No. 16-2272

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Lizbeth Patricia VALERIO-RAMIREZ,
Petitioner, Appellant,

v.

Jeff SESSIONS, Attorney General,
Respondent, Appellee.

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

BRIEF OF *AMICI CURIAE* HARVARD IMMIGRATION AND REFUGEE CLINICAL PROGRAM AND THE IMMIGRANT DEFENSE PROJECT IN SUPPORT OF PETITIONER-APPELLANT'S PETITION FOR REVIEW

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, I, John Willshire Carrera as counsel for *amici curiae*, state that the Harvard Immigration and Refugee Clinical Program and the Immigrant Defense Project do not have parent corporations, nor do they issue stock, and thus no publicly held corporation owns 10% or more of their stock.

DATED: February 15, 2017

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INTEREST OF *AMICI CURIAE*

Amici curiae are non-profit organizations that defend the legal and human rights of immigrants and refugees and have 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), *amici curiae* state 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 this brief, and (3) no person other than *amici*, its members, and its counsel contributed money that was intended to fund preparing or submitting the brief.

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 barring, based on past criminal charges, relief from removal to immigrants seeking refuge in this country from persecution abroad.

SUMMARY OF ARGUMENT

For the second time in this case, the Board of Immigration Appeals ("BIA" or "Board") has failed to consider Ms. Valerio's petition for withholding of deportation in accordance with the controlling statute's explicit directive to comply with international treaty obligations before ordering her removal. The applicable statute (former 8 U.S.C. § 1253(h), as amended by § 413(f) of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")) directs the government to withhold the deportation of a refugee who has been convicted of a crime when "necessary to ensure compliance" with the United States' international treaty obligations.

Prior to this case, the Board had not interpreted this statute's short-lived, express, textual mandate to consider the United States' international treaty

obligations before applying the "particularly serious crime" ("PSC") exception to *non-refoulement* (the prohibition on returning a refugee to his country of persecution) when the PSC did not also qualify even as an "aggravated felony." Therefore, this Court remanded the case to the BIA with the express instruction to "interpret in the first instance and apply [the statutory mandate], to a non-aggravated felon." *Velerio-Ramirez v. Lynch*, 808 F.3d 111, 118 (1st Cir. 2015).

On remand, however, the BIA failed to do what this Court had required. Instead, the BIA concluded without further explanation that AEDPA § 413 "did not make any significant changes" in the analysis of when a non-aggravated felony constitutes a PSC. By doing so, the BIA rendered the statute's mandate to ensure compliance with the United States' international treaty obligations meaningless for a broad category of convictions without clarifying where it found its basis for such differential treatment, or without so much as considering how international law defines a PSC.

Pursuant to the 1967 United Nations Protocol Relating to the Status of Refugees ("1967 Protocol"), which Congress incorporated into statutory law via the Refugee Act of 1980, there is a narrow exception to a country's duty of *non-refoulement* when a refugee has committed a PSC and is a danger to the community. Determining whether a criminal conviction meets this narrow exception requires a fact-specific, two-part test: (1) a criminal conviction that

qualifies as an exceptionally grave offense; and (2) a finding that the refugee currently constitutes a danger to the community. When applying this two-part test to Ms. Valerio's case, it is clear that her conviction for identity theft does not meet the narrow PSC exception as contemplated by the 1967 Protocol.

As the BIA failed to consider international treaty obligations despite AEDPA § 413(f)'s text its September 23, 2016 decision should be reversed and the case remanded for further proceedings in accordance with the 1967 Protocol as directed by the statute.

ARGUMENT

I. THE UNITED STATES HAS A DUTY OF *NON-REFOULEMENT* PURSUANT TO ITS OBLIGATIONS UNDER THE 1951 REFUGEE CONVENTION, 1967 PROTOCOL, AND STATUTORY LAW.

Article 33 of the 1951 Refugee Convention ("Refugee Convention") defines the international duty of *non-refoulement*, which prohibits any nation from returning a refugee to his or her country of origin.[2] Article 33(1), Refugee Convention, opened for signature July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150. When the United States acceded to the 1967 Protocol which largely

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[2] "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.

incorporated the Refugee Convention, it bound itself to this international duty of *non-refoulement*. *See* 19 U.S.T. 6223 (1968); *INS v. Stevic*, 467 U.S. 407, 416 (1984). The Refugee Convention's *non-refoulement* mandate is thus binding law in the United States. *See* U.S. Const. art. VI, cl. 2 ("[A]ll treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.").[3]

Congress codified the United States' duty of *non-refoulement* when it passed the Refugee Act of 1980 ("Refugee Act"). *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)).[4] In particular, the Refugee Act incorporated the language of the

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[3] In addition, *non-refoulement* has risen to the status of customary international law, thus making it binding on all nations. *See, e.g.*, Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol adopted at the Ministerial Meeting of States Parties of 12-13 Dec. 2001 HCR/MMSP/2001/09 (adopted Dec. 13, 2001) ("Acknowledging the continuing relevance and resilience of this international regime of rights and principles, including at its core the principle of *non-refoulement*, whose applicability is embedded in customary international law."). As customary international law, the principle of *non-refoulement* is similarly binding on the United States. *See 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.").

[4] The Refugee Act provided a process for noncitizens to seek withholding of deportation within U.S. borders as required by the Refugee Convention. *See*

Refugee Convention almost verbatim, requiring the Attorney General not to deport an individual to a country if "such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group or political opinion." 8 U.S.C. §1253(h) (amended 1996); *compare* Article 33(1), Refugee Convention (requiring Contracting States not to deport any refugee to 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"). By adopting the language of 1967 Protocol, which in turn incorporated language from the Refugee Convention, Congress intended to "bring United States law into conformity with our international treaty obligations under the [1967 Protocol] . . . and the [Refugee Convention]." S. Rep 96-256 at 4 (1979).

By codifying the United States' international treaty obligations, Congress intended the Refugee Act to be interpreted in accordance with international refugee law norms. *See Stevic*, 467 U.S. at 426 n.20 ("Although this section has been held by court and administrative decisions to accord aliens the protection required under Article 33, the Committee feels it is desirable, for the sake of clarity, to conform the language of that section to the [Refugee] Convention. . . . [T]he Committee feels that the proposed change in section 243(h) is *necessary so that U.S. statutory*

Deborah E. Anker, Law of Asylum in the United States § 1:1 (9th ed. 2016) (hereinafter "Anker").

law clearly reflects our legal obligations under international agreements.") (emphasis added) (quoting H.R. Rep. No. 96-256, at 17–18 (1979)). *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.").

Furthermore, the statute at issue in this case explicitly directs consideration of the United States' international treaty obligations before an exception to the United States' duty of *non-refoulement* may be triggered. In 1996, Congress amended the withholding of deportation provision of the Refuge Act and directed immigration adjudicators to refrain from denying a refugee withholding of deportation based on the "particularly serious crime" exception to *non-refoulement* when "necessary to ensure compliance with the [1967 Protocol]." AEDPA § 413(f); Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996) (repealed Apr. 1, 1997). Thus, in this case, U.S. refugee law's duty of *non-refoulement* and exceptions to that duty must be interpreted consistently with how this duty and its exception are understood under the 1967 Protocol because AEDPA § 413(f) requires it.[5]

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[5] AEDPA § 413(f)'s mandate is not, as Board suggests in this case, limited to refugees who have been convicted of an aggravated felony conviction. *See* A.R. 2 ("Section 413(f) of AEDPA was enacted to offset the expanded definition of

II. THE PARTICULARLY SERIOUS CRIME EXCEPTION TO *NON-REFOULEMENT* REQUIRES A TWO-STEP TEST: (1) CONVICTION FOR AN EXCEPTIONALLY GRAVE OFFENSE; AND (2) AN INDIVIDUALIZED FINDING THAT THE REFUGEE CURRENTLY CONSTITUTES A DANGER TO THE COMMUNITY.

The Refugee Convention contains a narrow exception to the duty of *non-refoulement* when 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"). *See* Refugee Convention, Article 33(2), 189 U.N.T.S. 150 (entered into force Apr. 22, 1954). Congress later incorporated this

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aggravated felony . . . [but] [i]t did not make any significant changes in our interpretation of when a crime that is not an aggravated felony constitutes a particularly serious crime."). While the BIA distinguishes between particularly serious crimes that are also aggravated felonies and those that are not, the statute itself does not. AEDPA § 413(f)'s text explicitly requires compliance with the 1967 Protocol before the PSC exception may be applied. There is nothing in the statute that limits such compliance to particularly serious crimes that also qualify as aggravated felonies. Indeed, commonsense dictates otherwise. Aggravated felonies are typically graver offenses than non-aggravated offenses, consequently, the deportation of a refugee convicted of a non-aggravated felony would more likely violate the Refugee Convention's PSC exception and AEDPA § 413(f)'s mandate to consider international treaty obligation is, therefore, more likely to be dispositive in such cases involving non-aggravated felony convictions. Here, the BIA offers no authority or logical explanation for the conclusion that AEDPA § 413(f) should be limited to aggravated felony convictions. Such an interpretation is arbitrary and capricious, contrary to the statute, and should not be given deference by this court. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843–44 (1984) (explaining deference to agency interpretation of statutes not permitted if interpretation is "arbitrary, capricious, or manifestly contrary to the statute").

limited exception into the Refugee Act. *See* 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 [and by extension the Refugee Convention]." S. Rep. No. 590, 96th Cong., 2d Sess. at 20 (1980); *see also* H.R. Rep. No. 781, 96th Cong., 2d Sess. 20 (1980); *see also Cardoza-Fonseca*, 480 U.S. at 437 (noting that Congress "accepted [the definition of refugee in the Refugee Act] with the understanding that it was based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol") (quoting S. Rep. No. 96-590, at 20 (1980))).

Interpreting the Refugee Convention's PSC Exception must begin with the plain-meaning of the text. Under the Vienna Convention on the Law of Treaties ("Vienna Convention"), the Refugee Convention must "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." *See* Vienna Convention, Art. 31(1), 1155 U.N.T.S. 331 (May 23, 1969).[6] The U.S. Supreme Court has

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[6] Although the United States has signed but not ratified the Vienna Convention, the U.S. Department of State has acknowledged that the Convention "is already recognized as the authoritative guide to current treaty law and practice." S. Exec. Doc. L., 92nd Cong., 1st Sess. 1 (1971).

similarly held that international treaties "are to be taken in their ordinary meaning as understood in the public law of nations." *Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931) (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 the Refugee Convention's PSC Exception text requires a two-step test. First, the refugee must have been convicted of a PSC. *See* Refugee Convention, Article 33(2), 189 U.N.T.S. 150. If step one is satisfied then an adjudicator must determine whether the refugee currently constitutes a danger to the community. *See id.* Interpreting the plain-meaning of both clauses in the Refugee Convention's PSC Exception (i.e., the "particularly serious crime" clause and the "danger to the community" clause) to establish a two-step test ensures that neither are rendered superfluous.[7] *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).

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[7] This Court must construe "any lingering ambiguities . . . in favor of the alien" when interpreting the Refugee Convention's PSC Exception. *See Cardoza-Fonseca*, 480 U.S. at 449.

Conversely, if the Refugee Convention's PSC Exception inquiry ended with a finding that the refugee had committed a particularly serious crime, then the phrase "constitutes a danger to the community" would be given no meaning. Both steps must be met, in succession, for the narrow exception to apply. Thus, if the refugee has not been convicted of a "particularly serious crime" then there is no need to evaluate whether the refugee also presents a danger to the community. Similarly, if the refugee has been convicted of a particularly serious crime but does not now pose a danger to the community, then the Refugee Convention's PSC Exception is not applicable.

Examining the exception's genesis weighs in favor of strictly applying a two part test to allow the return of refugees only when they have committed an exceptionally grave offense *and* are considered dangerous. 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). For example, the remarks of the U.S. delegate to the drafting convention shows great concern for creating an exception to *non-*

refoulement: "[I]t 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).

Consistent with these early concerns, leading refugee scholars agree that the Refugee Convention's PSC Exception was meant to be strictly limited, including requiring a two-step test. *See, e.g.*, 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.").

Thus, the Refugee Convention's PSC Exception text, drafting history, interpretation by refugee scholars, and, as discussed below, application by States Parties show that the narrow exception requires a two-step test. Only after a refugee has been convicted of a PSC and then found to be a danger to the community can a refugee be returned to his native country in accordance with international treaty obligation.

A. Step One Of The Refugee Convention's PSC Exception Requires An Offense To Be Exceptionally Grave, And Even Then, Requires An Individualized Consideration Of The Circumstances Of The Offense.

Whether a refugee meets the Refugee Convention's PSC Exception first

mandates a threshold requirement that the refugee has been convicted of an exceptionally grave offense without which "the question of whether the person concerned constitutes a danger to the community will not arise." 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).

The Refugee Convention does not define the term "particularly serious crime." But applying accepted tools of statutory interpretation, such as the plain-meaning of the term, interpreting the term in a manner consistent with the Refugee Convention's purpose and the narrow understanding of the term set forth in authoritative international law sources, and the rule of lenity confirms that only exceptionally grave offenses can qualify as "particularly serious." Furthermore, according to refugee law experts and other States Parties to the Refugee Convention, determining whether a criminal conviction is "particularly serious" requires a case-by-case review of both aggravating and mitigating factors related to the commission and punishment of the offense.

1. Identity Theft Is Not An Exceptionally Grave Offense For Purposes Of The Refugee Convention's PSC Exception.

Identity theft is not a PSC pursuant to the 1967 Protocol because it is not the type of crime contemplated under the Refugee Convention. The Refugee

Convention's PSC Exception has two qualifying terms—"particularly" and "serious"—that modify the term "crime" in order to emphasize the gravity required of an offense for it to qualify under the narrow exception. Leading refugee law scholars have explained that "[the] double qualification . . . 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).

The single qualifying term "serious" as used in the separate "serious non-political crime" exception in 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). *See also Cardoza-Fonseca*, 480 U.S. at 439 n.22 (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."). So as not to render the term "particularly" in the Refugee Convention's PSC Exception meaningless, it necessarily follows that a

"particularly serious" offense requires something more than a capital crime or very grave offense. *See* Br. for UNHCR as Amicus Curiae Supporting Pet'r, 648 F.3d 1095 (2011) (No. 03-74442), at *16–17. The UNHCR, *before the United States had acceded to the1967 Protocol*, had explained that the particularly serious crime term is limited to crimes like murder, rape and armed robbery. *See* Atle Grahl-Madsen, *Commentary on the Refugee Convention*, *Division of International Protection of the United Nations High Commissioner for Refugees* (1963), Article 33, 142, ¶ 9 ("Although the decision whether the crime is a particularly serious one would depend on the merits of the case, the offence must normally be a capital crime (murder, arson, rape, armed robbery, etc.).").

Furthermore, the rule of lenity requires interpreting "any lingering ambiguities . . . in favor of the alien." *Cardoza-Fonseca*, 480 U.S. at 449; *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 in the petitioner's favor). Although the plain meaning of the term "particularly serious" clearly requires an exceptionally grave offense, even if this Court were to find the term ambiguous, the rule of lenity likewise requires interpreting the term to include only exceptionally grave offenses.

Other States Parties to the Refugee Convention have similarly interpreted

the term to encompass only exceptionally grave offenses. For example, a UK 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, UKAIT 00012 ¶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.*

Identity theft is not an exceptionally grave offense such that it may qualify as "particularly serious" pursuant to the Refugee Convention's PSC Exception. Identify theft is not inherently violent like murder or rape. It is not inherently dangerous like armed robbery. Identity theft thus does not rise to the level of a PSC as contemplated by the Refugee Convention and the 1967 Protocol.

2. Even If The Board Could Consider Identity Theft An Exceptionally Grave Offense, It May Do So Only After An Individualized Review Of The Offense's Circumstances.

Both refugee law experts and States Parties require a review of the underlying aggravating and mitigating circumstances of an offense before it can be considered exceptionally grave. Refugee law experts agree that a PSC determination must follow an individualized determination that the offense at issue is exceptionally grave. *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 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* ¶ 9 (1963) (suggesting that, before a crime may be considered "particularly serious," an adjudicator must consider mitigating factors even with respect to crimes such as murder, rape or armed robbery).

Determining when an offense is exceptionally grave requires—at a 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.) ("whether a crime is a 'particularly serious' one in a given case must be a struggle by the decision-maker (judicial or otherwise) with the facts and circumstances relating to the conviction and the offender").

Here, the BIA failed to conduct an individualized determination of whether Ms. Valerio's offense and her punishment warranted a finding that her conviction for identity theft rose to the level of an exceptionally grave offense. Instead, the BIA in a conclusory fashion and without explication summarily qualified identify theft as "a widespread and serious crime that can cause severe detriment." (A.R. 3.) Moreover, the BIA did not conduct any examination of the crime's circumstances to find that Ms. Valerio's specific conduct qualified as exceptionally grave.[8]

[8] Significantly, in its prior decision this Court stated that "[a] single, unsupported assertion in a footnote, lacking rationale or precedent . . . is simply not enough, especially in light of the harsh consequences of deportation." *Velerio-Ramirez*, 808 F.3d at 118.

B. Step Two Of The Refugee Convention's PSC Exception Requires An Individualized Determination Of The Refugee's Current Dangerousness.

The Refugee Convention's PSC Exception requires not only a conviction for an exceptionally grave offense, but it also requires a separate analysis of dangerousness before the limited exception can be applied to return a refugee. *See* James C. Hathaway, *The Rights of Refugees Under International Law* 344 (2005) ("Beyond [a particularly serious crime determination], there must also be a determination that the offender constitutes a danger to the community.") (internal quotation marks omitted); Guy Goodwin-Gill and McAdam, *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."); *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").

According to leading refugee law expert Grahl-Madsen—whose commentary predates the United States' accession to the 1967 Protocol and thus informs a proper understanding of the legal obligations to which the United States agreed when it acceded—the dangerousness requirement in the Refugee Convention's PSC Exception is both distinct from the "particularly serious crime" analysis and especially important. In 1963, Grahl-Madsen stated that on those

"extremely rare occasions" when the Refugee Convention's 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* ¶¶ 7, 10 (1963).

Other State Parties to the Refugee Convention have similarly interpreted the Refugee Convention's PSC Exception to require both a PSC and a distinct dangerousness finding. *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).

An Austrian court also recognized that the Refugee Convention's PSC Exception requires a distinct and individualized dangerousness inquiry when it vacated a refugee's deportation order because the dangerousness analysis had been subsumed into the analysis of whether the offense qualified as a PSC. *See Ahmed v. Austria*, (1996) 24 E.H.R.R. 278, 281. The European Court of Human Rights upheld the Austrian court's decision because the refugee's criminal 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." *Id* at 281. A subsequent deportation order was upheld only when the required "future danger" assessment was made. *Id.* at 282.

An Australian court similarly held that Refugee Convention's PSC Exception required a two-step test when it vacated a refugee's deportation order because "despite the nature of the crimes he [had] committed he did not reasonably seem to pose further danger." *In re Baias & Minister for Immigration, Local Government & Ethnic Affairs*, (1996) 43 A.L.D. 284, ¶¶ 45–48, 50. Likewise, in 2012, another 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 (Australia) (emphasis added).

UK courts have also interpreted the Refugee Convention's PSC Exception to 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 he 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)).

Thus, both leading scholars and State Parties agree that a separate dangerousness determination must be made. In making such a determination, scholars stress that simply having been convicted of a particularly serious crime is not determinative of a refugee's dangerousness. *See* Atle Grahl-Madsen, *Commentary on the Refugee Convention, Division of International Protection of the United Nations High Commissioner for Refugees* ¶ 9 (1963) ("[A] single crime will in itself not make a man a danger to the community.").

Instead, determining whether a refugee who has been convicted of a "particularly serious crime" 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 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); *see also* Atle Grahl-Madsen, *Commentary on the Refugee Convention, Division of International Protection of the United Nations High Commissioner for Refugees* ¶ 9 (1963) (explaining that a refugee may have become rehabilitated since the crime, which would suggest that he or she is no longer a danger to the community). Therefore, evidence of prior criminal behavior is but one factor in a larger assessment of an individual's risk to public safety. *See id.*

In analyzing a refugee's current dangerousness, refugee scholars state that evidence of a lack of recidivism is relevant to the dangerousness determination. *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, ¶ 191 (Erika Feller, Volker Turk & Frances Nicholson, eds., 2003). States Parties to the Refugee Convention agree. For example, the Australian Administrative Appeals

Tribunal 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. In that case, the tribunal 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).

Considering both the facts of Ms. Valerio's conviction and her background, and the government's acknowledgement that her conviction does not fit even within the INA's very broad definition of what may be deemed an "aggravated felony,[9] it is clear that Ms. Valerio is not a danger to the community—a conclusion corroborated by both the criminal sentencing court and the immigration court in this case. The criminal sentencing judge considered both "the nature and

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[9] The 1967 Protocol's mandate to consider an individual's current dangerousness is even more persuasive in cases not involving an aggravated felony. *See supra*, footnote 5. Thus, First Circuit case law suggesting that a separate dangerousness determination is not required to determine whether an aggravated felony constitutes a PSC is therefore inapposite. *See Cheoum v. INS*, 139 F.3d 29 (1st Cir. 1997); *Mosquera-Perez v. INS*, 3 F.3d 553 (1st Cir. 1993). As this Court previously observed, the BIA has never considered AEDPA § 413(f)'s application to convictions that do not qualify as aggravated felonies. *See Velerio-Ramirez*, 808 F.3d at 117–18.

circumstances of the offense" and "the seriousness of the offense" when giving Ms. Valerio a sentence below the advisory guidelines. (A.R. 204.) The basis of Ms. Valerio's identity theft conviction was the misuse of identity documents given to her by her abusive ex-boyfriend, who kept Ms. Valerio under his financial control. (A.R. 259–62.) In his ruling, the sentencing judge stressed the "lack of likelihood of recidivism" as well as Ms. Valerio's "unusual personal circumstances" as additional reasons for the exceptionally short sentence. (A.R. 204.) The immigration judge in this case similarly did not consider Ms. Valerio to be dangerous when he granted her release from custody on bond. AR 636; *see also Matter of Urena*, 25 I. & N. Dec. 140, 141 (BIA 2009) ("An Immigration Judge should only set a bond if he first determines that the alien does not present a danger to the community."). This all supports the conclusion that Ms. Valerio simply is not a danger to the community as contemplated under international and U.S. refugee law interpreting and applying the Refugee Convention's limited PSC exception.

CONCLUSION

For the foregoing reasons, this Court should reverse the BIA's September 23, 2016 decision and remand this case to the BIA for further proceedings with a directive to apply AEDPA § 413(f) in accordance with the 1967 Protocol as explicitly required by the statute.

DATED: February 15, 2017

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 5,930 words, excluding those parts exempted by Federal Rule of Appellate Procedure 32(f). 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 February 15, 2017, I electronically filed the foregoing, Brief of *Amici Curiae* in Support of Petitioner-Appellant'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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