No. 11-702

In the Supreme Court of the United States

ADRIAN MONCRIEFFE, PETITIONER

v.

ERIC HOLDER, ATTORNEY GENERAL
OF THE UNITED STATES, RESPONDENT.

**On Writ Of Certiorari to
the United States Court of Appeals
for the Fifth Circuit**

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

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QUESTION PRESENTED

Whether a conviction under a provision of state law that encompasses but is not limited to the distribution of a small amount of marijuana for no remuneration constitutes an aggravated felony, notwithstanding that the record of conviction does not establish that the alien was convicted of conduct that would constitute a federal law felony.

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

Amicus curiae Human Rights First[1]—an organization dedicated to the rights of refugees and asylum seekers—respectfully submits this brief to alert the Court to the impact its decision may have on individuals fleeing persecution and on this Nation's compliance with its international treaty obligations.

Many years ago, when it acceded to the 1967 U.N. Protocol Relating to the Status of Refugees (the "Protocol"), the United States agreed that it would not deny protection to a refugee based on criminal conduct in the United States unless the refugee was convicted of a "particularly serious crime" and "constitutes a danger to the community." In the years since then, this Nation has reaffirmed its commitment to the Protocol's principles, codifying its provisions in the U.S. Code.

The Fifth Circuit's interpretation of the Immigration and Nationality Act (the "INA") would lead inevitably to a violation of the Protocol. According to the Fifth Circuit, a state conviction for possession of drugs with intent to distribute is presumptively an "aggravated felony," even though the offense does not require proof of intent to sell and encompasses possession of a small amount of marijuana to share socially with a friend, without remuneration—conduct that would constitute a

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

misdemeanor under federal law. Such a conviction would thus provide the basis for the refugee's removal from the United States, unless he affirmatively proves to an immigration judge that the facts of his particular offense correspond to a federal misdemeanor.

Adopting this approach would place the United States in violation of the obligations it assumed under the Protocol. The Immigration & Nationality Act treats aggravated felonies—whether "deemed" or actual—as "particularly serious crimes" *per se*, and the Board of Immigration Appeals has found conviction of such a crime to be an automatic bar to asylum. Conviction of an "aggravated felony" for drug trafficking—which the Fifth Circuit found the statute in this case to be—also operates as a presumptive bar to "withholding of removal"—the form of protection granted to a refugee if there is a clear probability that his life or freedom would be at risk if he returned to his home country. The Board has held that the "particularly serious crime" bar applies based on the fact of conviction alone, without any separate analysis of whether the alien in fact "constitutes a danger to the community." Under the Fifth Circuit's interpretation of the INA, then, a refugee under these circumstances *must* be denied asylum and would presumptively be denied withholding of removal, even though he has never been convicted of anything approaching a "particularly serious crime" and is not a "danger to the community."

This Court has long recognized that statutes should not be construed in a manner that would put the United States in violation of its international treaty obligations, unless the language of the statute

unambiguously compels such a result. See *Murray* v. *The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). Even if the Fifth Circuit's reading of the relevant statutes here were permissible under their plain language (and it is not), the inevitable conflict with this Nation's treaty obligations should compel rejecting such an interpretation.

Human Rights First is a non-profit, nonpartisan international human rights organization based in New York and Washington D.C. Through advocacy and action, Human Rights First works to encourage the U.S. government and private companies to respect human rights and the rule of law. It strives to create the political environment and policy solutions necessary to ensure consistent respect for human rights, both domestically and internationally.

Since 1978, Human Rights First has worked to protect the rights of refugees, including the right to seek and enjoy asylum. It advocates for adherence to the Protocol and the 1951 Convention Relating to the Status of Refugees (the "Convention"). Further, as the operator of one of the largest pro bono asylum representation programs in the country, Human Rights first also has a longstanding research and advocacy interest in the development of effective and fair methods for excluding from refugee protection those who are not entitled to the protection of the Convention and Protocol. See, *e.g.*, HUMAN RIGHTS FIRST, REFUGEES, REBELS & THE QUEST FOR JUSTICE (2002).

Human Rights First has a substantial interest in the issue now before the Court and is well-situated to assist the Court in understanding how the Court's interpretation of the term "aggravated felony" will

affect individuals fleeing persecution, as well as how it will affect this Nation's compliance with its international treaty obligations concerning refugees.

STATEMENT

Petitioner Adrian Moncrieffe was a legal permanent resident of the United States, having immigrated from Jamaica. He was pulled over for a traffic infraction and found to be in possession of 1.3 grams of marijuana—roughly half the weight of a penny. The state authorities charged him under a Georgia statute making it illegal to possess marijuana with the intent to distribute. This statute is quite broad, encompassing everything from the possession of very small amounts of marijuana to share socially (without remuneration) to the purchase and sale of larger amounts for profit. Mr. Moncrieffe entered a guilty plea, receiving five years of probation and the possibility of having the charges expunged from his record if he completed probation successfully.

Two years after his plea agreement, Mr. Moncrieffe was detained by the United States and placed in removal proceedings. Because the Georgia conviction was under a statute that encompassed all types of distribution offenses (both felonies and misdemeanors), the United States took the position that it constituted a conviction of an "aggravated felony" for purposes of federal immigration law and mandated Mr. Moncrieffe's removal. An immigration judge and the Board of Immigration Appeals accepted the Government's position, agreeing that the conviction must be analogized to a federal distribution felony and thus must be deemed an

"aggravated felony." Mr. Moncrieffe was then deported.

The INA defines the term "aggravated felony" as including

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

8 U.S.C. § 1101(a)(43)(B).[2]

Although the INA does not define "illicit trafficking," Section 924(c)(2) of Title 18 defines "drug trafficking crime," a subcategory of illicit trafficking, as "any felony punishable under the Controlled Substances Act, the Controlled Substances Import and Export Act, or the Maritime Drug Law Enforcement Act." 18 U.S.C. § 924(c)(2) (internal citations omitted).

In general, "trafficking" means "some sort of commercial dealing." *Lopez* v. *Gonzales*, 549 U.S. 47, 53 (2006) (citing BLACK'S LAW DICTIONARY 1534 (8th ed. 2004)). Accordingly, in the Controlled Substances Act, Congress has distinguished marijuana distribution felonies from marijuana distribution misdemeanors based specifically on the amount of marijuana involved and whether remuneration is received.[3] Within this statutory paradigm, Congress

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

[3] See 21 U.S.C. § 841(b)(1)(A)(vii) (sentence of at least 10 years for possession with the intent to distribute 1,000 or more

has concluded that "distributing a small amount of marihuana for no remuneration" is only a misdemeanor offense, punishable by a prison term of less than one year. 21 U.S.C. § 841(b)(4).

In the decision under review, however, the Fifth Circuit held that the INA's statutory provisions, taken together, require that "the default punishment for any [state law conviction for] possession of marijuana with [the] intent to distribute is equivalent to a felony under the [Controlled Substances Act]." *Moncrieffe* v. *Holder*, 662 F.3d 387, 392 (5th Cir. 2011). According to the Fifth Circuit, if the state statute encompasses conduct that would be punishable as a misdemeanor as well as a felony, "the defendant bears the burden of producing mitigating evidence in order to qualify for misdemeanor treatment." *Id.*

SUMMARY OF ARGUMENT

The decision in this case will have important implications for refugees fleeing persecution, as well as for this Nation's compliance with its international treaty obligations. In addition to barring an alien from being considered for cancellation of removal—the form of relief relevant to Petitioner here—a conviction for an "aggravated felony" also operates as an absolute bar to asylum. See 8 U.S.C. § 1158(b)(2)(B)(i). Moreover, an applicant for refugee

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kilograms of marijuana); *id.* § 841(b)(1)(B)(vii) (sentence of between 5 and 40 years for possession with the intent to distribute 100 kilograms or more); *id.* § 841(b)(1)(D) (sentence of no more than 5 years for possession with the intent to distribute less than 50 kilograms); *id.* § 841(b)(4) (sentence of no more than one year for "distributing a small amount of marihuana for no remuneration").

protection who has been convicted of an "aggravated felony" that involved "unlawful trafficking in controlled substances" is held by the Attorney General to be *presumptively* ineligible for "withholding of removal"—the relief granted to a refugee whose life or freedom would be threatened if he were returned to his country of nationality. 8 U.S.C. § 1231(b)(3). Conviction of such an offense will also result in termination of asylum (and may result in termination of withholding of removal) for refugees to whom those forms of protection were previously granted. 8 U.S.C. § 1158(c)(2); 8 C.F.R. § 208.24. For that reason, the statutory terms at issue must be interpreted in light of the context in which they were adopted—as part of Congress's effort to codify this Nation's obligations under the U.N. Protocol Relating to the Status of Refugees.

When it acceded to the Protocol, the United States committed itself to providing certain substantive protections to refugees. Chief among these is the protection against "*refoulement*" to persecution—that is, the commitment by the signatory state that it will not return a refugee to a place where his life or freedom would be threatened. Although the country of refuge may deny protection against *refoulement* based on criminal convictions, this bar is limited to those "who, having been convicted of a final judgment of a particularly serious crime, constitute[] a danger to the community of that country." CONVENTION RELATING TO THE STATUS OF REFUGEES, art. 33(2), July 28, 1951, 189 U.N.T.S. 150, *reprinted in* 19 U.S.T. 6259 (incorporated by reference and reproduction by the Protocol) (the "Convention"). Congress has generally equated an "aggravated felony" with a "particularly serious crime" for

purposes of interpreting the INA. See 8 U.S.C. § 1101(a)(43); see 8 U.S.C. § 1158(b)(2)(B)(i).

The Fifth Circuit's unjustifiably broad reading of the term "aggravated felony" would lead to the return of refugees to persecution, even if they have never been convicted of a "particularly serious crime" and do not constitute a "danger" to their new community. Under the Fifth Circuit's decision, if a state legislature decides to use a single statute to criminalize *both* the sharing of a small amount of marijuana with a friend *and* the purchase or sale of large amounts of marijuana for profit, any conviction under that statute would be presumed to operate as a categorical bar for a refugee seeking asylum. An immigration judge would have no discretion whatever to grant asylum in such a case, regardless of how great the risk of persecution the refugee faces in his home country, or how long ago the offense occurred. Further, the conviction would also create a presumption that the refugee would be ineligible for withholding of removal—the mandatory form of protection through which the United States implements its non-*refoulement* obligation under the Convention and Protocol.

To adopt the Fifth Circuit's reading of the relevant statutes would put the United States in violation of its commitments under the Protocol and the Convention—a result that Congress presumptively did not intend. As this Court has recognized, a statute should not be construed in a manner that would put the United States in violation of its international treaty obligations unless the statutory language unambiguously compels that result. *Murray* v. *The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). Thus, to the extent that these statutory

terms are susceptible to more than one interpretation, the *Charming Betsy* doctrine provides an additional reason to adopt a reading that limits "conviction of" an "aggravated felony" to its plain meaning—and to eschew expansion of these common terms to encompass a conviction for something that Congress itself does not regard as a particularly serious offense.

ARGUMENT

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

The statutory provisions in this case must be understood in the context in which they were adopted—as part of Congress's effort to implement this Nation's decades-old obligations under the Protocol Relating to the Status of Refugees. The discussion below outlines that context and how it should inform the question of statutory interpretation now before the Court.

1. The United States acceded to the Protocol more than 40 years ago. This included a commitment to comply with the substantive provisions of Articles 2 through 34 of the 1951 Convention Relating to the Status of Refugees, developed in the aftermath of World War II. See *Immigration & Naturalization Serv.* v. *Stevic*, 467 U.S. 407, 416 (1984); JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 8 (rev. ed. 1998). The United States was actively involved in drafting the Convention and creating an

international refugee protection regime to ensure the protection of those who flee persecution.[4]

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

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

CONVENTION, art. 33(1).

This is commonly known as the protection of "non-*refoulement*." "As the Secretary of State correctly explained when the Protocol was under consideration: 'foremost among the rights which the Protocol would guarantee to refugees is the prohibition (under Article 33 of the Convention) against their expulsion or return to any country in which their life or freedom would be threatened.'" *Stevic*, 467 U.S. at 428; see also CONVENTION prbl. ¶ 2 (these provisions were intended to address the international community's "profound concern for refugees" and "to assure

[4] See Report of the Ad Hoc Committee on Refugees and Stateless Persons, Second Session (14 August to 25 August 1950), *available at* http://www.unhcr.org.

refugees the widest possible exercise of [their] fundamental rights and freedoms").

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

As part of this same effort, Congress amended the INA to add a provision governing applications for asylum. 8 U.S.C. § 1158; see *Cardoza-Fonseca*, 480 U.S. at 423. The United States will recognize a refugee's status and his eligibility for asylum if he can prove that he has suffered from past persecution or has a "well-founded fear of future persecution" based upon race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1101(a)(42)(A). If the refugee makes this showing, the Attorney General has the power to grant asylum. See 8 U.S.C. § 1158 (b)(1) (asylum is discretionary).

Congress codified the Nation's non-*refoulement* obligation by providing that the Attorney General cannot return any alien to a country if he concludes that the alien's life or freedom would be threatened there because of persecution. *Stevic*, 467 U.S. at 410-11 (noting that the U.S. can meet its obligations under the Protocol either by providing asylum or by withholding removal for an alien who meets the definition of a refugee); see 8 U.S.C. § 1231(b)(3)(A).

This form of relief is known as "withholding of removal."

Eligibility for withholding of removal on this basis requires demonstrating a "clear probability" that the alien's life or freedom would be threatened upon his return to his home country. *Stevic*, 467 U.S. at 424; see also 8 U.S.C. § 1231(b)(3)(A) & (b)(3)(B).[5] Once the individual makes this showing, the Attorney General *must* grant withholding of removal, he has no further discretion in the matter. 8 U.S.C. § 1231 (b)(3); *Stevic*, 467 U.S. at 428; *Cardoza-Fonseca*, 480 U.S. at 423.

3. In seeking protection in the United States, refugees generally apply for both asylum and withholding of removal. There are important differences between these two types of relief.

For example, a person granted asylum can work without an employment authorization document and can obtain an unrestricted social security card.[6] He may apply for a refugee travel document that will allow for travel abroad. See 8 C.F.R. § 223.1(b). And he may apply to adjust his status to that of legal permanent resident one year after receiving asylum, putting him on the path to U.S. citizenship. See *id.* § 209.2(a). In addition, as recommended by the Final

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[5] The United States, in contrast to other parties to the Protocol, requires a higher standard of proof to establish entitlement to withholding of removal than the "well-founded fear" standard that defines a refugee under Article I of the Convention (and that is the standard for asylum under U.S. law). GUY S. GOODWIN-GILL, THE REFUGEE IN INT'L LAW 233, 234 (3d ed. 2007); *Stevic*, 467 U.S. at 428.

[6] See U.S. Citizenship & Immigration Servs., Types of Asylum Decisions, *available at* http://www.uscis.gov.

Act of the Conference that adopted the Convention, in order to preserve family unity, an asylee can apply for derivative asylum status for his spouse and minor children. 8 U.S.C. § 1158(b)(3).[7]

Withholding of removal, on the other hand, does not necessarily protect a refugee from being deported. Instead, it simply protects him from being deported to the particular country or countries where he would face persecution. Moreover, a refugee who is granted withholding but not asylum would not be entitled to bring his spouse and children to safety in the United States or to any of the other benefits of asylum described above.

4. The Convention does not require a host country to provide protection to a refugee if doing so would put its own citizens in danger. Accordingly, Article 33 provides that a host country may deny protection from *refoulement* to individuals who present a danger to their new communities. The second paragraph of Article 33 provides:

> The benefit of [Article 33] may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a *particularly serious crime, constitutes a danger to the community of that country*.

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[7] See also UNHCR HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, ch. VI (reedited 1992) ("HANDBOOK") (attaching recommendation of the Final Act of the Conference).

CONVENTION, art. 33(2) (emphasis added).

Congress has ratified language that tracks this exception. The statutory provisions authorizing both asylum and withholding of removal provide an exception for any individual who, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community." 8 U.S.C. § 1158(b)(2)(A)(ii); 8 U.S.C. § 1253(h)(2)(B), *repealed and recodified*, 8 U.S.C. § 1231(b)(3)(B)(ii) (asylum and withholding of removal are unavailable when "the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community"). Thus, a refugee convicted of a "particularly serious crime" while in the United States is automatically ineligible for a grant of asylum or withholding of removal, even if he has a well-founded fear of persecution and has shown a clear probability that his life or freedom will be threatened upon his return to his country of origin. Such a conviction is also grounds for termination of asylum and of "withholding of removal" for a refugee to whom such protection was previously granted. 8 U.S.C. § 1158(c)(2); 8 C.F.R. § 208.24(b)(3).

In general, Congress has equated an "aggravated felony" with a "particularly serious crime." See 8 U.S.C. § 1101(a)(43); see 8 U.S.C. § 1158(b)(2)(B)(i). "Aggravated felony," in turn, is defined by the INA to include a variety of grave offenses, including murder, rape, sexual abuse of a minor, running a prostitution business, and counterfeiting. 8 U.S.C. § 1101(a)(43). Also in this category is "illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, U.S. Code)." *Id.* at § 1101(a)(43)(B).

In some circumstances—where the refugee received a total sentence of less than five years—the Attorney General has discretion to conclude that an "aggravated felony" is *not* a "particularly serious crime" and hence does not bar withholding of removal. *Tunis* v. *Gonzales*, 447 F.3d 547, 549 (7th Cir. 2006) (citing 8 U.S.C. § 1231(b)(3)(B)(ii)). In a decision entitled *Matter of Y-L-*, however, the Attorney General has made clear that "aggravated felonies" with a sentence of less than five years that "involv[ed] unlawful trafficking in controlled substances *presumptively* constitute particularly serious crimes." *Matter of Y-L-*, 23 I&N Dec. 270, 274 (A.G. 2002) (emphasis added). According to the Attorney General, this presumption can be rebutted only in unusual circumstances that are both "extraordinary and compelling." *Id.* Facts such as "cooperation with law enforcement authorities, limited criminal histories, downward departures at sentencing, and post-arrest (let alone post-conviction) claims of contrition or innocence" do not justify deviation from the presumption. *Id.* at 277.

5. Because of the connection between the statutory definitions of the terms "aggravated felony" and "drug trafficking crime" and the statutory bars to asylum and withholding of removal, the Court's decision interpreting these terms will have profound implications for the rights of refugees who face a well-founded fear or clear probability of persecution if they are returned to their home countries.

II. The *Charming Betsy* doctrine compels a narrow reading of the definition of "aggravated felony."

This Court presumes that Congress intends its statutes to comply with its international treaty obligations unless the statute unambiguously states otherwise. "It has been a maxim of statutory construction since the decision in *Murray* v. *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), that 'an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains * * * .'" *Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982). Thus, a statute that is susceptible to more than one reading should be interpreted in a manner that avoids conflict with the international treaty obligations of the United States. This basic rule has been followed by this Court in a variety of contexts.[8]

Petitioner's opening brief explains in detail why a "conviction" for an "aggravated felony" cannot include a state law conviction under a statute encompassing conduct that would be a misdemeanor under federal law—namely, the possession of a small amount of marijuana to share socially, without remuneration. To the extent that the term is susceptible to an

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[8] *Weinberger*, 456 U.S. at 29-30, 32-33 (interpreting statute prohibiting employment discrimination against U.S. citizens on military bases overseas unless permitted by treaty); *Lauritzen* v. *Larsen*, 345 U.S. 571, 578 (1953) (determining statutory construction of Jones Act); accord *MacLeod* v. *United States,* 229 U.S. 416, 434 (1913) ("it should not be assumed that Congress proposed to violate the obligations of this country to other nations"); *Chew Heong* v. *United States*, 112 U.S. 536, 539-40 (1884) (interpreting immigration statute so as to avoid conflict with treaty right of Chinese alien to enter the United States).

expanded meaning, however—and the Fifth Circuit apparently believes it is—*Charming Betsy* dictates that these statutory terms be interpreted in a manner consistent with the Nation's treaty obligations. As discussed below, to include a state conviction that does not require proof of intent to sell illegal drugs in the term "aggravated felony" would put the United States in violation of its treaty obligations relating to the status of refugees. There is no reason to believe that Congress intended such a result.

A. The U.S. cannot be in compliance with the Protocol if it denies protection to those convicted of an offense that it does not otherwise regard as "serious."

The prohibition against *refoulement* to persecution is one of the core principles of the Convention (and of international human rights law generally). According to the Convention's preamble, its purpose is to ensure that refugees enjoy the widest possible exercise of the fundamental rights and freedoms guaranteed to all people. CONVENTION prbl. ¶ 2. As discussed above, Article 33(1) of the Convention states that: "[n]o 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."

The "particularly serious crime" provision of Article 33(2) creates only a very limited exception to the fundamental right to non-*refoulement*.[9] See

[9] In the record of proceedings connected with the adoption of Article 33(2), the U.S. delegate explained that "it would be highly undesirable to suggest in the text of [Article 33] that

James C. Hathaway & Colin J. Harvey, *Framing Refugee Protection in the New World Disorder*, 34 CORNELL INT'L L.J. 257, 293 (2001) (Article 33(2) authorizes *refoulement* to persecution only where it is necessary to protect the community in the host nation from an unacceptably high level of danger).

Congress could not have intended the term "aggravated felony" to encompass a state offense proscribing, *inter alia*, the possession of a small amount of marijuana without any intent to sell it. Article 33(2)'s exception applies, in relevant part, to anyone "who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country." CONVENTION art. 33(2). The Board of Immigration Appeals has interpreted the statutory scheme that Congress enacted to implement that exception to begin and end with whether the person committed a "particularly serious crime," without requiring any separate determination of "dangerousness." See, *e.g.*, *Matter of C.*, 20 I&N Dec. 529 (BIA 1992) (rejecting two-step inquiry that would include a separate assessment of dangerousness). Courts of appeals have deferred to the Board's interpretation, albeit at times with reluctance. *N-A-M* v. *Holder*, 587 F.3d 1052, 1057 (10th Cir. 2009) (upholding BIA's rule based on Tenth Circuit precedent while noting "strong arguments that the BIA is not accurately interpreting the statute or its treaty-based

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there might be cases, even highly exceptional cases, where a man might be sent to death or persecution." CONVENTION, *travaux préparatoires*; see Factum of the Intervenor, UNHCR, *Suresh* v. *Minister of Citizenship & Immigration*, S.C.C. No. 27790, ¶ 63 (Mar. 8, 2001), *reprinted at* 14 INT'L J. REFUGEE L. 141, 155.

underpinnings"). These precedents assume that Congress limited the terms "particularly serious crime" and "aggravated felony" to include only those crimes that it believed necessarily make a person a "danger to the community."

Congress's use of the term "serious" in other, related contexts is also instructive. The offenses Congress identifies under its definition of "serious drug offense" in the Criminal Code's main penalty provision involve, among others, commercial trafficking, participation in a continuing criminal enterprise, or importing or exporting a controlled substance. See 18 U.S.C. § 3559(c)(2)(H) (citing 21 U.S.C. §§ 841(b)(1)(A), 848, 960(b)(1)(A)). Congress penalizes those who commit a "serious drug offense" with a sentence of at least *ten years to life*. 18 U.S.C. § 3559(c)(2); see also 18 U.S.C. § 924(e)(2)(A) (a "serious drug offense" is defined as a federal offense with a maximum sentence of 10 years or more, or a state offense "involving manufacturing, distributing, or possessing with intent to manufacture or distribute" with a maximum sentence of 10 years or more). By contrast, Congress provided a maximum sentence of *no more than one year* for the offense of possessing a small amount of marijuana to share socially, for no remuneration. See 21 U.S.C. § 841(b)(4) (referencing the one year maximum penalty provision provided for in 21 U.S.C. § 844). Thus, under Congress's own statutory scheme, social sharing of marijuana is not a "serious" offense.

By definition, the term "particularly serious crime" cannot include an offense that Congress itself does not otherwise regard as "serious." And if the statutory exception to the non-*refoulement* obligation is understood not to require a separate determination

of "dangerousness," see *N-A-M*, 587 F.3d at 1057, extending the "aggravated felony" definition to offenses like the one at issue in this case creates a conflict with the treaty obligations of the United States that Congress presumptively did not intend. For both of these reasons, to interpret the definition of "aggravated felony" to encompass the social sharing of a small amount of marijuana would put the United States in conflict with the Protocol, based upon Congress's own standards for the relative seriousness of crimes.

B. UNHCR materials confirm that a "particularly serious crime" is one of extreme gravity.

Although the Protocol and Convention do not define "particularly serious crime," the U.N. High Commissioner on Refugees ("UNHCR") has provided guidance as to what types of criminal convictions could legitimately allow an exception to the obligation of non-*refoulement*.[10] Those materials demonstrate that possession of a small amount of marijuana to

[10] The UNHCR was created in the wake of World War II to coordinate international action for the world-wide protection of refugees. Its primary purpose is to safeguard the rights and well-being of refugees. The United States is a member of the UNHCR's Executive Committee. United States courts have sought guidance from the UNHCR when interpreting both the Protocol and the Convention. See *Castillo-Arias* v. *U.S. Att'y. Gen.*, 446 F.3d 1190, 1197 (11th Cir. 2006) ("Reference to the UNHCR Guidelines * * * is permissible because the U.S. Supreme Court has held that Congress intended to conform United States refugee law with the 1967 United Nations Protocol Relating to the Status of Refugees."); *Mohammed* v. *Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005) (noting the UNHCR's "analysis provides significant guidance for issues of refugee law").

share socially could not possibly qualify as a "particularly serious crime" that renders a person "a danger to the community."

This Court has recognized that the UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees "provides significant guidance in construing the Protocol, to which Congress sought to conform. It has been widely considered useful in giving content to the obligations that the Protocol establishes." *Cardoza-Fonseca*, 480 U.S. at 439 n.22. As relevant here, the Handbook highlights the fact that Article 33 permits a refugee's expulsion only in "extreme cases." HANDBOOK ¶ 154.

Indeed, the "particularly serious crime" exception in Article 33(2) is even narrower than Article 1(F) of the Convention, which states that the Convention does not apply "to any person with respect to whom there are serious reasons for considering that * * * he has committed a *serious non-political crime* outside the country of refuge prior to his admission to that country as a refugee." CONVENTION, art. 1(F)(b) (emphasis added).[11] As the Handbook explains, "a 'serious' crime must be a capital crime or a very grave punishable act" to fall within Article 1(F). HANDBOOK

[11] The history of these provisions confirms their relationship. The discussions at the Conference of Plenipotentiaries specifically made note of the link between Article 33(2) and what was eventually to become Article 1F. GUNNEL STENBERG, NON-EXPULSION AND NON-REFOULMENT: THE PROHIBITION AGAINST REMOVAL OF REFUGEES WITH SPECIAL REFERENCE TO ARTICLES 32 AND 33 OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES at 224 (1989). Therefore, Article 1(F) can aid how Article 33(2) is interpreted. See *id.*

¶ 155. "Minor offences punishable by moderate sentences are not grounds for exclusion under Article 1(F)(b)." *Id.* Obviously, a "*particularly* serious crime" would need to be a crime that is even more grave than those "serious crimes" that fall under Article 1(F). See REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION ¶ 149 at 130 (Erika Feller, *et al.* eds., 2003) ("A common sense reading of Article 33(2) in light of Article 1(F)(b) requires that it be construed so as to address circumstances not covered by Article 1(F)(b)."); accord *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982) (recognizing that a particularly serious crime is more serious than a serious non-political crime).

Another source of guidance is the UNHCR Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees ("GUIDELINES").[12] This document also discusses the exceptions in Article 33(2). The Guidelines emphasize that the second exception in Article 33(2) applies only to individuals who commit "particularly grave crimes." GUIDELINES ¶ 16. Further, they explain that "Article 33(2) concerns the future risk that a recognised refugee may pose to the host state." *Id.* ¶ 4.

Again, Congress presumably intended its statutory scheme to comply with Article 33(2) and to be limited to such "particularly grave crimes." An

[12] United States courts have looked to the Guidelines when interpreting the Protocol and the Convention. See *supra* note 10 and accompanying text.

offense that Congress has explicitly treated as a misdemeanor could not possibly meet that definition.

C. U.S. treaties relating to controlled substances also support the conclusion that sharing a small quantity of marijuana for no remuneration is not a "particularly serious crime."

Treaties relating to drug trafficking further show that the social sharing of marijuana cannot be deemed a "particularly serious" crime. The United States is party to a number of treaties concerning narcotics, including the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the "TRAFFICKING CONVENTION"). See Martin Gottwald, *Asylum Claims and Drug Offences: The Seriousness Threshold of Article 1F(B) of the 1951 Convention Relating to the Status of Refugees and the UN Drug Conventions*, 18 INT'L J. REFUGEE L. 81, 93 (2006) (comparing provisions of the drug conventions with provisions of the Convention Relating to the Status of Refugees). "The cornerstone of the Trafficking Convention is Article 3 on 'Offences and Sanctions,' which distinguishes between 'criminal offences' (Art. 3.2), 'serious criminal offences' (Art. 3.1 and Art. 3.7) and 'particularly serious offences' (Art. 3.5)." Gottwald, *supra*, at 94.

Article 3.1 of the Trafficking Convention requires signatory nations to criminalize offenses that involve actual distribution of drugs as "serious criminal offenses." See TRAFFICKING CONVENTION, *supra*, art. 3(a)(1). Under the Trafficking Convention, then, widespread commercial drug distribution is categorized as a "serious" offense, as opposed to a "particularly serious" offense.

Indeed, the Trafficking Convention sets out a long list of factors to be considered before a drug distribution offense becomes "particularly serious." See TRAFFICKING CONVENTION, *supra,* art. 3.5 ("The Parties shall ensure that their courts and other competent authorities having jurisdiction can take into account factual circumstances which make the commission of the offences established in accordance with paragraph 1 of this article particularly serious * * * ."). Those factors may include the involvement of international organized crime; the involvement of the offender in other illegal activities facilitated by commission of the offense; the use of violence or arms; the fact that the offender holds a public office and that the offense is connected with the office in question; and the victimization or use of minors. *Id*.

If even the commercial distribution of narcotics is not "particularly serious" without facts such as these, then surely the possession of a small amount of marijuana to share for no remuneration cannot be deemed "particularly serious."

III. The Fifth Circuit's approach would effectively permit a State to dictate the Nation's compliance or non-compliance with the Protocol's non-*refoulement* provision.

Immigration policy is a quintessential federal issue. As this Court very recently observed, it "shapes the destiny of the Nation." *Arizona* v. *United States*, 567 U. S. --, -- S.Ct. -- (2012) (slip op. at 24). For that reason, "it is just not plausible that Congress meant to authorize a State to overrule its judgment about the consequences of federal offenses to which its immigration law expressly refers." *Lopez*, 549 U.S. at 59.

That is particularly so in this context, where the statutory definitions implicate the Nation's compliance with international treaty obligations. U.S. treaty obligations are guarantees that the Federal Government makes on behalf of the entire Nation. The Constitution does not permit a State to enter into a treaty on its own. U.S. CONST. art. I, § 10. For the same reason, a State should not be able dictate, in any particular instance, whether the Nation will do what its international treaty obligations call for it to do.

Under the Fifth Circuit's reasoning, however, the Nation's compliance with the Protocol could depend on the legislative choices of an individual State. Here, the Georgia legislature decided to use a single statute to criminalize both the social sharing of small amounts of marijuana as well as the commercial sale of large amounts. Nevertheless, the Fifth Circuit is willing to presume that every conviction under this statute is a conviction for an aggravated felony. This, in effect, would allow a state legislature to "overrule" Congress's judgment and authorize a refugee's removal even when his offense would have been punished as only a misdemeanor under federal law. As this Court recently observed, "[a] decision on removability requires a determination whether it is appropriate to allow a foreign national to continue living in the United States. Decisions of this nature touch on foreign relations and must be made with one voice." *Arizona*, 567 U.S. at -- (slip op. at 18). Congress, not an individual state's legislature, is that "one voice." Accordingly, decisions about which offenses subject an alien to removal proceedings must be made by Congress, especially when they implicate this Nation's international treaty obligations. See *id.*

To be sure, the Fifth Circuit would allow a refugee to present evidence that his offense was, in fact, only a federal misdemeanor. But that is an entirely unsatisfactory way to ensure the Nation's compliance with the Protocol. As the Petitioner's brief explains, proving the circumstances of a particular drug offense after the fact is no small task. The immigration proceedings may take place years after the conviction, when evidence is gone and witnesses are unavailable. The state record of conviction may be of no help. And if the refugee has nothing but his own testimony and credibility to make his case, he may be left without any effective appellate review. For all these reasons, the Fifth Circuit's willingness to allow a refugee to try to rebut the presumption does not change the fact that its reasoning would often lead the United States to breach its obligations under the Protocol—returning a refugee to persecution even when no state or federal court ever convicted him of a "particularly serious crime."

Nor would the Fifth Circuit's approach leave any other effective way to ensure the United States' compliance with the Protocol. While one convicted of a "particularly serious crime" does remain eligible to apply for *deferral* of removal, under the regulations implementing the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), this is insufficient to ensure the protection required by the Protocol. See 8 C.F.R. § 208.17(a). To be eligible for deferral of removal, an alien must establish that upon returning to his country of nationality it is "more likely than not" that he would be tortured by, or with the acquiescence of, government officials acting under color of law. *Id.* §§ 208.17(a), 208.18(a). Deferral of removal thus will

not protect refugees who would face even a clear probability of persecution in their home countries, if that persecution does not meet the definition of "torture" or takes place without the requisite level of state involvement. Furthermore, deferral of removal does not provide the same level of protection as asylum or *withholding* of removal. For example, deferral of removal does not result in a grant of U.S. residency, does not necessarily result in a release from custody, and is subject to termination with fewer procedural protections. *Id.* § 208.17(b)(i)-(iv).

This lesser form of protection will not ensure adherence to the Protocol's non-*refoulement* provision that prohibits removing someone to a state "where his life or freedom would be threatened" on account of his membership in a protected class. See CONVENTION, art. 33(1). Thus, if the Fifth Circuit's reasoning is endorsed, the possibility of relief under the Convention Against Torture will not prevent the United States from breaching its international treaty obligations to refugees under the Convention and the Protocol.

CONCLUSION

In light of the implications of the issue for refugees and its impact on the Nation's compliance with its international treaty obligations and implementing statutes, Human Rights First urges this Court to reverse the decision of the Fifth Circuit and conclude that the term "aggravated felony" under the immigration laws cannot include a conviction under a state statute that encompasses the possession of a small amount of marijuana for sharing socially, without remuneration.

Respectfully submitted.

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