No. 18-1432

IN THE

Supreme Court of the United States

NIDAL KHALID NASRALLAH,

Petitioner,

v.

WILLIAM P. BARR, ATTORNEY GENERAL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR FORMER EXECUTIVE OFFICE OF IMMIGRATION REVIEW JUDGES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are thirty-three former immigration judges (IJs) and members of the Board of Immigration Appeals (BIA or Board). A complete list of signatories can be found in the Appendix of *Amici Curiae*.

Amici have dedicated their careers to the immigration court system and to upholding the immigration laws of the United States of America. Each is intimately familiar with the immigration court system and its procedures. Together they have a distinct interest in ensuring that claims duly asserted in immigration cases are afforded the level of Article III appellate review required by governing law.

The United Nations Convention Against Torture (CAT or the Convention), brought into United States domestic law as of October 21, 1998, provides a person an unconditional right not to be returned to a state if substantial grounds exist for finding that the person will likely be subject to torture there upon return. Based on their experience with immigration law, *amici* are deeply concerned that if CAT claims are treated no differently than traditional "orders of removal," when petitions for review are filed in courts of appeals, evaluation of decisions on CAT claims, which can carry life-or-death consequences, will escape meaningful review by Article III courts.

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1 All parties have consented to the filing of this brief. *Amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

CAT grants persons an absolute right not to be returned to a state if substantial grounds exist for finding that the person will likely be subject to torture there upon return. The Government has taken the position that the courts of appeals should not be able to review the finding underlying the grant or denial of CAT claims when a consolidated petition for review is presented. The Court should reject that approach.

First, affording judicial review of the basis for the finding underlying the grant or denial in a CAT claim respects the unconditional nature of CAT's guaranty against torture. Second, in adopting domestic legislation to implement CAT in 1998, the provisions Congress enacted do not limit the scope of judicial review over CAT claims, and thus allow the review of factual findings under a substantial evidence standard. Third, allowing review for CAT claims in an Article III court, as Congress intended, provides an essential structural backup to detect and correct errors that agency adjudicators may make while handling a torrent of more routine immigration matters. Where a petition for review presents a CAT claim, almost by definition looking at correction of error is a matter of life and death for the applicant.

When CAT came into force, it was a watershed moment in international law. Article 3 of the treaty provides that a state shall not return a person to another state if there are "substantial grounds" for believing that he would be in danger of being subjected to torture there. Although prior international agreements had recognized a similar principle against returning persons fleeing persecution to the country

they left, those agreements always included exceptions that made the protection conditional at best. CAT, by contrast, unequivocally provides that persons have a right not to be returned to a country where it is likely that they will be in danger of torture. That provision makes CAT claims unique. Unlike other protections in immigration law, persons cannot lose CAT protection by way of a criminal conviction or other circumstances.

The domestic law of the United States fully implements the unconditional guaranty in Article 3 of CAT. The 1998 implementing legislation for the Convention—enacted after the 1996 statutes limiting judicial review of "final order[s] of removal" to expedite the removals of criminal aliens—makes it the policy of the United States not to return "any person" to a country where there are substantial grounds for believing the person would be in danger of being subjected to torture. Foreign Affairs Reform and Restructuring Act of 1998 § 2242(a); 8 U.S.C. § 1231 Note. And another statute, the Real ID Act of 2005, contains adjacent provisions addressing judicial review of CAT claims and, separately, orders of removal, further underscoring the distinction between CAT claims and traditional orders of removal. *See* 8 U.S.C. § 1252(a)(4)–(5).

As *amici* know from experience, despite the special status of CAT claims, the time IJs and BIA members can devote to these claims is necessarily limited. Indeed, there is currently a backlog of over a million immigration cases of all types in the administrative adjudication system. That creates its own pressure to resolve matters, but the Department of Justice has also announced that IJs must meet a

quota of 700 cases per year to receive a satisfactory rating. Similarly, BIA members also must generally complete cases within tight timeframes. Review by an Article III court generally improves outcomes and builds confidence in a system of adjudication, but it takes on added meaning, and value, where the adjudications at issue may contain significant defects in fact-finding, or provide little, if any, reasoning. That is the situation here. There have been numerous important examples over the years of federal appellate decisions sharply criticizing IJs or the BIA for missing or ignoring facts central to disposition of a CAT claim. In light of the immense resource constraints of immigration courts, which *amici* experienced firsthand, it is crucial to have Article III court review of the underlying basis for a grant or denial of a CAT claim.

ARGUMENT

I. THE CONVENTION AGAINST TORTURE IS UNIQUE BECAUSE PERSONS IN SIGNATORY STATES HAVE AN ABSOLUTE, UNCONDITIONAL RIGHT NOT TO BE RETURNED TO A STATE WHERE THEY ARE LIKELY TO BE TORTURED.

Before CAT, international agreements contained announced principles obligating nations not to return persons to countries where they would be subject to persecution. Those obligations, however, were subject to exceptions. They could give way to concerns such as "public order" or "national security." CAT changed that. It imposes an "absolute," "unconditional" obligation, not subject to any exceptions, to protect applicants against return to countries where they will face torture. The domestic implementing legislation for CAT fully implements that treaty obligation by providing that "any person" shall not be returned to a

country if there are substantial grounds for believing the person would be tortured.

A. Unlike Prior International Agreements, The Convention Against Torture Creates For Persons In Signatory States An Absolute, Unconditional Right Not To Be Returned To A State Where They Are Likely To Be Tortured.

Article 3 of the 1933 Convention Relating to the International Status of Refugees expressed the first international commitment to "non-refoulement," the principle that individuals should not to be returned to countries where they would face persecution.[2] That 1933 convention required parties not to return refugees "across the frontiers of their country of origin," but it contained a crucial caveat: That protection gave way whenever "dictated by reasons of national security or public order." Convention Relating to the International Status of Refugees art. 3, Oct. 28, 1933, 159 L.N.T.S. 3663.

Similarly, the 1951 Convention Relating to the Status of Refugees prohibited returning a refugee "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 Relating to the Status of Refugees art. 33, July 28, 1951, 19 U.S.T. 6223,

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[2] *See* David Weissbrodt & Isabel Hortreiter, *The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties*, 5 BUFF. HUM. RTS. L. REV. 1, 2 (1999) [hereinafter Weissbrodt & Hortreiter].

189 U.N.T.S. 137. That 1951 convention contained a carve-out allowing a refugee to be returned if "there [we]re reasonable grounds for regarding [him] 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." *Id.*

The Convention Against Torture broke from the path marked by those 1933 and 1951 conventions. CAT absolutely prohibits returning persons to a state where they are likely be tortured. Article 2 of CAT provides that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2, Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85. And Article 3 provides that "[n]o [s]tate" shall return a person to a state if there are "substantial grounds for believing that he would be in danger of being subjected to torture" in that nation. *Id.* art. 3. This Article 3 protection is "unconditional and available to any person facing torture." *In re H-M-V-*, 22 I. & N. Dec. 256, 268 (BIA 1998) (citing J.H. Burgers & H. Danelius, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK 125 (1988) [hereinafter Burgers & Danelius]).

Accordingly, the Committee Against Torture, the supranational body which implements CAT, has described Article 3's protection as "absolute." Committee Against Torture, General Comment No. 4

(2017) on the Implementation of Article 3 of the Convention in the Context of Article 22, ¶¶ 8–9, U.N. Doc CAT/C/GC/4 (Sept. 4, 2018). In that regard, Article 3 "contains no exclusionary grounds," meaning it was "intended to provide an absolute prohibition" on returning a person to a country where there is a substantial risk of torture.[3]

The treaty's drafting history confirms the unconditional nature of the Article 3 guaranty. The drafters used the non-refoulement language of the 1951 Convention, cited above, as the model for Article 3, but the drafters did not import the old serious-criminal-conviction exception into CAT. Weissbrodt & Hortreiter, *supra*, at 16; Burgers & Danelius, *supra*, at 125.

B. Congress's Implementation Of The Convention Confirms That Article 3's Protections Are Absolute.

The contemporaneous pronouncements from Congress and from the Executive Branch concerning CAT confirm that the United States has committed itself, including in domestic law, to the unconditional guaranty embodied in Article 3 of CAT.

The United States signed the Convention on April 18, 1988. When President Reagan submitted the Convention to the Senate for advice and consent on May 20, 1988, he attached several proposed reservations,

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[3] Lori A. Nessel, *"Willful Blindness" to Gender-Based Violence Abroad: United States' Implementation of Article Three of the United Nations Convention Against Torture*, 89 MINN. L. REV. 71, 133 (2004) (citing Deborah E. Anker, LAW OF ASYLUM IN THE UNITED STATES 466 n.11 (3d ed. 1999)); *see also* Weissbrodt & Hortreiter, *supra*, at 16 (CAT protections "guaranteed in absolute terms").

understandings, and declarations (RUDs). One proposed reservation read: "The United States does not consider itself bound by Article 3 insofar as it conflicts with the obligations of the United States toward States not party to the Convention under bilateral extradition treaties with such States." S. EXEC. REP. NO. 101-30, at 17 (1990). President George H.W. Bush, however, subsequently withdrew that proposed reservation. His administration explained in a letter to the Chairman of the Senate Foreign Relations Committee that "[u]pon further reflection, this provision was deemed unnecessary because it could be construed to indicate that the U.S. was retaining, insofar as it relates to nonparties, the juridical right to send a person back to a country where that person would be tortured. Such was never the intent." *Id.* at 37.

Similarly, State Department Legal Adviser Abraham Sofaer testified before Congress in 1990 that "we have deleted our former reservation to the obligation not to extradite individuals if we believe they would be tortured upon their return to the requesting State. The United States supports the obligation of 'non-refoulement,' and we never intended to suggest by the proposed reservation that we wished to retain the right to send a person back to a country where that person would be tortured."[4]

The reservation was not included in the resolution of ratification passed by the Senate on October 27,

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[4] *Convention Against Torture: Hearing Before the S. Committee on Foreign Relations*, 101st Cong. 11 (1990) (statement of Abraham D. Sofaer, Legal Adviser, U.S. Dep't of State).

1990, thereby confirming the United States' unqualified support for Article 3. *See* S. TREATY DOC. NO. 100-20.

The legislation implementing CAT further confirmed this nation's commitment to Article 3's protections. CAT was implemented as part of the Foreign Affairs Reform and Restructuring Act (FARRA) of 1998. Pub. L. No. 105–277, 122 Stat. 2681. That statute declared: "It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of *any* person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States." 8 U.S.C. § 1231 Note FARRA § 2242(a) (emphasis added). Thus, "any person," even a person who would otherwise be removable (such as because of a criminal conviction), enjoys the protections of Article 3—period. Indeed, as the Court has recognized, "the Attorney General has no discretion to deny relief to a noncitizen who establishes his [CAT] eligibility." *Moncrieffe v. Holder*, 569 U.S. 184, 187 n.1 (2013).

II. U.S. LAW RECOGNIZES THAT CAT CLAIMS ARE DISTINCT FROM OTHER ASYLUM CLAIMS.

Looking beyond the implementing legislation for CAT, other provisions of the U.S. Code confirm the understanding that the protections provided by CAT are unique and distinct from other forms of asylum relief. In particular, when Congress passed the Real ID Act of 2005, Pub. L. No. 109–13, 119 Stat. 302, it effectively reaffirmed that CAT claims are special and a distinct category of relief. The statute contains adjoining provisions that address judicial review of CAT

claims, on the one hand, and "an order of removal," on the other:

> (4) Claims under the United Nations Convention
>
> . . . [A] petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture . . .
>
> (5) Exclusive means of review
>
> . . . [A] petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal . . . .

8 U.S.C. § 1252(a)(4)–(5).

As the Court has reiterated, "one of the most basic interpretive canons [is] that '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" *Corley v. United States*, 556 U.S. 303, 314 (2009) (second alteration in original) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)). And "the canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013); *see also Yates v. United States*, 135 S. Ct. 1074, 1077 (2015) (plurality opinion) (statute "should not be read to render superfluous an entire provision passed in proximity as part of the same Act"). Additionally, "Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another." *Dep't*

of Homeland Sec. v. MacLean, 135 S. Ct. 913, 919 (2015).

Here, only Petitioner's reading of 8 U.S.C. § 1252(a)(2)(C) adheres to those interpretive principles. By contrast, the Government would treat a decision adjudicating a claim for CAT relief as equivalent to an "order of removal," imposing on the former the limitation on the scope of judicial review that applies to the latter. That approach impermissibly reads Section 1252(a)(4)—which states *separately* the exclusive procedure for review of CAT claims—out of the Real ID Act.

The Government suggested in opposing certiorari (Br. in Opp. 12, 14) that because Section 2242(d) of FARRA provides for judicial review of CAT claims only "as part of the review of a final order of removal," any constraints on judicial review of final orders of removal necessarily apply to a CAT claim. *See* Pub. L. No. 105–277, § 2242(d), 112 Stat. 2681-822 (codified at 8 U.S.C. § 1231 Note). That contention is unconvincing because it does not account for the statutory structure. A CAT claim can only be presented in a petition for review if the applicant is also in jeopardy under a final order of removal. *See* 8 U.S.C. § 1252; *id.* § 1252(b)(9). That is, if an applicant does not face removal, that applicant would have no reason to seek immigration relief and no need to pursue the special CAT remedy. Although a CAT claim could only be presented as a procedural matter on a petition for review with a challenge to a final order of removal, however, that does not mean a CAT claim must be reviewed as though it were subject to the removal provisions of the Immigration and Nationality Act. As discussed, *supra* at 8–9, CAT claims and orders of removal arise out of

distinct statutory schemes, and review is provided for separately. Different claims encompassed in a single petition for review from a BIA decision get reviewed according to the scheme that governs each claim. Simply put, *when* a category of relief can be raised on appeal is not the same as *what* review that claim of relief receives.

Preserving the distinction between CAT claims and final orders of removal would likewise properly "assume that Congress is aware of existing law when it passes legislation." *Hall v. United States*, 566 U.S. 506, 516 (2012) (quoting *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990)). When Congress enacted 8 U.S.C. § 1252(a)(4), Congress necessarily knew of Section 2242(d) of FARRA. Knowing that, Congress chose to create separate provisions governing CAT claims and orders of removal, signifying that they are separate determinations even though they must be presented in a single petition for review as a procedural matter.

III. APPLYING THE PRESUMPTION OF JUDICIAL REVIEW IS ESPECIALLY WARRANTED HERE BECAUSE OF THE STATUTORY CHRONOLOGY AND THE PRACTICAL NEED TO CORRECT ERRORS FROM OVERBURDENED IMMIGRATION COURTS.

Amici are well aware of the burden facing immigration courts today. There is a growing backlog of cases, and the Justice Department has placed strict quotas and production deadlines on IJs and the BIA. Regardless of case volumes, appellate review is a significant aid to producing consistent results, enhancing both actual fairness and the perception of fairness. Because the administrative adjudication system has a

high volume of cases and is facing supervisory pressure to decide matters quickly, appellate review has become more valuable and significant to ensuring correct outcomes. Even before the imposition of these new judicial productivity requirements, there were many cases in which federal appellate courts sharply criticized BIA or IJ decisions that failed to consider fundamental facts, including in cases involving CAT claims. *See, e.g.*, *infra*, at Section III.A. As agency adjudicators are pressed to issue ever faster decisions in ever more cases, the likelihood of error increases.

The instant case presents a telling example of such an error and shows why judicial review is important. The IJ, closest to the evidence, found sufficient proof that Petitioner would be tortured if removed to Lebanon. The BIA disagreed, and, according to the Government, judicial review of that agency conclusion is precluded. The dispute over that central finding is a matter of life and death. Allowing Article III court review of the basis for denial of CAT relief, even if such review verifies only that the agency determination is supported by substantial evidence, properly respects both the structure Congress enacted and the judicial system's obligation to reach the right answer in every case.

A. Article III Courts Are Fully Equipped To Identify Factual Errors In Agency Adjudication Of CAT Claims And To Remand For Further Proceedings When Necessary.

Construing the statute to enable the federal appellate courts, under the highly deferential

substantial evidence standard, to set aside agency rejection of CAT claims would hardly assign unfamiliar responsibilities to Article III judges. *Cf. INS v. Elias-Zacarias*, 502 U.S. 478, 481 n.1, 483–84 (1992). To the contrary, there are many examples of appellate court decisions addressing significant factual errors in immigration proceedings. Many federal appellate decisions do not involve questions of law but instead consider whether factual determinations have proper record support or were properly weighed. *See, e.g.*, *Makwana v. Attorney Gen. of U.S.*, 611 F. App'x 58, 61 (3d Cir. 2015) (remanding case because factual error by BIA regarding date visa was revoked); *Oliva v. Lynch*, 807 F.3d 53, 56 (4th Cir. 2015) (BIA "failed to adequately address the record evidence"); *Ssali v. Gonzales*, 424 F.3d 556, 563 (7th Cir. 2005) (remanding case where a "very significant mistake suggests that the Board was not aware of the most basic facts of [petitioner's] case and deprives its ruling of a rational basis"); *Niam v. Ashcroft*, 354 F.3d 652, 656 (7th Cir. 2004) ("[T]he remainder of the immigration judge's opinion is riven with errors as well, . . . and these were not noticed by the [B]oard . . . .").

And some of those decisions have addressed factual errors in the disposition of CAT claims. *See, e.g.*, *Mandebvu v. Holder*, 755 F.3d 417, 433 (6th Cir. 2014) (CAT claim remanded where "neither the IJ nor the BIA" discussed country conditions); *Mostafa v. Ashcroft*, 395 F.3d 622, 625 (6th Cir. 2005) (similar). *Kang v. Attorney Gen. of U.S.*, 611 F.3d 157 (3d Cir. 2010) is a particularly stark example. There, the Third Circuit concluded that "the BIA appear[ed] to have totally ignored the most forceful record evidence," where the BIA determined that the applicant's CAT claim arose

from concerns about "mere prison conditions" he would face in China, even though his evidence described "Chinese officials beat[ing individuals], pour[ing] cold water over them, whipp[ing] them, put[ting] plastic bags over their heads to suffocate them, [hanging] them in the air, shin[ing] bright lights into their eyes, depriv[ing] them of sleep, and shock[ing] them with electrical current." *Id.* at 166.

As these cases illustrate, Article III review can be critical to ensuring that, in the disposition of a CAT claim, "the minimum standards of legal justice" are satisfied. *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005). That is particularly true where, as in the instant case, the IJ and the BIA disagreed on the fundamental basis for the CAT claim; such a claim "may have life or death consequences, and so the costs of error are very high." *Albathani v. INS*, 318 F.3d 365, 378 (1st Cir. 2003). Indeed, in the instant case, it was the IJ that undertook the most careful review of the factual basis for CAT relief (Petitioner's fear of harm in Lebanon "at the hands of" the Hezbollah terrorist organization), and it was the BIA that—without providing any indication it was reviewing a factual question—embraced the blanket conclusion that the record Petitioner compiled was inadequate. It is well within the competence of an Article III court to recognize that the BIA's assessment of the record lacks substantial support or, at a minimum, was inadequately explained, and to require further agency proceedings to correct the error.

Preserving Article III review, and enabling continued judicial correction of agency errors in deciding CAT claims, is also proper in light of "the strong presumption that Congress intends judicial review of

administrative action." *Smith v. Berryhill*, 139 S. Ct. 1765, 1776 (2019) (quoting *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986)). "When a statute is 'reasonably susceptible to divergent interpretation, [the Court] adopt[s] the reading that accords with traditional understandings and basic principles: that executive determinations generally are subject to judicial review.'" *Kucana v. Holder*, 558 U.S. 233, 251 (2010) (quoting *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995)). The Court has "consistently applied that interpretive guide to legislation regarding immigration, and particularly to questions concerning the preservation of federal-court jurisdiction." *Id.* (collecting cases); *see also Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) ("[S]ince the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used."). Here, only Petitioner's interpretation provides for any judicial review of CAT claims.

Applying the presumption of judicial review is particularly suitable here because of the timing of the CAT's ratification into federal law. In amending the INA in 1996 to streamline judicial review of claims and expedite certain removals, Congress enacted the jurisdictional bar currently contained in § 1252(a)(2)(C). *See* Pub. L. No. 104–208, § 306, 110 Stat. 3009-607 to 3009-608. It was not until two years later, however, that the legislation implementing CAT was passed, opening up deferral of removal to persons with criminal convictions. *See* Pub. L. No. 105–277, § 2242, 122 Stat. 2681. Given that the jurisdictional bar in Section 1252(a)(2)(C) predated the availability of

CAT claims under federal law, the 1996 limitation on the scope of judicial review does not apply to a broad form of relief first made available in 1998 and categorically different from previous defenses to removal.[5]

Interpreting the statute to permit judicial review over agency factual determinations in the CAT context also avoids "[s]eparation-of-powers concerns" that caution the Court against "remov[ing] cases from the Judiciary's domain" absent clear Congressional intent to do so. *Kucana*, 558 U.S. at 237. For example, this Court has understood Article III as "barring congressional attempts 'to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating' constitutional courts and thereby prevent[ing] 'the encroachment or aggrandizement of one branch at the expense of the other.'" *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850 (1986) (alteration in original) (citation omitted) (first quoting *Nat'l Ins. Co. v. Tidewater Co.*, 337 U.S. 582, 644 (1949) (Vinson, C.J., dissenting); then *quoting Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (per curiam)). Accordingly, in the bankruptcy context this Court has held that "Article I adjudicators" may decide claims before them without "offend[ing] the separation of powers" only "so long as Article III courts retain supervisory authority over the process." *Wellness Int'l Network, Ltd. v. Sharif*, 135 S.

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[5] The *Charming Betsy* canon provides further support for judicial review of CAT claims. It states that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804). Under this principle, courts "should not lightly presume that Congress has shut off avenues of judicial review that ensure this country's compliance with its obligations under" the Convention. *Wanjiru v. Holder*, 705 F.3d 258, 265 (7th Cir. 2013).

Ct. 1932, 1944 (2015). A similar separation-of-powers concern weighs against the Government's construction of immigration law here, which would give the Executive Branch unreviewable authority to decide the factual predicates for the CAT relief made available by Congress—which, as this Court has recognized, has plenary authority over immigration policy. *See, e.g.*, *Harisiades v. Shaughnessy*, 342 U.S. 580, 587 & n.11 (1952).

B. The Immigration Courts Are Under Pressure To Adjudicate Cases Speedily, Which Inevitably Leads To Error.

The practical importance of preserving Article III review of the factual basis for agency adjudications of CAT claims becomes even clearer when the docket pressures on agency adjudicators are taken into account.

Immigration courts face a national backlog of over one million cases.[6] That calculates to an average backlog of 2,500 cases for each of the approximately 400 immigration judges in the country.[7] Immigration judges face a daunting challenge because of these caseloads. One judge recently described her experience as "nightmarish," explaining that to tackle her well-above the mathematical average "pending caseload [of] about 4,000 cases" she had only "about half a

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[6] *Immigration Court's Active Backlog Surpasses One Million*, The Transactional Records Access Clearinghouse, https://trac.syr.edu/immigration/reports/574/ (last visited Dec. 13, 2019).

[7] United States Department of Justice, Executive Office for Immigration Review: About the Office, https://www.justice.gov/eoir/office-of-the-chief-immigration-judge (last updated Oct. 24, 2019).

judicial law clerk and less than one full-time legal assistant to help [her]."[8] Further, the Justice Department announced that, as of October 2018 IJs are required to dispose of 700 cases per year to receive a satisfactory rating.[9] Unsurprisingly, IJs have "felt the impact of the case quotas on our ability to render correct and well-reasoned decisions."[10] Lack of resources to create more IJ or law clerk positions only compounds the problem. Perhaps as a result of these dynamics, the percentage of IJ decisions appealed has jumped from 11% in fiscal year 2017 to 17% in fiscal year 2018.[11]

The BIA is also under pressure to adjudicate matters quickly. On October 1, 2019, the Director of the Executive Office for Immigration Review outlined a number of new procedures and requirements for the

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[8] *Amid "nightmarish" case backlog, experts call for independent immigration courts*, A.B.A. News (Aug. 9, 2019), https://www.americanbar.org/news/abanews/aba-news-archives/2019/08/amid-_nightmarish-case-backlog--experts-call-for-independent-imm/.

[9] Laura Meckler, *New Quotas for Immigration Judges as Trump Administration Seeks Faster Deportations*, Wall St. J. (Apr. 2, 2018), https://www.wsj.com/articles/immigration-judges-face-new-quotas-in-bid-to-speed-deportations-1522696158; *see also* EOIR Performance Plan, https://cdn.cnn.com/cnn/2018/images/04/02/immigration-judges-memo.pdf.

[10] Ilyce Shugall, *Why I Resigned as an Immigration Judge*, L.A. Times (Aug. 4, 2019), https://www.latimes.com/opinion/story/2019-08-03/immigration-court-judge-asylum-trump-policies.

[11] Suzanne Monyak, *BIA Pressed To Speed Cases, Raising Due Process Concerns*, Law360 (Oct. 2, 2019), https://www.law360.com/articles/1205349/bia-pressed-to-speed-cases-raising-due-process-concerns.

BIA to ensure cases are "adjudicated promptly."[12] At the outset of an appeal, each case is now referred for screening to assess its vulnerability to summary dismissal.[13] The Director also expressed a clear preference for single-member review of cases, stating that appeals "should" be determined by one member "unless" the member determines it is appropriate for a three-member panel.[14] Moreover, the Director imposed additional deadlines, generally requiring that single-member cases cannot be pending for more than 230 days and three-member cases more than 335 days after the filing of the notice of appeal.[15]

Given the volume of cases pending, those new constraints will only make it more difficult for the BIA to conduct the independent and thorough analysis of IJ decisions required by law. Referring *all* cases to review for summary dismissal means that every case is examined with an eye towards dismissal before the appellant has even had a chance to file a brief. The new deadlines also create additional incentives "for issuing more perfunctory opinions."[16] Moreover, favoring single-member review raises concerns because "single member opinions frequently fail to

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12 Memorandum from James R. McHenry, III, Oct. 1, 2019, available at https://www.law360.com/articles/1205349/attachments/0.

13 *Id.* at 2–3.

14 *Id.* at 4.

15 *Id.* at 4–5.

16 Arnold & Porter, *2019 Update Report: Reforming the Immigration System* UD 3–8 (Mar. 2019), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_2.pdf.

adequately address the parties' arguments or, when they do, are often inconsistent with one another."[17]

In light of these new production requirements, BIA members also may fall back on another tool to quickly resolve cases—Affirmance Without Opinion ("AWO"). As recently as 2011, the percentage of cases resolved via AWO was low—2 to 5%.[18] A new rule, effective as of September 2019, now provides that when a Board member issues an AWO, that decision is "presumed to have considered all of the parties' relevant issues and claims of error on appeal regardless of the type of the BIA's decision."[19] Thus, BIA can now issue a two-sentence opinion endorsing the IJ and rely on a regulatory presumption of regularity, regardless of the strength of the record.

In *amici*'s respectful view, the combination of those docket and deadline pressures further heightens the risk that IJ errors will go unnoticed and uncorrected. Social science research confirms that "[t]he accuracy of human judgments decreases under time pressure."[20] And the pressures on the BIA already have demonstrated the prospect of producing

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17 *Id.*

18 *Id.* at 3–7.

19 Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents, 84 Fed. Reg. 31463 (July 2, 2019) (to be codified at 8 C.F.R. pts. 1003, 1292).

20 Anne Edland & Ola Svenson, *Judgment and Decision Making Under Time Pressure Studies and Findings*, in TIME PRESSURE AND STRESS IN HUMAN JUDGMENT AND DECISION MAKING 29, 35–36 (Ola Svenson & A. John Maule eds., 1993); *see also* Eberhard Feess & Roee Sarel, *Judicial Effort and the Appeals System: Theory and Experiment*, 47 J. LEGAL STUD. 269,

significantly flawed results. *See, e.g.*, *Berishaj v. Ashcroft*, 378 F.3d 314, 331 (3d Cir. 2004) (concluding that it was "an embarrassment on the Agency on multiple levels" where BIA's summary affirmance of a stale decision "shirk[ed] its role and duty of ensuring that the final agency determination in an immigration case is reasonably sound and reasonably current"), *abrogated on other grounds by Nbaye v. Att'y Gen.*, 665 F.3d 57 (3d Cir. 2011). In *Daoud v. Gonzales*, 191 F. App'x 782 (10th Cir. 2006), for example, the Tenth Circuit held that the BIA erred when it summarily affirmed the IJ's denial of CAT relief where there was "unrefuted evidence" that certain individuals like the applicant were targeted specifically by terrorists and the BIA failed to analyze such evidence against the IJ's speculative reasoning. *Id.* at 785–86.

270–71 (2018) (concluding from laboratory experiment that penalizing reversals prompts greater trial-level effort compared with systems with no appeals and systems where reversals are not penalized).

CONCLUSION

For the reasons stated above and in Petitioner's briefs, the Court should reverse the Eleventh Circuit's judgment.

Respectfully submitted,

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December 16, 2019

APPENDIX OF *AMICI CURIAE*

1. **The Honorable Steven Abrams** served as an Immigration Judge at the New York, Varick Street, and Queens Wackenhut Immigration Courts in New York City from 1997 until 2013.

2. **The Honorable Terry A. Bain** served as an Immigration Judge in New York from 1994 until 2019.

3. **The Honorable Sarah Burr** served as an Immigration Judge, and then as Assistant Chief Immigration Judge, in New York from 1994 until 2012.

4. **The Honorable Esmerelda Cabrera** served as an Immigration Judge from 1994 until 2005 in the New York, Newark, and Elizabeth, New Jersey Immigration Courts.

5. **The Honorable Teofilo Chapa** served as an Immigration Judge in Miami, Florida from 1995 until 2018.

6. **The Honorable Jeffrey S. Chase** served as an Immigration Judge in New York City from 1995 until 2007

7. **The Honorable George T. Chew** served as an Immigration Judge in New York from 1995 until 2017.

8. **The Honorable Joan V. Churchill** served as an Immigration Judge from 1980 until 2005 in Washington DC-Arlington VA, including 5

terms as a Temporary Member of the Board of Immigration Appeals

9. **The Honorable Cecelia M. Espenoza** served as a Member of the BIA from 2000 until 2003.

10. **The Honorable Noel Ferris** served as an Immigration Judge in New York from 1994 until 2013. Previously, she served as Chief of the Immigration Unit at the U.S. Attorney's Office for the Southern District of New York from 1987 until 1990.

11. **The Honorable James R. Fujimoto** served as an Immigration Judge in Chicago from 1990 until 2019.

12. **The Honorable Jennie L. Giambastiani** served as an Immigration Judge in Chicago from 2002 until 2019.

13. **The Honorable John F. Gossart, Jr.** served as an Immigration Judge in Baltimore from 1982 until 2013.

14. **The Honorable Miriam Hayward** served as an Immigration Judge in San Francisco from 1997 until 2018.

15. **The Honorable Rebecca Jamil** served as an Immigration Judge in San Francisco from 2016 until 2018.

16. **The Honorable William P. Joyce** served as an Immigration Judge in Boston, Massachusetts from 1996 until 2002.

17. **The Honorable Carol King** served as an Immigration Judge in San Francisco from 1995 until 2017 and was a temporary member of the Board for six months between 2010 and 2011.

18. **The Honorable Elizabeth A. Lamb** served as an Immigration Judge in New York from 1995 until 2018.

19. **The Honorable Margaret McManus** served as an Immigration Judge in New York from 1991 until 2018.

20. **The Honorable Charles Pazar** served as an Immigration Judge in Memphis, Tennessee, from 1998 until 2017.

21. **The Honorable George Proctor** served as an Immigration Judge in Los Angeles and San Francisco from 2003 until 2008. From 1979 to 1988, he was U.S. Attorney for the Eastern District of Arkansas.

22. **The Honorable Laura Ramirez** served as an Immigration Judge in San Francisco from 1997 until 2018.

23. **The Honorable John W. Richardson** served as an Immigration Judge in Phoenix, Arizona from 1990 until 2018.

24. **The Honorable Lory D. Rosenberg** served on the BIA from 1995 until 2002.

25. **The Honorable Susan Roy** served as an Immigration Judge from 2008 until 2010 in Newark.

26. **The Honorable Paul W. Schmidt** served as an Immigration Judge from 2003 until 2016 in Arlington, VA. He previously served as Chairman of the BIA from 1995 until 2001, and as a BIA Member from 2001 until 2003. He served as Deputy General Counsel of the former INS from 1978 until 1987, serving as Acting General Counsel from 1979 until 1981 and 1986 until 1987.

27. **The Honorable Ilyce S. Shugall** served as an Immigration Judge in San Francisco from 2017 until 2019.

28. **The Honorable Denise Slavin** served as an Immigration Judge in the Miami, Krome Detention Center, and Baltimore Immigration Courts from 1995 until 2019.

29. **The Honorable Andrea Hawkins Sloan** served as an Immigration Judge in Portland from 2010 until 2017.

30. **The Honorable Robert D. Vinikoor** served as an Immigration Judge in Chicago from 1984 until 2017.

31. **The Honorable Polly A. Webber** served as an Immigration Judge in San Francisco from 1995 to 2016.

32. **The Honorable Robert D. Weisel** served as an Immigration Judge, and then as an Assistant Chief Immigration Judge, in New York from 1989 until 2016.

33. **The Honorable Bertha A. Zuniga** served as an Immigration Judge, in El Paso and in San Antonio, from 1995 until 2015