies on *Matter of N-A-M-*, 24 I. & N. Dec. 336, 342 (BIA 2007) to justify its failure to address whether Ms. Norman currently poses a "danger to the community," this Court is presented with a new question for review and should reject the BIA's failure to apply the statute.

A. This Court's precedent requires consideration of current "dangerousness" as a crucial factor in the "particularly serious crime" exception analysis.

In failing to consider Ms. Norman's current "danger to the community" before determining that the PSC exception applies to her case, the BIA contravened the precedent of this Court. In *Ahmetovic v. I.N.S.*, 62 F.3d 48 (2d Cir. 1995), this Court reviewed the standard established in *Matter of Frentescu*, 18 I. & N. Dec. 244 (1982). While *Frentescu* held that certain crimes are so serious that their commission *per se* is enough to warrant application of the PSC exception, the BIA also held that most cases require an individualized inquiry to determine whether the PSC bar to withholding is applicable. 18 I. & N. at 247. This inquiry considers four factors: (1) "the nature of the conviction," (2) "the circumstances and underlying facts of the conviction," (3) "the type of sentence imposed, and,

most importantly, [(4)] whether the type and circumstances of the crime indicate that the alien ***will be*** *a danger to the community*." *Id*. (emphasis added).

In *Ahmetovic*, this Court expressed reservations about the standard imposed by *Frentescu*, stating that it was "troubled by the BIA's failure to give separate consideration to whether [*Ahmetovic*] is a 'danger to the community.'" This concern stemmed from "the language 'having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community'[, which] suggests that a separate finding as to the alien's 'dangerousness' is required. Otherwise, the clause concerning 'danger to the community' might seem superfluous." 62 F.3d at 52. Nevertheless, addressing a crime deemed particularly serious per se—which is not the case here—this Court granted *Chevron* deference to the BIA's interpretation, trusting the assumption that the crucial "danger to the community" inquiry was "subsumed" within the PSC inquiry. *Ahmetovic*, 62 F.3d at 52-53; *see also Steinhouse*, 247 F.Supp.2d at 209 ("The Second Circuit in *Ahmetovic* did not go so far as to permit the BIA to wholly disregard dangerousness.").[7] In its only other published decision regarding the requirements

[7] If this Court were to decide—despite the *Ahmetovic* court's concern about appropriate consideration of "danger to the community"—that the *Ahmetovic* ruling requires deference to the BIA even when there is no indication that the BIA has given any consideration to this factor, amici respectfully submit that the Court should consider granting initial hearing en banc, *sua sponte*, to address this question. *See*, *e.g.*, *Rojas v. AG of the United States*, 728 F.3d 203, 205 (3d Cir. 2013) (en banc) (noting court ordered en banc rehearing *sua sponte*); *see also* Fed.

of the PSC bar to withholding, *Nethagani v. Mukasey*, this Court affirmed a 2003 BIA determination that the respondent's conviction constituted a PSC. 532 F.3d 150 (2d Cir. 2008). The decision in *Nethagani*—which addressed a crime, like those at issue here, not deemed particularly serious *per se*—rested on this Court's conclusion that the BIA had correctly applied all four *Frentescu* factors, including whether "the alien will be a danger to the community," in making its PSC determination. 532 F.3d at 155.[8]

In failing to consider Ms. Norman's current "danger to the community," the BIA failed to apply one of the four *Frentescu* factors, contrary to this Court's precedential decisions. This Court should therefore vacate the agency's decision and remand Ms. Norman's case to the BIA for a new analysis of the PSC exception that considers whether Ms. Norman currently poses a "danger to the community."

B. To the extent that the BIA has departed from evaluating current "dangerousness," that approach presents a new question for this Court's review and should be rejected because it is contrary to the unambiguous meaning and purpose of the statute.

In *Matter of N-A-M-*, the BIA stated that its "approach to determining whether a crime is particularly serious has evolved since the issuance of [the]

R. App. P. 35 Advisory Committee's Note ("[This rule] does not affect the power of a court of appeals to initiate in banc hearings sua sponte.").

[8] *Nethagani*, which was decided after *Matter of N-A-M-*, referenced *Matter of N-A-M-* for its holding that a crime does not need to be an aggravated felony in order to be "particularly serious," but not for its holding regarding the standard for case-by-case PSC determinations. 532 F.3d at 156.

decision in *Matter of Frentescu*[.]" 24 I. & N. Dec. 336, 342 (BIA 2007). It further stated that "the proper focus for determining whether a crime is particularly serious is on the nature of the crime and *not the likelihood of future serious misconduct*." *Id.* (emphasis added). The standard articulated in *Matter of N-A-M-* omits discussion of current "dangerousness" and arguably sweeps in far more convictions into the PSC category—and, as a result, could bar many more individuals from eligibility for withholding of removal—than did the *Frentescu* standard reviewed by this Court. If the government seeks to defend the decision below on the ground that no consideration of current dangerousness is required under *Matter of N-A-M-*, such an approach would present a new question for this Court's review. *See Chevron U.S.A., Inc., v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (Where an agency amended its definition of a statutory term, thus altering the reach of the statute, the Supreme Court reviewed the permissibility of the new definition without regard to prior constructions of the statute.).

As demonstrated in Point I, *supra*, Congress unambiguously expressed its intent to conform domestic refugee law to U.S. treaty obligations when it enacted the withholding provisions of the INA. Yet, contrary to Congress' clear intent, to the Refugee Act's plain language and structure, to longstanding canons of statutory construction, and to the Refugee Convention's requirements, the BIA in *N-A-M-* suggests that it could ignore consideration of whether the refugee currently poses a

"danger to the community," much less require a separate factual finding of current "dangerousness." *Matter of N-A-M-*, 24 I. & N. Dec. at 342.

Congress did not give the BIA discretion to abrogate U.S. treaty obligations by expanding the PSC bar to withholding beyond the limits of its language and of international law. As discussed in Point I, *supra*, Congress enacted the withholding provisions in order to conform domestic law to its international obligations under the Refugee Protocol. This unambiguous intent is demonstrated by the fact that Congress used the language of the Convention in the Refugee Act. The BIA's interpretation in *N-A-M-*, which fails to evaluate the current "danger to the community" element, contravenes fundamental canons of statutory construction and undermines the principle of *non-refoulement*—which prohibits the return of a refugee to a country where she faces persecution and potentially death, except in extraordinary circumstances—that the Refugee Act was enacted to protect. When the BIA does not consider current "danger" as a factor in the inquiry, much less as the crucial and separate prong mandated by the Refugee Convention, the BIA disregards Congressional intent.

Any reasonable interpretation of the PSC bar must at least consider "danger to the community" as a crucial factor. *See* Point II.C, *supra*. As the Second Circuit noted in *Ahmetovic*, the language of the statute suggests a separate finding as to the alien's current dangerousness because otherwise the clause concerning "danger to

the community" becomes superfluous. 62 F.3d at 52-53 (citing *Freytag v. Commissioner*, 501 U.S. 868, 877 (1991)). The statute's terms do not permit the BIA to disregard "the likelihood of future serious misconduct." Therefore, to the extent the BIA's interpretation of the PSC bar to withholding of removal in *Matter of N-A-M-* excludes consideration of current dangerousness, it frustrates the "unambiguously expressed intent of Congress," and is not entitled to deference. *See Chevron*, 467 U.S. 837 at 842-44.

Ms. Norman's convictions, for perjury and passport fraud, do not reflect a past or current "danger to the community" in the way envisioned by the statute and the Convention. The "danger to the community" prong is an analysis about whether the refugee currently constitutes a threat to this country's community that justifies sending her back to a country where she faces persecution and, potentially, death. To send a refugee back for convictions that pose no danger to the community would minimize and devalue the United States' commitment to implementing its duty of *non-refoulement*. Consequently, this case should be remanded back to the BIA to reach a decision based on the proper standards.

CONCLUSION

For the foregoing reasons, amici respectfully urge that the decision of the Board of Immigration Appeals be reversed and remanded with instructions to apply 8 U.S.C. § 1231(b)(3)(B)(ii) in a way that conforms to the Refugee Act and

U.S. treaty obligations. For the "particularly serious crime" exception to apply, where such application is not expressly mandated by domestic law, analysis of two separate and distinct elements is required: (1) whether the refugee has committed a "particularly serious crime" rising to the level of gravity required under the Refugee Act and Convention, and (2) whether the refugee currently constitutes a danger to the community as required under the Refugee Act and Convention. Only if this analysis is satisfied will the BIA give full effect to Congress' unambiguously expressed intent.

Dated: November 14, 2014

New York, NY

Respectfully submitted,

/s/Nancy Morawetz

Nancy Morawetz
Antonia House, Student Intern
Tianyin Luo, Student Intern
WASHINGTON SQUARE
LEGAL SERVICES, INC
245 Sullivan Street, 5th Floor
New York, NY 10012
(212) 998- 6430
nancy.morawetz@nyu.edu

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

   [X] this brief contains 6,946 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   [X] this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

Date: November 14, 2014
New York, NY

/s/ Nancy Morawetz_____

Nancy Morawetz
Washington Square Legal Services
245 Sullivan Street, 5th Floor
New York, NY 10012
nancy.morawetz@nyu.edu
(212) 998- 6430

APPENDIX

DESCRIPTIONS OF AMICI

Since 1978, **Human Rights first ("HRF")** (formerly known as the Lawyers Committee for Human Rights) has worked to promote fundamental human rights and to protect the rights of refugees. HRF has conducted research, convened legal experts, and provided guidance to assist in developing effective and fair methods for excluding those who are not entitled to refugee protection under international law. It coordinated a special issue of the International Journal of Refugee Law, 12 IJRL Special Supplementary Issue on Exclusion (2000), as part of an multi-year research project on exclusion that resulted in the publication of the report Refugees, Rebels & the Quest for Justice (2002).

The **Immigrant Defense Project ("IDP")** is a non-profit legal resource and training center that provides criminal defense attorneys, immigration attorneys, and immigrants with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. IDP is dedicated to promoting fundamental fairness for immigrants accused of crimes, and therefore has a keen interest in ensuring the correct interpretation of laws that may affect the rights of immigrants at risk of detention and deportation based on past criminal charges.

The National Immigration Project of the National Lawyers Guild (National Immigration Project) is a non-profit organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws, including noncitizens in immigration proceedings and persons who have been removed. The National Immigration Project has been promoting justice, transparency and government accountability in all areas of immigration law and social policies related to immigration for over forty years. Appearing as amicus curiae, the National Immigration Project litigates before the federal courts in cases challenging grounds of deportation and bars to withholding of removal.