No. 14-2318

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Lizbeth Patricia VELERIO-RAMIREZ,
Petitioner, Appellant,

v.

Eric H. HOLDER, Jr., Attorney General,
Respondent, Appellee.

ON PETITION FOR REVIEW OF AN ORDER
BY THE BOARD OF IMMIGRATION APPEALS

BRIEF OF *AMICUS CURIAE* HARVARD IMMIGRATION AND REFUGEE CLINICAL PROGRAM IN SUPPORT OF PETITIONER-APPELLANT'S PETITION FOR REVIEW

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Pursuant to Federal Rule of Appellate Procedure 26.1, I, Philip L. Torrey as counsel for *amicus curiae*, state that the Harvard Immigration and Refugee Clinical Program does not have a parent corporation, nor does it issue stock, and thus no publicly held corporation owns 10% or more of its stock.

DATED: March 9, 2015

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INTEREST OF AMICUS CURIAE

Amicus curiae is a non-profit organization that specializes in immigration law and has a direct interest in ensuring that the "particularly serious crime" bar to the withholding of deportation statute at issue in this case is interpreted properly and in conformity with U.S. international treaty obligations as directed by the statute's text.[1]

The Harvard Immigration and Refugee Clinical Program ("Clinic") has been a leader in the field of refugee law for over thirty years. The Clinic's staff includes Harvard Law School faculty members who teach courses on refugee law, immigration policy, and the intersection of criminal law and immigration law. The Clinic's publications have been cited frequently by international and domestic tribunals, including the U.S. Supreme Court. The Clinic's director authors the leading treatise on U.S. refugee law, *Law of Asylum in the United States*. Additionally, the Clinic has extensive experience directly representing noncitizens seeking refugee status and other forms of immigration protection in the United States, including those with criminal convictions.

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[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amicus curiae* states that: (1) no party's counsel authored this brief in whole or in part; (2) no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and (3) no person other than *amicus*, its members, and its counsel contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

This case concerns the proper application of the withholding of deportation's statutory text as it existed between April 24, 1996 and April 1, 1997. Withholding of deportation, which was the precursor of today's withholding of removal, protected a refugee from deportation unless that refugee "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States" ("PSC Exception"). 8 U.S.C. § 1253(h)(2)(B) (1981). In 1996, the withholding of deportation statute was amended to allow for the application of the PSC Exception only after consideration of U.S. treaty obligations relating to the protection of refugees. This brief focuses on international law that should be considered as required by the amended statute.

It is unsurprising that Congress expressly required consideration of international law before application of the PSC Exception given the statute's history. The withholding of deportation statute was first codified by the Refugee Act of 1980 ("Refugee Act"), which largely copied the language of the United Nations Convention Relating to the Status of Refugees ("Refugee Convention"). Most significantly, the statute mirrored the Refugee Convention's own language concerning the "particularly serious crime" exception to refugee deportation. Consequently, congressional intent to bring the United States into conformity with the Refugee Convention should alone require consideration of international refugee

law. But, as stated, the amended statute at issue expressly demands such consideration.

This Court has not yet had occasion to properly interpret the PSC Exception and its directive to consider international refugee law as the controlling statute in this case requires. The Board of Immigration Appeals ("BIA" or "Board") has likewise not properly analyzed the amended PSC Exception in either the instant case or in a prior similar case. As an issue of first impression, this Court should vacate the Board's decision in this case and remand with instructions to interpret the proper PSC Exception in conformance with the Refugee Convention's language and purpose as required by the statute's text.

ARGUMENT

I. WITHHOLDING OF DEPORTATION REQUIRES CONSIDERATION OF INTERNATIONAL LAW PURSUANT TO THE CONTROLLING STATUTORY TEXT.

While the withholding of deportation's PSC Exception is clear, there is a dearth of jurisprudence from federal courts and the BIA interpreting it. Indeed, Ms. Velerio-Ramirez's case presents this Court with an opportunity to properly consider the controlling PSC Exception as it existed after amendment by the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996), ("AEDPA") and before repeal by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat.

3009 (Sept. 30, 1996), ("IIRAIRA").[2]

This case concerns the proper application of AEDPA § 413(f), which significantly modified the withholding of deportation's PSC Exception to guarantee its application only after consideration of international law.[3] Specifically, AEDPA § 413(f) stated that a person was entitled to withholding of deportation, notwithstanding the PSC Exception, if the Attorney General determined that:

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[2] *Amicus curiae* respectfully directs this Court to the *amici* brief filed in this case by the National Immigration Project of the National Lawyers Guild and the Immigrant Defense Project for a thorough analysis of withholding of deportation's legislative history, which is beyond this brief's scope.

[3] The effective and applicability dates of AEDPA § 413(f) were governed by AEDPA § 413(g), which stated that "the amendments made by this section shall take effect on the enactment of this Act [April 24, 1996] and shall apply to applications filed before, on, or after such date if final action has not been taken on them before such date." AEDPA § 413(g). As discussed below, the term "final action" has been interpreted to mean final decision by the BIA. *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 420 (1999). Furthermore, IIRAIRA's amendments replacing the withholding of deportation statute did not apply to individuals in deportation proceedings commenced before April 1, 1997. *See* IIRIRA § 309(c)(1). Here, removal proceedings against Ms. Velerio-Ramirez were commenced in 1991 (Administrative Record ("AR") 749-750), her withholding of deportation application was filed on May 5, 2011 (AR 73), and final action on that application was taken by the BIA on November 17, 2014 (AR 1). Therefore, AEDPA § 413(f) governs this case.

> (A) such alien's life or freedom would be threatened, in the country to which such alien would be deported or returned, on account of race, religion, nationality, membership in a particular social group, or political opinion; and
>
> (B) the application [of withholding of deportation] to such alien is necessary to *ensure compliance with the 1967 United Nations Protocol Relating to the Status of Refugees*.

AEDPA § 413(f) (emphasis added). Here, both the Immigration Judge and the BIA failed to consider international law, pursuant to AEDPA § 413(f), prior to denying Ms. Velerio-Ramirez's withholding application because both courts erroneously applied statutory language and jurisprudence concerning post-IIRAIRA withholding of *removal* rather than pre-IIRAIRA withholding of *deportation*. (AR 57–70, AR 1–6.)

This Court has reviewed AEDPA § 413(f) in two prior cases, but neither case governs here. *See Choeum v. INS*, 129 F.3d 29 (1st Cir. 1997); *Mosquera-Perez v. INS*, 3 F.3d 553 (1st Cir. 1993). In *Choeum*, the Court ignored AEDPA's effective and applicability date provisions—despite objection by Immigration and Naturalization Service—and incorrectly held that AEDPA § 413(f) applied to Choeum's withholding of deportation application. *See Choeum*, 129 F.3d at 41 n.11. Approximately two years later, the U.S. Supreme Court held that AEDPA's withholding of deportation amendments applied to withholding applications on which the BIA had made a final decision *after* April 24, 1996. *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 420 (1999). The BIA's final decision on the withholding

application in *Choeum* was more than two months *before* April 24, 1996. 129 F.3d at 32 (noting that the BIA denied the respondent's petition for asylum and withholding of deportation on February 9, 1996). Consequently, the Court's analysis of AEDPA § 413(f) in *Choeum* was necessarily rendered dicta by the U.S. Supreme Court's decision in *INS v. Aguirre-Aguirre*.[4]

The Court's decision in *Mosquera-Perez v. INS* is also inapplicable because that case's holding is limited to a subsection of the PSC Exception concerning aggravated felonies not at issue here. *See* 3 F.3d 553, 554 (1st Cir. 1993). Specifically, the Court considered "whether an aggravated felony conviction constitutes an absolute bar to withholding of deportation." *Id.* Here, the crime at issue is not being charged as an aggravated felony. Consequently, *Mosquera-Perez* is likewise not controlling.

Thus, as an issue of first impression, this Court should vacate Ms. Velerio-Ramirez's deportation order and remand the case to the Board with a directive to properly consider the application of withholding of deportation's PSC Exception and U.S. international law obligations as commanded by AEDPA § 413(f)'s text.[5]

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[4] Even if this Court finds that *Choeum* requires a finding that the PSC Exception does not require a separate dangerousness test, *Choeum* does not preclude the Court from finding that the definition of a "particularly serious crime" is limited to exceptionally grave offenses as discussed *infra* Part III.A.

[5] At first glance, at least two BIA decisions appear to be directly on point, but

II. PURSUANT TO ITS INTERNATIONAL TREATY OBLIGATIONS AND U.S. STATUTORY LAW, THE UNITED STATES HAS A DUTY OF *NON-REFOULEMENT*.

When the United States acceded to the 1967 United Nations Protocol Relating to the Status of Refugees ("1967 Protocol"), it bound itself to the Refugee Convention, which was largely incorporated into the 1967 Protocol. 19 U.S.T. 6223 (1968); *INS v. Stevic*, 467 U.S. 407, 416 (1984). At that time, the Refugee Convention's *non-refoulement* mandate, which requires a country to not return a refugee to his or her country of origin, thus became binding law in the United States.[6] *See* U.S. CONST. art. VI, cl. 2 ("[A]ll treaties made, or which shall be

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in those cases the BIA's interpretation of AEDPA § 413(f) is limited to the effect of an aggravated felony on eligibility for withholding of deportation. *See, e.g.*, *Matter of Q-T-M-T-*, 21 I&N Dec. 639 (BIA 1996) (analyzing whether to withhold the deportation of an individual with an aggravated felony); *Matter of L-S-J-*, 21 I&N Dec. 973 (BIA 1997) (citing *Matter of Q-T-M-T-* and holding that an aggravated felony conviction for robbery with a deadly weapon is a "particularly serious crime").

[6] The term *non-refoulement* is derived from the French word *refouler* meaning "to drive back" and refers to "[a] refugee's right not to be expelled from one state to another . . . where his or her life or liberty would be threatened." *Black's Law Dictionary* 1083 (8th ed. 2004). Article 33 of the Refugee Convention addresses the fundamental principle of *non-refoulement*, stating: "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, nationality, membership of a particular social group or political opinion." Article 33(1), Refugee Convention, opened for signature July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150. Article 33 was the basis for the Refugee Act's withholding of deportation provision. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 440–41 (1987).

made, under the authority of the United States, shall be the supreme law of the land."); *see also Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."); *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts . . . as often as questions of right depending upon it are duly presented for their determination.").

The Refugee Act, which substantially mirrored the Refugee Convention, reflects Congress's effort to bring U.S. statutory law into conformance with its international treaty obligations.[7] *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987) (citing S. Rep. No. 96-590 (1980) at 20, H.R. Rep. No. 96–608, at 9 (1979)). Congress would not have included the Refugee Convention's language without intending it to have the same effect. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts."). Indeed, as noted above, Congress expressly instructed the Attorney General in AEDPA § 413(f) to consider the 1967 Protocol (and consequently the Refugee Convention) when it amended

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[7] Specifically, the Refugee Act provided a process for noncitizens to seek withholding of deportation within U.S. borders as required by the Refugee Convention. *See* Deborah E. Anker, *Law of Asylum in the United States* § 1:1 (7th ed. 2014) (hereinafter "Anker").

the Refugee Act's withholding of deportation statute. AEDPA § 413(f); Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996) (repealed Apr. 1, 1997). The PSC Exception must, therefore, be interpreted consistently with the Refugee Convention's duty of *non-refoulement* and its "particularly serious crime" exception. *See Cardoza-Fonseca*, 480 U.S. at 437.

Non-refoulement is a fundamental pillar of the Refugee Convention to which there are few exceptions. *See* Refugee Convention, Article 33(2), 189 U.N.T.S. 150 (entered into force Apr. 22, 1954). Indeed, drafting parties to the Refugee Convention were greatly concerned about including *any* exceptions to the duty of *non-refoulement*. *See* 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); *Ad Hoc Committee on Refugees and Stateless Persons, Second Session: Summary Record of the Fortieth Meeting Held at Palais des Nations, Geneva*, UN Doc. E/1850; E/AC.32/8 ¶ 30 (Aug. 22, 1950). The Refugee Convention's U.S. delegate suggested "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." *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).

Ultimately, a narrow exception to *non-refoulement* was created for a refugee

"who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community" ("Refugee Convention's PSC Exception").[8] Refugee Convention, Article 33(2), 189 U.N.T.S. 150. Congress later incorporated the Refugee Convention's PSC Exception into the Refugee Act nearly verbatim. Refugee Act of 1980, Pub. L. No. 96-212, § 203(e), 94 Stat. 102, 107 (amending Immigration & Nationality Act § 243(h)). Congress did so "with the understanding that . . . the provision be construed consistently with the Protocol." S. REP. No. 590, 96th Cong., 2d Sess., 20 (1980); *see also* H.R. REP. No. 781, 96th Cong., 2d Sess. 20 (1980).

As with any treaty provision, deciphering the meaning of the Refugee Convention's PSC Exception must begin with the treaty's text. The Vienna Convention on the Law of Treaties ("Vienna Convention") requires the Refugee Convention to "be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[9] Vienna Convention, Art. 31(1), 1155 U.N.T.S. 331 (May 23,

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[8] A "final judgment" means that "[a]ppeal rights should have expired or been exhausted, thereby limiting the risk of refoulement strictly to those whose criminality has been definitely established in accordance with prevailing legal norms." James C. Hathaway, Colin J. Harvey, *Framing Refugee Protection in the New World Disorder*, 34 Cornell Int'l L.J. 257, 320 (2001).

[9] Although the United States has signed but not ratified the Vienna Convention, the U.S. Department of State has acknowledged that the Convention

1969). The U.S. Supreme Court has adopted this well-established principle of international law. *See Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931) ("As treaties are contracts between independent nations, their words are to be taken in their ordinary meaning as understood in the public law of nations." (internal quotations omitted)); *see also Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 (1982) (reasoning that when treaty "interpretation follows from the clear treaty language, [it] must, absent extraordinarily strong contrary evidence, defer to that interpretation"). Thus, understanding the plain meaning of the Refugee Convention's PSC Exception language is paramount.

The text of the Refugee Convention's PSC Exception requires a two-step test. The exception allows a country to return a refugee who (1) has previously been convicted of a "particularly serious crime," and (2) currently constitutes a danger to the community. Refugee Convention, Article 33(2), 189 U.N.T.S. 150. If the refugee has not been convicted of a "particularly serious crime" then there is no need to evaluate whether the refugee presents a danger to the community. *See infra*, Part III.A. The Refugee Convention's PSC Exception will likewise not be satisfied if the refugee has been convicted of a "particularly serious crime" but does not now pose a danger to the community. *See infra*, Part III.B.

"is already recognized as the authoritative guide to current treaty law and practice." S. Exec. Doc. L., 92nd Cong., 1st Sess. 1 (1971).

III. THE EXCLUSION OF A REFUGEE IS PERMITTED IN THE RARE CASE WHEN BOTH REQUIREMENTS OF THE REFUGEE CONVENTION'S PSC EXCEPTION ARE MET.

A careful examination of the Refugee Convention's PSC Exception's text, interpretation by leading refugee scholars, and its application by other States Parties to the Refugee Convention elucidate the narrow circumstances by which its standards may be met. Proper application of the text's clear two-step test is critical. International law requires *non-refoulement* unless a refugee has been convicted of a "particularly serious crime" *and* currently poses a "danger to the community."

A. The Refugee Convention's PSC Exception First Requires a Conviction for an Exceptionally Grave Criminal Offense.

The term "particularly serious crime" ("PSC") is undefined by treaty or statute. But applying accepted statutory interpretation tools such as the plain meaning of the term and the rule of lenity, while interpreting the term in a manner consistent with the Refugee Convention's purpose, confirms that only exceptionally grave offenses can qualify as "particularly serious." According to refugee law experts and other States Parties to the Refugee Convention, determining whether a criminal conviction is "particularly serious" requires a close scrutiny of both aggravating and mitigating factors related to the commission and punishment of the crime.

The two qualifying terms "particularly" and "serious" modify the term "crime" to emphasize the gravity required of an offense for it to be a PSC. Leading refugee law scholars have explained that "[the] double qualification—*particularly* and *serious*—is consistent with the restrictive scope of the exception and emphasizes that *refoulement* may be contemplated pursuant to this provision only in the most exceptional of circumstances . . . ." 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* 139, ¶ 186 (Erika Feller, Volker Turk & Frances Nicholson, eds., 2003) (emphasis in the original). By comparison, the qualifying term "serious" as used in the "serious non-political crime" exception within the Refugee Convention, requires "a capital crime or a very grave punishable act." *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 (1992).[10] It necessarily follows from a plain meaning

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[10] The U.S. Supreme Court, the U.S. Court of Appeals for the First Circuit, and the Board have frequently looked to the Handbook for guidance in construing the asylum and withholding of removal provisions of the INA. *See, e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 438-39 (1987) (noting that "the Handbook provides significant guidance in construing the Protocol, to which Congress sought to conform [and] has been widely considered useful in giving content to the obligations that the Protocol establishes." *Id.* at 439 n. 22); *Matter of S-M-J-*, 21 I&N Dec. 721, 724–25 (BIA 1997) (repeatedly citing to the Handbook to interpret

that a *particularly* serious offense requires an *exceptionally* grave crime. *See* Br. for UNHCR as *Amicus Curiae* Supporting Pet'r, 648 F.3d 1095 (2011) (No. 03-74442), at *16–17.

Furthermore, the tools of statutory interpretation require U.S. courts to construe "any lingering ambiguities . . . in favor of the alien." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); *see also Lara-Cazares v. Gonzales*, 408 F.3d 1217, 1221 (9th Cir. 2005) (finding that gross vehicular manslaughter while intoxicated is not a crime of violence, in part because the rule of lenity resolves any potential ambiguity the petitioner's favor). Here, lenity requires interpreting the PSC term to include only exceptionally grave offenses in order to favor the Petitioner.[11]

Refugee law experts define exceptionally grave offenses as those crimes that are uniquely reprehensible and devoid of significant mitigating factors. *See, e.g.*, James C. Hathaway & Colin J. Harvey, *Framing Refugee Protection in the New World Disorder*, 34 Cornell Int'l L.J. 257, 292 (2001) (explaining that a PSC must

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essential elements of an asylum case, including the burden of proof, the role of the immigration judge and the requirement of an assessment of country conditions); *Ananeh-Firempong v. INS*, 766 F.2d 621, 626, (1985) (calling the Handbook "useful" in interpretation of the U.N. Protocol language in a case on withholding of deportation).

[11] *Cf. Soto-Hernandez* v. *Holder*, 729 F. 3d 1, 5 (1st Cir. 2013) (noting in dicta that the rule of lenity has been applied only to criminal law statute).

be "committed with aggravating factors, or at least without significant mitigating circumstances."); Atle Grahl-Madsen, *Commentary on the Refugee Convention, Division of International Protection of the United Nations High Commissioner for Refugees* (1963), ¶ 9 (suggesting that even crimes such as murder, rape, or armed robbery without significant mitigating factors may be considered "particularly serious"). Determining when an offense is exceptionally grave thus requires, at minimum, a balancing of the offense's nature, the perpetrator's behavior, the context in which the offense was committed, the actual harm inflicted, the procedure used to prosecute the crime, the crime's imposed terms of punishment, and whether most jurisdictions would consider the crime to be exceptionally grave. *See* Guy S. Goodwin-Gill & Jane McAdam, *The Refugee in International Law* (3d ed. 2007); Anker, § 6:20; Br. for UNHCR as *Amicus Curiae* Supporting Pet'r, 648 F.3d 1095 (2011) (No. 03-74442), at *17. Importantly, the name of an offense is not determinative of its gravity. *See* Br. for UNHCR as *Amicus Curiae* Supporting Pet'r, 648 F.3d 1095 (2011) (No. 03-74442), at *17. Rather, a crime must be found to be especially heinous based on the circumstances surrounding the offense and its punishment.

Other States Parties to the Refugee Convention have likewise adopted the factor-balancing test to determine whether an offense is exceptionally grave and thus a PSC. *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). For example, a United Kingdom court noted that murder would usually be considered a PSC, yet a mercy killing may not meet the high threshold of an exceptionally grave offense. *IH Eritrea*, U.K. ¶76. The court further noted that theft would usually not be a PSC—especially if the refugee stole in order to meet her basic needs—but an armed bank heist may be exceptionally grave. *Id.* Even if a refugee's conviction is determined to be a PSC, he or she must then also be considered a danger to the community before the Refugee Convention's PSC Exception is met.

B. The Refugee Convention's PSC Exception Next Requires an Individualized Assessment of a Refugee's Dangerousness.

Once a refugee has been convicted of an offense that qualifies as PSC, an adjudicator must undertake a separate and distinct inquiry concerning the current dangerousness of the refugee. *See* James C. Hathaway, *The Rights of Refugees Under International Law* 344 (2005) ("Beyond [a PSC determination], there must also be a determination that the offender constitutes a danger to the community." (internal quotation marks omitted)). A conviction for a crime that is "particularly serious" is a threshold requirement without which "the question of whether the person concerned constitutes a danger to the community will not arise." *See* 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* 139, ¶ 187 (Erika Feller, Volker Turk & Frances Nicholson, eds., 2003). In applying the Refugee Convention's PSC Exception only to refugees who meet both criteria, the Refugee Convention makes an important distinction between a refugee's *past* criminality and a refugee's *current* dangerousness.

Scholars agree that a refugee's dangerousness must be proven apart from having a criminal conviction that qualifies as a PSC. Simply having a conviction for a PSC is not determinative of a refugee's dangerousness because the refugee may have since become rehabilitated or disabled, which would suggest that he or she is no longer a danger to the community. *See* Atle Grahl-Madsen, *Commentary on the Refugee Convention, Division of International Protection of the United Nations High Commissioner for Refugees* (1963), ¶ 9 ("[A] single crime will in itself not make a man a danger to the community."). Indeed, "[i]t is not the acts that the refugee *has committed*, which warrant his expulsion [from the country of refuge]." *Id.* at 10 (emphasis added). Evidence of prior criminal behavior is but one factor in a larger assessment of an individual's risk to public safety. *See id.*

Furthermore, the "danger to the community" clause must be given full effect by an interpreting court lest it run afoul of the statutory interpretation rules against

surplusage and plain meaning.[12] *See United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992) (holding that "a statute must, if possible, be construed in such a fashion that every word has some operative effect."); *Duncan v. Walker*, 533 U.S. 167, 174-75 (2001); *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). If the Refugee Convention's PSC Exception inquiry ended with a finding of a conviction for an exceptionally grave offense, then including the phrase "constitutes a danger to the community" would be redundant.

According to leading experts Grahl-Madsen and Nehemiah Robinson—whose commentaries predate the United States's accession to the Protocol and thus should be understood to inform the United States's interpretation of it—the Refugee Convention's PSC Exception's dangerousness requirement is especially important.[13] In 1963, Grahl-Madsen stated that on those "extremely rare

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[12] Like step one's PSC analysis, this Court must construe "any lingering ambiguities . . . in favor of the alien" when interpreting the dangerousness clause of the Refugee Convention's PSC Exception. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987).

[13] Other leading refugee scholars have since agreed that the dangerousness requirement is a distinct and critical part of the Refugee Convention's PSC exception analysis. *See, e.g.*, Guy Goodwin-Gill, *The Refugee in International Law* 239–40 (3d ed. 2007) ("The refugee's danger to the community is a fundamental part of the inquiry into whether the particularly serious crime exception applies in a given case."); *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

occasions" when the PSC Exception is applied, it is the "danger [the alien] constitutes which is the decisive factor." Atle Grahl-Madsen, *Commentary on the Refugee Convention, Division of International Protection of the United Nations High Commissioner for Refugees* (1963), ¶¶ 7, 10. Similarly, Robinson wrote in 1953 that a refugee "may not be expelled except on the 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." Nehemiah Robinson, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation* 29–30 (1953).

Determining whether a refugee is a danger to the community requires an examination of several factors. An adjudicator must again consider mitigating factors related to the prior offense, such as the refugee's emotional state when the crime was committed, and factors that diminish or eliminate the prospective danger the refugee poses since committing the PSC, such as the passage of time without further serious criminal behavior. *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 Refugee Convention Relating to the Status of Refugees* 228 (1989). Additional mitigating factors include the

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country."); *see also* Anker, § 6:20 (noting that the Refugee Act's "danger to the community" requirement, which is derived from the Refugee Convention, "is especially critical").

possibility of rehabilitation and reintegration into society. *See Note on Non-Refoulement submitted by the High Commissioner for Refugees to the Executive Committee of the High Commissioner's Programme*, 29th Session, Subcommittee of the Whole International Protection, ¶ 14 (Aug. 23, 1977).

Other States Parties to the Refugee Convention have similarly interpreted the Refugee Convention's PSC Exception to require a distinct dangerousness test. *See Air France v. Saks*, 470 U.S. 392, 405 (1985) (reasoning that other States Parties' interpretation of the Refugee Convention should be "entitled to considerable weight"). For example, the Canadian Supreme Court, comparing the Refugee Convention's PSC exception with another section of the Refugee Convention, reasoned that the government must "make the *added* determination that the person poses a danger to the safety of the public or the security of the country . . . to justify *refoulement*." *See Pushpanathan v. Minister of Citizenship and Immigration*, [1998] 1 S.C.R. 982, ¶12 (emphasis added).

The Australian Administrative Appeals Tribunal has given substantial weight to the dangerousness prong of the Refugee Convention's PSC exception. In 1996, it vacated a deportation order entered against a refugee pursuant to the Refugee Convention's PSC Exception because "despite the nature of the crimes he has committed" he did not reasonably seem to pose further danger. *See In re Baias & Minister for Immigration, Local Government & Ethnic Affairs*, (1996) 43 A.L.D.

284, ¶¶ 45–48, 50. In an earlier case, the same court reasoned that "[t]he reference in Article 33(2) of the convention to a refugee who 'constitutes a danger to the community' is . . . concerned with the risk of recidivism." *In re Tamayo & Dep't of Immigration*, (1994) 37 A.L.D. 786, ¶20. The court further required refugees' personal circumstances to "be considered not only with regard to the way they may ameliorate culpability, but also [insofar] as they affect the possibility of recidivism and the danger to the community." *Id.; accord, WAGH v. Minister for Immigration & Multicultural & Indigenous Affairs*, 75 A.L.D. 651, ¶ 14 (2003). In 2012, an Australian tribunal held that a State Party to the Refugee Convention could 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." *Plaintiff M47/2012 v. Director-General of Security*, [2012] HCA 46 n.457 (Austl.) (emphasis added).

United Kingdom courts have similarly interpreted the Refugee Convention's PSC Exception to also require an individualized assessment of dangerousness. *See* Immigration and Nationality Appeals Directorate, *Changes to Refugee Leave and Humanitarian Protection* (2005) (quoted in *R v. Sec'y of State for Home Dep't,* [2006] EWHC 3513 (Eng. Q.B. 2006)) (reasoning that a refugee is subject to the Refugee Convention's PSC Exception only if she has been "convicted of a particularly serious crime *and* is a danger to the community.") (emphasis added);

see also EN (Serbia) v. Secretary of State of the Home Department, [2010] Q.B. 633 (U.K.) ("Article 33(2) of the Refugee Convention imposed on a state wishing to [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.") (emphasis added). Moreover, the threat to public safety posed by the refugee must be "sufficiently particularised" to validate the refugee's exclusion based on the Refugee Convention's PSC Exception. *See "NSH" v. Sec'y of State for Home Dep't,* [1988] Imm.A. R. 389 (Eng.C.A. (1988)).

Austrian courts have also recognized that the Refugee Convention's PSC Exception requires a distinct and individualized dangerousness inquiry. In 1997, the European Court of Human Rights explained that the vacating of a refugee's deportation order by an Austrian court was proper because the refugee's conviction for a PSC had "only evidentiary relevance; it could not be deduced therefrom that, *ipso facto*, the applicant constituted a danger to Austrian society." *See Ahmed v. Austria*, (1996) 24 E.H.R.R. 278, 281. A subsequent deportation order was upheld only when the required "future danger" assessment was made. *Id.* at 282.

Even the European Union Qualification Directive ("Directive") explicitly makes "dangerousness to the community" a prerequisite of denying *non-refoulement*. The Directive allows for *refoulement* if a refugee, "having been

convicted by a final judgment of a particularly serious crime, *constitutes a danger to the community of that Member State*." *See EU Qualification Directive*, art. 14(4) (2011) (emphasis added). Thus, the mirrored language proves that when drafting the Directive the European Parliament clearly thought that determining whether a refugee posed a "danger to the community" was a crucial part of the Refugee Convention's PSC Exception's analysis.

CONCLUSION

For the foregoing reasons, this Court should reverse the BIA's November 17, 2014 decision and remand this case to the BIA for further proceedings with a directive to apply the proper PSC Exception as amended by AEDPA § 413(f), which requires consideration of the United States' treaty obligations pursuant to the Refugee Convention.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B) as it contains 6,609 words, excluding those parts exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). Additionally, 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 this brief has been prepared in a proportionally spaced typeface in Microsoft Word, using Times New Roman in 14 point font.

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CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2015, I electronically filed the foregoing, Brief of *Amicus Curiae* in Support of Petitioner-Appellee's Petition for Review, with the Clerk of the Court for the U.S. Court of Appeals for the First Circuit by using the appellate CM/ECF system. I certify that the following counsel of record for Petitioner and Respondent in this case are registered CM/ECF users and will therefore be served by the appellate CM/ECF system:

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