

No. 09-60

In the Supreme Court of the United States

JOSE ANGEL CARACHURI-ROSENDO, PETITIONER

v.

ERIC HOLDER, ATTORNEY GENERAL
OF THE UNITED STATES, RESPONDENT.

**On Writ Of Certiorari to
the United States Court of Appeals
for the Fifth Circuit**

**BRIEF FOR ORGANIZATIONS
REPRESENTING ASYLUM SEEKERS
AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER**

KRISTA M. ENNS
Winston & Strawn LLP
101 California Street
San Francisco, CA 94111
(415) 591-1400

LINDA T. COBERLY
Counsel of Record
Winston & Strawn LLP
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5600

Counsel for Amici Curiae

QUESTION PRESENTED

Whether a person convicted under state law for simple drug possession (a misdemeanor under federal law) may be deemed “convicted of” an “aggravated felony” for purposes of the Immigration and Nationality Act on the theory that he could have been prosecuted for recidivist simple possession (a federal law felony), even though there was no charge or finding of a prior conviction in his state court prosecution for possession.

TABLE OF CONTENTS

	Page(s)
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
INTEREST OF <i>AMICI CURIAE</i>	2
STATEMENT.....	4
SUMMARY OF ARGUMENT	7
ARGUMENT	9
I. The United States has agreed to protect refugees from refoulement to persecution, and its statutes reflect that commitment.....	9
II. U.S. law bars a person convicted of a “particularly serious crime” from both asylum and withholding of removal, and it equates a “particularly serious crime” with an “aggravated felony” under the INA.	13
A. A person who commits an “aggravated felony” is automatically ineligible for asylum.	15
B. A person who commits an “aggravated felony” is presumptively ineligible for withholding of removal.	17
III. <i>The Charming Betsy</i> doctrine compels a narrow reading of the definition of “aggravated felony.”	22
A. The U.S. cannot be in compliance with the Protocol if it denies protection to those convicted of an offense that it does not otherwise regard as “serious.”	23

B. UNHCR materials confirm that a “particularly serious crime” is one of extreme gravity.....	26
C. U.S. treaties relating to controlled substances also support the conclusion that simple possession cannot be a “particularly serious crime.”	29
CONCLUSION	30

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Castillo-Arias v. U.S. Atty. Gen.</i> , 446 F.3d 1190 (11th Cir. 2006)	28
<i>Chew Heong v. United States</i> , 112 U.S. 536 (1884)	22
<i>Ford v. Bureau of Immigration & Customs Enforcement’s Interim Field Office Director</i> , 294 F. Supp. 2d 655 (M.D. Pa. 2003).....	21
<i>Immigration & Naturalization Serv. v. Cardoza-Fonseca</i> , 480 U.S. 421 (1987)	10, 11, 12, 27
<i>Immigration & Naturalization Serv. v. Stevic</i> , 467 U.S. 407 (1984)	9, 10, 11, 12
<i>Lauritzen v. Larsen</i> , 345 U.S. 571 (1953)	22
<i>Lopez v. Gonzales</i> , 549 U.S. 47 (2006)	4, 5, 6, 20
<i>MacLeod v. United States</i> , 229 U.S. 416 (1913)	22
<i>Matter of B-</i> , 1 I&N Dec. 47 (BIA, A.G. 1941).....	15
<i>Matter of C.</i> , 20 I&N Dec. 529 (BIA 1992)	25
<i>Matter of Frentescu</i> , 18 I&N Dec. 244 (BIA 1982)	28
<i>Matter of S-S-</i> , Interim Decision 3374 (BIA 1999).....	19

<i>Matter of Y-L</i> ,	
23 I&N Dec. 270 (A.G. 2002)	18, 19, 20, 21
<i>Mohammed v. Gonzales</i> ,	
400 F.3d 785 (9th Cir. 2005)	28
<i>Murray v. The Charming Betsy</i> ,	
6 U.S. (2 Cranch) 64 (1804)	2,8, 22, 23
<i>Tunis v. Gonzales</i> ,	
447 F.3d 547 (7th Cir. 2006)	19, 20
<i>Urbina-Mauricio v. Immigration & Naturalization Serv.</i> ,	
989 F.2d 1085 (9th Cir. 1993)	24
<i>Weinberger v. Rossi</i> ,	
456 U.S. 25 (1982)	22

STATUTES AND REGULATIONS

8 U.S.C. § 1101	<i>passim</i>
8 U.S.C. § 1158	<i>passim</i>
8 U.S.C. § 1231	<i>passim</i>
8 U.S.C. § 1253	13, 18
18 U.S.C. § 924	6, 25
18 U.S.C. § 3559	25
21 U.S.C. § 801	5
21 U.S.C. § 802	5
21 U.S.C. § 841	25
21 U.S.C. § 844	6, 26
21 U.S.C. § 848	25
21 U.S.C. § 851	6
21 U.S.C. § 951	5

21 U.S.C. § 960.....	25
8 C.F.R. § 208.13.....	15
8 C.F.R. § 208.16.....	17, 21
8 C.F.R. § 208.17.....	17
8 C.F.R. § 208.18.....	17
8 C.F.R. § 209.2.....	13
8 C.F.R. § 223.1.....	12
MISCELLANEOUS	
BLACK'S LAW DICTIONARY 1534 (8th ed. 2004).....	6
CONVENTION AGAINST ILLICIT TRAFFIC IN NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES, Dec. 20, 1988, 28 I.L.M. 493.....	29
CONVENTION RELATING TO THE STATUS OF REFUGEES, JULY 28, 1951, 189 U.N.T.S. 150, <i>reprinted in</i> 19 U.S.T. 6259	<i>passim</i>
Factum of the Intervenor, UNHCR, <i>Suresh v.</i> <i>Minister of Citizenship & Immigration</i> , S.C.C. No. 27790, (Mar. 8, 2001), <i>reprinted at</i> 14 INT'L J. REFUGEE L. 141	24
GUY S. GOODWIN-GILL, THE REFUGEE IN INT'L LAW 136 (1996).....	12
Martin Gottwald, <i>Asylum Claims and Drug</i> <i>Offences: The Seriousness Threshold of</i> <i>Article 1F(B) of the 1951 Convention Relating</i> <i>to the Status of Refugees and the UN Drug</i> <i>Conventions</i> , 18 INT'L J. REFUGEE L. 81 (2006).....	29
JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS (rev. ed. 1998).....	9

James C. Hathaway & Anne K. Cusick, <i>Refugee Rights Are Not Negotiable</i> , 14 GEO. IMMIGR. L.J. 481 (2000).....	25
James C. Hathaway & Colin J. Harvey, <i>Framing Refugee Protection in the New World Disorder</i> , 34 CORNELL INT’L L.J. 257 (2001).....	24
Protocol Relating to the Status of Refugees, Jan. 31, 1967, <i>reprinted in</i> 19 U.S.T. 6259 (Nov. 1, 1968)	<i>passim</i>
REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION (Erika Feller, <i>et al.</i> eds., 2003).....	28
Report of the Ad Hoc Committee on Refugees and Stateless Persons, Second Session, Geneva, 14 August to 25 August 1950, at <a href="http://www.unhcr.org/refworld/publisher,AH
CRSP,,3ae68c1ac,0.html">http://www.unhcr.org/refworld/publisher,AH CRSP,,3ae68c1ac,0.html	9
S. Rep. No. 96-256 (1979), <i>reprinted in</i> 1980 U.S.C.C.A.N. 141.....	11
GUNNEL STENBERG, NON-EXPULSION AND NON- REFOULMENT: THE PROHIBITION AGAINST REMOVAL OF REFUGEES WITH SPECIAL REFERENCE TO ARTICLES 32 AND 33 OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES (1989)	27
UNHCR Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees	28

UNHCR HANDBOOK ON PROCEDURES AND
CRITERIA FOR DETERMINING REFUGEE STATUS
UNDER THE 1951 CONVENTION AND THE 1967
PROTOCOL RELATING TO THE STATUS OF
REFUGEES, Chapter VI (Reedited 1992) 13, 27

U.S. Citizenship & Immigration Serv., *Types of
Asylum Decisions*,
<http://www.uscis.gov/portal/site/uscis/menuitem.em.5af9bb95919f35e66f614176543f6d1a/?vgnextchannel=f39d3e4d77d73210VgnVCM100000082ca60aRCRD&vgnnextoid=4a49549bf0683210VgnVCM100000082ca60aRCRD> 12

“Yaroslav Lesiv: Framed on Drug Charge,”
The Ukrainian Weekly, No. 16, April 17,
1983, at p.2 (available at
<http://www.scribd.com/doc/16333232/The-Ukrainian-Weekly-198316>) 15

INTRODUCTION

*Amici curiae*¹—a group of organizations who represent or advocate for refugees and asylum seekers—respectfully submit this brief to alert the Court to the impact its decision may have on individuals fleeing persecution and on this Nation’s compliance with its international treaty obligations.

When it acceded to the U.N. Protocol Relating to the Status of Refugees (the “Protocol”), the United States agreed that it would not use criminal conduct as a reason to deny asylum unless the refugee had been convicted of a “particularly serious crime” and thus “constitutes a danger to the community.” In the years since then, this Nation has reaffirmed its commitment to the Protocol’s principles, codifying its provisions in the U.S. Code.

The Fifth Circuit’s interpretation of the Immigration and Nationality Act (the “INA”) would lead inevitably to a violation of the Protocol. According to the Fifth Circuit, a refugee is deemed to have been convicted of an aggravated felony when he was in fact convicted only of misdemeanor possession of a controlled substance under state law—here, a single tablet of Xanax—because he *could have been* (but was not) prosecuted as a recidivist offender under federal law. A conviction for an aggravated felony—whether “deemed” or actual—is an automatic bar to asylum. It also operates as a presumptive bar to “withholding of removal”—the form of protection

¹ Counsel for all parties have consented to the filing of this brief. Letters evidencing consent are on file with the Clerk. No party or counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici* and their counsel has made a monetary contribution to the preparation or filing of this brief.

granted to a refugee if there is a clear probability that her life or freedom would be at risk if she returned to her home country. Under the Fifth Circuit's interpretation of the INA, then, an asylum seeker under these circumstances *must* be denied asylum and would presumptively be denied withholding of removal—even though she has never been convicted of anything approaching a “particularly serious crime” that would make her a “danger to the community.”

This Court has long recognized that statutes should not be construed in a manner that would put the United States in violation of the law of nations, unless the language of the statute unambiguously compels such a result. See *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). Even if the Fifth Circuit's reading of the relevant statutes here were permissible under their plain language, the inevitable conflict with this Nation's treaty obligations should compel rejecting such an interpretation.

INTEREST OF *AMICI CURIAE*

The National Immigrant Justice Center (“NIJC”) is a program of the Heartland Alliance for Human Needs and Human Rights, a non-profit corporation headquartered in Chicago, Illinois. NIJC is dedicated to ensuring human rights protections and access to justice for all immigrants, refugees, and asylum seekers. By partnering with more than 1,000 attorneys from the nation's leading law firms, NIJC provides direct legal services to approximately 8,000 individuals annually. This experience informs NIJC's advocacy, litigation, and educational initiatives, as it

promotes human rights on a local, regional, national, and international stage.

The Advocates for Human Rights are a non-governmental, non-profit organization dedicated to the promotion and protection of internationally recognized human rights. Founded in 1983, the organization today engages nearly 1,000 active volunteers annually to document human rights abuses, advocate on behalf of individual victims of human rights violations, educate on human rights issues, and provide training and technical assistance to address and prevent human rights violations. The Advocates for Human Rights provide pro bono legal assistance to indigent asylum seekers in the Upper Midwest. The organization has a strong interest in seeing that the United States construe legal protections for refugees and for those in danger of torture in a way that is consistent with international human rights standards in the Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, *reprinted in* 19 U.S.T. 6259 (the “Convention”) and the Convention Against Torture.

The Immigrant Law Center of Minnesota is a Minnesota-based organization that engages in advocacy, direct services, education, outreach, and impact litigation to protect the civil rights of immigrants. It represents asylees and refugees throughout Minnesota in removal proceedings before the immigration courts and the Board of Immigration Appeals.

The Immigrants’ Rights Project of Public Counsel provides representation to individuals seeking asylum in the United States, representing clients from all over the world for whom the U.S. is the last

place of refuge and return to their home country may mean death or torture. Public Counsel is the largest pro bono public interest law firm in the world. Founded in 1970, Public Counsel is dedicated to advancing equal justice under law by delivering free legal and social services to the most vulnerable members of our community. Its staff of 39 attorneys and 5 social workers—along with thousands of volunteer lawyers, law students, and legal professionals—assist more than 27,000 low income children, youth, adults, and families each year.

Amici have a substantial interest in the issue now before the Court, both as advocates for the rights of refugees and asylum seekers generally and as providers of legal assistance to refugees and asylum seekers, either directly or through networks of pro bono attorneys. Given their experience and perspective, *Amici* are well-situated to assist the Court in understanding how the “aggravated felony” issue will impact individuals fleeing persecution, as well as how it will affect this Nation’s compliance with its international treaty obligations concerning refugees.

STATEMENT

The case before the Court arises out of a complex web of statutory provisions that determines whether a person has been convicted of an “aggravated felony” for purposes of the INA. As discussed further below, the Court’s interpretation of these provisions could have serious implications for refugees because of how that term is incorporated into the statutes relating to asylum and “withholding of removal.”

As this Court recognized in *Lopez v. Gonzales*, 549 U.S. 47 (2006), a conviction for an aggravated felony

has more serious collateral consequences than a “felony conviction simple” because of how federal statutes and the Sentencing Guidelines incorporate the term “aggravated felony.” *Id.* at 50. Under the INA, if a refugee is “convicted of” an “aggravated felony,” she is categorically ineligible for asylum. 8 U.S.C. § 1158(b)(2); see also *Lopez*, 549 U.S. at 50-51. She is also presumptively ineligible for withholding of removal (8 U.S.C. § 1231(b)(3)), which means she can be returned to the country she fled for fear of persecution.

The INA defines the term “aggravated felony” as including

* * * illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, U.S. Code).

8 U.S.C. § 1101(a)(43)(B).²

Although the INA does not define “illicit trafficking,” Section 924(c)(2) of Title 18 defines “drug trafficking crime,” a subcategory of illicit trafficking, as

any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law

² Section 102 of the Controlled Substances Act defines “controlled substance” in a manner not relevant here; it does not define the term “illicit trafficking.” See 21 U.S.C. § 802.

Enforcement Act (46 U.S.C. App. 1901 et seq.).

18 U.S.C. § 924(c)(2).

In general, “trafficking” means “some sort of commercial dealing.” *Lopez*, 547 U.S. at 53 (citing BLACK’S LAW DICTIONARY 1534 (8th ed. 2004)). Congress, however, “counterintuitively define[d] some possession offenses as ‘illicit trafficking’ . . . regardless of whether these federal possession felonies or their state counterparts constitute ‘illicit trafficking in a controlled substance’ or ‘drug trafficking’ as those terms are used in ordinary speech.” *Id.* at 55 n.6. Among these crimes is a repeat possession offense under 21 U.S.C. § 844(a) where the prior conviction has been established and the requirements for a recidivist conviction set out in 21 U.S.C. § 851 have been met.

In the decision under review, the Fifth Circuit held that these statutory provisions, taken together, require that where conduct underlying a state simple possession misdemeanor conviction *could have been* charged as a federal recidivist possession felony, a court must “deem” the offender as having been “convicted of” an aggravated felony—even if that state misdemeanor has no element of illicit trafficking and notwithstanding that the offender was never charged with or convicted of recidivist possession. In the instant case, for example, Mr. Carachuri-Rosendo’s state misdemeanor conviction for possessing a single tablet of Xanax was “deemed” a conviction of an “aggravated felony,” because he had previously been convicted of misdemeanor possession and thus *could have been* (but was not) charged with recidivist possession.

Among other things, the Fifth Circuit’s interpretation stretches the English language too far. Simply put, a “conviction” for the “aggravated felony” of “drug trafficking” cannot reasonably be understood to mean a conviction for misdemeanor possession of a minor quantity of drugs, even if the conviction was not a first offense. Moreover, and as discussed further below, even if these statutes could be read in this way, this Nation’s obligations under the Protocol preclude such an interpretation.

SUMMARY OF ARGUMENT

The term “aggravated felony” has important implications for refugees. A refugee who has been convicted of an “aggravated felony” in the United States is automatically ineligible for asylum, without exception. 8 U.S.C. § 1158(b)(2)(B)(i). Additionally, an asylum applicant or other immigrant who has been convicted of an “aggravated felony” is presumptively ineligible for “withholding of removal”—the relief granted to a refugee whose life or freedom would be threatened if she were to be returned to her country of nationality. 8 U.S.C. § 1231(b)(3).

Allowing a misdemeanor possession conviction to be deemed a “conviction of” an “aggravated felony” simply because it was not a first offense, therefore, would have grave implications for this Nation’s commitment to protect those who have fled from political, religious, and other kinds of persecution. Under the Fifth Circuit’s decision, certain misdemeanor possession convictions would operate, among other things, as a categorical bar for a refugee seeking asylum. An immigration judge would have no discretion whatever to grant asylum in such a

case, regardless of how great the risk of persecution the refugee faces in her home country, or how long ago the offenses occurred. And a misdemeanor conviction for drug possession could mean that a refugee will be returned to a country where she will face a threat to her life or freedom.

When it acceded to the Protocol, the United States committed to providing certain substantive protections to refugees. Chief among these is the protection against “*refoulement*” to persecution—the return of the refugee to a place where her life or freedom would be threatened. Although the country of refuge may deny protection against *refoulement* based on criminal convictions, this bar is limited to those “who, having been convicted of a final judgment of a particularly serious crime, constitute[] a danger to the community of that country.” CONVENTION, art. 33(2) (incorporated by reference and reproduction by the Protocol).

To adopt the Fifth Circuit’s reading of the relevant statutes would put the United States in violation of its commitments under the Protocol and the Convention—a result that Congress presumptively did not intend. As this Court has recognized, a statute should not be construed in a manner that would put the United States in violation of its international treaty obligations unless the statutory language unambiguously compels that result. *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). Thus, to the extent that these statutory terms are susceptible to more than one interpretation, the *Charming Betsy* doctrine provides an additional reason to adopt a reading that limits “conviction of” an “aggravated felony” to its plain meaning—and to eschew expansion of these common

terms to encompass a conviction for a simple possession misdemeanor that “could have been charged” as a recidivist offense.

In light of the impact of this issue on this Nation’s treaty obligations and its own laws implementing those obligations—and in light of the impact the Court’s decision will have on those who have fled persecution based on religion, race, nationality, membership in a social group, or political opinion—*Amici* urge this Court to reject the strained statutory interpretation adopted by the Fifth Circuit.

ARGUMENT

I. The United States has agreed to protect refugees from *refoulement* to persecution, and its statutes reflect that commitment.

Almost 40 years ago, the United States acceded to the Protocol Relating to the Status of Refugees. In so doing, the United States made a commitment to comply with the substantive provisions of Articles 2 through 34 of the 1951 Convention Relating to the Status of Refugees, developed in the aftermath of World War II. See *Immigration & Naturalization Serv. v. Stevic*, 467 U.S. 407, 416 (1984); JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 8 (rev. ed. 1998). The United States was actively involved in drafting the Convention and creating an international refugee protection regime to ensure the protection of those who flee persecution.³

³ See Report of the Ad Hoc Committee on Refugees and Stateless Persons, Second Session, Geneva, 14 August to 25 August 1950, at <http://www.unhcr.org/refworld/publisher,AHCRSP,,,3ae68c1ac,0.html>.

Article 33 of the Convention is incorporated into the Protocol by reference and reproduction. The first paragraph of Article 33 “provides an entitlement for the subcategory [of refugees] that ‘would be threatened’ with persecution upon their return.” *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 441 (1987). Specifically, the first paragraph states:

No Contracting State shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

CONVENTION, art. 33(1). This is commonly known as the protection of “*non-refoulement*.” “As the Secretary of State correctly explained when the Protocol was under consideration: ‘[F]oremost among the rights which the Protocol would guarantee to refugees is the prohibition (under Article 33 of the Convention) against their expulsion or return to any country in which their life or freedom would be threatened.’” *Stevic*, 467 U.S. at 428; see also CONVENTION, prbl. ¶ 2 (noting that these provisions were intended to address the international community’s “profound concern for refugees” and “to assure refugees the widest possible exercise of [their] fundamental rights and freedoms”).

The second paragraph of Article 33 describes two narrow categories of refugees who are not entitled to this protection, in view of the danger they would present to the host country:

The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, *or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.*

CONVENTION, art. 33(2) (emphasis added).

To bring the United States into conformance with the language and requirements of the Protocol and Convention, Congress enacted the Refugee Act. See *Cardoza-Fonseca*, 480 U.S. at 436. The Act reaffirmed this Nation’s commitment to “one of the oldest themes in [its] history—welcoming homeless refugees to our shores.” S. Rep. No. 96-256, at 1 (1979), *reprinted in* 1980 U.S.C.C.A.N. 141, 141.

As part of this same effort, Congress also amended the INA to add the provision codifying the method by which a refugee can obtain asylum. 8 U.S.C. § 1158; see *Cardoza-Fonseca*, 480 U.S. at 423. The United States will recognize a refugee’s status and her eligibility for asylum if she can prove that she has suffered from past persecution or has a “well-founded fear of future persecution” based upon race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1101(a)(42)(A).

Congress further amended the INA to provide that the Attorney General cannot return any alien to a country if he concludes that the alien’s life or freedom would be threatened there because of persecution. *Stevic*, 467 U.S. at 410-11. This form of protection—known as “withholding of removal”—was made

mandatory (that is, not discretionary) and is intended to codify our Nation's non-*refoulement* obligation under the Convention. See 8 U.S.C. § 1231(b)(3)(A); *Stevic*, 467 U.S. at 421 (noting that the U.S. can meet its obligations under the Protocol by providing either asylum or withholding of removal to an alien who meets the definition of a refugee). Eligibility for withholding of removal requires a demonstration of a "clear probability" that the alien's life or freedom would be threatened. *Stevic*, 467 U.S. at 424; see also 8 U.S.C. § 1231(b)(3)(A) & (b)(3)(B).⁴

In seeking protection in the United States, refugees generally apply for both asylum and withholding of removal. There are important differences between these two types of relief, however. For example, an asylee can work without an employment authorization document and can obtain an unrestricted social security card.⁵ She may apply for a refugee travel document that will allow for travel abroad. See 8 C.F.R. § 223.1(b). And she

⁴ The United States, in contrast to other parties to the Protocol, requires a higher standard of proof to establish entitlement to withholding of removal than the "well-founded fear" standard that defines a refugee under Article I of the Convention (and that is the standard for asylum under U.S. law). GUY S. GOODWIN-GILL, *THE REFUGEE IN INT'L LAW* 136, 138 (1996); *Stevic*, 467 U.S. at 428. Withholding of removal is mandatory for refugees who meet this higher threshold, whereas asylum is discretionary. 8 U.S.C. § 1231(b)(3); 8 U.S.C. § 1158(b)(1); see *Stevic*, 467 U.S. at 428; *Cardoza-Fonseca*, 480 U.S. at 423.

⁵ See U.S. Citizenship & Immigration Servs., *Types of Asylum Decisions*, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextchannel=f39d3e4d77d73210VgnVCM100000082ca60aRCRD&vgnextoid=4a49549bf0683210VgnVCM100000082ca60aRCRD>.

may apply to adjust her status to that of legal permanent resident one year after receiving asylum, putting her on the path to U.S. citizenship. See 8 C.F.R. § 209.2(a). In addition, as recommended by the Final Act of the Conference that adopted the Convention, in order to preserve family unity, an asylee can apply for derivative asylum status for her spouse and minor children. 8 U.S.C. § 1158(b)(3).⁶

While a refugee who is granted withholding of removal will still be protected from deportation to her country of persecution, she could still be deported to another country. She is also not entitled to bring her spouse and children to safety in the United States or to any of the other benefits of asylum described above.

II. U.S. law bars a person convicted of a “particularly serious crime” from both asylum and withholding of removal, and it equates a “particularly serious crime” with an “aggravated felony” under the INA.

In the context of both asylum and withholding of removal, Congress added language that tracks the exception in the second paragraph of Article 33. Thus it excepted any refugee who, “having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community” from the benefits of both of these statutes. 8 U.S.C. § 1158(b)(2)(A)(ii); 8 U.S.C. § 1253(h)(2)(B), *repealed and recodified*, 8 U.S.C. § 1231(b)(3)(B)(ii) (“the alien,

⁶ See also UNHCR HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, ch. VI (Reedited 1992) (“HANDBOOK”) (attaching recommendation of the Final Act of the Conference).

having been convicted by a final judgment of a particularly serious crime is a danger to the community”).

Congress has generally equated “particularly serious crime” under the INA with the category of “aggravated felony.” See 8 U.S.C. § 1101(a)(43); see also 8 U.S.C. § 1158(b)(2)(B)(i). “Aggravated felony,” in turn, is defined by the INA to include the following, among other things:

“murder, rape, or sexual abuse of a minor”

8 U.S.C. § 1101(43)(A)];

“an offense that—relates to the owning, controlling, managing, or supervising of a prostitution business” [*id.* § 1101(43)(K)];

“an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year” [*id.* § 1101(43)(R)]; and

“illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, U.S. Code).”

8 U.S.C. § 1101(a)(43)(B).⁷ As shown below, because an alien becomes ineligible to remain in the United States if she is “convicted of” an “aggravated felony,” this Court’s interpretation of those terms in this case could have dramatic implications for refugees who face a risk of persecution if they are returned to their countries of nationality.

A. A person who commits an “aggravated felony” is automatically ineligible for asylum.

As noted above, the U.S. will recognize a refugee’s status and her eligibility for asylum if she can prove that she has suffered from past persecution or has a “well-founded fear of future persecution” based upon race, religion, nationality, membership in a particular

⁷ *Amici* note that the definition of “aggravated felony” extends by statute to foreign convictions, 8 U.S.C. § 1101(a)(43). Although it may be more appropriate to view foreign convictions through the “serious nonpolitical crime” bar in 8 U.S.C. § 1158(b)(2)(A)(III), the agency now appears to apply the per se rules of 8 U.S.C. § 1158(b)(2)(B)(I) to foreign offenses. Compare 8 CFR § 208.13(c)(1) (current law) with 8 CFR § 208.13(c)(2) (for asylum applications filed before 1997, a crime could be particularly serious only if committed “in the United States”). Setting aside the potential problems inherent in relying on convictions imposed by oppressive regimes (see, e.g., “Yaroslav Lesiv: Framed on Drug Charge,” *The Ukrainian Weekly*, No. 16, April 17, 1983, at p.2 (available at <http://www.scribd.com/doc/16333232/The-Ukrainian-Weekly-198316>) (reporting that Ukrainian dissident was framed by the U.S.S.R. on false charges of drug possession); see also *Matter of B-*, 1 I&N Dec. 47 (BIA, A.G. 1941)), if a simple possession offense can be an “aggravated felony,” that could mean that a refugee with a well-founded fear of persecution would be ineligible for asylum simply because of drug possession offenses committed in her youth, before she became a target of persecution and fled her home country.

social group, or political opinion. 8 U.S.C. § 1101(a)(42)(A).

A refugee who has been “convicted of” an “aggravated felony” while in the United States, however, is automatically ineligible for a grant of asylum, notwithstanding her well-founded fear of persecution. See 8 U.S.C. § 1158(b)(2)(A)(ii) & (b)(2)(B)(i). As discussed above, Section 1158(b)(2)(A)(ii) of Title 8 provides categorically that asylum is not available to one convicted of a “particularly serious crime.” It further provides that “an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime.” 8 U.S.C. § 1158(b)(2)(B)(i). These provisions thus erect an automatic bar to asylum for anyone who has been “convicted of” an “aggravated felony.”

The implications of this bar to asylum are grave. As discussed above, a grant of asylum carries with it a number of important rights and benefits that assist a refugee and her family to become integrated into U.S. society, including the ability to work without an employment authorization document, to apply after one year to adjust her status to that of a legal permanent resident, and to apply for derivative asylum status for immediate family members. Under the Fifth Circuit’s reading of the relevant statutes, then, a refugee will suffer grave consequences even if her only convictions were based on misdemeanor charges of simple possession—including, for example, where one of those possessions is for a single tablet of Xanax—as long as the Government can assert that she *could have been* charged as a recidivist offender.

B. A person who commits an “aggravated felony” is presumptively ineligible for withholding of removal.

A person who is not a U.S. citizen and lacks valid immigration status may be “removed” on that basis. Likewise, a person who has been granted legal status in this country, even a lawful permanent resident, can be “removed” if she is “convicted of” criminal conduct. As noted above, however, a refugee under these circumstances will be entitled to “withholding of removal” if she can show that her life or freedom would be threatened upon her return on account of race, religion, nationality, membership in a particular social group, or political opinion. See 8 U.S.C. § 1231(b)(3)(A).

“Withholding of removal” is not available if the Attorney General decides that “the alien, having been convicted by a final judgment of a particularly serious crime, is a danger to the community of the United States.” 8 U.S.C. § 1231(b)(3)(B)(ii).⁸ Although the

⁸ The regulations implementing the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment contain an identical exception barring “withholding of removal” for those convicted of “particularly serious” crimes. See 8 C.F.R. § 208.16(d)(2) (2001). Those convicted of “particularly serious crimes” do remain eligible for *deferral* of removal, which does not result in a grant of U.S. residency, does not necessarily result in a release from custody, and is subject to termination if the conditions change. See 8 C.F.R. § 208.17(a), (b)(i)-(iv). Furthermore, to establish eligibility for deferral of removal, an alien must establish that it is “more likely than not” she would be tortured by, or with the acquiescence of, government officials acting under color of law. *Id.* §§ 208.17(a), 208.18(a). Deferral of removal thus will not protect refugees who would face a probability of persecution in their home countries if that persecution does not meet the definition of “torture” or takes place without the requisite level of state involvement.

statute itself does not define the term “particularly serious crime,” the final clause of Section 1231(b)(3) provides:

for purposes of clause (ii), an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of the sentence imposed, an alien has been convicted of a particularly serious crime.

8 U.S.C. § 1231(b)(3) (final clause).⁹ Thus, by statute, a refugee convicted of an aggravated felony and sentenced to at least five years of imprisonment is *automatically* deemed to have committed a “particularly serious crime” that bars her from receiving “withholding of removal.” *Matter of Y-L-*, 23 I&N Dec. 270, 273 (A.G. 2002). If a state conviction for possession can be deemed a “conviction of” an “aggravated felony” under the statutes at issue here, then even a refugee with a suspended sentence could fall under this automatic bar to withholding of removal. See 8 U.S.C. § 1101(a)(48)(B) (five-year threshold includes suspended sentences).

⁹ Prior law provided that *all* aggravated felonies constituted “particularly serious crime[s].” See 8 U.S.C. § 1253(h)(2) (1994). That provision was later eliminated and replaced by the current definition of “particularly serious crime” contained in the last clause of 8 U.S.C. § 1231(B)(3) (cited above).

Indeed, even if the total sentence is *less* than five years, the barrier to receiving “withholding of removal” may still be nearly absolute. For other types of crimes, if a refugee receives a total sentence of less than five years, the Attorney General has discretion to conclude that the “aggravated felony” is *not* a “particularly serious crime” and hence does not bar withholding of removal. *Tunis v. Gonzales*, 447 F.3d 547, 549 (7th Cir. 2006) (citing 8 U.S.C. § 1231(b)(3)(B)(ii)). Under the Attorney General’s decision in *Matter of Y-L-*, however, “aggravated felonies” with a sentence of less than five years that “involve[e] unlawful trafficking in controlled substances *presumptively* constitute particularly serious crimes.” *Matter of Y-L-*, 23 I&N Dec. at 274 (overruling *Matter of S-S-*, Interim Decision 3374 (BIA 1999), which invoked a case-by-case review to determine which crimes are “particularly serious”). The Attorney General further concluded that only under the most “extraordinary and compelling” circumstances would departure from this interpretation be warranted or permissible. *Id.* He noted that, at a minimum, those circumstances would need to include *all* of the following criteria:

- (1) a very small quantity of the controlled substance;
- (2) a very modest amount of money paid for the drugs in the offending transaction;
- (3) merely peripheral involvement in the criminal activity, transaction, or conspiracy;
- (4) the absence of any violence or threat of violence, implicit or otherwise;

(5) the absence of any organized crime or terrorist organization involvement, direct or indirect; and

(6) the absence of any adverse or harmful effect of the activity or transaction on juveniles.

Id. at 276-77.

According to the Attorney General, only if *all* these criteria were present would it be appropriate to consider whether other, additional “unusual circumstances” justify departure from the presumption that drug-related aggravated felonies are always “particularly serious.” *Id.* at 277; *Tunis*, 447 F.3d at 449. Additionally, the Attorney General has concluded that facts such as “cooperation with law enforcement authorities, limited criminal histories, downward departures at sentencing, and post-arrest (let alone post-conviction) claims of contrition or innocence” do not justify deviation from the presumption. 23 I&N Dec. at 277.

Although the convictions before the Attorney General in *Y-L* involved specific evidence of “trafficking,” whether possession as a second or subsequent offense falls within the same category may depend on the outcome of this case. As this Court has observed, certain simple possession offenses—including repeat offenses—are “counterintuitively” defined as “illicit trafficking” offenses. *Lopez*, 549 U.S. at 55 n.6. If this Court were to adopt the Fifth Circuit’s reading, there would be little to prevent the Government from applying the *Y-L*-presumption to any and all repeat possession offenses, no matter how counterintuitive that result may be.

To be sure, the *Y-L-* standard purports to create a rebuttable presumption and not a per se rule. See *Ford v. Bureau of Immigration & Customs Enforcement's Interim Field Office Director*, 294 F. Supp. 2d 655, 661-62 (M.D. Pa. 2003) (stating “[t]he Attorney General in *Matter of Y-L-* stopped short of creating a per se rule that all drug trafficking convictions constitute “particularly serious crimes”); 8 C.F.R. § 208.16(d)(3) (“[I]t shall be presumed that an alien convicted of an aggravated felony has been convicted of a particularly serious crime.”). As a practical matter, however, the standard set out by the Attorney General in *Y-L-* is close to a complete bar on withholding of removal, simply because the exception is so narrow. For example, the third *Y-L-* criterion listed above—requiring “mere peripheral involvement” in the criminal activity or transaction—would not be met in the vast majority of simple possession cases, if the relevant criminal activity is understood to be the possession itself. And in any event, even if a given possession offense met all the *Y-L-* factors, that fact alone would not guarantee that “withholding of removal” would be granted.

As this discussion illustrates, this Court’s interpretation of the terms “convicted of” an “aggravated felony” may have a significant impact on a refugee’s ability to obtain asylum and to avoid *refoulement* to persecution in her home country. That impact cannot be ignored, particularly in light of the treaty issues to which we now turn.

III. The *Charming Betsy* doctrine compels a narrow reading of the definition of “aggravated felony.”

This Court presumes that Congress intends its statutes to comply with the law of nations unless the statute unambiguously states otherwise. “It has been a maxim of statutory construction since the decision in *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), 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). Thus, a statute that is susceptible to more than one reading should be interpreted in a manner that avoids conflict with the international treaty obligations of the United States. This basic rule has been followed by this Court in a variety of contexts.¹⁰

Petitioner’s opening brief explains in detail why “conviction of” an “aggravated felony” should be understood to include only those aggravated felonies for which the individual was actually convicted (as opposed to those with which she could hypothetically have been charged). To the extent that the definition of “convicted of” an “aggravated felony” is also

¹⁰ *Weinberger*, 456 U.S. at 29-30, 32-33 (looking to international law in interpreting statute prohibiting employment discrimination against U.S. citizens on military bases overseas unless permitted by treaty); *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953) (in maritime tort case, looking to law of nations in determining statutory construction of Jones Act); *MacLeod v. United States*, 229 U.S. 416, 434 (1913) (“it should not be assumed that Congress proposed to violate the obligations of this country to other nations”); *Chew Heong v. United States*, 112 U.S. 536, 539-40 (1884) (interpreting immigration statute so as to avoid conflict with treaty right of Chinese alien to enter the United States).

susceptible of an expanded meaning, however—and the Fifth Circuit apparently believes it is—*Charming Betsy* dictates that these statutory terms be interpreted in a manner consistent with the Nation’s treaty obligations. As discussed below, deeming a simple possession state misdemeanor conviction to be a “conviction of” an “aggravated felony” would put the United States in violation of its treaty obligations and implementing statutory provisions relating to the status of refugees. There is no reason to believe that Congress intended such a result.

A. The U.S. cannot be in compliance with the Protocol if it denies protection to those convicted of an offense that it does not otherwise regard as “serious.”

The prohibition against *refoulement* to persecution is one of the core principles of the Convention (and of international refugee law generally). According to the Convention’s preamble, its purpose is to ensure that refugees enjoy the widest possible exercise of the fundamental rights and freedoms guaranteed to all people. CONVENTION, prbl. ¶ 2. As discussed above, Article 33(1) of the Convention states that: “[n]o Contracting State shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

Thus Article 33(1) affirms the basic principle that a person must not be removed from his country of refuge and sent back to a place where his life or freedom would be jeopardized. And the “particularly serious crime” exception of Article 33(2) creates only

a very limited exception to the fundamental right to non-*refoulement*.¹¹ See James C. Hathaway & Colin J. Harvey, *Framing Refugee Protection in the New World Disorder*, 34 CORNELL INT'L L.J. 257, 293 (2001) (Article 33(2) authorizes *refoulement* to persecution only where it is necessary to protect the community in the host nation from an unacceptably high level of danger).

The structure of the “particularly serious crime” provisions in U.S. law supports the view that Congress could not have intended to make every simple possession that could possibly have been charged as a recidivist offense an “aggravated felony” for purposes of the INA. Article 33(2)’s exception applies, in relevant part, to anyone “who, having been convicted by a final judgment of a particularly serious crime, *constitutes a danger to the community of that country.*” CONVENTION art. 33(2) (emphasis added). The statutory scheme that Congress enacted to implement that exception has been interpreted to begin and end with whether the person committed a “particularly serious crime,” without any case-by-case determination of “dangerousness.” See, e.g., *Urbina-Mauricio v. Immigration & Naturalization Serv.*, 989 F.2d 1085, 1087 (9th Cir. 1993) (“[o]nce a court has determined that an alien has been convicted of a particularly serious crime, it need not make a

¹¹ In the record of proceedings connected with the adoption of Article 33(2), the U.S. delegate explained that “it would be highly undesirable to suggest in the text of [Article 33] that there might be cases, even highly exceptional cases, where a man might be sent to death or persecution.” CONVENTION, *travaux préparatoires*. See Factum of the Intervenor, UNHCR, *Suresh v. Minister of Citizenship & Immigration*, S.C.C. No. 27790, at ¶ 63 (Mar. 8, 2001), reprinted at 14 INT’L J. REFUGEE L. 141, 155.

separate finding that the alien constitutes a danger to the community; the latter follows naturally from the former”); *Matter of C.*, 20 I&N Dec. 529 (BIA 1992) (rejecting proposed two-step inquiry that would include a separate assessment of dangerousness).¹² Thus, consistent with Article 33(2), Congress presumably limited the terms “particularly serious crime” and “aggravated felony” to include only those crimes that it believed necessarily make a person a “danger to the community.” It would be inconsistent with that presumption to interpret the definition of “aggravated felony” to include the crime of possessing a small quantity of drugs, even if that possession was repeated.

Congress’s use of the term “serious” in other, related contexts is also instructive. The offenses Congress identifies under its definition of “serious drug offense” in the main penalty provision under the Criminal Code involve either actual trafficking, participation in a continuing criminal enterprise, importing or exporting, or possession *with the intent* to “manufacture, distribute, or dispense” a controlled substance. See 18 U.S.C. § 3559(c)(2)(H) (citing 21 U.S.C. §§ 841(b)(1)(A), 848, 960(b)(1)(A)). Moreover, Congress penalizes those who commit a “serious drug offense” with a sentence of *ten years to life*. 18 U.S.C. § 3559(c)(2); see also 18 U.S.C. § 924(e)(2)(A) (a “serious drug offense” is defined as a federal offense with a maximum sentence of 10 years or more, or a state offense “involving manufacturing, distributing, or possessing with intent to manufacture or

¹² This itself is a departure from the international standard. James C. Hathaway & Anne K. Cusick, *Refugee Rights Are Not Negotiable*, 14 GEO. IMMIGR. L.J. 481, 537-38 (2000) (“Under the international standard, conviction by final judgment of a particularly serious crime is a necessary, but not sufficient, condition for removal.”).

distribute” with a maximum sentence of 10 years or more). By contrast, the maximum federal sentence for simple possession of any drug other than cocaine base is only *three* years, even for repeat offenders. See 21 U.S.C. § 844(a).

By definition, the term “particularly serious crime” cannot include an offense that Congress does not otherwise regard as “serious.” And given that the non-*refoulement* statutory provisions been found not to require a separate determination of “dangerousness,” Congress must have intended the categories of “aggravated felony” and “particularly serious crime” to include only those crimes that necessarily pose danger to the community. For both of these reasons, to interpret the definition of “aggravated felony” to include a simple possession offense—even if it is not a first offense—would put the United States in conflict with the Protocol, based upon Congress’s own standards for the relative seriousness of crimes.

B. UNHCR materials confirm that a “particularly serious crime” is one of extreme gravity.

Although the Protocol and Convention do not define “particularly serious,” the U.N. High Commissioner on Refugees (“UNHCR”) has provided guidance as to what types of criminal convictions could legitimately allow an exception to the obligation of non-*refoulement*.¹³ Those materials demonstrate

¹³ The UNHCR was created in the wake of World War II to coordinate international action for the world-wide protection of refugees. Its primary purpose is to safeguard the rights and well-being of refugees. The U.S. is a member of the Executive Committee of the UNHCR.

that the possession of a small amount of drugs could not possibly qualify as a “particularly serious crime” that renders a person “a danger to the community.”

For example, the exceptions in Article 33(2) are discussed in the Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees. While the Handbook does not have the force of law, it “provides significant guidance in construing the Protocol, to which Congress sought to conform. It has been widely considered useful in giving content to the obligations that the Protocol establishes.” *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987). As relevant here, the Handbook highlights the fact that Article 33 permits a refugee’s expulsion only in “extreme cases.” HANDBOOK ¶ 154.

Indeed, the “particularly serious crime” exception in Article 33(2) is even narrower than Article 1(F) of the Convention, which states that the Convention does not apply “to any person with respect to whom there are serious reasons for considering that * * * he has committed a *serious non-political crime* outside the country of refuge prior to his admission to that country as a refugee.” CONVENTION art. 1(F)(b) (emphasis added).¹⁴ As the Handbook explains, “a

¹⁴ The history of these provisions confirms their relationship, as the discussions at the Conference of Plenipotentiaries specifically made note of the link between Article 33(2) and what was eventually to become Article 1F. GUNNEL STENBERG, NON-EXPULSION AND NON-REFOULMENT: THE PROHIBITION AGAINST REMOVAL OF REFUGEES WITH SPECIAL REFERENCE TO ARTICLES 32 AND 33 OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES at 224 (1989). Therefore, Article 1(F) can aid how Article 33(2) is interpreted. See *id.*

‘serious’ crime must be a capital crime or a very grave punishable act” to fall within Article 1(F). HANDBOOK ¶ 155. “Minor offences punishable by moderate sentences are not grounds for exclusion under Article 1(F)(b).” *Id.* Obviously, a “*particularly serious crime*” would need to be a crime that is even more grave than those “serious crimes” that fall under Article 1(F). See REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION ¶ 149 at 130 (Erika Feller, *et al.* eds., 2003) (“A common sense reading of Article 33(2) in light of Article 1(F)(b) requires that it be construed so as to address circumstances not covered by Article 1(F)(b).”); accord *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982) (recognizing that a particularly serious crime is more serious than a serious non-political crime).

Another source of guidance is the UNHCR Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees (“GUIDELINES”).¹⁵ This document also discusses the exceptions in Article 33(2). The Guidelines emphasize that the second exception in Article 33(2) applies only to individuals who commit “particularly grave crimes”. GUIDELINES ¶ 16. Further, they explain that “Article 33(2) concerns the future risk

¹⁵ See *Castillo-Arias v. U.S. Atty. Gen.*, 446 F.3d 1190, 1197 (11th Cir. 2006) (“Reference to the UNHCR Guidelines * * * is permissible because the U.S. Supreme Court has held that Congress intended to conform United States refugee law with the 1967 United Nations Protocol Relating to the Status of Refugees.”); *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005) (noting the UNHCR’s “analysis provides significant guidance for issues of refugee law”).

that a recognised refugee may pose to the host state.”
Id. ¶ 4.

Again, Congress presumably intended its statutory scheme to comply with Article 33(2) and to be limited to such “particularly grave crimes.” A misdemeanor conviction for simple possession of a small amount of a controlled substance—even if the conviction could be deemed a felony conviction based on uncharged prior offenses—could not possibly meet that definition.

C. U.S. treaties relating to controlled substances also support the conclusion that simple possession cannot be a “particularly serious crime.”

The treaties that relate to drug trafficking further suggest that simple possession cannot be a “particularly serious” crime under international law. The United States is party to a number of treaties on narcotics, including the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (“Trafficking Convention”). See Martin Gottwald, *Asylum Claims and Drug Offences: The Seriousness Threshold of Article 1F(B) of the 1951 Convention Relating to the Status of Refugees and the UN Drug Conventions*, 18 INT’L J. REFUGEE L. 81, 93 (2006) (comparing provisions of the drug conventions with provisions of the Convention Relating to the Status of Refugees). “The cornerstone of the Trafficking Convention is Article 3 on ‘Offences and Sanctions,’ which distinguishes between ‘criminal offences’ (Art. 3.2), ‘serious criminal offences’ (Art. 3.1 and Art. 3.7) and ‘particularly serious offences’ (Art. 3.5).” Gottwald, *supra*, at 94. It is Article 3.2 of this Convention that requires signatory nations to

criminalize simple possession offenses, within the limits of their own constitutional law, whereas the other paragraphs of that article pertain to the actual sale and distribution of drugs. See TRAFFICKING CONVENTION, *supra*, art. 3. Under the Trafficking Convention, then, simple possession is categorized only as a “criminal offence” and not as a “particularly serious” or even “serious” offense.

Indeed, the Convention sets out a long list of factors to be considered before even a true drug distribution offense becomes “particularly serious.” See TRAFFICKING CONVENTION, *supra*, art. 3.5 (“The Parties shall ensure that their courts and other competent authorities having jurisdiction can take into account factual circumstances which make the commission of the offences established in accordance with paragraph 1 of this article particularly serious * * * .”). Those factors may include the involvement of international organized crime; the involvement of the offender in other illegal activities facilitated by commission of the offense; the use of violence or arms; the fact that the offender holds a public office and that the offense is connected with the office in question; and the victimization or use of minors. *Id.* If even the *distribution* of narcotics is not “particularly serious” without facts such as these, then surely simple possession—even if repeated—is not “particularly serious.”

CONCLUSION

In light of the implications of the issue for refugees and its impact on the Nation’s compliance with its international treaty obligations and implementing statutes, Amici urge this Court to reverse the decision of the Fifth Circuit and hold that

the terms “conviction of” an “aggravated felony” do not extend to a state misdemeanor conviction for simple possession, even if that offense could have been charged—but was not—as a recidivist offense.

Respectfully submitted.

KRISTA M. ENNS
Winston & Strawn LLP
101 California Street
San Francisco, CA 94111
(415) 591-1400

LINDA T. COBERLY
Counsel of Record
Winston & Strawn LLP
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5600

FEBRUARY 2010