

No. 16-1274

IN THE
Supreme Court of the United States

TING XUE,
Petitioner,

v.

JEFFERSON B. SESSIONS III,
Respondent.

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

**BRIEF AMICUS CURIAE OF THE
FOUNDATION FOR MORAL LAW AND
THE INTERNATIONAL CONFERENCE OF
EVANGELICAL CHAPLAIN ENDORSERS
IN SUPPORT OF PETITIONER**

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INTEREST OF AMICI CURIAE¹

Amicus Curiae Foundation for Moral Law (“the Foundation”) (www.morallaw.org) is a national public-interest organization based in Montgomery, Alabama, dedicated to the defense of religious liberty and the strict interpretation of the Constitution as written and intended by its Framers.

The Foundation believes America was founded as a citadel of religious liberty and a haven for those who have suffered religious persecution, and that religious liberty is the first and foremost of all freedoms because, as the Declaration of Independence states, all men are “endowed by their Creator with certain unalienable rights.” As Thomas Jefferson asked, “Can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God? That they are not to be violated but with His wrath?”²

The International Conference of Evangelical Chaplain Endorsers (“ICECE”) (www.icece-militarychaplains.com) is an association of chaplain

¹ Pursuant to Rule 37.2, counsel of record for all parties received notice of intent to file this brief at least ten days before the due date. Pursuant to Rule 37.3, all parties have consented to the filing of this brief. Pursuant to Rule 37.6, no party or party’s counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amici curiae*, their members, or their counsel, contributed money that was intended to fund the preparation or submission of this brief.

² “Notes on the State of Virginia” (1787), in 8 *The Writings of Thomas Jefferson* 404 (H.A. Washington ed., 1854).

endorsers and nonprofit organizations whose purpose is to represent their member churches in endorsing military chaplains and other institutional chaplains, and to identify, define, and address issues of importance to evangelical military chaplains and the military personnel they represent, including the protection and advancement of religious liberty.

Accordingly, the Foundation and ICECE are deeply concerned because the Immigration Judge (“IJ”), the Board of Immigration Appeals (“BIA”), and the Tenth Circuit have redefined the historic meanings of “religious persecution,” “free exercise,” “religious liberty,” and “burden” on religion to turn away a Chinese Christian who is clearly the victim of religious persecution. These redefinitions are not limited to an immigration context. They also conflict with the foundational precept upon which our freedoms exist, “that all men are endowed by their Creator with certain unalienable rights,” and thus undermine religious freedom and the rule of law.

INTRODUCTION

Legal and illegal immigration, a “wall,” sanctuary cities, crimes, threats of terrorism, and bans on immigration from certain countries are central issues in the minds of Americans today. Yet amid the controversy about immigration, and with an estimated 11 million illegal immigrants living in America today,³ the INS has singled out for

³ Jens Manuel Krogstad et al., *5 Facts about Illegal Immigration in the U.S.*, PEW RESEARCH CENTER (Apr. 27, 2017), <https://goo.gl/rkl9Uu>.

deportation Ting Xue, a married, working, law-abiding Chinese Christian who seeks asylum because of religious persecution.

This makes no sense whatsoever.

SUMMARY OF ARGUMENT

The twentieth century, despite its supposed enlightenment, witnessed by some estimates more religious persecution and more religious martyrs slain for their faith than the previous nineteen centuries combined.⁴ A 2009 study by the Pew Research Center concluded that one-third of the countries in the world, containing 70% of the world's population, have "high or very high" restrictions on religion.⁵

Many of America's early settlers, and many of those who arrived later, came to these shores to escape religious persecution and to find religious liberty. How many of those would have been admitted to our country if they had been required to prove to an IJ that the persecution they suffered was substantial enough to create a presumption that they are likely to face further persecution if they are returned to their homeland? And how many of those and their descendants would still be here if required to argue before an appellate court that the IJ's

<http://www.dailywire.com/news/13360/how-many-us-immigrants-are-illegal>.

⁴ *20th Century Saw 65% of Christian Martyrs, Says Author*, XENIT (May 9, 2002), <https://goo.gl/fy1Y2a>.

⁵ *Global Restrictions on Religion*, PEW RESEARCH CENTER (Dec. 17, 2009), <https://goo.gl/fhq7Js>.

findings were not “supported by substantial evidence” or, depending on the Circuit, that they were entitled to “de novo review”?

On questions of immigration and asylum, our courts need to speak with one voice. For those who seek asylum at great risk and at great expense, their prospects for remaining in America should not depend upon the Circuit in which they happen to reside.

Statistics on how many days and nights one spent in jail, how many times one was beaten, whether medical attention was required, how often the chamber pot in the jail cell was emptied, or how many bowls of porridge the prisoner was served do not adequately portray the reality of religious persecution. Rather, this Court should look to the overall history and tradition of religious persecution in Communist China and the fact that such persecution is intensifying rather than abating.

Religious freedom is the first right guaranteed by the Bill of Rights. The Declaration of Independence recognizes that human rights are the unalienable endowment of God. Petitioner Ting Xue, who risked everything to come to America, should not be sent back to China just because he resides and works in the wrong circuit.

ARGUMENT

I. The Court should grant certiorari because the split in the circuits creates uncertainty and disruption in the immigration, naturalization, and asylum process.

The Foundation and ICECE will not dwell extensively upon the circuit splits, because Counsel for Ting Xue has very capably established that the Tenth Circuit is at odds with the Seventh, Ninth, and Eleventh Circuits.

Splits between the circuits may not be that harmful in domestic matters such as property law, criminal procedure, or commerce. But uniformity is vitally important in the area of foreign policy which includes immigration. As Thomas Jefferson wrote to James Madison on December 16, 1786: “To make us one nation as to foreign concerns, and keep us distinct in Domestic ones, gives the outline of the proper division of powers between the general and particular governments.”⁶

The fate of one who flees for refuge to this citadel of freedom should not depend upon the Circuit Court of Appeals that hears his case.

⁶ Letter, Thomas Jefferson to James Madison, (Dec. 16, 1786), 7 *The Papers of Thomas Jefferson* (Julian P. Boyd, ed.) 51 (1950).

Ting Xue originally filed his case in the Ninth Circuit because he resided in Los Angeles. He transferred the case to the Tenth Circuit because he moved to Denver for employment. If he had refused the job offer and become an unemployed resident of California, the Ninth Circuit almost certainly would have decided in his favor. Because he chose to move to Denver and be a productive person on the road to citizenship, his appeal was denied. This result is senseless and unfair.

II. The Tenth Circuit erred by considering issues of persecution narrowly rather than looking to the broader policies of the Government of China and its ruling Communist Party.

The facts in this case are not in dispute, nor is Ting Xue's credibility. Ting Xue's church has been declared illegal by the Chinese Government. Chinese officials raided his church and arrested him, detained him three days and four nights, questioned him repeatedly in an aggressive and hostile manner, inflicted physical punishment upon him, did not empty the chamber pot during his entire confinement. He was released only when his mother paid a sum equal to about 60% of his annual salary. Additionally, government officers forced him to sign a promise never to attend his church again; threatened him with worse punishment, including a year of confinement, if he did; required him to report to the police station for weekly one-hour lectures about the need to support the government and to answer questions about his "re-education"; and threatened his mother after he left China. While he was not

present, police again raided his church and arrested everyone present. All “repeat offenders” were denied bond and sentenced to one year imprisonment. If this were a question of fact, no reasonable person could deny that this is “persecution.” What is persecution, however, is not a question of fact but a value judgment and a question of law entitled to *de novo* review.

To determine whether Ting Xue has suffered persecution in the past or is likely to suffer persecution in the future (the statute is disjunctive), the Court should look beyond the facts of Ting Xue’s individual case and examine the overall policy of the Government of China and its ruling Communist Party toward religion in general and Christianity in particular. Federal Rule of Evidence 406 (“Habit; Routine Practice”) provides:

Evidence of a person’s habit or an organization’s routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

As Paul Kengor, Professor of Political Science at Grove City College, explains:

The Soviet Union, reflective of the communist world as a whole, was openly hostile to religion and officially atheist; it was not irreligious or unreligious, with no

stance on religion, but took the position that there was no God. Moreover, that atheism translated into a form of vicious anti-religion that included a systematic, often brutal campaign to eliminate belief. This began from the outset of the Soviet communist state and still continues in various forms in communist countries to this day, from China to North Korea to Cuba.

The roots of this hatred and intolerance of religion lie in the essence of communist ideology. Marx dubbed religion the “opiate of the masses” and opined that, “Communism begins where atheism begins.” ...

This atheism was endemic to the communist experiment. Even those communists unable to secure political power—and thus lacking the ability to persecute believers—still did their best to persecute the teachings of organized religion and ridicule the idea of the existence of God. ... Communists were proud of their atheism, and militant about it.

....

Whether the despot was Fidel Castro or Pol Pot or Stalin, the sentiment was the same: “Religion is poison,” as Mao Tse-Tung was said to have stated. Wherever they went,

from East to West, from Africa to Asia, from Phnom Penh to St. Petersburg, communists pursued an all-out assault on religion. Communists quibbled over the details of how to implement Marx's vision, but they were unanimous in one thing: religion was the enemy, a rival to Marxist mind control, and it had to be vanquished regardless of costs and difficulties.⁷

Although some disagreement exists as to the extent by which the Government of China today implements Communist ideology and the means employed, the Communist Party totally controls the Chinese government. Mao Zedong (1893-1976) governed China as Chairman of the Communist Party of China from 1949 to 1976. A Chinese expert writes: "Mao's responsibility for the extinction of anywhere from 40 to 70 million lives [some give a much higher figure] brands him as a mass killer greater than Hitler or Stalin; his indifference to the suffering and the loss of humans breathtaking."⁸

Upon seizing power in 1949, Mao ordered the expulsion of Christian missionaries (at least 10,000) from China.⁹ But rather than abating with time,

⁷ Dr. Paul Kengor, *The War on Religion*, VICTIMS OF COMMUNISM MEMORIAL FOUNDATION, <https://goo.gl/9ZqJNd>. For the larger picture of the repressive character of communism, see Lloyd Billingsley, *The Generation That Knew Not Josef* (1985), Aleksandr I. Solzenitsyn *The Gulag Archipelago* (1973), and Eugene Lyons, *Workers' Paradise Lost: Fifty Years of Soviet Communism: A Balance Sheet* (1967).

⁸ Jonathan Fenby, *Modern China: The Fall and Rise of a Great Power, 1850 to the Present* 251 (2008).

⁹ *Persecution of Christians in China*, <https://goo.gl/fdr08j>.

Communist persecution of religion increased with the “Great Proletarian Cultural Revolution.” Guy Gardner writes,

Churches and temples were desecrated. The Christian churches and cathedrals of the large eastern cities had their crosses and statues pulled down and their stained glass destroyed. Those who practiced religion, especially clergy and monks, became targets of “criticism” sessions by the red guards, and were harassed and beaten. Tibetan Buddhist monks were tortured, Catholic priests were sent to labor camps, and Muslim schools and mosques were turned into pig slaughterhouses.¹⁰

In *The Red Book of Chinese Martyrs*, the author details the Communist persecution of Chinese Roman Catholics. The publisher’s synopsis of the book states:

Only recently have non-specialists had access to autobiographical testimonies concerning the laogi, the Chinese forced labor camps.

For years ideological baggage encumbering journalism about China severely limited opportunities for hearing stories of Christian persecution and martyrdom, however, after decades

¹⁰ Guy Gardner, *The Communist Persecution of Christianity & Religion*, PEOPLE OF OUR EVERY DAY LIFE, <https://goo.gl/wnMq8U>.

of propaganda, we are finally seeing a “demythologization” of Mao, a man responsible for crimes equal to or even worse than those of Stalin or Hitler.¹¹

The Chinese Communist government typically displays greater hostility toward “foreign” religions such as Christianity, Judaism, and Islam than toward more “native” religions or belief systems such as Taoism, Buddhism, or Confucianism.¹² To blunt the influence of Christianity, the Chinese government has created government-approved Christian churches, such as the Chinese Patriotic Catholic Movement, which renounces allegiance to the Pope and the Vatican, and the Three-Self Patriotic Movement that supports the policies of the Chinese government and allows the government to exercise substantial control over it.

Our purpose in this brief is not to pass judgment upon either of these movements. Our purpose, rather, is to observe that millions of Protestant and Catholic Christians like Ting Xue do not share the beliefs and practices of the Patriotic Catholic Movement or the Three-Self Patriotic Movement and therefore cannot in good conscience affiliate with them. Just because these two religious organizations enjoy a degree of government toleration, accompanied by heavy government control, does not mean that other

¹¹ Gerolamo Fazzini, *The Red Book of Chinese Martyrs*, IGNATIUS PRESS, <https://goo.gl/OaaxB6>.

¹² Buddhism originated in India, but its roots in China are more ancient and widespread than those of Western religions. Many claim Confucianism is more a philosophy than a religion.

Christians like Ting Xue and the churches to which they belong are not being persecuted.

This persecution is not abating with time but is intensifying. As Voice of America reports: “The Chinese Communist Party has ‘intensified’ its persecution of religious practitioners in recent years under the leadership of President Xi Jinping, and the ramifications are being felt well beyond the boundaries of religious policy, according to the U.S.-based Freedom House nonprofit.”¹³

In its *Freedom in the World 2017* report in which a rating of “1” means most free and “7” means least free, Freedom House gave China a “7” on political rights and “6” on civil liberties. Furthermore, the trend is downward. “China received a downward trend arrow due to the chilling effect on private and public discussion, particularly online, generated by cybersecurity and foreign NGO laws, increased internet surveillance, and heavy sentences handed down to human rights lawyers, microbloggers, grassroots activists, and religious believers.”¹⁴

The Freedom House report further states:

The ruling Chinese Communist Party (CCP) has tightened its control over the media, religious groups, and civil society associations in recent years. A renewed

¹³ *Freedom House: Chinese Communists Intensifying Religious Persecution*, VOICE OF AMERICA (Feb. 28, 2017), <https://goo.gl/JPIO9I>.

¹⁴ *Freedom in the World 2017 (China)*, Freedom House, <https://goo.gl/zyi6DK>.

push for party supremacy and ideological conformity has undermined rule of law reforms and curtailed civil and political rights. The state president and CCP leader, Xi Jinping, is consolidating personal power to a degree not seen in China for decades. Faced with a slowing economy, the leadership continues to cultivate nationalism, including hostile anti-Western rhetoric, as a pillar of legitimacy. China's budding civil society and human rights movements have struggled in the midst of a multiyear crackdown.¹⁵

A party work conference on religion held in April 2016, the first since 2001, "laid out the leadership's plans to tighten control over religious organizations and activities."¹⁶ The report continues:

The space for autonomous religious practice narrowed further during the year as the government restricted and harassed a wide range of religious communities and laid out plans for tighter management of religion during the first National Conference on Religious Work in 15 years. At the April meeting, authorities asserted that religion must serve as an instrument for national unity and social stability, and called on religious groups to "Sinicize" by "endorsing the political system, conforming

¹⁵ *Id.*

¹⁶ *Id.*

to Chinese society, and embodying Chinese culture.”

The regime’s 17-year campaign against the Falun Gong spiritual group continued in 2016, marking one of the longest and harshest campaigns of religious persecution since the CCP took power. While Falun Gong practitioners are no longer sent in large numbers to “reeducation through labor” camps, which were abolished in 2013, many are still criminally prosecuted, in some cases receiving long prison terms, or arbitrarily detained in “legal education centers,” where they can face torture to force them to abandon their beliefs. Once released, they typically experience constant monitoring and harassment.

Curbs on the practice of Islam among the Uighur population of Xinjiang remained intense, affecting the wearing of religious attire, attendance at mosques, fasting during Ramadan, and other basic religious activities. Separately, an ongoing campaign against Protestant churches in Zhejiang Province, considered the heartland of Christianity in China, has resulted in the demolition of over 1,200 crosses and numerous churches in recent years, and congregations across the region remain under pressure. In August 2016, Hu Shigen, who led a number of underground churches, was sentenced to seven and a

half years in prison in Tianjin for supposedly spreading subversive ideas.¹⁷

Other sources confirm the Freedom House report. ABC's China correspondent reports:

The Communist Party has just enacted much tougher laws that criminalize Christians if they do not pledge loyalty to the state. Chinese President Xi Jinping has warned that all religions now have to become “Chinese” and the new laws will attempt to bring churchgoers and their leaders under party control.

....

The new laws will put the state firmly in charge, giving the Communist Party the ability to hire and fire church leaders and change religious doctrine to make it more Chinese. That means churchgoers will have to pledge loyalty to the Communist Party first, which Pastor Wang [Zeqing] says cannot be done. “Jesus Christ is my only belief, my only loyalty is to Jesus Christ,” he says.¹⁸

The United States Commission on International Religious Freedom (“USCIRF”)¹⁹ has come to the

¹⁷ *Id.*

¹⁸ Matthew Carney, *Chinese Communist Party Readies Crackdown on Christianity*, ABC NEWS (Oct. 7, 2016), <https://goo.gl/W2WU2u>.

¹⁹ USCIRF is “an independent, bipartisan U.S. federal government commission, the first of its kind, dedicated to

same conclusion. The USCIRF 2017 Annual Report notes that the U.S. State Department has placed China on its list of Countries of Particular Concern (“CPC”), those which most severely repress religion and persecute people for their religious beliefs.²⁰

In its key findings on China, the report states:

During 2016, as China's President Xi Jinping further consolidated power, conditions for freedom of religion or belief and related human rights continued to decline. Authorities target anyone considered a threat to the state, including religious believers, human rights lawyers, and other members of civil society. In 2016, the Chinese government regularly emphasized the “sinicization” of religion, and circulated revised regulations governing religion, including new penalties for activities considered “illegal” and additional crackdowns on Christian house churches. ... Based on China's longstanding and continuing record of severe religious freedom violations, USCIRF again finds that China merits designation in 2017 as a

defending the universal right to freedom of religion or belief abroad.” <http://www.uscifr.gov/about-uscifr>. The International Religious Freedom Act of 1998 authorized the creation of the USCIRF. *See* 22 U.S.C. §§ 6431-36.

²⁰ USCIRF 2017 Annual Report, <https://goo.gl/Xz1xey>. The other CPC countries are Burma, Central African Republic, Eritrea, Iran, Nigeria, North Korea, Pakistan, Russia, Saudi Arabia, Sudan, Syria, Tajikistan, Turkmenistan, Uzbekistan, and Vietnam. *Id.*

“country of particular concern,” or CPC, under the International Religious Freedom Act (IRFA). The State Department has designated China as a CPC since 1999, most recently in October 2016.²¹

As this evidence demonstrates, religious persecution, and especially persecution against Christians who because of religious conviction cannot be part of the state-sanctioned Three-Self Patriotic Movement, is widespread, severe, systematic, rooted in Communist ideology, and is intensifying.

By closing its eyes to the total picture of China’s historic and continuing repression, the Tenth Circuit has violated the presumption of regularity. That presumption “supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.” *United States v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926). Under China’s policy and law, Chinese officials have a duty to persecute Christians.

That Chinese officials imprisoned Xue and subjected him to physical and mental abuse, inhumane conditions, and fined him all because he exercised his Christian faith is not disputed. The same officials threatened to imprison him if he were again to exercise his Christian faith. China’s recently revised religion regulations include new penalties for religious activities which China considers “illegal” and additional crackdowns on Christian house

²¹ *Id.* at 32.

churches. See USCIRF 2017 Annual Report, *supra*. The presumption of regularity, absent evidence to the contrary, assumes that Chinese officials were acting in accord with their government's official policy. "Every public official is presumed to act in obedience to his duty, until the contrary is shown[.]" *Am. Fed'n of Gov't Employees, AFL-CIO v. Reagan*, 870 F.2d 723, 727 (D.C. Cir. 1989) (quoting *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 32-33 (1827)). That same presumption means that China will be expected to do exactly what it promised Xue it would do to him if he exercised his faith, namely to persecute him. Under the facts before the Court, that persecution could include retaliation against Xue for fleeing China in order to practice his Christian faith.

Although lacking evidence rebutting the presumption of regularity, The Tenth Circuit assumed China would act contrary to its stated regulations, policy, and law. That assumption contradicts the presumption that China's officials act with "regularity" to enforce the laws and implement the policy of suppressing Christianity, *i.e.*, what they have done in the past and what they have promised to do in the future.

There is a presumption of regularity in the conduct of government affairs. This presumption can be applied in any review unless there is substantial credible evidence to rebut the presumption.

32 C.F.R. § 724.211 ("Regularity of Government Affairs").

For the Chinese government, “regularity” means the repression and persecution of Christianity. Ever since it came to power in 1949, the Chinese Communist Party has professed its hostility toward religion in general, Christianity in particular, and especially those forms of Christianity that do not allow themselves to be controlled by the state. The Chinese communists have not only historically followed a policy of repression and persecution of Christians but have also recently announced a determination to intensify that repression and persecution.

Local officials have carried out that policy of persecution in the case of Ting Xue. They have declared that his church is illegal; they have raided meetings of his church and arrested him and others; they have brutalized him; they have forced him to sign a promise that he will not associate further with his church; they have compelled him to report weekly to the police on his activities and have threatened him with extreme punishment if he again associates with his church.

The conclusion of the courts below that Ting Xue has failed to show a likelihood that he will face persecution if he is forced to return to China assumes contrary to the presumption of regularity that the Chinese Communist Party and local officials will violate their duty to enforce Chinese law and to carry out the promises made to Xue of further persecution. The presumption of regularity in government affairs applies “unless there is substantial credible evidence to rebut the presumption.” 32 C.F.R. § 724.211. In

this case no substantial and credible evidence exists to rebut the presumption of regularity.

III. The Tenth Circuit erred by failing to consider the effect of the Religious Freedom Restoration Act and the First Amendment on asylum policy.

The Religious Freedom Restoration Act (“RFRA”), 42 U.S.C. § 2000bb et seq., places the burden on the government to prove that it has a compelling interest that cannot be achieved by less restrictive means before imposing a substantial burden upon the exercise of a person’s sincerely-held religious beliefs. The Act was held constitutional as applied to the federal government. *Gonzales v. O Centro Espirita Beneficente Uniao de Vegetal*, 546 U.S. 418 (2006). See also *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

The removal of Ting Xue from his home, family, job, and adopted country clearly comes within the purview of RFRA. Even though Ting Xue is not a U.S. citizen, his residence in the United States brings him under at least some of the protections of the Constitution, the First Amendment and RFRA. “Freedom of speech and of press is accorded aliens residing in this country.” *Bridges v. Wixon*, 326 U.S. 135, 148 (1945). Children of illegal immigrants, for instance, have a right to public education, *Plyler v. Doe*, 457 U.S. 202 (1982). Certainly these protections also include religious freedom, the reason many original settlers came to America.

Ting Xue came to the United States because of his religious convictions. His forcible return to China will subject him to renewed and heightened persecution because of those same convictions. Clearly the decision below constitutes a substantial burden upon Ting Xue's exercise of religion. If not reversed, it will force him into a dilemma. He must either (1) follow his religious convictions and be subject to severe punishment, or (2) violate his religious convictions by renouncing and not practicing his faith. When the government places a person in that kind of dilemma, the government has placed a substantial burden on the free exercise of religion. *See Thomas v. Review Board*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963).

Pursuant to RFRA and the First Amendment, the burden therefore falls upon the Government to demonstrate a compelling interest that cannot be achieved by less restrictive means. Even if there were a compelling interest in removing aliens from this country, that interest can be served by the less restrictive means of exempting Ting Xue and others similarly situated. Ting Xue is a law-abiding, productive member of society and an asset to our country. Under the rationale of *Stanley v. Illinois*, 605 U.S. 645 (1972), he is entitled to an "individualized determination" of his fitness to stay in this country rather than a determination made by rote formulas that are applied arbitrarily and capriciously. In this case those formulas bode ill to make the INS and the IJ the handmaidens of the repressive Chinese government, reminiscent of the days of the Fugitive Slave Act when judges and officials of supposedly "free" states dutifully

consigned fugitive slaves to the fate that awaited them when returned to their slave-state masters,

IV. Religious liberty is the first and foremost of American freedoms.

Religious liberty is the first right guaranteed by the Bill of Rights to the United States Constitution. Religious liberty is also the foremost right because God is the source of all human rights and our relationship to God transcends all human relationships. As Justice Douglas stated for the Court: “We are a religious people whose institutions presuppose a Supreme Being.” *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). He further elaborated in *McGowan v. Maryland*, 366 U.S. 420, 562 (1961) (dissenting opinion):

The institutions of our society are founded on the belief that there is an authority higher than the authority of the State; that there is a moral law which the State is powerless to alter; that the individual possesses rights, conferred by the Creator, which government must respect.

Certain rights, including religious freedom, are considered “non-derogable,” that is, they cannot be abrogated even in a state of emergency. According to the International Covenant on Civil and Political Rights, Art. 4(2), these non-derogable rights include “freedom of thought, conscience and religion.”²² The American Convention on Human Rights, Article 12,

²² Malcolm N. Shaw, *International Law* 240 (1991).

also recognizes “freedom of conscience and religion” as a non-derogable right.²³ Law Professor Malcolm N. Shaw says the recognition of these rights as non-derogable means they are part of *jus cogens*, fundamental principles of international law from which no derogation is permitted.²⁴

Because freedom of religion must include the right to talk and write about one’s religion and to assemble and associate with those who share one’s convictions, religious freedom is inseparable from the freedoms of speech, press, assembly, and association. The Bible commands believers to evangelize others (*Matthew* 28:19, *Mark* 16:15, *II Timothy* 4:2, *I Peter* 3:15, *Jude* 3) and to assemble together regularly (*Hebrews* 10:25). Only by adopting a very narrow view of religion and assuming that Ting Xue could limit himself to secret belief without engaging in the religious exercise that necessarily results from sincere religious belief, could the IJ, the BIA, and the Tenth Circuit conclude that Ting Xue was not likely to suffer persecution if he is forcibly returned to China.

Those who have risked everything to come to this country in pursuit of religious freedom are entitled to the utmost respect and consideration.

²³ *Id.*

²⁴ *Id.*

CONCLUSION

The late Rev. Richard Wurmbrand (1909-2001), a Lutheran pastor, founder of Voice of the Martyrs²⁵, and friend of the author of this brief, served fourteen years in Romanian Communist prisons. A collection of letters he wrote from prison begins as follows:

Every freedom-loving man has two fatherlands; his own and America. Today, America is the hope of every enslaved man, because it is the last bastion of freedom in the world. Only America has the power and spiritual resources to stand as a barrier between militant Communism and the peoples of the world. It is the repository of the hopes of millions of people around the world. It is the last “dike” holding back the rampaging flood-waters of militant Communism. If it crumples, there is no other dike; no other dam; no other line of defense to fall back upon. America is the last hope of millions of enslaved peoples. They look to it as their second fatherland. In it lies their hopes and prayers. I have seen fellow-prisoners in Communist prisons beaten, tortured, with fifty pounds of chains on their legs—praying for America ... that the dike will not crumple; that it will remain free.²⁶

²⁵ VOICE OF THE MARTYRS, <https://www.persecution.com>.

²⁶ Richard Wurmbrand, *The Wurmbrand Letters* 9 (1967).

America welcomed Richard Wurmbrand to these shores. His defense of religious liberty has made us a better people. Can we close our doors and our hearts to Ting Xue without becoming accomplices to the repressive policies of the Chinese government?

The Foundation urges this Court to grant Ting Xue's petition for a writ of certiorari.

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