No. 19-897

IN THE

Supreme Court of the United States

TONY H. PHAM, SENIOR OFFICIAL PERFORMING THE DUTIES OF THE DIRECTOR OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL.,

Petitioners,

—v.—

MARIA ANGELICA GUZMAN CHAVEZ, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF *AMICI CURIAE* HUMAN RIGHTS FIRST AND INTERNATIONAL LAW SCHOLARS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI*[1]

Human Rights First is a non-governmental organization established in 1978 that works to ensure U.S. leadership on human rights globally and compliance domestically with this country's human rights commitments. Human Rights First operates one of the largest U.S. programs for *pro bono* legal representation of refugees, working in partnership with volunteer lawyers at leading law firms to provide legal representation without charge to indigent asylum applicants, including some detained in immigration detention facilities across the United States. Human Rights First has conducted research, issued reports and provided recommendations to the United States Government regarding compliance with its legal obligations under international law with respect to its use of immigration detention.

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[1] Counsel for both parties have consented in writing to the participation of *amici*. No party in this case authored this brief in whole or in part, or made any monetary contribution to its preparation and submission.

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INTRODUCTION AND SUMMARY OF ARGUMENT

This *amicus* brief addresses the obligation of U.S. courts to construe federal statutes, including the Immigration and Nationality Act ("INA"), in a manner consistent with the nation's obligations under binding international treaties. This has been an established canon of statutory construction since *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). Applying that canon here, this Court should avoid an interpretation of the INA that allows for detention without a prompt individualized determination by a court, independent of the detaining authorities and capable of ordering release, that detention is reasonable, necessary and proportionate under the facts of the particular case.

Pursuant to treaties, such as the International Covenant on Civil and Political Rights ("ICCPR"), the United States must protect individuals' right to liberty. It may not arbitrarily detain any person and must provide certain safeguards against arbitrary detention. These protections, as well as those contained in the United Nations Convention Relating to the Status of Refugees ("Refugee Convention") and its Protocol, apply to individuals seeking refugee protection held in U.S. immigration detention. In

particular, the United States must provide for prompt review by a court of each individual's detention, and continuing detention must be subject to periodic review. The Government must show the reviewing court that the particular individual's detention is, and remains, reasonable, necessary and proportionate in the circumstances of the individual's case.

The Government's interpretation of the INA cannot be squared with U.S. treaty obligations under international law. According to the Government, the INA authorizes the detention of those seeking refugee protection while denying them access to an individualized immigration court custody hearing. The Government's interpretation, in short, would deny to many individuals seeking refugee protection, including families with children, the rights and safeguards the United States is obligated to provide under the ICCPR and other international treaties.

Further, detention impedes access to refugee protection and increases the risk that individuals with bona fide claims will abandon their cases, thus undermining the United States' compliance with the principle of *non-refoulement*, which prohibits states from returning refugees to countries where they may be at risk of torture or persecution.

These considerations provide further reason why this Court should reject the Government's construction of the INA and affirm the Court of Appeals' decision.[2]

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[2] Respondents' brief invokes the canon of statutory interpretation that a statute be interpreted, where possible, to avoid potential constitutional concerns, and explains how the INA should be construed to satisfy this principle.

I. The INA Should Be Interpreted Consistently with U.S. Treaty Obligations

Since the earliest days of the republic, this Court has recognized that domestic statutes must be read in light of this nation's binding international treaty obligations. *See*, *e.g.*, *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801). "It has been a maxim of statutory construction since the decision in [*Charming Betsy*] that an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains." *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (internal quotation marks omitted); *accord F. Hoffmann-La Roche Ltd v. Empagran S.A.*, 542 U.S. 155, 164 (2004); *Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 178 n.35 (1993); Restatement (Third) of the Foreign Relations Law of the United States § 114 (1987) [hereinafter Restatement (Third)].

The United States is bound by the international treaties to which it is a party. Restatement (Third) § 102. Under *Charming Betsy* and its progeny, this Court must consider these sources of authority when interpreting statutes that implicate the Government's obligations under international law. *See Chew Heong v. United States*, 112 U.S. 536, 539-40 (1884) (interpreting a statute so as not to violate terms of treaty); *Charming Betsy*, 2 Cranch at 118 (interpreting a statute so as not to violate "the law of nations").

This Court has applied the *Charming Betsy* doctrine for over two hundred years in a wide variety of contexts. *See, e.g.*, *Weinberger*, 456 U.S. at 32 ("We think that some affirmative expression of

congressional intent to abrogate the United States' international obligations is required in order to construe" a statute as undermining international agreements); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 251-53 (1984) (holding that Warsaw Convention provisions were enforceable despite a later conflicting statutory enactment, in part because of considerations of international law); *United States v. Forty-Three Gallons of Whisky*, 108 U.S. 491, 496 (1883) ("The laws of Congress are always to be construed so as to conform to the provisions of a treaty, if it be possible to do so."); *Clark v. Allen*, 331 U.S. 503, 517 (1947); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963); *Chew Heong*, 112 U.S. at 549.

This Court should thus avoid an interpretation of the INA that would violate the Government's treaty obligations under international law.

II. U.S. Treaty Obligations Prohibit Mandatory Detention Without Case-by-Case Assessment

The Government's practice of detaining non-citizens under 8 U.S.C. § 1231 without access to immigration court review of their detention is at odds with the ICCPR, a multilateral treaty that the United States ratified without relevant reservation. *See* International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; 138 Cong. Rec. 8070-71 (1992). As discussed below, Article 9(1) of the ICCPR prohibits "arbitrary arrest or detention." In addition, Article 9(4) of the ICCPR provides that anyone deprived of liberty by arrest or detention "shall be entitled to take proceedings before a court." Pursuant to executive order, it is the

Government's "policy and practice . . . fully to respect and implement its obligations under the international human rights treaties to which it is a party, including the ICCPR." *Implementation of Human Rights Treaties*, Executive Order No. 13107, 63 Fed. Reg. 68,991 (Dec. 10, 1998).[3] The U.N. Human Rights Committee has specifically expressed concern that the United States' use of mandatory detention that results in non-citizens being detained "without regard to the individual case" raises concerns under Article 9 of the ICCPR. U.N. Human Rights Comm., Concluding Observations on the Fourth Periodic Report of the United States of America ¶ 15, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014).

Other international instruments guarantee non-citizens' rights that complement those in ICCPR Article 9. The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Torture Convention") requires that "detainees and persons at risk of torture and ill-treatment" have access to "judicial and other remedies that will allow them to have their complaints promptly and impartially examined, to defend their rights, and to *challenge the legality of their detention or treatment*." U.N. Comm. Against Torture, General Comment No. 2, Implementation of

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[3] Although the ICCPR is "not self-executing," it nonetheless "bind[s] the United States as a matter of international law," *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004); *see* Restatement (Third) § 111 cmt. h. Accordingly, it is a source of binding obligations when construing a federal statute. *See Chew Heong*, 112 U.S. at 548-50; *Ma v. Ashcroft*, 257 F.3d 1095, 1114-115 (9th Cir. 2001).

Article 2 by States Parties, ¶ 13, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008) (emphasis added).

The Refugee Convention further provides that states parties "shall not impose penalties" on arriving refugees "on account of their illegal entry or presence" in the country or restrict "the movements of such refugees" unless such restriction is "necessary." *See* United Nations Convention Relating to the Status of Refugees art. 31, July 28, 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention]. Articles 2 through 34 of the Refugee Convention became binding on the United States through its accession to the United Nations Protocol Relating to the Status of Refugees ("Refugee Protocol"). *See* United Nations Protocol Relating to the Status of Refugees art. 1 ¶ 1, Jan. 31, 1967, 606 U.N.T.S. 267 [hereinafter Refugee Protocol]. The American Declaration of the Rights and Duties of Man ("American Declaration") likewise provides in Article XXV that "[e]very individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court."[4] Further, as discussed in Section II.B

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[4] *See* art. XXV, O.A.S. Res. XXX (1948), O.A.S. Off. Rec. OEA/Ser. LV/I. 4 Rev. (1965) (prohibiting arbitrary deprivations of liberty and requiring review of detentions "without delay by a court"). Although the American Declaration is not a binding treaty, it is a source of legal obligation for every member of the Organization of American States (OAS), and the United States is a member of the OAS. *See James Terry Roach and Jay Pinkerton v. United States*, Case 9647, Res. 3/87, Inter-Am. Comm'n H.R. (Sept. 22, 1987) (finding United States legally bound to the rights enumerated in the American Declaration); *accord* Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (July 14, 1989); *see also* Denise Gilman, *Realizing Liberty: The Use of*

infra, international treaties—including the ICCPR and Torture Convention—afford migrant children special protections and restrict their immigration-based detention.

Consistent with U.S. treaty obligations, the United States may detain a person only after establishing, on a case-by-case basis, that detention is reasonable, necessary and proportionate under the particular individual's circumstances. Detention is only permitted as a measure of last resort. The Government's position runs counter to these obligations.

A. The Government Must Provide for an Individualized Determination That a Non-Citizen's Detention Is Reasonable, Necessary and Proportionate

The Government's interpretation of the INA is at odds with the United States' obligation to assess on a case-by-case basis whether an individual's detention is reasonable, necessary and proportionate.

Article 9(1) of the ICCPR provides that every person "has the right to liberty" and "[n]o one shall be subjected to *arbitrary* arrest or detention." ICCPR art. 9(1) (emphasis added). The American Declaration similarly provides that all persons have the right to liberty and that unlawful or arbitrary detention is prohibited. American Declaration arts. I, XXV. The prohibition against arbitrary detention "is recognized in all major international and regional instruments

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International Human Rights Law to Realign Immigration Detention in the United States, 36 Fordham Int'l L.J. 243, 282 (2013).

for the promotion and protection of human rights," and it has been "widely enshrined in national constitutions and legislation." U.N. Working Grp. on Arbitrary Det., Rep. of the Working Group on Arbitrary Detention, ¶¶ 42, 43, U.N. Doc. A/HRC/22/44, (Dec. 24, 2012) [hereinafter 2012 Arbitrary Detention Report].

As the U.N. Human Rights Committee, which supervises and monitors the implementation of ICCPR obligations, has explained, Article 9(1) of the ICCPR applies to all deprivations of liberty, including those related to immigration control. U.N. Human Rights Comm., General Comment No. 35: Article 9 (Liberty and Security of Person), ¶¶ 3, 12, 18, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014) [hereinafter HRC General Comment No. 35]. The rights espoused in the ICCPR "must . . . be available to all individuals, regardless of nationality or statelessness, such as asylum seekers [and] refugees." U.N. Human Rights Comm., General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004). Parties to the ICCPR, such as the United States, must also ensure "in their legislation and in practice" that immigrants are not denied their right to be free from arbitrary detention. *See* HRC General Comment No. 15, ¶ 4.

Detention is arbitrary if it is not "reasonable, necessary and proportionate in the light of the circumstances." HRC General Comment No. 35, ¶ 18. To ensure these requirements are met, the decision to detain a person "must consider relevant factors case by case." *Id.*; *see also A v. Australia*, Communication

No. 560/1993, U.N. Human Rights Comm., ¶¶ 9.2, 9.4, U.N. Doc. CCPR/C/59/D/560/1993 (Apr. 30, 1997); François Crépeau (Special Rapporteur on the Human Rights of Migrants), Rep. of the Special Rapporteur on the Human Rights of Migrants ¶ 53, U.N. Doc. A/HRC/20/24 (Apr. 2, 2012) [hereinafter Rapporteur's 2012 Report] ("States must take full account of individual circumstances" when considering whether detention is appropriate). That decision must also take into account "all the circumstances" that bear on the reasonableness, necessity and proportionality of detention. *Van Alphen v. Netherlands*, Communication No. 305/1988, U.N. Human Rights Comm., ¶ 5.8, U.N. Doc. CCPR/C/39/D/305/1988 (July 23, 1990); *see also* HRC General Comment No. 35, ¶ 18.

The "necessity" principle allows states to resort to detention "only as a last available measure." U.N. Working Grp. on Arbitrary Det., Rep. of the Working Group on Arbitrary Detention, ¶ 78, U.N. Doc. E/CN.4/1999/63 (Dec. 18, 1998) [hereinafter 1998 Arbitrary Detention Report]; *see also* U.N. High Comm'r for Refugees, *Detention Guidelines* (2012) [hereinafter UNHCR Detention Guidelines], ¶ 2 (noting that "detention . . . should normally be avoided and be a measure of last resort").[5] It also requires states to "take into account less invasive means of achieving the same ends" before resorting to detention. HRC General Comment No. 35, ¶ 18;

[5] The UNHCR Detention Guidelines are issued in conjunction with Article 35 of the Refugee Convention, and "reflect the state of international law relating to detention – on immigration related grounds – of asylum-seekers and other persons seeking international protection." UNHCR Detention Guidelines, ¶ 4.

accord C. v. Australia, Communication No. 900/1999, U.N. Human Rights Comm., ¶ 8.2, U.N. Doc. CCPR/C/76/D/900/1999 (Nov. 13, 2002). A determination that detention is necessary to protect the public or prevent flight requires "case by case" consideration of "less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions."[6] HRC General Comment No. 35, ¶ 18. A "mandatory rule for a broad category" of individuals is impermissible. *Id.*; *accord A v. Australia*, ¶ 9.2 (noting that necessity must be determined in light of "all the circumstances of the case").

The "proportionality" principle requires states to balance the potential need for detention against the effect that detention will have on each particular detainee. As the U.N. Refugee Agency ("UNHCR") has explained, proportionality "requires that a balance be struck between the importance of respecting the rights to liberty and security of person

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[6] States have numerous alternatives to detention to manage migration in ways that are consistent with international legal obligations. *See* Rapporteur's 2012 Report, ¶ 48 ("Research has found that over 90 per cent compliance or cooperation rates can be achieved when persons are released to proper supervision and assistance. The alternatives have also proved to be considerably less expensive than detention . . . ."); UNHCR Detention Guidelines at Annex A; U.S. Conference of Catholic Bishops et al., *Unlocking Human Dignity: A Plan to Transform the U.S. Immigrant Detention System* 28-29 (2015) (outlining effectiveness of alternatives to detention in the United States in securing appearance for hearings and immigration appointments); Ingrid Eagly et. al., *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 Cal. L. Rev. 785, 815-16 (2018) (citing study showing that 96% of families who applied for asylum attended "all their hearings").

and freedom of movement, and the public policy objectives of limiting or denying these rights." UNHCR Detention Guidelines, ¶ 34. The principle also requires the state to balance the need for detention against the effect that detention will have on an individual detainee's "physical or mental health." *See* HRC General Comment No. 35, ¶ 18.

Assessing reasonableness, necessity and proportionality requires an individualized assessment of the unique circumstances concerning each non-citizen detainee. *See Velez Loor v. Panama*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 218, ¶ 171 (Nov. 23, 2010); Inter-Am. Comm'n H.R., Rep. on Terrorism and Human Rights, OEA/Ser/L/V/II.116, doc. 5, rev. 1 corr., ¶ 409 (Oct. 22, 2002). For that reason, the Human Rights Committee has repeatedly found that a non-citizen's detention was arbitrary under Article 9(1) of the ICCPR where the state failed to justify the detention in light of the individual's particular circumstances. In *Kwok Yin Fong v. Australia*, for example, the Human Rights Committee concluded that Australia had violated Article 9(1) of the ICCPR where it put forward only "general reasons" to justify the prolonged detention of a non-citizen and failed to justify the detention based on "grounds particular to her case." *Fong v. Australia*, Communication No. 1442/2005, U.N. Human Rights Comm., ¶ 9.3, U.N. Doc. CCPR/C/97/D/1442/2005 (Nov. 23, 2009). Similarly, the Committee has found a violation of Article 9(1) where the state tried to justify an asylum seeker's prolonged detention on the ground that its "general experience" was that "asylum seekers abscond if not retained in custody." *Shafiq v.*

Australia, Communication No. 1324/2004, U.N. Human Rights Comm., ¶ 7.3, U.N. Doc. CCPR/C/88/D/1324/2004 (Nov. 13, 2006).

i. *Mandatory Detention Is an Impermissible Penalty and Restriction on Movement of Refugees*

The Government's interpretation of the INA also conflicts with the United States' obligation under the Refugee Convention to avoid unnecessary restrictions on the movement of individuals seeking refugee protection and to avoid punishing such persons for their unlawful entry or presence.

Mandatory detention—applied without regard to reasonableness, necessity or proportionality—serves no governmental purpose other than to punish those seeking refuge in the United States. Such arbitrary, punitive detention amounts to an unlawful penalty under international law. *See, e.g.*, UNHCR Detention Guidelines, ¶ 32 (explaining that "detention for the sole reason that the person is seeking asylum" constitutes a "penalty . . . in violation of international law"); *see also* Refugee Convention art. 31(2) (prohibiting contracting states from imposing restrictions on the movements of refugees "other than those which are necessary"); UNHCR Detention Guidelines, ¶¶ 21-30; Gabriela Rodríguez Pizarro (Special Rapporteur on the Human Rights of Migrants), Rep. to the Commission on Human Rights, ¶ 73, U.N. Doc. E/CN.4.2003/85 (Dec. 30, 2002) ("Detention of migrants on the ground of their irregular status should under no circumstance be of a punitive nature.") These concerns extend with equal, if not greater, force to migrant children. Jorge

Bustamante (Special Rapporteur on the Human Rights of Migrants), Rep. to the Human Rights Council, ¶ 105, U.N. Doc. A/HRC/11/7 (May 14, 2009) [hereinafter Rapporteur's 2009 Report] ("[D]eprivation of liberty of children in the context of migration should never have a punitive nature.").

The Refugee Convention specifically prohibits the use of detention as a penalty or sanction for illegal entry or presence in a country where refuge is sought. *See* UNHCR Detention Guidelines, ¶¶ 11, 14, 32, 48(iii) ("Detention of asylum-seekers for immigration-related reasons should not be punitive in nature."); Cathryn Costello, UNHCR, *Article 31 of the 1951 Convention Relating to the Status of Refugees*, (July 2017), PPLA/2017/01, at 32; James C. Hathaway, *The Rights of Refugees Under International Law* 421-23 (2005) (Article 31(2) enjoins states "from detaining refugees on the basis of general rules that authorize prolonged detention as a response to unauthorized entry"); Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention and Protection*, ¶¶ 108, 111 (2001) [hereinafter Goodwin-Gill] (penalizing those viewed as illegal entrants without regard to the circumstances of flight in each individual case amounts to a breach of state's obligation).

In this case, the Government seeks to detain those who seek refugee protection for the duration of their immigration proceedings due to the manner of their entry and without allowing an immigration court to review their detention. The U.N. Working Group on Arbitrary Detention has specifically expressed concern regarding the United States' detention of immigrants subject to mandatory detention. Upon

visiting the United States, the Working Group observed that immigrants in U.S. "holding facilities . . . were subject to mandatory detention under punitive conditions that were often indistinguishable from those applicable to persons who had been sentenced to punishment in the criminal justice system." U.N. Working Grp. on Arbitrary Det., Rep. on Its Visit to the United States of America, ¶ 27, U.N. Doc. A/HRC/36/37/Add.2 (July 17, 2017) [hereinafter 2017 Working Group Report]. These conditions were, "in many cases, . . . unreasonably long, unnecessary, [and] . . . carried out in degrading conditions." *Id.* ¶ 87. Mandatory detention substantially increases the likelihood that individuals seeking refugee protection will be subjected to such unlawful treatment.

ii. *Detention as a Method of Deterrence Is Impermissible*

International law likewise prohibits the use of detention as a method of deterring unlawful entry or presence of persons seeking international protection. A.C. Helton, *Detention of Refugees and Asylum Seekers*, in Loescher, G. & Monahan, L., "Refugee Issues in International Relations," Oxford (1989) ("Detention for purposes of deterrence is a form of punishment, in that it deprives a person of their liberty for no other reason than their having been forced into exile . . . ."); U.N. Working Grp. on Arbitrary Det., Revised Deliberation No. 5 on deprivation of liberty of migrants, ¶¶ 21-22, U.N. Doc. A/HRC/39/45 (Feb. 7, 2018) ("The element of reasonableness requires that the detention be

imposed in pursuance of a legitimate aim in each individual case.").

Detention "as part of a policy to deter future asylum seekers, or to dissuade those who have commenced their claims from pursuing them, is contrary to the norms of refugee law." Goodwin-Gill at 54; *see also* UNHCR Detention Guidelines, ¶ 32; Michael Kagan, Limiting Deterrence: Judicial Resistance to Detention of Asylum-Seekers in Israel and the United States, 51 Texas Int'l L. J. 191, 195 (2016) (detention for the purpose of general deterrence "focus[es] on deterring people who are not even parties to the proceedings"). The Working Group on Arbitrary Detention has further observed that the "degrading conditions" to which many detained immigrants are subjected in the United States are an unlawful "deterrent to legitimate asylum claims." 2017 Working Group Report, ¶ 87. Mandatory detention, which often functions solely as a punitive deterrent to legitimate claims for refugee protection, is thus contrary to international law.

B. International Law Imposes Special Restrictions on the Detention of Migrant Children

The Government's unsupportable interpretation of the INA further ignores the special protections afforded to children under binding international treaties. These safeguards prohibit the detention of children for reasons related to their immigration status in almost all cases. In those rare circumstances where detention of a child for immigration purposes

may be necessary, it should be used only as a last resort and for the shortest possible measure of time.

Article 24 of the ICCPR mandates that every child has "the right to such measures of protection as are required by [his or her] status as a minor." *See also Juvenile Reeducation Institute v. Paraguay, Preliminary Objections, Merits, Reparations, and Costs, Judgment*, Inter-Am. Ct. H.R. (ser. C) No. 112, ¶¶ 147, 225-28 (Sept. 2, 2004) (explaining that "it is the child's vulnerability that necessitates special measures of protection"); *see also Roper v. Simmons,* 543 U.S. 551, 553 (2005) (recognizing children's special vulnerability due to their age).

These protections are rooted in the principle that, "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, *the best interests of the child* shall be a primary consideration." United Nations Convention on the Rights of the Child ("CRC") art. 3, Nov. 20, 1989, 1577 U.N.T.S. 3 (emphasis added).[7] International bodies and courts have consistently recognized that immigration-based detention is never in a child's best interest. *See, e.g.*, Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, ¶ 154, Advisory Opinion OC-21/14, Inter-Am. Ct. H.R. (ser. A) No. 21 (Aug. 19, 2014) (finding that the "deprivation of liberty of a child" based "exclusively on migratory reasons" can "never be understood as a

[7] The United States has signed, but not ratified, the CRC. Nevertheless, as a signatory to the CRC, the United States is bound not to "defeat" the CRC's "object and purpose." Vienna Convention on the Law of Treaties, Art. 18, 1155 U.N.T.S. 331.

measure that responds to the child's best interest"); Rapporteur's 2009 Report, ¶ 62; United Nations Comm. on the Rights of the Child, Rep. of the 2012 Day of General Discussion: The Rights of All Children in the Context of International Migration, ¶ 78 ("The detention of a child because of their or their parent's migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child.").

For these reasons, international bodies have concluded that the immigration-based detention of children is generally prohibited under international law. *See, e.g.*, U.N. Comm. on the Protection of the Rights of All Migrant Workers and Members of Their Families, Joint General Comment No. 4 (2017), U.N. Comm. on the Rights of the Child, Joint General Comment No. 23 (2017), ¶¶ 10-12 CMW/C/GC/4-CRC/C/GC/23 (Nov. 16, 2017) (finding that detention of children for immigration purposes "conflict[s] with the principle of the best interests of the child"); U.N. High Comm'r for Refugees, UNHCR's Position Regarding the Detention of Refugee and Migrant Children in the Migration Context (Jan. 2017) (concluding "that *children should not be detained* for immigration related purposes" because "*detention is never in their best interests*." (emphasis in original)); *see also* U.N. Refugee Agency Press Release, "UNHCR stresses urgent need for States to end unlawful detention of refugees and asylum-seekers, amidst COVID-19 pandemic" (July 24, 2020), *available at*, https://www.unhcr.org/enus/news/press/2020/7/5f1569344/unhcr-stresses-urgent-need-states-end-unlawful-detention-refugees-asylum.html ("Children should never be held in immigration detention.").

Due to the exceptional vulnerability of child detainees, the detention of children can even amount to torture, thereby violating the Torture Convention, to which the United States is a party. *See, e.g.*, Juan Méndez (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), Rep. to the Human Rights Council, ¶ 80, U.N. Doc. A/HRC/28/68 (Mar. 5, 2015) ("[T]he deprivation of liberty of children based on their or their parents' migration status is never in the best interests of the child, exceeds the requirement of necessity, becomes grossly disproportionate and may constitute cruel, inhuman or degrading treatment of migrant children."); U.N. Gen. Assembly, Report of the Independent Expert Leading the United Nations Global Study on Children Deprived of Liberty, ¶ 6, U.N. Doc. A/74/136 (July 11, 2019) ("[T]he available evidence shows that immigration detention is harmful to a child's physical and mental health and exposes the child to the risk of sexual abuse and exploitation."); Julie M. Linton et al., "Detention of Immigrant Children," 139 *Pediatrics* 4, 6 (Mar. 13, 2017) ("[E]ven brief detention can cause psychological trauma and induce long-term mental health risks for children").[8]

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[8] Additionally, mandatory detention of asylum seekers with reinstated removal orders may result in family separation, where, for instance, a parent is subjected to mandatory detention because of a prior removal order, but the child is entitled to a custody hearing. Family separation is also prohibited under international law. *See* ICCPR Article 17; Convention on the Rights of the Child Articles 7 and 9; American Convention on Human Rights Article 11. Family separation also violates the Torture Convention and the ICCPR because it amounts to

In those rare circumstances where brief detention of a child may be necessary, the detention must be carried out "only as a measure of last resort and for the shortest appropriate period of time." UNHCR Detention Guidelines, ¶ 51. Some experts, however, have concluded that detention of children for migration purposes cannot be justified as a measure of last resort given the availability of non-custodial alternatives. Manfred Nowak, The United Nations Global Study on Children Deprived of Liberty 448-51 (2019). The Working Group on Arbitrary Detention—after observing children in the United States, "some only a few days old," in detention "despite the availability of less restrictive measures"—has likewise noted that children should never be detained "except as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration." 2017 Working Group Report, ¶¶ 42, 44.

The Government's interpretation of the INA would deprive a child subject to reinstatement of removal with his or her parent(s) of the individualized hearing necessary to make certain that the child's best interests, in light of his or her unique circumstances, are taken into account. At a minimum, a case-by-case inquiry is essential to ensure that the child is detained only as a last resort and for the shortest possible period of time. The Government's interpretation would make this assessment impossible and, as such,

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torture. *See* Physicians for Human Rights, *You Will Never See Your Child Again: The Persistent Psychological Effects of Family Separation* 5 (Feb. 2020), https://phr.org/wp-content/uploads/2020/02/PHR-Report-2020-Family-Separation-Full-Report.pdf.

it cannot be squared with the United States' obligations under international law.

III. The United States Has an Obligation Under International Law to Provide Prompt and Periodic Court Review of All Detentions

The United States' international treaty obligations further require the Government to provide all those who seek refugee protection with prompt and periodic court review of their detention. ICCPR Article 9(4) provides:

> Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.[9]

Similarly, the American Declaration provides that "[e]very individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court." American Declaration art. XXV; *see also* American Convention art. VII; Inter-Am. Comm'n H.R. Res. 1/08, Principles and Best Practices on the Protection

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[9] *See also, e.g.*, UNHCR Detention Guidelines, ¶ 2 ("As seeking asylum is not an unlawful act, any restrictions on liberty imposed on persons exercising this right need to be provided for in law, carefully circumscribed and subject to prompt review."); Comment 35 to the ICCPR, ¶ 33 (explaining that, in the context of criminal charges, "delay longer than 48 hours must remain absolutely exceptional and be justified under the circumstances").

of Persons Deprived of Liberty in the Americas, at Principle III(1) (Mar. 13, 2008).

The right of detainees to prompt court review of their detention is binding on the United States through the ICCPR. *See also* U.N. Working Grp. on Arbitrary Det., Rep. of the Working Group on Arbitrary Detention, ¶ 19, U.N. Doc. WGAD/CRP.1/2015 (May 4, 2015) [hereinafter May 2015 Arbitrary Detention Report]; *id.* ¶ 19 n.35 ("The right to bring such proceedings before a court is well enshrined in treaty law[.]"). This is a "self-standing human right, the absence of which constitutes a human rights violation." *Id.* ¶ 2.

The review proceedings guaranteed by the ICCPR must also be conducted by a court that is independent of the detaining authority. *See id.* ¶ 69 (the reviewing court "must be a different body from the one that ordered the detention"); UNHCR Detention Guidelines, ¶ 47(iii) ("[T]he reviewing body must be independent of the initial detention authority, and possess the power to order release or to vary any conditions of release."). The U.N. Human Rights Committee has explained that the ICCPR "envisages that the legality of detention will be determined by a court so as to ensure a higher degree of objectivity and independence in such control." *Torres v. Finland*, Communication No. 291/1988, U.N. Human Rights Comm., ¶ 7.2, U.N. Doc. CCPR/C/38/D/291/1988 (Apr. 2, 1990) [hereinafter *Torres v. Finland*]; *accord* G.A. Res. 43/173, Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment (Dec. 9, 1988).

Moreover, the reviewing court must have the authority to order release. *See A v. Australia*, ¶ 9.5 (stating that court review under ICCPR art. 9(4) "must include the possibility of ordering release"); May 2015 Arbitrary Detention Report, ¶ 27.

Court review of detention must also be provided periodically or regularly. *See* HRC General Comment No. 35, ¶ 18 (detention "must be subject to periodic re-evaluation and judicial review"). Periodic review is necessary to prevent arbitrary detention because "detention should not continue beyond the period for which the State can provide appropriate justification." *A v. Australia*, ¶ 9.4; *accord* HRC General Comment No. 35, ¶ 12 ("[D]etention is arbitrary if it is not subject to periodic re-evaluation of the justification for continuing the detention."); Rapporteur's 2012 Report, ¶ 21; May 2015 Arbitrary Detention Report, ¶ 61 (non-nationals should have access to "regular periodic reviews of their detention to ensure it remains necessary, proportional, lawful and non-arbitrary"); *id.* ¶ 82; *id.* ¶ 104(b) (court is empowered to "consider whether the detention remains justified, or whether release is warranted in light of all the changing circumstances of the detained individual's case").

The system the Government advocates—in which those who seek refugee protection would be subject to mandatory detention on the decision of U.S. Customs and Border Protection or Immigration and Customs Enforcement ("ICE") to reinstate a removal order depriving them of an immigration court custody hearing—is at odds with these requirements. Even if ICE did fairly exercise its discretion to release some asylum seekers, the United States' international law

obligations require that review of detention be conducted by a different body from the one that orders detention. Accordingly, the Government must "ensure that the decision to detain a non-citizen is promptly assessed by an independent court" and guarantee that "immigration detainees are given the chance to have their custody reviewed in a hearing before an immigration judge." Jorge Bustamante (Special Rapporteur on the Human Rights of Migrants), Rep. to the Human Rights Council ¶¶ 122, 123, U.N. Doc. A/HRC/7/12/Add.2 (Mar. 5, 2008). The Inter-American Commission on Human Rights recommends that U.S. detention determinations be conducted on a case-by-case basis, subject to judicial review, and that immigrants be permitted to appeal detention decisions to an immigration court. Inter-Am. Comm'n H.R., Rep. on Immigration in the United States: Detention and Due Process, ¶¶ 429, 431, OEA/Ser.L/V/II Doc. 78/10 (Dec. 30, 2010). The U.N. Working Group on Arbitrary Detention has similarly stated that "[i]ndividualised review should comply with procedural requirements of international law, including: the requirement that the State bear the burden of proof to demonstrate that it has a legitimate interest in detention, the provision of automatic and periodic bond hearings, and the requirement that immigration judges consider the accrued length of detention in deciding whether to release an individual." U.N. Working Grp. on Arbitrary Det., Preliminary Findings from Its Visit to the United States of America (Oct. 24, 2016), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20746&LangID=E.

The Government argues that "aliens detained under Section 1231(a) retain substantial protection from unwarranted detention." Pet'rs Br. 34-36. But in reality, the Government has, as a general matter, chosen not to exercise discretion to release those seeking refugee protection from detention. A 2015 analysis of data obtained through the Freedom of Information Act revealed that "in over 85% of withholding-only cases, respondents remained detained throughout the adjudication of their claims." Lindsay M. Harris, *Withholding Protection*, 50.3 Columbia Human Rights L. Rev., 12 n.27 (2019) (citing David Hausman, Am. Civil Liberties Union Found., Fact Sheet: Withholding-Only Cases and Detention 2 (2015)). In addition, various reports indicate that ICE's detention decisions have in many cases been inconsistent, arbitrary, and/or not actually based on assessments of the particular individual's circumstances: for example, ICE parole decisions for "arriving asylum seekers" often fail to actually involve assessments of the necessity of detention in each particular individual's case; ICE officers often fail to parole asylum seekers who meet the criteria detailed in ICE's own parole directive applicable to "arriving asylum seekers"; and these problems have worsened in recent years. *See, e.g.*, *Damus v. Nielsen*, 313 F. Supp. 3d 317, 339-42 (D.D.C. 2018) (finding that "individualized parole determinations are likely no longer par for the course" based in part on an observed "drastic decline in parole-grant rates"); *Mons v. McAleenan*, No. 19-CV-1593, 2019 U.S. Dist. LEXIS 151174, at *31-35 (D.D.C. Sept. 5, 2019) (noting "substantial body of evidence" that ICE New Orleans Field Office was not following agency guidance regarding parole for asylum seekers); Human Rights

First, *Lifeline on Lockdown: Increased U.S. Detention of Asylum Seekers* 103, 13-19 (2016) [hereinafter HRF Report]; Human Rights First, *Prisons and Punishment: Immigration Detention in California* (2019) [hereinafter California Report] (describing how, despite ICE parole guidelines, California immigration detention has seen great increases in "both the number of asylum seekers and immigrants held in detention and the length of time they spend in these prison-like facilities"); 1 U.S. Comm'n on Int'l Religious Freedom, *Report on Asylum Seekers in Expedited Removal* 60-62 (2005) (finding that asylum parole guidelines for "arriving" asylum seekers were "not being consistently applied").[10]

IV. Arbitrary Detention Impedes Access to Refugee Protection and Can Lead to Refoulement

Under binding international treaties, the United States must not return those seeking refugee protection to countries where they face persecution or torture. This prohibition, known as the principle of non-refoulement, is codified in treaties to which the United States is bound as a party. *See*, *e.g.*, Refugee

[10] As these reports indicate, in many cases parole decisions are not actually based on an individualized assessment, but instead on factors such as the availability of bed space in detention facilities, local ICE detention policies, and/or a desire to deter other asylum seekers from seeking refugee protection in the United States. *See* California Report at 5-6; HRF Report at 2-3, 14-17, 22-24, 30-31; *see also* U.S. Comm'n on Int'l Religious Freedom, *Barriers to Protection* 47-48 (2016) (parole bond rates reported based on availability of detention beds).

Convention art. 33.1 (incorporated by the Refugee Protocol, to which the United States is a party) ("No Contracting State shall expel or return [] a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."); Torture Convention art. 3 ("No State Party shall expel, return [] 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.").

Arbitrary detention of people seeking refugee protection frustrates the Government's ability to comply with this principle and, in many cases, leads to "refoulement in disguise." Nils Melzer (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), Rep. to the Human Rights Council, ¶ 45, U.N. Doc. A/HRC/37/50 (Feb. 26, 2018). Even where legal safeguards are available in theory to prevent unlawful detention, many detained non-citizens simply do not have a means "to access [] such substantive, procedural, and institutional guarantees." U.N. Working Grp. on Arbitrary Det., Rep. of the Working Group on Arbitrary Detention, ¶¶ 42, 43, U.N. Doc. A/HRC/10/21 (Feb. 16, 2009).

Detention impedes access to legal assistance, which is among the most important factors in determining the outcome of an immigrant's case. "Having a lawyer is associated with better outcomes at every stage in the immigration court process," and it "is particularly vital to ensuring a fair court process for parents and children who have endured violence in their countries and during their journeys." Eagly et.

al., 106 Cal. L. Rev. at 815-16. In one recent study of U.S. immigrants who challenged their removal, "49% of released family members with counsel were successful, as were 37% of represented detained family members. In comparison, for those without counsel, only 7% of released family members and 8% of detained family members had success" in avoiding removal." *Id.* at 846. Unrepresented detainees are not only less likely to succeed in court but are also far less likely to apply for relief in the first place. Another recent study found that "[d]etained immigrants with counsel were nearly 11 times more likely to seek relief such as asylum than those without representation (32 percent with counsel versus 3 percent without)." American Immigration Council, "Access to Counsel in Immigration Court" (Sept. 2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf.

Despite the critical impact of representation on the likelihood of success in immigration proceedings, detained immigrants are "the least likely [of all immigrants] to obtain representation." *Id.* The same study, for example, found that "[o]nly 14 percent of detained immigrants acquired legal counsel, compared with two-thirds of non-detained immigrants." *Id.*; *see also* Eagly et. al., 106 Cal. L. Rev. at 790–91. Non-citizens without legal representation are thus at much greater risk of refoulement.

In addition to hindering access to representation, immigration-based detention "increases the vulnerability of" immigrants, causing many to "face increased risks to their health and wellbeing and to

their psychological or mental state." U.N. High Comm'r for Refugees, UNHCR Emergency Handbook, "Detention (and freedom of movement) of persons of concern," https://emergency.unhcr.org/entry/44484/detention-and-freedom-of-movement-of-persons-of-concern. Numerous medical associations have recognized the severe physical and psychological toll that detention takes on immigrant populations.[11]

Some non-citizens give up on their claims for refugee protection and return to the countries from which they fled, rather than subject themselves to continued physical and psychological suffering in detention. *See, e.g.*, 2017 Working Group Report, ¶ 87 ("[T]he current system of detaining immigrants and asylum seekers is, in many cases . . . a deterrent to legitimate asylum claims."); Riddhi Mukhopadhyay, Death in Detention: Medical and Mental Health Consequences of Indefinite Detention of Immigrants in United States, 7 Seattle J. for Social Justice 693, 714 (2008) ("Others, unable to bear the pain and degradation of further detention, have abandoned

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[11] *See, e.g.*, Am. Coll. of Physicians, "The Health Impact of Family Detentions in Immigration Cases" (July 3, 2018), https://www.acponline.org/acp_policy/policies/family_detention_position_statement_2018.pdf (finding detention of children and families "can be expected to result in considerable adverse harm . . ., including physical and mental health, that may follow them through their entire lives"); Am. Pub. Health Assoc., "APHA Opposes Separation and Confinement to Detention Centers of Immigrants" (Nov. 5, 2019), https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2020/01/15/apha-opposes-separation-and-confinement-to-detention-centers-of-immigrants ("Even with improved living standards in these detention centers . . . detainees' mental health is negatively impacted by disempowerment and lack of control.").

their claims for release . . . despite the fear of persecution or no knowledge of the place to which they are being deported."); Eagly et. al., 106 Cal. L. Rev. at 714–15 ("[A]fter being separated from their young children during mandatory detention, many parents have abandoned their asylum claim and returned to countries they had escaped, despite fearing for their own safety.").

A recent story offers a vivid example of the impediments that detainees encounter in pursuing legitimate claims for refugee protection. A teacher from Somalia, Yuusuf (a pseudonym used to ensure his safety), fled to the United States after extremist groups murdered his daughter, sister, and fellow teachers. Southern Poverty Law Center Report, "Detention system forces people to give up claims to stay in U.S." (Oct. 4, 2018), https://www.splcenter.org/news/2018/10/04/splc-report-detention-system-forces-people-give-claims-stay-us. Yuusuf sought asylum upon entry and endured "more than two years in inhumane conditions" in immigration detention, on top of "a long, grueling legal process." *Id.* Having lost his ability to cope with the conditions of his confinement, Yuusuf ultimately stopped fighting his unlawful detention and was deported. Reflecting on the time he spent seeking refuge in the United States, Yuusuf observed: "This is more than jail . . . . In jail, you get your sentence and you know when you are free, but detention is endless." *Id.*

Combined, the institutional constraints, physical confinement and emotional trauma caused by immigration-based detention greatly reduce the likelihood that non-citizens will successfully obtain

refugee protection in the United States—regardless of whether they have a legitimate fear of persecution if returned to their home countries. The Government's interpretation of the INA, which would result in arbitrary and indefinite detention of those who seek refuge in this country, therefore violates the United States' obligation to respect the principle of non-refoulement.

CONCLUSION

For the reasons set forth above, this Court should affirm the Court of Appeals' decision in this case.

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