No. 24-777

IN THE
Supreme Court of the United States

DOUGLAS HUMBERTO URIAS-ORELLANA; SAYRA ILIANA GAMEZ-MEJIA; AND G.E.U.G.,

Petitioners,

v.

PAMELA BONDI, U.S. ATTORNEY GENERAL,

Respondent.

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

BRIEF OF IMMIGRATION LAW AND INTERNATIONAL HUMAN RIGHTS LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are academics whose research focuses on international human rights law and member states' compliance with treaty obligations. *Amici*'s scholarly work has explored the procedural protections required to ensure the full range of rights guaranteed to refugees under international law.

Professor Charles Shane Ellison is a clinical law professor at Duke University School of Law[2] with expertise in U.S. and international refugee law. He has researched and published on the ways in which international legal norms should inform the interpretation and application of United States asylum protections—including as to the question presented in this case. *See* Charles Shane Ellison, *The Toll Paid When Adjudicators Err: Reforming Appellate Review Standards for Refugees*, 38 Geo. Immigr. L.J. 143 (2024). He has authored or coauthored amicus briefs on protection-based claims in the First, Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth Circuit Courts of Appeals.

Professor Elspeth Guild holds a Global Chair in Social Justice at the University of Liverpool and is Emerita Professor at Radboud University, Nijmegen,

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[1] Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici curiae* or their counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

[2] For all *amici*, titles and institutional affiliations are provided for identification purposes only.

Netherlands and Queen Mary University of London. She regularly advises European Union and Council of Europe institutions on migration and asylum related matters. She has written numerous studies for the European Parliament including "Visas for Human Rights Defenders" in 2024. She also advises the Council of Europe and has written two Issue Papers for the Commissioner for Human Rights. In 2022 she assisted the Council of Europe Parliamentary Assembly with an analysis of the E.U. Pact on Migration and Asylum, resulting in resolution 2416 (2022). Her most recent book is *Monitoring Border Violence in the EU: Frontex in Focus* (2023). Together with Professor Song, she previously submitted an *amicus* brief to this Court addressing other nations' approaches to family reunification. *See* Br. of Migrant Rights Initiative & Immigration, International & Comparative Law Scholars as *Amici Curiae* in Supp. of Resps., *Dep't of State v. Muñoz*, No. 23-334 (U.S. Mar. 28, 2024).

Professor James C. Simeon is a Professor in the School of Public Policy and Administration (SPPA), Faculty of Liberal Arts and Professional Studies, and a former Head of McLaughlin College, Director of the SPPA, and a former Acting Director and Deputy Director at the Centre for Refugee Studies (CRS), at York University, Toronto, Canada. Prior to joining the faculty at York University, Professor Simeon served as the first Executive Director of the International Association of Refugee Law Judges (IARLJ), now the International Association of Refugee and Migration Judges (IARMJ). He is currently an

Associate Member of the IARMJ and serves as the Coordinator of its Inter-Conference Working Party Process. He is also one of the founding members of the IARMJ America Chapter. He is a past President of the Canadian Association for Refugees and Forced Migration Studies (CARFMS), and a member of the International Association for the Study of Forced Migration (IASFM) and the Institute of Public Administration of Canada (IPAC). Professor Simeon served on the Immigration and Refugee Board of Canada (IRB) as a Member and Coordinating Member from September 1994 to October 2005. While a Member and Coordinating Member of the IRB he sat on a number of high-profile cases, including *Pushpanathan v Canada (Minister of Citizenship & Immigr.)*, [1998] 1 S.C.R. 982 (Can.), an exclusion case under Article 1F of the 1951 Convention relating to the Status of Refugees argued at the Supreme Court of Canada.

Professor Lili Song is a member of the Faculty of Law at the University of Otago, where her primary research area is refugee and immigration law. She has taught New Zealand refugee and immigration law there since 2020. She has held research or visiting positions at Harvard University, Oxford University, the University of Michigan, the East-West Center, Melbourne University, the Australian National University, Chiang Mai University, the Humanities Institute (Myanmar), and Northwestern University. She also serves as editor of the Otago Law Review. As noted above, she submitted an *amicus* brief to this Court in *Department of State v. Muñoz*.

Amici have a strong interest in ensuring that U.S. asylum proceedings comply with international human rights treaties to which the United States is a party. They submit this brief to provide their perspective on how international law, as interpreted by other member states, bears on the procedural protections for asylum and related protection proceedings.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Immigration and Nationality Act (INA) is the bedrock of the United States asylum system. A refugee, the INA provides, is someone with "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42). But that law does not exist in a vacuum. Congress adopted this definition "to bring United States refugee law into conformance" with international treaties, including the 1967 Protocol Relating to the Status of Refugees (the "Protocol"). *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). Consistent with that history, this Court has long looked to international law in resolving questions about the meaning of the INA's framework for asylum and related protection claims. *See, e.g.*, *id.* at 436–39 & nn.20–23; *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 174–78 (1993); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 426–28 (1999).

The Protocol requires signatories to maintain a process that allows them to determine fairly and efficiently whether someone qualifies as a refugee.

And the United Nations High Commissioner for Refugees (UNHCR)—the main body responsible for providing international protection to refugees—has explained that this requires an appeal to be conducted by an *independent* body.

Applied to the U.S. system, the Board of Immigration Appeals (BIA) is not that "independent" body. While empowered to conduct *de novo* review of Immigration Judge decisions, the BIA is the opposite of independent: it is an arm of the Department of Justice. Indeed, the Attorney General has unfettered power to refer BIA cases to herself and render precedential decisions.

So in the U.S. system, it is up to federal courts to provide the independent and impartial review required. But they cannot fulfill that role with one hand tied behind their backs. As Petitioners explain, independent judicial review—with *de novo* review of questions like what conduct rises to the level of persecution under the law—is necessary to safeguard asylum applicants in a context where a wrong decision may mean life or death. Judges should not have to look the other way once they have decided that the immigration authority seeking to remove a noncitizen wrongly interpreted the governing law. *De novo* judicial review of determinations about the legal meaning of persecution is needed to fulfill international law's promise of meaningful and independent judicial review.

In recognition of these principles, sister signatories bound by the same international law

obligations conduct *de novo* review, or their jurisdiction's equivalent, of asylum determinations. Those states' approaches inform this Court's understanding of the United States' international-law obligations under the Protocol and related treaties.

Amici submit this brief to aid the Court in its understanding of two topics. First, *amici* urge the Court to consider the United States' international law obligations—including treaties governing asylum and related protections—in resolving the appropriate standard of review under the INA. And second, as international law scholars in jurisdictions around the world, *amici* wish to share their understanding of other jurisdictions' approaches to this same issue.

The stakes could hardly be higher. "[E]ach time we wrongly deny a meritorious asylum application, … we risk condemning an individual to persecution. Whether the danger is of religious discrimination, extrajudicial punishment, forced abortion or involuntary sterilization, physical torture or banishment, we must always remember the toll that is paid if and when we err." *Ming Shi Xue v. Bd. of Immigr. Appeals*, 439 F.3d 111, 114 (2d Cir. 2006) (Calabresi, J.). That is precisely why international law guarantees a meaningful and independent appeal from denials of asylum—and why applicants should receive *de novo* judicial review on the legal meaning of persecution.

ARGUMENT

I. International Law Requires a Meaningful and Independent Appeal Process for Protection Claims.

A. The INA Must Be Harmonized with International Law.

This Court has consistently recognized that the INA's asylum protections are interpreted in light of U.S. treaty obligations and other international commitments. *See e.g.*, *INS v. Stevic*, 467 U.S. 407, 425–26 (1984); *Cardoza-Fonseca*, 480 U.S. at 432–33. It should do the same here.

Two principal international treaties govern treatment of refugees: the 1951 Convention Relating to the Status of Refugees, 19 U.S.T. 6223, 189 U.N.T.S. 150 (the "Convention"), and the 1967 Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, 606 U.N.T.S. 268 (the "Protocol"), which incorporated articles 2 through 34 of the Convention and imposed additional obligations. The United States acceded to the Protocol in 1968. In doing so, it "agreed to comply with the substantive provisions of Articles 2 through 34" of the Convention. *Cardoza-Fonseca*, 480 U.S. at 429; *see Stevic*, 467 U.S. at 416.

Before the United States signed the Protocol, "U.S. law demonstrated some similarities to the language in the Convention but in important respects did not require compliance with the Convention and thus with the Protocol." Note, *American Courts and the U.N. High Commissioner for Refugees: A Need for*

Harmony in the Face of a Refugee Crisis, 131 Harv. L. Rev. 1399, 1401 (2018). The Refugee Act of 1980 amended the INA to "bring United States refugee law into conformance with the 1967 United Nations Protocol." *Cardoza-Fonseca*, 480 U.S. at 436–37 (citation omitted).

In doing so, Congress adopted a definition of "refugee" that is "virtually identical to the one prescribed by Article 1(2) of the Convention":

> an individual who 'owing to a 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; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.'

Cardoza-Fonseca, 480 U.S. at 437 (quoting 8 U.S.C. § 1101(42)). Congress intended "that the new statutory definition of 'refugee' be interpreted in conformance with the Protocol's definition." *Id.* (citing S. Rep. No. 96-590, at 20 (1980); H.R. Rep. No. 96-608, at 9 (1979)); *see also* Fatma E. Marouf, *The Role of Foreign Authorities in U.S. Asylum Adjudication*, 45 N.Y.U. J. Int'l L. & Pol. 391, 398 & nn.23–24 (2013) (collecting legislative history "explicitly stat[ing] that

Congress intended to conform U.S. domestic law to the nation's international obligations under the Protocol and give 'statutory meaning to our national commitment to human rights and humanitarian concerns'").

Consistent with that history, courts look to international law "as a guide to construing the statutory provisions at issue so as to give effect to Congress's intent to honor the United States' obligations under international law." *Garcia v. Sessions*, 856 F.3d 27, 42 (1st Cir. 2017), *abrogated on other grounds by Riley v. Bondi*, 145 S. Ct. 2190 (2025). That comports with the canon of construction 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); *accord Garcia*, 856 F.3d at 42; *Kofa v. INS*, 60 F.3d 1084, 1090 (4th Cir. 1995) (en banc).

This Court has made the point explicit in prior protection cases, holding that international law—while not dispositive—sheds important light on the meaning of the INA. *See Stevic*, 467 U.S. at 425–26 (acknowledging that Congress "intended that [the term 'refugee'] would be construed consistently with the Protocol"); *Cardoza-Fonseca*, 480 U.S. at 432–33 (considering "the abundant evidence of an intent [in enacting the INA] to conform the definition of 'refugee' and our asylum law to the United Nation's Protocol to which the United States has been bound since 1968").

B. International Law Requires a Meaningful and Independent Appeal Process for Asylum Applicants.

A state's obligations under the Protocol include the requirement to provide "fair and efficient procedures for the determination of refugee status." UNHCR Exec. Comm., Conclusions Adopted by the Executive Committee on International Protection of Refugees, No. 71 (XLIV), U.N. Doc. A/48/12/Add.1 (Oct. 8, 1993), https://www.unhcr.org/sites/default/files/legacy-pdf/578371524.pdf. States may comply with the duties imposed by the Convention through various procedural mechanisms. Álvaro Botero & Jens Vedsted-Hansen, *Asylum Procedure*, *in Oxford Handbook of Int'l Refugee L.* 588, 590 (Cathryn Costello et al. eds., 2021). Nonetheless, the Convention (and by extension the Protocol) imposes a duty on signatories to design and conduct "national examination procedures … in such a way as to ensure compliance with the obligations undertaken" by signing on to the Convention or Protocol, "in accordance with the obligation to perform treaty obligations in good faith and the principle of effectiveness as generally recognized in international law." *Id.*

This principle is echoed in guidance from the UNHCR. *See Cardoza-Fonseca*, 480 U.S. at 438–39 & n.22 (noting that UNHCR guidelines "provide[ ] significant guidance in construing the Protocol, to which Congress sought to conform"); *Negusie v. Holder*, 555 U.S. 511, 536–37 (2009) (Stevens, J.,

concurring in part and dissenting in part) (drawing from UNHCR guidance and recognizing the Court "has looked for guidance in the past" from the same). The UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection* declares that "[a] person is a refugee within the meaning of the 1951 Convention as soon as he fulfills the criteria contained in the definition. … He does not become a refugee because of recognition, but is recognized because he is a refugee." UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection* ¶ 28 (2019), https://www.unhcr.org/us/sites/en-us/files/legacy-pdf/5ddfcdc47.pdf. Given that broad protection, member states have an "implicit duty to establish administrative or judicial mechanisms that are able to deal meaningfully with applications for asylum." Botero & Vedsted-Hansen, *supra*, at 589.

Consistent with these requirements, UNHCR has stated that member states shall "preserv[e] critical due process protections such as the right to an independent appeal."[3] This appeal must be "conducted by an independent body." UNHCR

[3] *See* UNHCR, *Comments of the United Nations High Commissioner for Refugees on the Proposed Rules from the U.S. Department of Justice (Executive Office for Immigration Review) and U.S. Department of Homeland Security (U.S. Citizenship and Immigration Services), "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review"* 9 (July 15, 2020), https://www.refworld.org/legal/natlegcomments/unhcr/2020/en/123896 [hereinafter UNHCR Comments on Procedure for Asylum].

Comments on Procedure for Asylum at 33 (internal quotation marks omitted).[4]

Other international covenants further support the need for an independent appeal process. *See Charming Betsy*, 6 U.S. (2 Cranch) at 118; *supra* page 9. The International Covenant on Civil and Political Rights (ICCPR), 999 U.N.T.S. 171, was signed by the United States in 1976 and ratified in 1992. Although the ICCPR is similarly not self-executing, "the Supreme Court and lower federal courts frequently consult the ICCPR as an interpretive tool to determine important issues in the area of human rights law." *Garcia*, 856 F.3d at 60–61 (Stahl, J., dissenting) (collecting cases). The ICCPR provides "an appeal right against decisions which could lead to removal": at the stage where "forced removal is inevitable," the person seeking asylum must have an opportunity for "effective, independent review of the decision to expel." UNHCR, *Statement on the Right to*

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[4] *See also* UNHCR, *Comments of the United Nations High Commissioner for Refugees on the Proposed Rule from the U.S. Department of Justice (Executive Office for Immigration Review) and the U.S. Department of Homeland Security (U.S. Citizenship and Immigration Services): "Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers"* 6 (May 31, 2022), https://www.refworld.org/legal/natlegcomments/unhcr/2022/en/124209 ("Asylum-seekers have a right to an *effective remedy* under international human rights law and should be able to appeal the factual and legal findings of a negative decision before an *independent and impartial administrative or judicial tribunal or other body*." (emphasis added)).

an Effective Remedy in Relation to Accelerated Asylum Procedures ¶ 42 (May 21, 2010), https://www.unhcr.org/sites/default/files/legacy-pdf/4deccc639.pdf.

Likewise, the UNHCR has interpreted the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 (entered into force June 26, 1987), to require states to "put in place mechanisms and allocate resources to ensure that the [international human rights law] protection needs of all migrants can be assessed individually and with due process, including as a supplement to asylum determination mechanisms." UNHCR, *The Principle of* Non-Refoulement *Under International Human Rights Law* (Jan. 1, 2018), https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrinciple Non-RefoulementUnderInternationalHuman RightsLaw.pdf.

C. Independent Appellate Review Requires *De Novo* Judicial Review of What Qualifies as "Persecution."

As applied to the United States, the international law requirement of independent review necessitates *de novo* judicial review to determine what conduct rises to the level of persecution for purposes of asylum and related protection claims. Neither BIA review nor more deferential judicial review suffices.

First, the BIA itself does not provide the necessary independent review. Members are appointed by the

Attorney General and act as the Attorney General's "delegates." *See* 8 C.F.R. § 1003.1(a)(1). And the Attorney General may at any point direct the BIA to refer a case for the Attorney General's review and final decision, which is precedential and binding. *Id.* § 1003.1(g)(2), (h). This means that individual BIA decisions are not insulated from political pressure, because the Attorney General may at her option provide the decision on a case. And, "due to the famous lack of independence of the overall system of immigration adjudication, decisions of the BIA are, or at least can be, functionally exercises of the will of the Attorney General even without the direct use of the referral power." Stella Burch Elias & Paul Gowder, *Against Attorney General Self-Referral in Immigration Law*, 109 Minn. L. Rev. 2331, 2384–85 & n.225 (2025) (collecting sources showing that "[b]oth immigration judges and the BIA are famously supine toward the policy judgments of presidents").

Nor does deferential judicial review suffice. *Amici* endorse Petitioners' persuasive showing that deferential review of Immigration Judge and BIA determinations on what conduct legally qualifies as persecution requires courts to uphold erroneous legal determinations—in short, to deny asylum eligibility notwithstanding their independent judgment that the noncitizen *is* eligible for asylum. *See* Pet. Br. 18–32. That is problematic on its own terms, but it is especially so in the context of the U.S. immigration system. "[T]he cases provide many examples of clear errors in [the BIA's] decision-making that were remedied by the courts." Mary Hoopes, *Judicial*

Deference and Agency Competence: Federal Court Review of Asylum Appeals, 39 Berkeley J. Int'l L. 161, 193 (2021). Federal court review is necessary to "recognize and address problems that go unaddressed by the agency through their review of fact-intensive, high volume adjudication," including immigration decision-making. *Id.* at 195 (citing Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 Tex. L. Rev. 1097, 1101 (2018)). And only *de novo* review ensures that asylum eligibility determinations are made correctly and in accordance with international law obligations.

II. Sister Signatories Implement Their International Law Obligations By Conducting *De Novo* Review.

Sister signatories comply with their international law obligations by undertaking *de novo* review of legal determinations concerning asylum. *Amici* set forth those approaches below to guide this Court in its analysis of the question presented.

At the outset, courts and jurists have consistently recognized that "the opinions of [the United States'] sister signatories [are] entitled to considerable weight" in determining U.S. international law obligations. *Air France v. Saks*, 470 U.S. 392, 404 (1985) (quoting *Benjamins v. British Eur. Airways*, 572 F.2d 913, 919 (2d Cir. 1978)) (considering French decisions and scholarship on Swiss and German law in construing "accident" under Warsaw Convention); *accord El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 175–76 & n.16 (1999) (considering decisions from

the United Kingdom, New Zealand, and Singapore in assessing liability under the Warsaw Convention); *Abbott v. Abbott*, 560 U.S. 1, 16–18 (2010) (considering decisions from the United Kingdom, Israel, Austria, South Africa, and Germany interpreting the Hague Convention, and acknowledging contrary authority from Canada and France); *see also Negusie*, 555 U.S. at 537 (Stevens, J., concurring in part and dissenting in part) ("When we interpret treaties, we consider the interpretations of the courts of other nations."); *Olympic Airways v. Husain*, 540 U.S. 644, 660 (2004) (Scalia, J., dissenting) ("We can, and should look to decisions of other signatories when we interpret treaty provisions. Foreign constructions are evidence of the original shared understanding of the contracting parties. Moreover, it is reasonable to impute to the parties an intent that their respective courts strive to interpret the treaty consistently.").

Here, as discussed below, Protocol signatories—including the United Kingdom, New Zealand, and European Union member states including Spain—apply their jurisdiction's equivalent of *de novo* review to asylum determinations. This reflects their understanding that only *de novo* review of what constitutes persecution under the law is sufficient to afford adequate protections to asylum applicants.

A. United Kingdom

The United Kingdom is a good example. United Kingdom Administrative Court judges typically view themselves as the "primary decision maker" when reviewing Home Office determinations that affect

individual liberty or determine whether there has been a human rights violation, including in the context of immigration detention. *See* Justine N. Stefanelli, *Judicial Review of Immigration Detention in the UK, US and EU: From Principles to Practice* 158–59 (2020). In doing so, they look not just to "whether the Home Secretary's judgment was unreasonable" but rather to whether the judgment was "lawful." *Id.* at 158. While United Kingdom courts may defer to immigration authorities on factual matters particularly within their expertise, such as the average time it takes to obtain travel documents, they nonetheless engage in *de novo* review of "the application of the law to th[e] facts." *Id.* at 165; *accord* Robert Thomas, *Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication* 78 (2011) (observing that United Kingdom asylum applicants are entitled to a "*de novo* decision" by an "independent judge" upon refusal by the Home Office).

B. New Zealand

The same is true in New Zealand. Under the 2009 New Zealand Immigration Act, if a refugee status claim is considered and then declined by Immigration New Zealand, the government agency responsible for immigration and asylum affairs, the claimant can appeal the decision to the Immigration & Protection Tribunal as of right. Immigration Act 2009, s 194 (N.Z.). The Tribunal is a specialist tribunal administered by New Zealand's Ministry of Justice and chaired by a district court judge. *See Immigration & Protection Tribunal*, Ministry of Just., https://www.justice.govt.nz/tribunals/immigration/im

migration-and-protection/ (last visited Aug. 25, 2025). In turn, by statute, the Tribunal must determine the claim *de novo*. Immigration Act 2009, s 198(1) (N.Z.) (providing that when hearing an appeal under the relevant section, "the Tribunal must … determine the matter de novo").

C. European Union

So too with European Union members. The European Union's Asylum Procedure Directive, which was in place until 2024, required member states to provide "for a full and ex nunc examination of both facts and points of law" of courts' or tribunals' decisions to withdraw protection from refugees, as a baseline requirement for an "effective remedy" to an adverse decision. Eur. Parl. & Council Directive 2013/32, art. 46 ¶ 3, 2013 O.J. (L 180) 60, https://eur-lex.europa.eu/eli/dir/2013/32/oj/eng. An "ex nunc" determination requires "consideration of the evidence of the situation (all elements, facts and points of law) available at the moment of the decision." Migration & Home Affairs, *Ex-Nunc Examination*, Eur. Comm'n, https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/ex-nunc-examination_en (last visited Aug. 26, 2025). Although the Directive was replaced in 2024 by a new international protection regulation, the new regulation likewise preserves the right to "a full and *ex nunc* examination of both facts and points of law" before a court or tribunal of first instance. Eur. Parl. & Council Regulation 2024/1348, art. 67 ¶ 3, 2024 O.J. (L 1348) 1, https://eur-lex.europa.eu/eli/reg/2024/1348/oj/eng. The decision

to review even factual determinations anew exceeds what is required and sought by Petitioners here.

As an example of implicitly *ex nunc* review, the Spanish National Court overturned an administrative denial of refugee status on the grounds that gang extortion was "common criminality" rather than persecution. AN, Sala de lo Contencioso, Sección 2, de 09/02/2018, Rec 605/2016, https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/AN%2C%20Sala%20de%20lo%20Contencioso%2C%20Rec%20605-2016.pdf. The court provided a substantive review of the law at issue, including considering new UNHCR guidance that was issued after the initial decision. *Id.*

Similarly, a Court of Justice of the European Union (CJEU) ruling under the prior governing Directive with similar language to the European Union's 2013 directive confirmed that even without a specific requirement of *ex nunc* review, such review was required. *See* Case C-756/21, *X. v. Int'l Protection Appeals Tribunal*, ECLI:EU:C:2023:523 (June 29, 2023). It explained that a "court or tribunal of first instance, tasked with performing the judicial scrutiny function provided for in Article 39 of [the European Council's directive][,] … is required to carry out [a] full review." *Id.* ¶ 63. More specifically, it must have "the power to deliver a decision *ex nunc* on the basis of the elements produced before it." *Id.*

D. Canada

The Canadian courts have likewise given rigorous scrutiny to legal determinations related to asylum,

including what constitutes a "well-founded fear of persecution." Gerald Heckman & Amar Khoday, *Once More unto the Breach: Confronting the Standard of Review (Again) and the Imperative of Correctness Review when Interpreting the Scope of Refugee Protection*, 42 Dalhousie L.J. 49, 72–74 (2019). For example, Canadian courts apply independent review to "general questions of law that are of central importance to the legal system as a whole," because they require "uniform and consistent answers." *Canada (Minister of Citizenship & Immigr.) v. Vavilov*, 2019 SCC 65, paras. 17, 58–59 (Can.) (internal quotation marks omitted). And even in other circumstances, Canadian courts carefully scrutinize administrative decisions and reverse when they violate established legal principles or fail to consider important factors. In *Mason v. Canada*, for example, the Canadian Supreme Court reversed a lower court decision because the administrative tribunal failed to consider "Canada's *non-refoulement* obligation under Article 33 of the *Refugee Convention*." *Mason v. Canada (Minister of Citizenship & Immigr.)*, 2023 SCC 21, para. 104 (Can.).

* * *

The approaches of sister signatories to the Protocol corroborate that *de novo* judicial review on the legal meaning of persecution is the appropriate standard to promote the United States' compliance with its international law obligations.

CONCLUSION

The First Circuit's judgment should be vacated and remanded for further proceedings applying a *de novo* standard of review.

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