No. 19-1212

IN THE
Supreme Court of the United States

DAVID PEKOSKE, ACTING SECRETARY OF HOMELAND SECURITY, ET AL.,
Petitioners,

v.

INNOVATION LAW LAB, ET AL.,
Respondents.

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

BRIEF OF IMMIGRATION AND INTERNATIONAL LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

KELSEY L. STIMPLE
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654
(312) 222-9350

ZACHARY C. SCHAUF
Counsel of Record
NOAH B. BOKAT-LINDELL
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
zschauf@jenner.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

INTERESTS OF *AMICI*[1]

Amici curiae are 73 scholars of immigration and international law. The names of *Amici* are listed in Appendix A. *Amici* have an interest in this case because they write in the areas of immigration law, international human rights law, and asylum law, including *nonrefoulement* obligations under international law and how U.S. domestic law implements those obligations.

SUMMARY OF ARGUMENT

I. The 20th century witnessed many horrors, with states persecuting their own citizens and forcing untold millions to flee and seek safety away from their native lands. But it also witnessed a coming together, with nations of the world promising to protect those who were made refugees. Central to this promise was the duty of "*nonrefoulement*." Via *nonrefoulement*, the nations of the world covenanted to protect refugees from being returned—directly or indirectly, in any manner whatsoever—to their home countries, or to any third country, if they face persecution on account of a protected ground.

The United States has, for decades, been committed to this sacred principle. In 1968, the United States signed and ratified the 1967 Protocol Relating to the Status of Refugees ("1967 Protocol"), which incorporated the prohibition on *refoulement* in the 1951

[1] All parties received notice of and consented to this filing. No party or party's counsel wholly or partially authored this brief. Only *Amici* and counsel for *Amici* funded its preparation and submission.

Convention Relating to the Status of Refugees ("1951 Convention").[2] The United States implemented that obligation in domestic law with the Refugee Act of 1980. Then, the United States reiterated its commitment to the *nonrefoulement* principle by signing and ratifying the Convention Against Torture ("CAT"), which prohibits returning people to torture.[3]

II. The so-called Migrant Protection Protocols (or "MPP") violate these binding obligations. MPP ensures that the United States will return many individuals to Mexico even though they face persecution or torture there (or in the countries to which, from Mexico, they are at risk of being returned). And MPP's procedures—such as they are—are designed to thwart, rather than effectuate, the guarantees of protection the United States promised to honor. Many of those returned to Mexico face immediate danger in Mexico (or in the third countries where they may be returned). Under MPP, asylum officers do not so much *ask* about such fears. And if refugees—virtually all lacking legal representation, facing the unfamiliar agents of an unfamiliar government—happen to *volunteer* these fears, MPP imposes on them an impossibly heavy burden they cannot hope to meet via MPP's procedures. As a result, the United States will return thousands of people to face

---

[2] Convention Relating to the Status of Refugees, art. 33(1), July 28, 1951, 189 U.N.T.S. 137; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267; *see INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987).

[3] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, Dec. 10, 1984, T.I.A.S. No. 94-1120.1, 1465 U.N.T.S. 85.

persecution or torture, in direct violation of U.S. and international law.

III. The 1980 Refugee Act makes clear—in both its text and its legislative history—that Congress intended to honor the full extent of its commitments under international law. Indeed, even if the Government had offered a *possible* interpretation of U.S. domestic law that permitted MPP—which it has not—the *Charming Betsy* canon would resolve this case against the Government. Under that canon, courts must construe statutes to accord with the United States' international law obligations so long as it is fairly possible to do so. That rule dictates construing the relevant statutes to prohibit MPP.

ARGUMENT

I. BINDING INTERNATIONAL LAW PROHIBITS *REFOULEMENT*

No nation may return individuals to places where they fear persecution or torture. This protection against "*refoulement*" is the "most essential component" of international refugee law.[4] By ratifying the 1967

[4] Exec. Comm. of the High Commissioner's Programme, Note on *Non-Refoulement*, U.N. Doc. EC/SCP/2 ¶ 1 (Aug. 23, 1977), https://www.unhcr.org/en-us/excom/scip/3ae68ccd10/note-nonrefoulement-submitted-high-commissioner.html (explaining that the *nonrefoulement* principle provides "protection against return to a country where a person has reason to fear persecution") (hereinafter "UNHCR, Note on *Non-Refoulement*"). The United States has been a member of the Executive Committee of the High Commissioner's Programme—the governing body of UNHCR—since its founding. The Executive Committee's functions include

Protocol and the CAT, the United States fully committed itself to this principle. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 169 n.19 (1993); *see INS v. Cardoza-Fonseca*, 480 U.S. 421, 429 (1987).

A. International Law Broadly Prohibits *Refoulement*.

For nearly seven decades, *nonrefoulement* has been a cornerstone of international law.

1. *Nonrefoulement*'s postwar history stems from the 1951 Convention. The United States and its partner nations drafted the Convention to ensure that "individuals . . . are not turned back to countries where they would be exposed to the risk of persecution." Andreas Zimmerman & Claudia Mahler, *Article 1A, Para. 2, in The 1951 Convention Relating to the Status of Refugees & Its 1967 Protocol: A Commentary* 281, 337 (Andreas Zimmerman et al. eds., 2011).

Article 33 provides that "[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social

---

advising the High Commissioner and issuing Conclusions on International Protection. Adopted by the consensus of UNHCR's member states—which today number 106—the Conclusions reflect states' understanding of international legal standards regarding the protection of refugees and act as "international guidelines to be drawn upon by States, UNHCR[,] and others when developing or orienting their policies on refugee issues." Exec. Comm. of the High Comm'r's Programme, *Gen. Conclusion on Int'l Protection No. 55 (XL)*, ¶ p, U.N. Doc. A/44/12/Add.1 (Oct. 13, 1989).

group or political opinion." 1951 Convention art. 33(1). Article 33 prohibits both direct and indirect *refoulement*. Direct *refoulement* occurs when refugees face persecution in the country of return; indirect (or "chain") *refoulement* occurs when refugees face in the country of return a second return to *another* country where they will face persecution.[5]

The 1951 Convention broadly defines "refugee" as anyone who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country." 1951 Convention, art. 1(A)(2).

Originally, the 1951 Convention applied only to people who became refugees due to "events occurring before 1 January 1951." 1951 Convention, art. 1(A)(2). The 1967 Protocol, however, universalized the Convention and removed its temporal and geographic limitations. *See* 1967 Protocol, art. I(1) ("The States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined." (footnote omitted)); *see id.* art. I(2), 606 U.N.T.S. at 268 (defining "refugee" to eliminate the 1951 Convention's time limitations). The Convention's

---

[5] U.N. High Comm'r for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* ¶¶ 8, 20 (2007), https://www.refworld.org/docid/45f17a1a4.html (hereinafter "UNHCR, *Opinion on Extraterritorial Application*").

protection against *refoulement* was "[f]oremost among the rights which the [1967] Protocol would guarantee to refugees." *INS v. Stevic*, 467 U.S. 407, 428 n.22 (1984) (citation omitted).

Moreover, the *nonrefoulement* obligation does not depend on the host country's decision to *recognize* someone as a refugee.[6] Rather, as the UNHCR has explained, all "asylum applicants must be treated on the assumption that they may be refugees until their status has been determined." UNHCR, Note on *Non-Refoulement*, *supra*; *see* Cornelius W. Wouters, *International Legal Standards for the Protection from Refoulement* 47 (Intersentia 2009) ("A person is a refugee as soon as he satisfies the criteria contained in the definition."). That is because "[w]ithout such a rule, the principle of *nonrefoulement* would not provide effective protection for refugees"—"applicants might be rejected at the frontier or otherwise returned to persecution on the grounds that their claim had not been

---

[6] U.N. High Comm'r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection: Under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* ¶ 28 (reissued Feb. 2019), https://www.unhcr.org/en-us/publications/legal/5ddfcdc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html (hereinafter "UNHCR, *Handbook for Determining Refugee Status*") ("A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one.").

established." UNHCR, Note on *Non-Refoulement*, *supra*.

2. More recently, the CAT has reiterated and strengthened international law's prohibition on *refoulement*.

Under Article 3 of the CAT, "[n]o State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." In determining whether "substantial grounds" exist, contracting states must "take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights." CAT art. 3(2). Nearly every country—171 states—has signed or acceded to the CAT.[7]

The Committee Against Torture—an independent body charged with monitoring states' implementation of the CAT, *see* CAT art. 19—interprets the CAT as imposing obligations as to both direct and indirect *nonrefoulement*, "without any form of discrimination and regardless of the nationality" of the person.[8] Again, the indirect *nonrefoulement* obligation means that a

---

[7] *See Status of Treaties: Convention Against Torture*, U.N. Treaty Collection (as of Jan. 1, 2021), https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&lang=en ("*Status of Treaties: Convention Against Torture*").

[8] *See* U.N. Comm. Against Torture, *Gen. Comment No. 4 (2017) On the Implementation of Article 3 of the Convention in the Context of Article 22* ¶ 10 (2018), https://www.refworld.org/docid/5a903dc84.html.

person "should never be deported to another State where he/she may subsequently face deportation to a third State in which there are substantial grounds for believing that he/she would be in danger of being subjected to torture."[9]

Thus, the nations of the world have for decades agreed that people cannot be sent away, directly or indirectly, to another country where they have a reasonable fear of being persecuted or tortured. This *nonrefoulement* obligation applies regardless of an individual's legal status, nationality, or formal recognition as a refugee. And it requires states to review the conditions in the country to which they would

---

[9] *Id.* ¶ 12. The International Covenant on Civil and Political Rights, Dec. 16, 1966, 172 U.N.T.S. 1976 ("ICCPR"), buttresses these *nonrefoulement* obligations. Like the CAT, Article 7 of the ICCPR provides that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." ICCPR art. 7. Article 13 of the ICCPR also states that any non-citizen "lawfully in the territory of a State Party" may be "expelled therefrom only in pursuance of a decision reached in accordance with law and shall … be allowed to submit the reasons against his expulsion and to have his case reviewed by … the competent authority." *Id.* art. 13. Combined, these provisions implicitly prohibit *refoulement* and guarantee due process to refugees facing return or removal. *See* Wouters, *supra*, at 362-63. The United States ratified the ICCPR in 1992. *See Status of Treaties: International Covenant on Civil and Political Rights*, U.N. Treaty Collection (as of Jan. 1, 2021), https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND.

remove a refugee to determine whether the refugee would face persecution or torture.[10]

B. The *Nonrefoulement* Obligation Applies To The United States.

The United States has bound itself to follow the international law prohibition on *refoulement* by ratifying treaties that establish it—without any reservation limiting the United States' *nonrefoulement* obligations.

1. The United States ratified the 1967 Protocol to the Refugee Convention in 1968, thereby adopting the *nonrefoulement* provision of the 1951 Convention. *See Status of Treaties: Protocol Relating to the Status of Refugees*, U.N. Treaty Collection (as of Jan. 1, 2021), https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5. The United States is now one of 147 states parties to the agreement. *Id.*

The United States is also bound by the CAT, which the Senate gave its advice and consent to ratify in 1990 and which went into effect in 1994. *See Status of Treaties: Convention Against Torture*, *supra*.[11] Ever

---

[10] The 2006 International Convention for the Protection of All Persons from Enforced Disappearances also includes the *nonrefoulement* obligation. International Convention for the Protection of All Persons From Enforced Disappearance, art. 16(1), Dec. 20, 2006, 2716 U.N.T.S. 3 ("No State Party shall expel, return ('refouler'), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.").

[11] The United States ratified the CAT subject to two conditions, but neither concerned *nonrefoulement*. First, it included a

since, the United States has maintained its commitment to the CAT's *nonrefoulement* mandate—and monitored other nations' willingness to follow this mandate.[12]

2. The United States has also committed itself to *nonrefoulement* through regional agreements. These agreements—though not binding in the manner of the 1967 Protocol or the CAT—reaffirm the principles the United States has embraced via the 1967 Protocol and the CAT.

As a Member State of the Organization of American States ("OAS"), the United States has undertaken to respect and ensure the rights of all persons subject to its jurisdiction pursuant to the OAS Charter[13] and the

---

reservation stating that it "considers itself bound by the obligation under article 16 to prevent 'cruel, inhuman or degrading treatment or punishment,' only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States." *Status of Treaties: Convention Against Torture*, *supra*. Second, the United States stated its understanding that "the phrase, 'where there are substantial grounds for believing that he would be in danger of being subjected to torture,' as used in article 3 of the Convention, to mean 'if it is more likely than not that he would be tortured.'" *Id.*

[12] For instance, the United States objected to Pakistan's reservations to the *nonrefoulement* article and other articles of the CAT, signaling the United States' concern that countries like Pakistan not "modify [their] substantive obligations under the Convention." *Status of Treaties: Convention Against Torture*, *supra*.

[13] The United States ratified the OAS Charter in 1951. *See Charter of the Organization of American States: Signatories and*

American Declaration of the Rights and Duties of Man ("American Declaration").[14] The Ninth International Conference of American States, which the United States led, adopted the American Declaration in 1948.[15] The American Declaration sets out a range of other rights that are relevant to refugees, including the right to life, liberty and security of the person (Article I); equality before the law (Article II); family and the protection thereof (Article VI); protection for mothers and children (Article VII); recognition of juridical personality (Article XVII); fair trial (XVIII); and protection from arbitrary arrest (Article XXV).

The OAS Charter also authorized the 1969 American Convention on Human Rights ("American Convention"), which the United States has signed but not yet ratified.[16] Article 22 of the American Convention explicitly recognizes the right to asylum and prohibits *refoulement*, using language that mirrors Article 33 of the 1951 Convention. *See* American Convention, art.

Ratifications, Org. Am. States (2021), http://www.oas.org/en/sla/dil/inter_american_treaties_A-41_charter_OAS_signatories.asp.

[14] American Declaration of the Rights and Duties of Man, 1948, http://www.oas.org/dil/access_to_information_human_right_American_Declaration_of_the_Rights_and_Duties_of_Man.pdf.

[15] *Pan-American Conferences: 1826-1948*, Encyclopedia Britannica (rev. 2008), https://www.britannica.com/topic/Pan-American-conferences.

[16] American Convention on Human Rights, Nov. 22, 1969, S. Treaty Doc. No. 95-21, 1144 U.N.T.S. 123; *see* OAS Charter, art. 106. *Multilateral Treaties: American Convention on Human Rights*, Org. Am. States (2014), http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm.

22(6)-(8). These regional agreements further reinforce the United States' nonrefoulement obligations.

C. International Law Rejects The Government's Proposed Distinction Between Permanent Removals And Temporary Returns.

In defending MPP, the Government has suggested that *nonrefoulement* obligations do not apply when a government effects "a temporary *return* to the contiguous territory from which the [non-citizen] is arriving pending removal proceedings," rather than a permanent removal. Pet'r's Br. 32. Under international law, however, this is a distinction without a difference. The 1951 Convention prohibits states from "expel[ling] or return[ing]" refugees "*in any manner whatsoever*" to a country where their life and freedom would be threatened based on a protected ground. 1951 Convention, art. 33(1) (emphasis added). That broad prohibition includes the supposedly temporary "manner" in which MPP returns refugees to Mexico. Moreover, the "non-derogable" *nonrefoulement* norm "applies in all circumstances." UNHCR, *Opinion on Extraterritorial Application*, *supra*, ¶ 20; *see supra* at 4-5. Thus, whenever refugees are transferred to another country, the transferor country's *nonrefoulement* obligations require it to determine whether the transferee nation has sufficient protections against persecution.[17]

The 1951 Convention's "negotiation and drafting history" reinforces the same point. *Medellin v. Texas*,

---

[17] S*ee* UNHCR, *Opinion on Extraterritorial Application*, *supra*, ¶ 20.

552 U.S. 491, 507 (2008) (noting that the negotiation and drafting history of a treaty are "aids to its interpretation" (quotation marks omitted)). During the 1951 Convention's preparation, the U.N. Secretary-General stated in a Memorandum to the Ad Hoc Committee on Statelessness and Related Problems that "turning a refugee back to the frontier of the country where his life or liberty is threatened . . . . would be tantamount to delivering him into the hands of his persecutors." UNHCR, *Opinion on Extraterritorial Application*, *supra*, ¶ 30.

The United States concurred: During the Committee's discussions, the United States' representative argued that "[w]hether it was a question of closing the frontier to a refugee who asked admittance, or of turning him back after he had crossed the frontier, or even expelling him after he had been admitted to residence in the territory, the problem was more or less the same." *Id.* Thus, as UNHCR has noted, "[t]he prohibition of *refoulement* to a danger of persecution under international refugee law is applicable to *any* form of forcible removal." *Id.* ¶ 7 (emphasis added).

II. MPP VIOLATES THE UNITED STATES' *NONREFOULEMENT* OBLIGATIONS.

MPP violates the *nonrefoulement* principle by forcing refugees to return—directly and indirectly—to countries where they risk persecution and by providing no meaningful opportunity for these refugees to invoke *nonrefoulement* protections.

First, refugees only receive consideration for *nonrefoulement* protection if they *volunteer* during initial screening that they fear return to Mexico. Pet. App. 28a. ***Second***, the refugees must know to volunteer this information even though they are "not entitled to advance notice of, and time to prepare for, the hearing with the asylum officer; to advance notice of the criteria the asylum officer will use; … or to any review of the asylum officer's determination." *Id.* And ***third***, MPP requires refugees immediately to "show that it is 'more likely than not' that he or she will be persecuted in Mexico" rather than that they have a "credible fear" of persecution, which is the lower standard applicable in traditional screening interviews. Pet. App. 27a-28a.

These actions will result in *refoulement*. To begin, requiring refugees affirmatively to volunteer that they fear persecution unlawfully foists onto refugees' shoulders the United States' obligations under international law. As the UNHCR has noted, "*States* have a duty to *establish*, prior to implementing any removal measure, that the person whom it intends to remove from their territory or jurisdiction would not be exposed to a danger of serious human rights violations …." UNHCR, *Opinion on Extraterritorial Application*, *supra*, ¶ 22. The interviewing officer "has to conduct a personal interview which establishes, as far as possible, all the facts relevant to determining whether a person is a refugee or qualifies for subsidiary protection status according to law."[18] Even in preliminary or simplified

[18] U.N. High Comm'r for Refugees, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law*

procedures, governments must still collect information "sufficient to establish that the Applicant meets the inclusion criteria of the applicable refugee definition and that no credibility or exclusion concerns arise."[19] Thus, before transferring refugees back to Mexico, the United States is required to establish that they do not fear persecution. It cannot meet its obligation by, ostrich-like, burying its head in the sand and remaining willfully ignorant of an individual's fear.

MPP compounds these violations by depriving refugees of protections before and during their meetings with asylum officers. As UNHCR emphasizes, "[a]ll applicants for international protection should enjoy the same procedural safeguards and rights," including "the opportunity of a personal interview," to ensure a full and fair hearing.[20] *Accord* UNHCR, *Opinion on Extraterritorial Application*, *supra*, ¶ 8 ("[I]n order to give effect to their obligations under the 1951 Convention and/or 1967 Protocol, States will be required to grant individuals seeking international protection access to the territory and to fair and efficient asylum procedures."). Those procedural requirements also include due process and access to representation.[21]

---

and Practice 102 (Mar. 2010), https://www.unhcr.org/4c7b71039.pdf (hereinafter "UNHCR, *Improving Asylum Procedures*").

[19] U.N. High Comm'r for Refugees, *Procedural Standards for Refugee Status Determination under UNHCR's Mandate* 145 (Aug. 2020), https://www.unhcr.org/4317223c9.pdf.

[20] UNHCR, *Improving Asylum Procedures*, *supra*, at 242.

[21] *See* UNHCR, *Handbook for Determining Refugee Status*, *supra*, ¶ 192.

UNHCR admonishes that the same "basic requirements should also apply to screening or preliminary interviews."[22] Indeed, that has to be the rule: If refugees do not have a fair opportunity to invoke *nonrefoulement* protections at the screening stage, they may never have another chance. MPP, however, deprives refugees of the notice and information necessary for them even to *know* that they must make a case, much less for them actually to *make* it.

The Government claims that MPP's process suffices because refugees have incentives to volunteer their fear of persecution. Pet'r's Br. 36-37. That, however, is pure fantasy. Many refugees will not even know that they are entitled to protection if they fear persecution, much less have the wherewithal to invoke this protection, unprompted, in an intimidating interview with officials from a strange government whose very language the refugees may not speak. And refugees are even less likely to know this protection extends to their fear of returning to *Mexico*, as opposed to their home countries. Certainly, as the court below noted, "the Government points to no evidence supporting its speculations … that [non-citizens], unprompted and untutored in the law of refoulement, will volunteer that they fear returning to Mexico." Pet. App. 30a-31a.

Indeed, all evidence points the opposite direction. For instance, the U.S. Commission on International Religious Freedom ("USCIRF") concluded, based on a

---

[22] UNHCR, *Improving Asylum Procedures*, *supra*, at 96.

decade of observing the expedited removal process, that "DHS officials often fail to follow required procedures to identify asylum-seekers and refer them for credible fear determinations."[23] USCIRF observed that officials failed to inform interviewees of their right to seek asylum or correctly to record their answers.[24] As a result, asylum officers informed USCIRF "that the majority of their credible fear interview referrals come from U.S. Immigration and Customs Enforcement," which detains those subject to expedited removal and is not tasked with screening, rather than from the Customs and Border Protection officials who are required to screen for fear.

Nor is it defensible to expect refugees to meet a "more likely than not" standard at this preliminary interview. There is good reason why this demanding standard normally applies only in full, formal removal proceedings. As this Court has recognized in other contexts, those attempting to make a claim may have a

---

[23] U.S. Comm'n on Int'l Religious Freedom, *2019 Annual Report* 17 (Apr. 2019), https://www.uscirf.gov/sites/default/files/2019USCIRFAnnualReport.pdf. USCIRF "is an independent, bipartisan U.S. government advisory body," created by the International Religious Freedom Act of 1998, that advises the United States government on its refugee and asylum policy. *Id.* at 5; *see* 22 U.S.C. § 6474 (authorizing USCIRF to study expedited removal proceedings).

[24] U.S. Comm'n on Int'l Religious Freedom, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal, Report Highlights: CBP's Record Identifying Asylum Seekers* 1 (2016), https://www.uscirf.gov/sites/default/files/Report%20Highlights.%20CBPs%20Record%20Identifying%20Asylum%20Seekers.pdf.

difficult time *proving* that claim—or even defining the claim with precision—at the outset of a case. This is why a plaintiff in a civil suit must "prove his case [at trial] 'by a preponderance of the evidence,'" *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003), but need only plead "facial plausibility" in his complaint, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also, e.g.*, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (discussing the different "manner and degree of evidence required at the successive stages of the litigation"). Just so here. People will rarely be able to prove they will more likely than not face persecution or torture on a protected ground during initial screening interviews—when they have had no opportunity to develop their claim for protection.

III. THE UNITED STATES HAS IMPLEMENTED ITS *NONREFOULEMENT* OBLIGATIONS IN U.S. DOMESTIC LAW, WHICH MPP VIOLATES.

U.S. domestic law implements the *nonrefoulement* obligation that MPP violates. The Government's contrary arguments lack merit.

A. Statutory Text And Legislative History Show That Federal Law Implements The United States' International Law Obligations.

The United States has implemented its *nonrefoulement* obligations in domestic law—in particular, in the 1980 Refugee Act. Via this Act, Congress intended to bring domestic law in line with the United States' international obligations under Article 33.1 of the Refugee Convention.

The Immigration and National Act of 1965 had previously only "authorized" the Attorney General to withhold deportation of someone who would be subjected to persecution. The 1980 Refugee Act made such withholding mandatory. The new § 243(h), now codified at 8 U.S.C. § 1231(b)(3)(A), provided that "[t]he Attorney General shall not deport or return any [non-citizen] … to a country if the Attorney General determines that such [non-citizen's] life or freedom would be threatened in such country on account of race religion, nationality, membership in a particular social group, or political opinion." Pub. L. No. 96-212, 94 Stat. 107 (codified at 8 U.S.C. § 1253(h) (1980)).

As this Court has repeatedly recognized, "one of Congress' primary purposes [in passing the 1980 Act] was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees." *Cardoza-Fonseca*, 480 U.S. at 436; *see also INS v. Doherty*, 502 U.S. 314, 332 (1992) (Scalia, J., concurring) (noting that the 1980 Refugee Act "removed all doubt concerning the matter" of whether the United States "honored the dictates" of Article 33.1 *nonrefoulement*); *Stevic*, 467 U.S. at 421 (observing that 1980 amendments to § 243(h) "basically conform[ed] it to the language of Article 33 of the United Nations Protocol").

This intent is clear not just from the 1980 Refugee Act's text, but from its legislative history. Through the Act, Congress aspired to "give[] statutory meaning to our national commitment to human rights and humanitarian concerns." S. Rep. No. 96-256, at 1 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 141, 141. In

particular, as the House Report emphasized, the bill intended to "conform[] United States statutory law to our obligations under Article 33 [of the United Nations Refugee Protocol]." H.R. Rep. No. 96-608, at 17 (1979). And as the Senate Report reiterated, Congress based Section 243(h) "directly upon the language of the [1967] Protocol and … intended that the provision be construed consistent with the [p]rotocol." S. Rep. No. 96-590, at 20 (1980).

Congress did not intend to disavow this commitment when, in 1996, it enacted the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"). True enough, IIRIRA altered the 1980 Refugee Act's language about *nonrefoulement*—changing the phrase "[t]he Attorney General shall not *deport or return*" refugees when they face persecution, to provide that "the Attorney General may not *remove*" refugees when they face such a risk. 8 U.S.C. § 1231(b)(3)(A) (emphasis added). Based on that shift, the Government has argued that the word "remove" now prohibits only one type of *refoulement*—via removal procedures—and does not encompass agents informally turning refugees back at the border. Pet'r's Br. 32.

That is not a plausible reading of Congress's intent. As the court below explained, this change was merely part of a general statutory revision. *See* Pet. App. 27a. "Throughout IIRIRA, 'removal' became the new all-purpose word, encompassing 'deportation,' 'exclusion,' and 'return' in the earlier statute." *Id.* (citing *Salgado-Diaz v. Gonzales*, 395 F.3d 1158, 1162 (9th Cir. 2005)); *see also Judulang v. Holder*, 565 U.S. 42, 46 (2011) ("Since [1996], the Government has used a unified procedure,

known as a 'removal proceeding,' for exclusions and deportations alike."). But while Congress "unified" its terminology, it kept the substance of the law's obligations the same—for instance, maintaining the "two separate lists of substantive grounds" for exclusion and deportation that preceded IIRIRA even while combining the procedures for both into a single "removal" proceeding. *Judulang*, 565 U.S. at 46.

Legislative history confirms that Congress did not intend to effect a substantive change. The Conference Report details dozens of examples of the same language change throughout the statute, many of them under the heading "Revision of Terminology Relating to Deportation." H.R. Rep. 104-828 at 74-76 (1996) (Conf. Rep.). The Conference Report often conflated the word "removal" with the words it replaced, confirming that Congress intended to change style but not substance. *See, e.g.*, *id.* at 216 ("[Section 241,] Subsection (b)(3) restates, with some modifications, the provisions in current section 243(h) regarding withholding of *deportation* to a country where the [non-citizen's] life or freedom would be threatened." (emphasis added)).

"[W]hen Congress wishes to alter the fundamental details of a regulatory scheme, … we would expect it to speak with the requisite clarity to place that intent beyond dispute." *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1849 (2020) (internal quotation marks omitted). Congress "does not 'hide elephants in mouseholes.'" *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1071 (2018) (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)). Here, neither the statutory text nor the

legislative history provides a shred of evidence that, through IIRIRA's "revision of terminology," Congress intended to disavow its *nonrefoulement* obligations under international law. "[I]f Congress had such an intent, Congress would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it at some point in … [IIRIRA's] legislative history." *Chisom v. Roemer*, 501 U.S. 380, 396 (1991).

B. The *Charming Betsy* Canon Confirms That U.S. Domestic Law Implements Its International Law Obligations.

If any ambiguity remained, it would be resolved by the settled principle that this Court must read § 1231(b)(3)(A) to be consistent with the United States' international law obligations, unless it is not fairly possible to do so. "For two centuries," this Court has "affirmed that the domestic law of the United States recognizes the law of nations." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004). In Justice Gray's famous phrase, "[i]nternational law is part of our law," and it "must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." *The Paquete Habana*, 175 U.S. 677, 700 (1900). As a corollary, this Court has admonished "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. (2 Cranch) 64, 118 (1804).

Here, the statutory text certainly does not require construing U.S. domestic law to violate international

law. To be clear, *Amici* agree with Respondents that § 1231(b)(3)(A) is best read to prohibit MPP. But even if the Government's contrary reading were possible, the *Charming Betsy* canon would foreclose it. The relevant treaties confirm that the *nonrefoulement* obligation applies to temporary as well as permanent returns, and requires procedures that fairly guard against the risk of *refoulement*. *See supra* Parts I.A, I.C. These obligations "reflect[] principles of customary international law"[25] and treaty law—"law that (we must assume) Congress ordinarily seeks to follow." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004). By contrast, the Government's interpretation of § 1231(b)(3)(A) would flout the United States' international law obligations.

Likewise, even if IIRIRA's change to § 1231(b)(3)(A)—replacing "return" with "removal"—could plausibly be read as authorizing MPP, the same interpretive principles would foreclose this reading. Indeed, "[t]here is … a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action. 'A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.'" *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (quoting *Cook v. United States*, 288 U.S. 102, 120 (1933)).

---

[25] *See* Declaration of States Parties to the 1951 Convention or Its 1967 Protocol Relating to the Status of Refugees ¶4, U.N. Doc. HR/MMSP/2001/09 (Jan. 16, 2002), https://www.unhcr.org/en-us/protection/globalconsult/3c2306cc4/declaration-states-parties-1951-convention-andor-its-1967-protocol-relating.html (concluding *nonrefoulement* is customary international law).

Congress crafted the 1980 Refugee Act, and especially § 1231(b)(3)(A), to implement Article 33 of the 1951 Convention. And as *Amici* have just explained, Congress in IIRIRA expressed no intent to abrogate a significant part of Article 33's *nonrefoulement* obligation.

Nor do the Government's other arguments supply the certainty that § 1231(b)(3)(A) lacks. For instance, the Government notes that the expedited removal statute "has permitted removal 'without further hearing or review unless the [non-citizen] *indicates* either an intention to apply for asylum … or a fear of persecution.'" Pet'r's Br. at 36 (quoting 8 U.S.C. § 1225(b)(1)(A)(i)).[26] The expedited removal statute, however, does not say that refugee must "indicate" this fear *sua sponte*, as MPP requires. And if, counterfactually, the expedited removal statute did speak clearly enough to violate the United States' *nonrefoulement* obligations, that would undermine rather than support the Government's position here. That is because § 1231(b)(3)(A) lacks the key text—the word "indicates"—on which the Government relies in the expedited-removal statute. "[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 or exclusion."

---

[26] *See also* 8 U.S.C. § 1225(b)(1)(A)(iv) (requiring the Government to "provide information concerning the asylum interview … to [non-citizens] who may be eligible," and allowing those eligible to "consult with a person or persons of the [non-citizen's] choosing prior to the interview or any review thereof").

Cardoza-Fonseca, 480 U.S. at 432 (quotation marks omitted).

The Government also asserts that "DHS reasonably determined that the temporary return of third-country nationals to the contiguous country through which they just traveled implicates appreciably less risk of torture or persecution than does the removal of [non-citizens] to the home countries that they fled." Pet'r's Br. 35. But the relevant inquiry for *nonrefoulement* purposes is not whether the risks of persecution in Mexico are lower than those of a third country; it is whether the risk of persecution or indirect *refoulement* in Mexico is high enough in absolute terms. If so, refugees must be allowed to remain in the United States.

* * *

For seven decades, recognizing the horrors of the Holocaust and other humanitarian disasters, the international community has agreed not to turn away or send refugees to countries where they face a real risk of persecution on protected grounds. For half a century, the United States has bound itself by treaty to this international law mandate. For forty years, Congress has enshrined our *nonrefoulement* obligation in the U.S. Code. "It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals." *Sosa*, 542 U.S. at 730. This Court should not read federal law to do so here.

CONCLUSION

The Court should affirm the decision below.

JANUARY 22, 2021

Respectfully submitted,

KELSEY L. STIMPLE
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654
(312) 222-9350

ZACHARY C. SCHAUF
Counsel of Record
NOAH B. BOKAT-LINDELL
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
zschauf@jenner.com

APPENDIX

List of *Amici*

Sabrineh Ardalan
Clinical Professor, Harvard Law School
Director, Harvard Immigration and Refugee Clinical Program

Nermeen Arastu
Associate Professor
CUNY School of Law

David Baluarte
Associate Dean for Academic Affairs
Washington and Lee University School of Law

Jon Bauer
Clinical Professor of Law and
Richard D. Tulisano '69
Scholar in Human Rights
University of Connecticut School of Law

Lenni Benson
Distinguished Professor of Human Rights and Immigration Law
New York Law School

Stella Burch Elias
Professor of Law
University of Iowa College of Law

Kristina M. Campbell
Professor of Law
UDC David A Clarke School of Law

Stacy Caplow
Professor of Law
Brooklyn Law School

Benjamin Casper Sanchez
Associate Clinical Professor
Faculty Director, James H. Binger Center for New Americans
University of Minnesota Law School

Jennifer M. Chacon
Professor of Law
UCLA School of Law

Gabriel J. Chin
Edward L. Barrett Jr. Chair and Martin Luther King Jr. Professor of Law
University of California, Davis School of Law

Michael J. Churgin
Raybourne Thompson Centennial Professor in Law
University of Texas at Austin

Dree K. Collopy
Adjunct Professor
American University Washington College of Law

Holly Cooper
Immigration Law Clinic Co-Director
UC Davis School of Law

Julie Dahlstrom
Clinical Associate Professor
Boston University School of Law

Ingrid Eagly
Professor of Law
UCLA School of Law

Charles Shane Ellison
Senior Lecturing Fellow
Duke University School of Law

Kate Evans
Clinical Professor
Duke University School of Law

Jill E. Family
Commonwealth Professor of Law and Government
Widener Law Commonwealth

Maryellen Fullerton
Suzanne J. and Norman Miles
Professor of Law
Brooklyn Law School

Lauren Gilbert
Professor of Law
St. Thomas University School of Law

Anju Gupta
Professor of Law
Rutgers Law School

Lindsay M. Harris
Associate Professor
Director, Immigration & Human Rights Clinic
University of the District of Columbia
David A. Clarke School of Law

Katie Herbert Meyer
Assistant Professor of Practice & Director
Washington University School of Law

Bill Ong Hing
Professor, Director of the Immigration and Deportation
Defense Clinic
University of San Francisco School of Law

Laila L. Hlass
Professor of the Practice
Tulane Law School

Geoffrey Hoffman
Clinical Professor
University of Houston Law Center

Mary Holper
Associate Clinical Professor
Boston College Law School

Alan Hyde
Distinguished Professor
Rutgers Law School

Michael Kagan
Joyce Mack Professor of Law
University of Nevada, Las Vegas

Anil Kalhan
Professor of Law
Drexel University Kline School of Law

Daniel Kanstroom
Professor of Law
Boston College

Nancy Kelly
Lecturer on Law
Harvard Law School

Elizabeth Keyes
Associate Professor
University of Baltimore School of Law

Annie Lai
Clinical Professor of Law
UC Irvine School of Law

Christopher N. Lasch
Professor of Law
University of Denver

Jennifer Lee Koh
Visiting Lecturer
University of Washington School of Law

Peter Margulies
Professor of Law
Roger Williams University School of Law

Fatma Marouf
Professor of Law
Texas A&M University School of Law

Karla McKanders
Clinical Professor of Law
Vanderbilt University Law School

Jennifer Moore
Professor of Law and Pamela Minzner Chair in Professionalism
University of New Mexico School of Law

Hiroshi Motomura
Susan Westerberg Prager Distinguished Professor of Law
UCLA School of Law

Lori A. Nessel
Professor of Law
Seton Hall Law School

Michael A. Olivas
Wm B. Bates Distinguished Chair in Law (Emeritus)
University of Houston Law Center

Sarah H. Paoletti
Practice Professor of Law
Director, Transnational Legal Clinic
University of Pennsylvania Carey Law School

Jaya Ramji-Nogales
Professor of Law
Temple Law School

Carrie L. Rosenbaum
UC Berkeley

Rubén G. Rumbaut
Distinguished Professor
University of California, Irvine

Leila Sadat
James Carr Professor of International Law
Washington University School of Law

Faiza Sayed
Visiting Professor of Clinical Law
Brooklyn Law School

Irene Scharf
Professor of Law
Director, Immigration Law Clinic
University of Massachusetts School of Law

Andrew Schoenholtz
Professor from Practice
Georgetown Law

Erica B. Schommer
Clinical Professor of Law
St. Mary's University School of Law

Philip G. Schrag
Delaney Family Professor of Public Interest Law
Georgetown Law

Bijal Shah
Associate Professor of Law
Arizona State University, Sandra Day O'Connor
College of Law

Rebecca Sharpless
Professor of Law
University of Miami School of Law

Sarah R. Sherman Stokes
Clinical Associate Professor of Law
Boston University School of Law

Anita Sinha
Associate Professor of Law
American University Washington College of Law

Jayashri Srikantiah
Professor of Law & Associate Dean for Clinical
Education
Stanford Law School

Elissa Steglich
Clinical Professor
University of Texas School of Law

Margaret H. Taylor
Professor of Law
Wake Forest University School of Law

Claire R. Thomas
Director, Asylum Clinic
New York Law School

David B. Thronson
Alan S. Zekelman Professor of
International Human Rights Law
Michigan State University College of Law

Philip L. Torrey
Managing Attorney
Harvard Immigration and Refugee Clinical Program
Harvard Law School

Diane Uchiniya
Assistant Professor
Director of Clinical Programs
Creighton School of Law

Sheila Velez Martinez
Director, Immigration Law Clinic
University of Pittsburgh School of Law

Leti Volpp
Robert D. and Leslie Kay Raven Professor of Law
UC Berkeley

Jonathan Weinberg
Professor of Law and Associate Dean for Research
Wayne State University

Deborah M. Weissman
Reef C. Ivey II Distinguished Professor of Law
University of North Carolina School of Law

Anna Welch
Clinical Professor
Director, Refugee and Human Rights Clinic,
Maine Law

John Willshire Carrera
Lecturer on Law
Harvard Law School

Michael J. Wishnie
William O. Douglas Clinical Professor of Law
Yale Law School

Beth Zilberman
Assistant Professor of Law
Immigration Clinic Director