

No. 06-1346

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IN THE  
**Supreme Court of the United States**

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AHMED ALI,

*Petitioner,*

v.

DEBORAH ACHIM, ET AL.,

*Respondents.*

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

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**BRIEF OF INTERNATIONAL LAW SCHOLARS AS  
*AMICI CURIAE* IN SUPPORT OF PETITIONER**

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## INTEREST OF THE *AMICI CURIAE*<sup>1</sup>

*Amici curiae* include two groups: legal scholars who have studied, written, and published on the status and treatment of refugees under international law; and Human Rights First.

Guy Goodwin-Gill is currently a Senior Research Fellow at All Souls College and Professor of International Refugee Law at the University of Oxford. He works in public international law, with a particular interest in immigration, refugees and asylum, the use of force, human rights and international humanitarian law, the United Nations and international organizations generally, elections and democratization. He is the author of a leading treatise in refugee law, *The Refugee in International Law* (3d ed. 2007), the second edition of which this Court cited in *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 n.24 (1987).

James C. Hathaway is the James E. and Sarah A. Degan Professor of Law and Director of the Program in Refugee and Asylum Law at the University of Michigan Law School. His primary expertise is in international human rights law, with a focus on international refugee law. He is the author of *The Law of Refugee Status* (1991), *Reconceiving International Refugee Law* (1997), and of *The Rights of Refugees Under International Law* (2005). His

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<sup>1</sup> This brief is submitted pursuant to Rule 37 of the Rules of this Court with the written consent of both petitioner and respondents, whose consent letters have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

work has been regularly cited by leading courts of the common law world, including the House of Lords, Supreme Court of Canada, and High Court of Australia.

Deborah Anker is a Clinical Professor of Law at Harvard Law School and Director of the Harvard Immigration and Refugee Clinical Program. She is the author of numerous publications on international law and particularly refugee law, including *Law of Asylum in the United States* (3d ed. 1999).

All of the foregoing scholars have a strong interest in the Court's proper understanding of the United States' obligations under international law and how those obligations impact on the interpretation of the statute at issue here.

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

### **SUMMARY OF ARGUMENT**

When Congress enacted the provisions of the Refugee Act of 1980 at issue here, it did not merely consider the provisions of the U.N. Convention

Relating to the Status of Refugees, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954) (the “Convention”). It copied them nearly word for word. Both the general rule of non-refoulement (non-return to persecution) and the exception for certain refugees who have committed a “particularly serious crime” and constitute “a danger to the community” come virtually verbatim from Article 33 of the Convention. Because Congress used the Convention’s terms and plainly intended to implement its requirements, an analysis of the statute’s meaning must include an understanding of how those words are understood under the Convention.

From the Convention, the Refugee Act adopted what is now 8 U.S.C. § 1231(b)(3)(A), which generally forbids a refugee to be returned to a country where his life or liberty would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion. This principle of “non-refoulement” is the cornerstone of international refugee law. It is found not only in the Convention but in numerous other human rights treaties and recognizes the fundamental obligation of all nations to refrain from sending refugees back to persecution. The Refugee Act also incorporated the Convention’s limited exceptions to that duty, including the one at issue in this case for any refugee who “having been convicted of a particularly serious crime is a danger to the community.” 8 U.S.C. § 1231(b)(3)(B)(ii). Congress has since mandated that certain crimes—notably not the crime of which Petitioner was convicted—are deemed *per se* to be “particularly serious crimes.” It has not, however, altered the core language of the exception to eliminate the requirement that an individual

constitute a “danger to the community” in order for the exception to apply.

The Board of Immigration Appeals (“BIA”) and the court below unduly restrict the grant of non-refoulement protection by reading subsection (B)(ii) to exclude any refugee convicted of what it considers a “particularly serious crime”—a term it has applied to include a wide range of crimes irrespective of whether they are aggravated, of their punishment, and of other important factors applied under the Convention. That reading of the statute is not entitled to deference because it contradicts the plain language of the statute as well as Congress’s evident intent to incorporate the Convention’s terms as they were and are understood in international law.

First, while the BIA dismisses the idea that it must specifically assess a refugee’s potential danger to the community, the Act by its terms requires it. The statute requires separate consideration of a refugee’s “danger to the community,” and not simply a mechanical determination that he has or has not committed a “particularly serious crime.” Otherwise, the reference to dangerousness would be mere surplusage. Reading the statute that way contravenes settled canons of construction and ignores the well-accepted interpretation that the identical words in the Convention have been given by other contracting states and by leading commentators.

Second, the BIA takes an inappropriately expansive view of what may constitute a “particularly serious crime.” This case does not involve any of the crimes Congress later expressly deemed “particularly serious.” This core statutory term should, however,

be understood to apply to only the gravest crimes under exceptional circumstances. Reading the statute as the BIA does gives “particularly serious” virtually no meaning other than what the BIA sees fit to give it, thereby contravening the meaning that the unique phrase “particularly serious crime” has under the Convention. Viewed in context, the words’ meaning is clear and the BIA’s contrary interpretation is not entitled to deference. There is nothing in the terms of the statute or its history that suggests Congress, when expressly adopting the terms of the Convention and stating an intention to conform to it, meant to vest discretion in the BIA to adopt an interpretation that violates international law.

## ARGUMENT

### I. THE REFUGEE ACT IMPLEMENTS WELL-SETTLED PRINCIPLES OF INTERNATIONAL LAW, AGAINST WHICH THE BIA’S CONTRARY INTERPRETATION IS NOT ENTITLED TO DEFERENCE.

The Court’s review should begin with the language of the statute. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) (“First, always, is the question whether Congress has directly spoken to the precise question at issue.”); accord *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999); *Cardoza-Fonseca*, 480 U.S. at 430-31. “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.” *Chevron*, 467 U.S. at 842-43; *Cardoza-Fonseca*, 480 U.S. at 432 n.12; *see also id.* at 453 (Scalia, J., concurring in judgment). The Court does

not, however, look solely to the bare words used but applies the “traditional tools of statutory construction” to determine whether Congress has made its intentions clear. *Chevron*, 467 U.S. at 843 n.9. Among those tools are 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), and the equally fundamental principle that when Congress adopts language from another source where it has an accepted meaning, it is presumed to intend that meaning absent direction to the contrary. *See, e.g., Molzof v. United States*, 502 U.S. 301, 308 (1992).

Here, the statute establishes a policy of non-refoulement, the expression of which is adopted directly from the Convention. This case centers on the meaning of a limited exception to that policy, also taken directly from the Convention. By its terms, the relevant exception has two express elements: commission of a “particularly serious crime” and a showing that the refugee is a “danger to community.” 8 U.S.C. § 1231(b)(3)(B)(ii). Each element should play a critical role in determining whether the United States will take the extreme step of returning an individual to a country where his life or freedom would indeed be threatened. The BIA, however, disregards the second element entirely and interprets the first without regard to how those words were and are understood in the Convention. For the reasons set out below, the BIA’s interpretation runs contrary to the unambiguous meaning of the statute and therefore is not entitled to deference.

**A. Section 1231(b)(3) Implements the Duty of Non-Refoulement By Adopting Both the Convention’s Affirmative Proscription and Its Limited Exceptions.**

Congress first made the principle of non-refoulement part of U.S. statutory law in the Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 (the “Refugee Act”). “Non-refoulement,” from the French “refouler” (meaning “to drive back”), refers to “[a] refugee’s right not to be expelled from one state to another . . . where his or her life or liberty would be threatened.” *Black’s Law Dictionary* 1083 (8th ed. 2004). It is the centerpiece of the U.N. Convention Relating to the Status of Refugees, 189 U.N.T.S. 150, 152 (entered into force Apr. 22, 1954), to which the United States bound itself in relevant part by acceding to the 1967 United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, 606 U.N.T.S. 267. *See INS v. Stevic*, 467 U.S. 407, 416 (1984).

The Refugee Act’s general rule of non-refoulement—to which the provision at issue here is an exception—is as follows:

[T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1231(b)(3)(A).<sup>2</sup> Congress took that language nearly verbatim from Article 33(1) of the Convention:

No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers or 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.

189 U.N.T.S. 150.

In implementing the Convention, Congress also adopted its limited exceptions to the non-refoulement principle. The exception relevant here is found in subsection (B)(ii), which provides that subsection (A) above does not apply:

to any alien if the Attorney General determines that . . . the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States.

8 U.S.C. § 1231(b)(3)(B)(ii). As originally adopted, this provision was the same, except that it said “constitutes” rather than “is” a danger to the

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<sup>2</sup> Although Congress has made minor changes to the language over the years, the operative text remains the same. The original version stated that “[t]he Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien’s life or freedom would be threatened . . . .” Refugee Act of 1980, § 203(e). The difference has no bearing on the issues before the Court.

community. Refugee Act, § 203(e).<sup>3</sup> This language too comes straight from Article 33(2) of the Convention:

The benefit of [non-refoulement] may not . . . be claimed by a refugee . . . who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

189 U.N.T.S. 150.

Adopting the Convention’s language was the most straightforward way for Congress to manifest its unambiguous intent, confirmed in the legislative history, “to bring United States refugee law into conformance with the [Convention].” *Cardoza-Fonseca*, 480 U.S. at 436 (citations omitted).

**B. The Statute Requires Consideration of a Refugee’s Potential Danger to the Community.**

The words of the non-refoulement exception at issue embrace two distinct concepts. They extend to a refugee who, in the past, has been convicted of a “particularly serious crime,” but it also requires that the refugee, in the present tense, “is a danger to the community of the United States.” 8 U.S.C. § 1231(b)(3)(B)(ii). Contrary to the Act’s plain language and structure, to long-standing canons of statutory construction, to Congress’s clear intent, and to the Convention’s requirements, the BIA

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<sup>3</sup> The operative language of what is now subsection (B)(ii) has not otherwise changed since adopted. Subsection (B) also includes two later provisos regarding “particularly serious crimes” which will be addressed below.

impermissibly reads the “danger to the community” phrase out of the statute.

Instead of making an individualized determination of future dangerousness before applying (B)(ii), the BIA looks only to what constitutes a “particularly serious crime.” The BIA flatly rejects the position that the Act “requires two separate factual findings”: “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.” *In re Carballe*, 19 I&N Dec. 357, 360-361 (BIA 1986); *accord In re N-A-M-*, 24 I&N Dec. 336, 342 (BIA 2007). While the BIA has on occasion suggested that its examination of the crime considers whether it is of the type that “indicate[s] that the alien will be a danger to the community,” *In re Frentescu*, 18 I&N Dec. 244, 247 (BIA 1982), more recent decisions have made clear that its determination may be “based solely on [the crime’s] elements, i.e., that the offense by its ‘nature’ is a particularly serious one.” *In re N-A-M-*, 24 I&N Dec. at 343. In the BIA’s view, “the proper focus” of the particularly-serious-crime determination “is on the nature of the crime and *not the likelihood of future serious misconduct.*” *Id.* at 342 (emphasis added).<sup>4</sup>

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<sup>4</sup>In *N-A-M-*, the BIA created more confusion than it resolved over the “particularly serious crime” inquiry. Although the BIA had suggested that it would, after examining the elements of a crime, open the inquiry to “all reliable information” that could weigh on the question, 24 I&N Dec. at 342, in performing that analysis it held “that the respondent’s offense is a particularly serious crime based solely on its elements,” *id.* at 343, and refused to consider evidence that the respondent was not a danger to the community, *id.* at 342-43. The BIA did the same

The Act's terms, however, do not permit the BIA simply to disregard "the likelihood of future serious misconduct." *Id.* at 342. This Court has long recognized that it must "give effect, if possible, to every clause and word of a statute." *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (quoting *Inhabitants of Montclair Twp. v. Ramsdell*, 107 U.S. 147, 152 (1883)). In particular, this duty requires that "a statute ought, upon the whole, be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). This Court has emphasized that "statutory construction is a holistic endeavor," *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004) (citations omitted), requiring courts to "construe a statute to give every word some operative effect," *Cooper Indus.*, 543 U.S. at 167. And although the Court has been willing "to give a word limited effect" in a statute, it is "quite another [thing] to give it no effect whatever." *Solid Waste Agency v. U.S. Army Corps. of Eng'rs*, 531 U.S. 159, 172 (2001).<sup>5</sup>

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(continued...)

below. *See* Pet. App. 57a-58a; *see also* Pet. Br. 35 n.21 (noting Petitioner's challenge to the BIA's refusal to consider factors relevant to future dangerousness or recidivism).

<sup>5</sup> It is doubly important not to disregard language limiting an exception to a statutory grant of relief such as the non-refoulement principles in § 1231(b)(3)(A). This Court "usually read[s] the exception narrowly in order to preserve the primary operation of the [policy]." *Comm'r v. Clark*, 489 U.S. 726, 739-40 (1989); *see also John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 97 (1993) (noting that

Under the BIA's approach, the final phrase of (B)(ii)—“is a danger to the community of the United States”—has no effect at all.<sup>6</sup> Indications of dangerousness, do not factor into its analysis of “particularly serious crime,” and once that is determined, the BIA's application of (B)(ii) is automatic. Some courts of appeals have sought to supply the missing meaning by seeing (B)(ii) as stating a cause—the particularly serious crime—and an effect—the danger to the community. *See, e.g., Crespo-Gomez v. Richard*, 780 F.2d 932, 933 (11th Cir. 1986). This reading, however, still renders the dangerousness clause superfluous. Congress is not in the habit of stating a legislative finding in the middle of an operative provision.

More importantly, the supposed causal relationship makes no sense because one can easily imagine a very serious crime that despite its severity would say very little about the refugee's potential danger to the community. Indeed, this is exactly the distinction the Convention's formulation makes. The drafting history, addressed below, *supra*, pp. 29-30, shows that the original proposal included no exceptions to refoulement at all, but that several

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(continued...)

exceptions in comprehensive schemes are read narrowly). As an exception to the Act's general and strongly expressed rule of non-refoulement contained in subsection (A), subsection (B)(ii) should be construed narrowly.

<sup>6</sup> Although the courts of appeals have generally deferred to the BIA's approach, some have been at least “troubled [by the] BIA's failure to give separate consideration to whether [the alien] is a ‘danger to the community.’” *Ahmetovic v. INS*, 62 F.3d 48, 52 (2d Cir. 1995).

exceptions were ultimately made to allow states to safeguard their security. Thus the potential “danger to the community,” not merely the criminal conviction, was the central inquiry. Atle Grahl-Madsen, *Commentary on the Refugee Convention, Division of International Protection of the United Nations High Commissioner for Refugees*, Article 33, ¶¶9-10 (1997) (explaining that on the “extremely rare occasions” that the provisions of Article 33(2) are applied, it is the “danger [the alien] constitutes which is the decisive factor”);<sup>7</sup> see also James C. Hathaway, *The Rights of Refugees Under International Law* 349 (2005). Commentators have since recognized the common-sense notion that present danger does not necessarily follow from a past conviction, regardless of the nature of the crime: “a person, who, on the other hand, has been convicted for a capital crime—which he has committed in a state of emotional distress or in self-defence—would not constitute a danger to the community.” Gunnel Stenberg, *Non-Expulsion and Non-Refoulement: The Prohibition Against Removal of Refugees with Special Reference to Articles 32 and 33 of the 1951 Convention Relating to the Status of Refugees* 228 (1989) (quoting an earlier-expressed UNHCR guideline). Therefore, mitigating factors cannot be ignored. One can also imagine subsequent facts, such as a later acquired physical disability, that might lessen or eliminate the danger the refugee poses regardless of his prior criminal activity. Under the BIA’s interpretation, none of those factors are considered.

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<sup>7</sup> Available at <http://www.unhcr.org/publ/PUBL/3d4ab5fb9.pdf> (last visited Nov. 26, 2007).

Assuming that Congress expected all “particularly serious crimes” to necessarily establish dangerousness is also inconsistent with later amendments to 8 U.S.C. § 1231(b)(3)(B). For a time, Congress deemed all “aggravated felonies” to be “particularly serious crimes.” That category, however, included crimes such as tax evasion, *id.* § 1101(a)(43)(M)(ii), and trafficking in vehicles with altered identification numbers, *id.* § 1101(a)(43)(R), that do not inherently indicate the offender’s danger to the community, must less a danger so grave as to justify exceptions to the statutory and treaty requirement of non-refoulement. Congress’s *per se* approach to those crimes made sense *only* if Congress also understood that conviction of such a crime was merely the threshold inquiry that required the agency then to assess whether the refugee was, in fact, “a danger to the community.”

Other courts have suggested that if Congress had intended separate consideration of dangerousness, it would have included a conjunction between the “particularly serious crime” and “danger to the community language” phrases. *See, e.g., Ramirez-Ramos v. INS*, 814 F.2d 1394, 1397 (9th Cir. 1987). Although a conjunction might have been more clear had Congress been writing on a blank sheet, it was not. Instead, Congress drew the Act’s language nearly verbatim from Article 33 of the Convention. It gave no indication that in doing so it meant the words to have a meaning other than that already understood under the Convention. *See, e.g.,* Nehemiah Robinson, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation* 29-30 (1953) (noting that Article 33’s language allowed refugees to submit mitigating

evidence to show he does not pose a threat to public order). Alternative formulations, while perhaps more clear when read in isolation, would not have so unambiguously manifested Congress's intent to conform U.S. law to the international standards of the Convention.<sup>8</sup>

Even were the meaning of (B)(ii) not clear strictly as a grammatical matter, it becomes so in the context of its adoption. By using language substantively identical to the Convention, Congress must have intended that the language have the same meaning. It is a "cardinal rule of statutory construction" that where Congress uses specialized terms that have acquired an accepted meaning,

it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

*Molzof*, 502 U.S. at 307 (1992) (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952) (citations omitted)); see also *Moskal v. United States*, 498 U.S.

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<sup>8</sup> It is important to note while Congress has made several amendments to section (B) that deem certain crimes "particularly serious," it has made no substantive alterations to the text of subsection (B)(ii) itself or addressed the "danger to the community" requirement in any other way.

103, 121 (1990) (Scalia, J., dissenting) (“If a word is obviously transplanted from another legal source...it brings its soil with it.”) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537(1947)); cf. *Richards v. United States*, 369 U.S. 1, 11 (1962) (holding that “it is the duty of the court to ‘not be guided by a single sentence or member of a sentence, but [to] look to the provisions of the whole law, and to its object and policy’” (citations omitted)). If there were any doubt, the Conference Report on the Act explains that the exceptions now contained in subsection (B) were included specifically because of Congress’s “understanding that [they were] based directly upon the language of the Protocol” and would be “*construed consistent with the Protocol.*” H.R. Conf. Rep. No. 96-781 at 20-21 (1980), *reprinted in* 1980 U.S.C.C.A.N. 160, 161-62 (emphasis added); *see also Cardoza-Fonseca*, 480 U.S. at 432 (acknowledging “the abundant evidence of an intent to conform . . . our asylum law to the United Nation’s Protocol” when interpreting the Refugee Act of 1980).

The corresponding exception in Article 33(2) of the Convention has been consistently understood to establish a conviction of a “particularly serious crime” as merely a threshold requirement, after which the signatory state must determine whether the individual currently poses a “danger to the community” before denying non-refoulement protection. *See infra*, pp. 29-33. Fundamental to an understanding of Article 33 is the constraint that “[i]rrespective of how the expression ‘a particularly serious crime’ [is] interpreted, expulsion or return to a country of persecution may only be effected if the refugee ‘constitutes a danger to the community.’”

Grahl-Madsen, *supra*, ¶9; *see also* Hathaway, *supra*, at 347 (2005). It is this understanding that Congress intended to implement by incorporating the Convention’s language wholesale into the Refugee Act.

Additionally, the meaning of (B)(ii)’s words is further clarified by a comparison to a similar exception—the “serious non-political crime” exception, 8 U.S.C. § 1231(b)(3)(B)(iii), which this Court examined in *Aguirre-Aguirre*, 526 U.S. 415. That exception applies if “there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States.” 8 U.S.C. § 1231(b)(3)(B)(iii).<sup>9</sup> Both provisions speak to historical fact: the commission of a “particularly serious crime” in § 1231(b)(3)(B)(ii), and the commission of a “serious non-political crime” in § 1231(b)(3)(B)(iii). But only (B)(ii) includes an *additional* factor—that the refugee “is a danger to the community.” As both a matter of logic and of settled principles of statutory construction, including that factor in one but not the other of two parallel provisions must have meaning. *See Bates v. United States*, 522 U.S. 23, 29-30 (1997) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion

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<sup>9</sup> The “serious non-political crime” exception was also taken virtually verbatim from the Convention, albeit from a different article, Art. I(F)(b), 189 U.N.T.S. at 150. It also was included in the Refugee Act at the same time as the “particularly serious crime” exception and was placed immediately after it.

or exclusion.”) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)); *Brown v. Gardner*, 513 U.S. 115, 120 (1994) (citing same language from *Russello* in finding text of statute clear and rejecting agency deference under *Chevron*).

This case thus presents a situation just the opposite of *Aguirre-Aguirre*. There, the Ninth Circuit had imported into the “serious non-political crime” inquiry an additional factor derived from elsewhere in the Convention—“the risk of persecution [the refugee] would face if returned to Guatemala,” *Aguirre-Aguirre*, 526 U.S. at 425—that was not indicated in the text of § 1231(b)(3)(B)(iii). The Court unanimously rejected that interpretation on the face of the statute: “As a matter of plain language, it is not obvious that an already-completed crime is somehow rendered less serious by considering the further circumstances that the alien may be subject to persecution if returned to his home country.” *Id.* at 426. Here, on the other hand, the BIA has adopted a construction of the “particularly serious crime” exception that parallels the “serious non-political crime” exception, despite the fact that the former *does* expressly add a *future* consideration, *i.e.*, whether the refugee “is a danger to the community.” Just as in *Aguirre-Aguirre*, where the Court rejected reading words *into* one of the prior-crimes exceptions that were *not there*, the Court should by the same token reject the BIA’s attempt to read words *out of* another of the exceptions that *are there*.

Finally, this Court has long recognized that “an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains.” *Murray v. The Schooner Charming Betsy*,

6 U.S. (2 Cranch) 64, 118 (1804); *see also Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (noting the “firm and obviously sound” principle of interpretation that a treaty will not be considered “abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed” (citations omitted)). Although *Charming Betsy* long predates *Chevron*, the latter decision did not shift the balance to privilege administrative power over settled principles of construction. To the contrary, Congress is presumed to legislate against that background. Indeed, *Charming Betsy* gave rise to one of this Court’s earliest clear statement principles, in accordance with which it construes statutes to avoid serious constitutional questions. *See DeBartolo v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574-75 (1988). This Court routinely applies that doctrine in rejecting deference to an agency interpretation under *Chevron*. *See, e.g., INS v. St. Cyr*, 533 U.S. 289, 300 (2001); *DeBartolo*, 485 U.S. at 574-75; *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 265 (1991).

This Court should not, therefore, simply declare the text ambiguous and defer to the BIA’s interpretation. While the Refugee Act does vest considerable authority in the Government, and therefore by delegation to the BIA, it does not grant unfettered discretion. The touchstone of *Chevron* deference is Congress’s intent to leave a particular issue to the agency. There is no reason to conclude that Congress meant to give the BIA discretion to abrogate U.S. treaty obligations by expanding subsection (B)(ii) well beyond the limits of its language and international law. To the contrary,

Congress’s use of the exact words of the Convention—not to mention its stated intent to conform U.S. law to the Convention—establishes that (B)(ii) must be read consistent with the international understanding of the operative language. The U.S. statute therefore requires a distinct consideration of a refugee’s dangerousness, separate and apart from the threshold question of whether he has been convicted of a “particularly serious crime.”

**C. The Statute’s Limitation of the Exception For “Particularly Serious Crimes” Applies Only to Capital or Very Grave Crimes.**

The BIA and the court below also erred by giving the phrase “particularly serious crimes” a reading contrary to the import of its words and its understood meaning in the Convention. One must recognize at the outset that this case does not involve any of the crimes that Congress by later enactments deemed “particularly serious crime[s]” *per se*, nor any of those which the Department of Homeland Security by regulation designated particularly serious.<sup>10</sup> Therefore, while Congress has, as to aggravated felonies,

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<sup>10</sup> See 8 U.S.C. § 1231(b)(3)(B)(iv) (“[A]n alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime”); 8 C.F.R. § 208.16(d)(3) (“it shall be presumed that an alien convicted of an aggravated felony has been convicted of a particularly serious crime,” regardless whether the term of imprisonment assessed was 5 years or more). The history of the amendments to section 1231(b)(3)(B) is set out in Pet. Br. 20-25 and will not be repeated here. Suffice it to say that none of those amendments changed the language of subsection (B)(ii) in any respect.

adopted a categorical approach that is itself inimical to how the term “particularly serious crime” is understood in the Convention and therefore in the Refugee Act, Congress did not expressly or by implication purport to apply that approach to non-aggravated felonies of the sort at issue here. Therefore, the task for this Court is no different than it would have been in 1980: it must determine whether the term “particularly serious crime” in the Refugee Act, incorporating and implementing the Convention, embraces such crimes.<sup>11</sup>

Section (B)(ii)’s reference to a refugee’s past crime or crimes is doubly qualified by the words “particularly” and “serious.” Their plain meaning alone underscores that the reference to crimes is a very limited one. 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” likewise means “of or relating to a matter of importance” or “having important or dangerous possible consequences.” *Id.* at 1069. Combining these definitions, the term “particularly serious crime” refers only to crimes that are especially

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<sup>11</sup> Precisely because those later enactments do not by their terms cover such crimes, the canon of *expressio unius est exclusio alterius*—the expression of one thing is the exclusion of another—strongly implies that non-aggravated felonies, consistent with the international law principles Congress meant to implement in the Refugee Act, fall completely outside the scope of “particularly serious crime.” *See* Pet. Br. 18-19. Whether or not those later enactments exclude non-aggravated felonies, however, it cannot be disputed that none of them include such crimes.

distinct within the restrictive category of those that are most important.

Although the full meaning of the three words in isolation is not obvious, the words must be read in context:

In making the threshold determination under *Chevron*, “a reviewing court should not confine itself to examining a particular statutory provision in isolation.” Rather, “[t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. . . . It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”

*Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2534 (2007) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) (citations omitted)).

As explained above, the Act manifests a purpose, through use of the exact words from the Convention, to implement its general rule of non-refoulement, subject only to very limited exceptions.<sup>12</sup> Viewed in

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<sup>12</sup> To avoid frustrating the purpose of the Act, exceptions should generally be strictly construed:

Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative

that context, the import of “particularly serious crime” is clear. As set forth in more detail below, the Convention's use of the term “particularly serious crime,” which the Refugee Act adopted without change, was and is understood to apply only to especially grave offenses. As commentators have noted, the Convention's double qualifier of “particularly” and “serious” makes clear that the provision should apply “only in the most exceptional of circumstances.” Sir Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion* 139, ¶186 (2001). For the same reasons that Congress should be assumed to have adopted the internationally recognized meaning of the phrase “danger to the community” when it took that language from the Convention, *see supra*, pp. 7-9, 15-17, it should also be assumed to have understood and adopted the meaning of the phrase “particularly serious crime.”

**II. UNDER THE REFUGEE CONVENTION,  
CONTRACTING STATES MAY DEPART  
FROM NON-REFOULEMENT ONLY IN  
EXCEPTIONAL AND CAREFULLY  
CIRCUMSCRIBED CASES.**

As shown above, Congress was not merely informed or guided by international law, but implemented the United States’ treaty obligations by

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(continued...)

process and to frustrate the announced will of the people.

*A.H. Philips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) (interpreting exception to general provision of Fair Labor Standards Act).

adopting the relevant provisions wholesale from the Convention. Accordingly, the intended meaning of the Refugee Act's provisions cannot be understood without reference to the obligations under international law that the Convention imposes. Indeed, as the provisions of a treaty to which the United States has bound itself, the Convention's provisions are themselves binding law.<sup>13</sup>

Interpretation of the Convention begins, like that of a statute, with the words used. The Vienna Convention on the Law of Treaties, which is understood to codify customary norms of treaty interpretation, provides, in Article 31, that treaties “shall 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.” 1155 U.N.T.S. 331 (1969). Among the factors to be considered are the subsequent practices of signatory states. *See id.*, Art. 31(3)(b); *see also Air France v. Saks*, 470 U.S. 392, 404 (1985). The Vienna Convention also permits resort to the drafting history,

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<sup>13</sup> While, as this Court has recognized, the oft-cited U.N. Handbook does not bind the Attorney General, the relevant provisions of the Convention, as incorporated into the Protocol, are binding. *See* U.S. CONST. art. VI, cl. 2; Carlos Manuel Vazquez, *The “Self-Executing” Character of the Refugee Protocol’s Nonrefoulement Obligation*, 7 GEO. IMMIGR. L.J. 39, 44-49 (1993). Even without the use of identical language in the statute and the clear statements in the legislative history that Congress intended to conform U.S. law to the Convention, a later enactment of Congress would not be presumed, absent a clear statement, to abrogate the United States’ treaty obligations. *See Trans World Airlines*, 466 U.S. at 252 (refusing to consider a treaty “abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed” (citations omitted)).

including the *travaux préparatoires*, in order to confirm the meaning derived from the text and context. *See* Art. 32.

**A. Non-Refoulement is the Cornerstone of Refugee law, to Which Exceptions are Rarely Made.**

Non-refoulement first crystallized as an international obligation in the Convention. Specifically, Article 33(1) prohibits returning a refugee to a country “where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” 189 U.N.T.S. 150, 176. Non-refoulement is “the cornerstone of international refugee law” and is firmly established in other international human rights treaties as well as the Convention. High Commissioner's Statement, UNHCR, Cairo, March 4, 2007; *see also* Hathaway, *The Rights of Refugees Under International Law* 300 (“Art. 33 of the Refugee Convention is the primary response of the international community to the need of refugees to enter and remain in an asylum state.”).

The Convention’s prohibition is not absolute. Article 33(2) provides several specific exceptions, including the one at issue here. Given the severe consequences of invoking the exception—in this case, “uncontradicted testimony” established that Petitioner is likely to be beaten if not killed upon return to Somalia—Pet. App. 2a-3a—it is meant as a very limited exception applicable only to exceptional cases of criminal behavior. *See* Deborah E. Anker, *Law of Asylum in the United States* 423, 462-63 (3d ed. 1999).

**B. The Convention Requires a Separate and Individualized Assessment of the Refugee's Danger to the Community.**

As explained above, the understanding of the Convention under international law turns on the text as well as on other indicia such as the Convention's history, authoritative commentary on its meaning, and the practices of contracting states. These sources establish that Article 33(2) of the Convention has two distinct prerequisites: the refugee must *both* have committed a "particularly serious crime," *and* constitute a danger to the community.

For reasons already stated, the Convention's language, like that of the Act, embraces two distinct elements, one based on past conduct and the other on the risk of future conduct. The rationale for including both elements in the Article 33(2) inquiry is simply that neither necessarily depends on the other. As one commentator said of the dangerousness prong:

It may be that a person who has been convicted for a major crime or several times for a minor, but nevertheless serious, offence, constitutes, as a habitual criminal, a danger to the community, while a person, who, on the other hand, has been convicted for a capital crime—which he has committed in a state of emotional distress or in self-defence—would not constitute a danger to the community.

Stenberg, *supra*, at 228 (quoting an earlier-expressed UNHCR guideline).

The import of the Convention's words is confirmed by the consistent practices of signatory states. Such

evidence is important under the Vienna Convention, Article 31(3)(b), and also as a matter of U.S. law, *see Saks*, 470 U.S. at 404 (holding that in matters a treaty touches, “the opinions of . . . sister signatories [are] entitled to considerable weight” (internal quotation marks and citation omitted)). With the exception of the United States, tribunals in the signatory nations consistently address the refugee’s potential “danger to the community” as a distinct inquiry under the Convention.

The Canadian Supreme Court, for example, in contrasting Article 33(2) with Article 1F, noted, after finding that a refugee has committed a particularly serious crime, the government must “make the added determination that the person poses a danger to the safety of the public or to the security of the country . . . to justify *refoulement*.” *Pushpanathan v. Minister of Citizenship & Immigration*, [1998] 1 S.C.R. 982, ¶12.

Similarly, in *In re Baias & Minister for Immigration, Local Government & Ethnic Affairs*, (1996) 43 A.L.D. 284, the Australian Administrative Appeals Tribunal reversed an order of deportation entered against a refugee under the “particularly serious crime” exception, “despite the nature of the crimes he has committed,” because it concluded that he did not appear to be a future danger. *See id.* ¶¶45-48, 50. That court in another case explained 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. It therefore read Article 33(2) to require that the refugee’s personal

circumstances “must be considered not only with regard to the way they may ameliorate culpability, but also in so far as they affect the possibility of recidivism and the danger to the community posed by the applicant.” *Id.*; accord, *WAGH v. Minister for Immigration & Multicultural & Indigenous Affairs*, 75 A.L.D. 651, ¶14 (2003).

In the United Kingdom as well, courts conducting an inquiry under Article § 33(2) consider whether an alien is “convicted of a particularly serious crime *and* is a danger to the community.” *R v. Sec’y of State for Home Dep’t*, [2006] EWHC 3513 (Eng. Q.B. 2006) (emphasis added). Moreover, courts have held that under Article 33(2), the government must show that the danger posed by the refugee is “sufficiently particularised” to validate the reasonableness of exclusion. *“NSH” v. Sec’y of State for Home Dep’t*, [1988] Imm. Ar. 389 (Eng. A.C. 1988).

Finally, the courts of Austria have made a separate inquiry into a refugee’s future dangerousness. A published decision of the European Court of Human Rights in *Ahmed v. Austria*, (1997) 24 E.H.R.R. 278, explains that an Austrian court overturned the deportation of a Somali refugee who had committed a particularly serious crime because, in the court’s view, the conviction had “only evidentiary relevance; it could not be deduced therefrom that, *ipso facto*, the applicant constituted a danger to Austrian society within the meaning of Article 33(2).” *Id.* at 281. A subsequent deportation order was upheld once the requisite assessment of future danger was made. *Id.* at 282.

The Convention’s drafting history further indicates the need for a separate dangerousness inquiry under

Article 33(2). As originally proposed, the non-refoulement provision had no exceptions at all. *See Report of the Ad Hoc Committee on Statelessness and Related Problems*, E/1618, E/AC.32/5 (Feb. 17, 1950). So fundamental is non-refoulement to refugee law that although “some question was raised as to the possibility of exceptions to Article [33], the Committee felt strongly that the principle here expressed was fundamental and that it should not be impaired.” *Report of the Ad Hoc Committee on Refugees and Stateless Persons*, Second Session, Geneva, ¶30 (Aug. 14-25, 1950). The full Conference of Plenipotentiaries later added the exception that exists today, *see Draft Convention Relating to the Status of Refugees, France–United Kingdom: Amendment to Article 28* (denying non-refoulement to any refugee “who, having been lawfully convicted . . . of particularly serious crimes or offences, constitutes a danger to the community[.]”), but the French co-sponsor of that amendment emphasized that it and a related national security exception were directed only at making it “possible for States to punish activities carried on in the name of [the asylum] right, but directed against national security *or constituting a danger to the community.*” *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary of Record of Sixteenth Meeting*, A/CONF.2/SR.16 (Nov. 23, 1951) (commonly referred to as the “Travaux Préparatoires”) (emphasis added). In the particular words they chose, the British co-sponsor explained that the “authors of the [Article 33(2) exception] had sought to restrict its scope, so as not to prejudice the efficacy of the article as a whole.” *Id.* These comments, made both by the drafters of the exception

and at the time of the Convention's adoption, make clear that Article 33(2) was intended to have a restrictive application in only extreme cases that presented a real risk of future dangerousness.

The leading commentators on the Convention and refugee law confirm that Article 33(2) requires a distinct inquiry into dangerousness in order to justify refoulement under the Convention. *See* Brief of *Amicus Curiae* UNHCR Part II.B. Grahl-Madsen, whose views on the Convention have been cited by this Court, *see Cardoza-Fonseca*, 480 U.S. 421, and have been regarded as authoritative since he wrote *Commentary on the Refugee Convention 1951* in 1963, unequivocally describes Article 33(2) as requiring a two-part inquiry. *See* Grahl-Madsen, *supra*, ¶¶9-10. The term “danger to the community,” Grahl-Madsen notes, cannot logically refer to past danger but “only to a present or future danger.” *Id.* ¶7. Moreover, addressing the circumstances present here, he explained that “a single crime will in itself not make a man a danger to the community,” and that “[i]t is not the acts that the refugee has committed, which warrant his expulsion, but these acts may serve as an indication as to the behaviour one may expect from him in the future, and thus indirectly justify his expulsion[.]” *Id.* ¶¶7, 10.

Similarly, Nehemiah Robinson, whose analysis was published at the time of the Convention's adoption,<sup>14</sup> makes clear that a refugee “may not be expelled except on grounds of national security and public

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<sup>14</sup> Because it was published in 1953, Robinson's commentary, like Grahl-Madsen's, predates the Refugee Act and thus provides evidence of how the Convention would have been understood when Congress adopted its language.

order.” Robinson, *supra*, at 29. And with respect to dangerousness, Robinson stresses that “[o]rdinarily—except when there are compelling reasons to refuse it—the refugee shall be allowed to submit evidence *to prove that he does not represent a threat to national security or public order*[.]” *Id.* at 30 (emphasis added). This is, of course, evidence that the BIA refuses to consider under section (B)(ii). *See In re N-A-M-*, 24 I&N Dec. at 342; *see also* Pet. App. 57a-58a.

More recently, *amicus curiae* James C. Hathaway has written that in addition to the commission of a particularly serious crime and a final judgment, “[t]hird and most important, the nature of the conviction and other circumstances must justify the conclusion that the refugee in fact constitutes a danger to the community.” *The Rights of Refugees Under International Law* 351 (2005). He stresses that “it is not enough that the crime committed has been ‘serious,’ but it must rather be ‘particularly serious.’ Beyond this, there must also be a determination that the offender ‘constitutes a danger to the community.’” *Id.* at 344; *see also* James C. Hathaway & Colin J. Harvey, *Framing Refugee Protection in the New World Disorder*, 34 CORNELL INT’L L.J. 257, 288 n.173 (2001). *Amicus* Guy S. Goodwin-Gill has also explained that individual determinations of future dangerousness are critical if the international community is to remain true to the intent of Article 33(2). While acknowledging the sparseness of comparative case law, Goodwin-Gill leaves no doubt that “principles of natural justice and due process of law require something more than mere mechanical application” of the “particularly serious crime” exception, *The Refugee in International Law* 237, and that the refugee’s danger to the community

is a fundamental part of that inquiry, *see id.* at 239-40.

Similarly, Lauterpacht and Bethlehem recognize that the commission of a particularly serious crime is only a threshold requirement for the operation of the exception, without which “the question of whether the person concerned constitutes a danger to the community will not arise for consideration.” Lauterpacht & Bethlehem, *supra*, at 139, ¶187. As they explain:

This requirement is not met simply by reason of the fact that the person concerned has been convicted of a particularly serious crime. An additional assessment is called for which will hinge on an appreciation of issues of fact such as the nature and circumstances of the particularly serious crime for which the individual was convicted, when the crime in question was committed, *evidence of recidivism or likely recidivism, etc.*

*Id.* at 140, ¶191 (emphasis added). There can be no doubt under the Convention that a refugee’s “danger to the community” is not conclusively presumed merely from the commission of a “particularly serious crime.”

**C. The Convention’s Use of the Unique Phrase “Particularly Serious Crime” Embraces Only Especially Grave Crimes and Extreme Circumstances.**

Apart from independent consideration of dangerousness, the Convention is also understood to use the phrase “particularly serious crime”

restrictively to encompass only exceptional crimes. It is intended to be reserved for only the most extreme circumstances. As the *UN Handbook* explains with respect to the “serious non-political crimes” exception, to be serious “a crime must be 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*, ¶155 (Jan. 1, 1992) (emphasis added). The additional qualifier “particularly” obviously raises the bar even higher for application of Article 33(2). As leading commentators have explained:

[O]nly convictions for crimes of a particularly serious nature that will come within the purview of the exception. This 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[.]

Lauterpacht & Bethlehem, *supra*, at 139, ¶186; *see also* Brief of *Amicus Curiae* UNHCR Part II.A.

Thus commentators have recognized that “particularly serious crime” in the Convention is understood to embrace only very grave crimes. The term mandates not a categorical approach but a particular consideration of circumstances in individual cases. Grahl-Madsen's Commentary, for example, embraces the view of the United Nations High Commissioner for Refugees that “it is clear that the expression ‘particularly serious’ was intended to

narrow the meaning of the word ‘crime.’ Although the decision whether the crime is a particularly serious one would depend on the merits of the case, the offence must normally be a capital crime (murder, arson, rape, armed robbery, etc.)” Grahl-Madsen, *supra*, ¶9. Similarly, *amicus curiae* Goodwin-Gill has written that “as a matter of international law, the interpretation of [Article 33(2)] ought necessarily involve an assessment of *all the circumstances*, including the nature of the offense, the background to its commission, the behaviour of the individual, and the actual terms of any sentence imposed.” *The Refugee in International Law*, at 239-40 (emphasis added). Any “*a priori* determinations of seriousness by way of legislative labeling or other measures substituting executive determinations for judicial (and judicious) assessments are inconsistent with the international standard which is required to be applied, and with the humanitarian intent of the Convention.” *Id.* at 240.

\* \* \*

The requirements of an individualized inquiry into dangerousness and careful consideration of a crime’s particularly serious nature flow not simply from the exception’s language, but from the purpose of the non-refoulement provisions as a whole. Signatory states should be wary of adjudicatory practices that “disregard context and circumstances, and therefore the principle of *individual* assessment” because ultimately “what is at issue here is action by the State in manifest disregard of what is recognized as serious danger (persecution) to the life or liberty of a refugee.” *Id.* (emphasis added). The risk Petitioner faces if he returns to Somalia is undisputed. The

“danger” he poses “to the community of the United States,” as well as the seriousness of his particular crime, is unaddressed. The Convention and the Refugee Act require more.

### CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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