14-4382-ag(L),
15-145-ag(CON), 15-265-ag(CON)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

KATERYNA SERGEEVNA VASKOVSKA,
Petitioner,

v.

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

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

BRIEF OF *AMICI CURIAE*
HARVARD IMMIGRATION AND REFUGEE CLINICAL PROGRAM,
IMMIGRANT DEFENSE PROJECT, NATIONAL IMMIGRATION PROJECT
OF THE NATIONAL LAWYERS GUILD
IN SUPPORT OF PETITIONER'S PETITION FOR REVIEW

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, I, Philip L. Torrey as counsel for *amici curiae*, state that the Harvard Immigration and Refugee Clinical Program, Immigration Defense Project, and National Immigration Project of the National Lawyers Guild do not have parent corporations, nor do they issue stock, and thus no publicly held corporation owns 10% or more of *amici curiae*'s stock.

DATED: May 4, 2015

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AMICI CURIAE STATEMENTS OF INTEREST[1]

The **Harvard Immigration and Refugee Clinical Program** ("Clinic") is a non-profit that has been a leader in the field of refugee law for over thirty years. 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.

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.

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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 the brief, and (3) no person other than *amici curiae*, its members, and its counsel contributed money that was intended to fund preparing or submitting the brief.

The **National Immigration Project of the National Lawyers Guild** ("NIPNLG") 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. NIPNLG 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*, NIPNLG litigates before the federal courts in cases challenging grounds of deportation and bars to withholding of removal.

SUMMARY OF ARGUMENT

With few exceptions, U.S. treaty obligations and U.S. domestic law prevent the United States from returning an individual to his or her home country if that individual faces persecution upon return. This *non-refoulement* or "non-return" obligation is nearly absolute, but there is a narrow exception for an individual convicted of a "particularly serious crime" ("PSC") who poses a danger to the community. This *amici curiae* brief describes the proper interpretation of the PSC exception to *non-refoulement*.

As a party to the 1967 United Nations Protocol Relating to the Status of Refugees ("1967 Protocol"), which incorporates the United Nations Convention Relating to the Status of Refugees of 1951 (entered into force Apr. 22, 1954) ("Refugee Convention"), the United States is bound by the *non-refoulement* mandate. The Refugee Convention's PSC exception to *non-refoulement* is narrow and requires a two-step inquiry. An adjudicator must first determine whether the criminal conviction at issue is exceptionally grave. An exceptionally grave offense requires an examination of several factors including, *inter alia*, the circumstances of the offense, the punishment imposed, and the mental health of the refugee at the time the offense was committed. After an adjudicator determines that the conviction at issue is an exceptionally grave offense, the adjudicator must then determine whether the refugee currently poses a danger to the community. The

danger to the community analysis is separate and distinct from the exceptionally grave offense analysis.

The Refugee Act of 1980 ("Refugee Act") adopted the Refugee Convention's language—including the PSC exception—bringing U.S. refugee law into conformance with U.S. treaty obligations. The PSC exception at issue in this case mirrors the Refugee Convention's PSC exception and thus should be interpreted in the same manner. The seminal Board of Immigration Appeals ("BIA" or "Board") decision interpreting the PSC exception, *Matter of Frentescu*, 18 I. & N. Dec. 244 (BIA 1982), holds that a four-factor test is required to determine whether an offense qualifies as a PSC. The test's essential fourth factor relates to whether the individual poses a danger to the community.

This Court has accepted the *Matter of Frentescu* four-factor PSC exception analysis and recognized the importance of considering an individual's dangerousness before applying the PSC exception. Since *Matter of Frentescu*, the BIA has, however, gutted the pivotal dangerousness standard in contravention of international and domestic human rights obligations. First, the Board determined that a separate and distinct dangerousness test, like that required by the Refugee Convention, was unnecessary. More recently the Board seemingly eliminated the critical dangerousness factor from the *Frentescu* test altogether. The BIA's complete elimination of any dangerousness inquiry has swept minor crimes that are

neither exceptionally grave nor an indication of an individual's dangerousness—such as the possession of a controlled substance offense at issue in this case—into the limited PSC category.

This Court should therefore vacate the Board's decision in this case and remand with instructions to the BIA to interpret the PSC exception in conformance with the Refugee Convention, the PSC exception's statutory language, congressional intent, and this Court's own precedent.

ARGUMENT

I. CONGRESS INTENDED THE REFUGEE ACT OF 1980 TO CONFORM TO U.S. INTERNATIONAL TREATY OBLIGATIONS.

When the United States acceded to the 1967 Protocol, it bound itself to the Refugee Convention, which was largely incorporated into the 1967 Protocol. 19 U.S.T. 6223 (1968); *I.N.S. v. Stevic*, 467 U.S. 407, 416 (1984). As such, the Refugee Convention's *non-refoulement* mandate became binding law in the United States.[2] *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.");

[2] 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; *see generally I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 440–41 (1987).

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.").

By passing the Refugee Act, Pub. L. 96-212, 94 Stat. 102, Congress expressed its unambiguous 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].").[3] This Court is required to interpret the Refugee Act in conformance with the Refugee Convention. *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."); *see also Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) ("It has been a maxim of statutory construction since the decision in *Murray v. The Charming Betsy* . . . that 'an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains . . . .'"). Congress incorporated the Convention's *non-refoulement* obligation into U.S. refugee law by explicitly adopting the

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[3] *See* 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.").

language of the Refugee Convention when drafting the Refugee Act.[4]

Congress also copied the language of the Refugee Convention's limited exceptions to the *non-refoulement* principle into U.S. refugee law nearly verbatim.[5] The relevant PSC exception in this case was first enacted with the passage of the Refugee Act, which has since been amended, and is now codified at 8 U.S.C. §§ 1231(b)(3)(B)(ii) (2012) and 1158(b)(2)(A)(ii) (2012).[6] By using language that is almost identical to that of the Refugee Convention, Congress intended the "particularly serious crime" exception to be interpreted as envisioned in the Refugee Convention.

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[4] It is a "cardinal rule of statutory construction" that when 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).

[5] The Refugee Convention states, "[t]he benefit of [non-refoulement] may not, however, 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." Article 33(2), Refugee Convention, 19 U.S.T. 6259, 189 U.N.T.S. 150.

[6] Withholding of removal "does not apply to an alien . . . if the Attorney General decides that . . . the alien, having been convicted of a particularly serious crime is a danger to the community of the United States . . . ." 8 U.S.C. § 1231(b)(3)(B)(ii). Asylum "shall not apply to an alien if the Attorney General determines that . . . the alien having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States." 8 U.S.C. § 1158(b)(2)(A)(ii). For the purposes of this brief, the interpretation of the PSC exception to withholding of removal and asylum is the same because, in part, this case does not involve a conviction that has been found to be an "aggravated felony" pursuant to 8 U.S.C. § 1101(a)(43).

II. THE PARTICULARLY SERIOUS CRIME EXCEPTION TO *NON-REFOULMENT* REQUIRES A TWO-STEP ANALYSIS.

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. 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 stated "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* ¶ 30. Ultimately, a narrow exception to *non-refoulement* was created 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"). Refugee Convention, Art. 33(2), 189 U.N.T.S. 150.

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." Vienna Convention, Art. 31(1), 1155 U.N.T.S. 331 (May 23, 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").

The text of the Refugee Convention's PSC Exception requires a two-step analysis. The exception allows a country to return a refugee who (1) has previously been convicted of a PSC, and (2) currently poses a danger to the community. *See* Refugee Convention, Art. 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 II.A. The Refugee Convention's PSC Exception will likewise not be satisfied if the refugee was convicted of a "particularly serious crime" but does not currently pose a danger to the community. *See infra*, Part II.B.

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

The term "particularly serious crime" is undefined by treaty or statute. 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, et al. eds., 2003) (emphasis in original). Similarly, 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).[7] It necessarily follows from the exception's plain meaning 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.

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 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) (hereinafter "Grahl-Madsen") (suggesting that crimes such as

[7] Although the U.S. Supreme Court has held that the Handbook is not binding on U.S. courts, the Court stated that it "may be a useful interpretive aid" in construing provisions of the INA enacted by the Refugee Act. *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 426–27 (1999) (deferring to the BIA's interpretation of the "serious non-political crime" bar to withholding of deportation). Indeed, the U.S. Supreme Court, the U.S. Court of Appeals for the Second Circuit, and the Board of Immigration Appeals have all looked to the Handbook for guidance in construing the asylum and withholding of removal provisions of the INA. *See, e.g.*, *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (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."); *Osorio v. I.N.S.*, 18 F.3d 1017, 1027–29 (2d Cir. 1994) (citing to the Handbook multiple times for clarification on the grounds of persecution in an asylum case); *Matter of S-M-J-*, 21 I. & N. Dec. 721, 724–25 (BIA 1997) (repeatedly citing to the Handbook to interpret essential elements of an asylum case).

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); Deborah E. Anker, *Law of Asylum in the United States* § 6:20 (7th ed. 2014) (hereinafter "Anker"); Br. for UNHCR as *Amicus Curiae* Supporting Pet'r, 648 F.3d 1095 (2011) (No. 03-74442), at *17.

Other States Parties to the Refugee Convention have likewise adopted a factor-balancing test to determine whether an offense is exceptionally grave. *See, e.g.*, *Betkoshabeh v. Minister for Immigration and Multicultural Affairs*, [1998] 157 ALR 95 (Austl.) (holding that the PSC inquiry is intensely fact specific); *IH (s. 72 "Particularly Serious Crime") Eritrea*, [2009] UKAIT 00012 (U.K.).

An applicant's mental health at the time of the criminal act is one factor that courts have examined in determining whether an offense qualifies as a PSC. For example, interpreting the Refugee Convention's PSC Exception, a federal court in Australia held that an applicant's mental illness when the offense was committed

was an important factor that was overlooked by the lower tribunal. *See Betkoshabeh*, 157 ALR 95 (citing the BIA's four-factor test in *Matter of Frentescu*, 18 I. & N. Dec. 244 (BIA 1982)). In that case, the lower tribunal failed to fully consider the facts and circumstances of the applicant's convictions for "aggravated burglary" and "threat to kill," especially the applicant's psychological state. *Id.* According to the high court, "[t]he Tribunal should have considered the extent to which [] psychological illness reduced the [applicant's] moral culpability." *Id.* The court concluded that the Refugee Convention's PSC Exception requires more than a cursory reliance on the nature of a criminal violation, but must include examination of all relevant facts and circumstances underlying the act. *See id.*

Furthermore, international tribunals have typically only found an exceptionally grave offense, warranting application of the Refugee Convention's PSC Exception, to require something beyond a conviction for simply possessing a controlled substance with limited or no imprisonment imposed. *See e.g.*, *Secretary of the State for the Home Department v. Mugwaga*, [2011] UKUT 00338 (IAC) (holding that a conviction for conspiracy to supply heroin with a 33 month imprisonment sentence was a PSC); *Secretary of the State for the Home Department v. TB (Jamaica)*, [2008] EWCA Civ 977 (holding that a conviction for distributing heroin and crack cocaine for which the applicant was eventually imprisoned for four years and three months was a PSC).

B. Second, the Refugee Convention's PSC Exception Requires an Individualized Assessment of a Refugee's Dangerousness.

If a refugee has been convicted of an offense that qualifies as a PSC, then an adjudicator must undertake a separate and distinct inquiry concerning the current dangerousness of the refugee before the Refugee Convention's PSC Exception is met. *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."). 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, et al. eds., 2003). By 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* Grahl-Madsen, at ¶ 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.*

According to leading experts Grahl-Madsen and Nehemiah Robinson—whose commentaries predate the United States' accession to the 1967 Protocol and thus should be understood to inform the United States' interpretation of it—the Refugee Convention's PSC Exception's dangerousness requirement is especially important.[8] In 1963, Grahl-Madsen stated that on those "extremely rare occasions" when the exception is applied, it is the "danger [the alien] constitutes which is the decisive factor." Grahl-Madsen, at ¶¶ 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

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[8] 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 country.").

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 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 International Protection ¶ 14 (Aug. 23, 1977).

Other States Parties to the Refugee Convention have interpreted the Refugee Convention's PSC Exception to require a distinct dangerousness test.[9] For

[9] Other States Parties' interpretation of the Refugee Convention should be "entitled to considerable weight." *See Air France v. Saks*, 470 U.S. 392, 405 (1985).

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 tribunal 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, the

High Court of Australia 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 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 or 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).

III. THE STATUTORY TEXT OF THE PSC EXCEPTION AND CONGRESSIONAL INTENT ALSO REQUIRE BOTH AN EXCEPTIONALLY GRAVE CRIMINAL OFFENSE AND A SEPARATE AND DISTINCT INQUIRY ABOUT WHETHER A REFUGEE CURRENTLY POSES A DANGER TO THE COMMUNITY.

The plain meaning of the PSC exception's text demonstrate Congress's clear

intent to incorporate the Refugee Convention's PSC Exception's requirements that: (1) the criminal offense at issue must be "particularly serious;" and (2) the refugee must constitute "a danger to the community of the United States." The interpretation of a statutory provision must begin with its text. *See Chevron U.S.A., Inc., v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43; *Cardoza-Fonseca*, 480 U.S. at 432 n.12. The Court does not, however, look solely to the bare words used but applies the "traditional tools of statutory construction." *Chevron*, 467 U.S. at 843 n.9. Among those tools is the canon that courts and the agency should "give every word some operative effect." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 167 (2004); *see also United States v. Manasche*, 348 U.S. 528, 538–39 (1955) (It is well-settled that courts must "give effect, if possible, to every clause and word of a statute.") (quoting *Inhabitants of Montclair Twp. v. Ramsdell*, 107 U.S. 147, 152 (1883)); *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("[A] statute ought, upon the whole, be so construed that . . . no clause, sentence, or word shall be superfluous, void, or insignificant . . . .") *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.").

The plain meaning of the PSC exception's text and Congress's intent to mirror the Refugee Convention's PSC Exception's language suggest that the exception requires both an exceptionally grave offense and a showing of current dangerousness. First, by using the Refugee Convention's double qualification, "particularly serious," to modify the term "crime" Congress narrowed the PSC exception to include only those refugees who were convicted of an especially grave crime. The term "particular" is commonly understood to mean "distinctive among other examples or cases of the same general category." *Webster's Collegiate Dictionary* 847 (10th ed. 1993). "Serious" has been defined as "having important or dangerous possible consequences." *Id.* at 1069. Combining these definitions, the term "particularly serious crime" refers only to a restricted category of crimes that are especially severe. Examining the PSC exception, the Ninth Circuit noted that the "particularly" and "serious" modifiers emphasize that a PSC "must be not just any crime, and not just any *serious* crime—already a subset of all crimes—but one that is *particularly* serious." *Alphonsus v. Holder*, 705 F.3d 1031, 1048 (9th Cir. 2013) (emphasis in original). That court reasoned that a PSC must be more severe than a "serious non-political crime" and generally involve a "relatively grave" offense. *See id*. at 1049.

The final clause of the PSC exception, which must not be read as mere surplusage, requires an additional analysis concerning whether the refugee is

currently "a danger to the community." Merging "the 'danger to the community' inquiry [with] the 'particularly serious' offense inquiry runs 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." *See N-A-M- v. Holder*, 587 F.3d 1052, 1061 (10th Cir. 2009) (Henry, J., concurring). The BIA has nevertheless indicated that there is no need for a separate and distinct dangerousness inquiry, *see Matter of Carballe,* 19 I. & N. Dec. 357, 360–61 (BIA 1986) ("If it is determined that the crime was a 'particularly serious' one, the question of whether the alien is a danger to the community of the United States is answered in the affirmative."), but it has now also suggested that there is no need for any dangerousness inquiry whatsoever. *See Matter of N-A-M-*, 24 I. & N. Dec. 336, 342 (BIA 2007).

When the BIA does not consider current dangerousness as a separate and distinct prong mandated by the Refugee Convention and now further disregards dangerousness as a factor altogether, the BIA acts in violation of congressional intent. Insofar as the Board has departed from the statutory provision's plain language and original purpose, this Court must not afford its flawed analysis deference. *See Chevron*, 467 U.S. at 842–43.

IV. THIS COURT'S PRECEDENT REQUIRES CONSIDERATION OF A REFUGEE'S DANGEROUSNESS BEFORE DETERMINING WHETHER THE REFUGEE'S CONVICTION QUALIFIES AS A PSC.

If this Court is not persuaded that the PSC exception requires a separate and distinct dangerousness inquiry, this Court at minimum should continue to apply the well-established four-factor test, which includes a dangerousness factor, when determining whether a refugee has been convicted of a PSC. *See, e.g., Nethagani v. Mukasey*, 532 F.3d 150, 155 (2d Cir. 2008) (approving the BIA's *Matter of Frentescu* four-factor PSC analysis, including whether the applicant poses 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."). Omitting *any* consideration of a refugee's dangerousness prior to applying the PSC exception, as suggested in *Matter of N-A-M-* and as the courts below did in this case, is not only contrary to the PSC exception's text and the United States' international treaty obligations, but it is also

contrary to this Court's precedent.

Adjudicators must first examine the elements of an offense to determine whether, on its face, the crime is so egregious that it constitutes a per se PSC. *See Ahmetovic v. I.N.S.*, 62 F.3d 48, 52 (2d Cir. 1995); *Matter of N-A-M-*, 24 I. & N. Dec. at 343; *Matter of Frentescu*, 18 I. & N. Dec. at 247. According to the BIA, an individualized examination of the facts and circumstances of an offense is warranted "[o]nly where there is room for disagreement as to whether the crime in question was 'particularly serious.'" *Matter of Q-T-M-T-*, 21 I. & N. Dec. 639, 650 (BIA 1996). If the elements of an offense do not potentially bring it within the ambit of a PSC, then there is no need to examine the facts and circumstances of an offense because it cannot be considered a PSC. *See Matter of N-A-M-*, 24 I. & N. Dec. at 342. Crimes that have qualified as per se PSCs involve offenses that are graver than simple possession of a controlled substance. *See, e.g.*, *Ahmetovic v. I.N.S.*, 62 F.3d 48 (2d Cir. 1995) (first-degree manslaughter); *Eskite v. I.N.S.*, 901 F. Supp. 530 (E.D.N.Y. 1995) (possession with intent to sell crack cocaine); *Matter of Carballe*, 19 I. & N. Dec. 357 (1986) (armed robbery and attempted armed robbery).

In *Ahmetovic v.I.N.S.*, this Court reviewed the BIA's PSC exception analysis first established in *Matter of Frentescu*, 18 I. & N. Dec. 244 (1982) and later modified by *Matter of Carballe*, 19 I. & N. Dec. 357 (1986). 62 F.3d at 52–53 (2d

Cir. 1995). Crimes that are not per se PSCs—including the crime at issue in this case—but may qualify as a PSC require a fact intensive inquiry involving: (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.* at 52 (citing *Matter of Frentescu*, 18 I. & N. Dec. at 247 (emphasis added)). In *Matter of Carballe*, the BIA interpreted a prior version of the withholding statute and concluded that a separate and distinct inquiry about the applicant's dangerousness was not required and that an individual convicted of a PSC summarily constituted a danger to the community. *See* 19 I. & N. Dec. at 360. But, even in *Matter of Carballe*, the BIA retained *Frentescu*'s fourth dangerousness factor when determining whether a conviction qualified as a PSC. *Id.*

This Court afforded deference to the BIA's interpretation of the PSC exception in *Matter of Frentescu* and *Matter of Carballe*, but it did so with tremendous reservation. *See Ahmetovic*, 62 F.3d at 52. Notably, this Court was "troubled by the BIA's failure to give separate consideration to whether [Ahmetovic] is a 'danger to the community.'" *Id.* This Court reasoned that "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." *Id.*[10] Ultimately, this Court deferred to the BIA's interpretation with the assumption that the crucial "danger to the community" inquiry would be "subsumed" within the four-factor *Frentescu* test. *See 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.").

The BIA has significantly changed the PSC analysis since *Matter of Frentescu, Matter of Carballe,* and *Ahmetovic* such that this Court should no longer afford deference to the BIA's PSC exception analysis. Deference to the BIA's PSC analysis is not required by *Ahmetovic* for three reasons: (1) *Ahmetovic* involved a prior version of the withholding statute that is not at issue in this case; (2) the conviction in that case was a per se PSC—first degree manslaughter—unlike the non-per se PSC conviction in this case for a minor drug possession offense; and most importantly (3) *Ahmetovic* analyzed the BIA's PSC test developed in *Matter of Frentescu* and *Matter of Carballe,* neither of which completely eliminated a dangerousness inquiry, unlike the agency interpretation in

[10] Furthermore, the tools of statutory interpretation require U.S. courts to construe "any lingering ambiguities . . . in favor of the alien." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987).

Matter of N-A-M-, 24 I. & N. Dec. 336 (BIA 2007) at issue here. *See Ahmetovic*, 62 F.3d at 50–53.

Unlike the agency interpretation at issue in *Ahmetovic*, this case involves the PSC analysis as altered by the BIA's decision in *Matter of N-A-M-*, which seemingly eliminated consideration of an applicant's dangerousness from the PSC analysis altogether. In *Matter of N-A-M-*, the BIA misinterpreted its own precedent when it reasoned that "in *Matter of Carballe* 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*." *Matter of N-A-M-*, 24 I. & N. Dec. at 342 (emphasis added). But, as discussed above, *Matter of Carballe* reserved the PSC exception's application to refugees who constitute a danger to the community. 19 I. & N. Dec. at 360 ("In determining whether a conviction is for such a [PSC], the *essential key* is whether the nature of the crime is one which indicates that the alien poses a danger to the community." (emphasis added)). Indeed, this Court afforded deference to the BIA's analysis in *Matter of Frentescu* and *Matter of Carballe* with the understanding that an applicant's dangerousness would remain a central factor in the four-factor *Frentescu* test. *See Ahmetovic*, 62 F.3d at 52–53. Continued deference to the BIA's watered-down version of the

PSC analysis in light of *Matter of N-A-M-*'s faulty reasoning is thus not warranted.[11]

In its only other published decision analyzing the PSC exception, this Court again affirmed the BIA's four-factor *Frentescu* test, including the requirement that the applicant must pose a danger to the community before the PSC exception can be met.[12] *Nethagani v. Mukasey*, 532 F.3d 150, 155 (2d Cir. 2008). In that case, applying prior precedent, the BIA held that Nethagani's conviction of reckless endangerment for firing an illegally possessed firearm into the air was a PSC.[13] *Id.* at 152. This Court affirmed the BIA's determination because it had properly applied the *Frentescu* factors, including the fourth factor concerning whether "the

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[11] Despite the BIA's removal of dangerousness as a factor from the PSC exception analysis in *Matter of N-A-M-*, the Board recently announced that in fact "dangerousness is the pivotal standard by which particularly serious crimes are judged." *Matter of G-G-S-*, 26 I. & N. Dec. 339, 343 (BIA 2014). The BIA's inconsistent interpretation of the PSC exception further demonstrates that the agency's PSC analysis should not be afforded deference.

[12] In a recent unpublished decision, this Court found that the BIA properly determined that a conviction for aggravated assault was a PSC. *See Flores v. Holder*, No. 14-53, 2015 WL 1136414, *2 (2d Cir. Mar. 16, 2015). In that case, the Court articulated *Frentescu*'s four-factor analysis as the appropriate PSC test. *Id.* Although the Court also noted that *Matter of N-A-M-* modified the *Frentescu* analysis, it affirmed the BIA's decision that Flores's conviction was for a PSC because, in part, the nature of the crime indicated that he was a danger to the community. *Id.*

[13] The Court cited *Matter of N-A-M-* in its decision, but only for its holding that a crime need not be an aggravated felony for it to be "particularly serious." 532 F.3d at 156.

alien will be a danger to the community." *Id.* at 155 ("[F]iring a pistol into the air presents 'a high potential for serious or fatal harm to the victim or an innocent bystander.'").

The BIA's recent dismantling of the PSC exception analysis and complete abrogation of a dangerousness inquiry presents a new question of law for this Court's review. This Court should therefore reverse and remand the BIA's decision in the present case with a directive to the BIA to consider the applicant's dangerousness before applying the PSC exception in accord with BIA and Second Circuit precedent.

CONCLUSION

For the foregoing reasons, this Court should vacate and remand the BIA's decision with instructions to interpret the PSC exception in a manner that is consistent with this Court's precedent, the BIA's own precedent, and the United States' international treaty obligations pursuant to the Refugee Convention.

CERTIFICATE OF COMPLIANCE

This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B) as it contains 6,989 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 Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 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.

DATED: May 4, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2015, I electronically filed the foregoing, Brief of *Amici Curiae* in Support of Petitioner's Petition for Review, with the Clerk of the Court for the U.S. Court of Appeals for the Second 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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