No. 21-60314

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DANIEL GIRMAI NEGUSIE,
Petitioner,

v.

MERRICK GARLAND,
U.S. ATTORNEY GENERAL,
Respondent.

ON PETITION FOR REVIEW OF AN ORDER BY
THE BOARD OF IMMIGRATION APPEALS

BRIEF OF *AMICI CURIAE* SCHOLARS OF INTERNATIONAL REFUGEE LAW IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, I, Sabrineh Ardalan as counsel for *amici curiae*, state that the Scholars of International Refugee Law do not have parent corporations, nor do they issue stock, and thus no publicly held corporation owns 10% or more of their stock.

DATED: August 5, 2021

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CERTIFICATE OF INTERESTED PARTIES
(No. 21-60314)

(1) Petitioner Daniel Girmai Negusie;

(2) Counsel for Petitioner Hiroko Kusuda, Loyola University New Orleans College of Law;

(3) Counsel for Petitioner John Etter;

(4) Respondent Merrick Garland, U.S. Attorney General;

(5) Counsel for Respondent Paul F. Stone, Office of Immigration Litigation, U.S. Department of Justice;

(6) *Amici Curiae* Scholars of International Refugee Law (full list provided on pages 29–33);

(7) Counsel for *Amici Curiae*, Katherine Evans, Durham, North Carolina;

(8) Counsel for *Amici Curiae*, Barbara Rodriguez (Law Intern), Cambridge, Massachusetts;

(9) Counsel for *Amici Curiae*, Sabrineh Ardalan, Cambridge, Massachusetts.

The undersigned counsel of record certifies that the listed persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED: August 5, 2021

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INTEREST OF AMICI CURIAE

Amici are legal scholars who have studied and published on the status and rights of refugees under U.S. and international law, on exclusion from refugee status, and on international criminal law. *Amici* have a strong interest in ensuring that U.S. law is properly interpreted in a manner consistent with the United States' obligations under the 1967 Protocol relating to the Status of Refugees [hereinafter "Protocol"] and the 1951 United Nations Convention relating to the Status of Refugees [hereinafter "Convention"]. The U.S. Supreme Court has previously consulted and relied on the opinions of leading scholars interpreting those instruments. *See, e.g.*, *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 438–40 (1987); *id.* at 451 (Blackmun, J., concurring); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 182 & n.40 (1993).[1]

SUMMARY OF ARGUMENT

The U.S. Supreme Court in *Negusie v. Holder* rejected the rule set forth by the Board of Immigration Appeals ("the Board") that "motive and intent are irrelevant" to the persecutor bar contained in the Refugee Act, and concluded instead that "coercion or duress" may indeed matter. *Negusie v. Holder*, 555 U.S. 511, 517,

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici curiae* state that: (1) no party's counsel authored this brief in whole or in part; (2) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (3) no person other than *amici*, its members, and its counsel contributed money that was intended to fund preparing or submitting the brief. Pursuant to Federal Rules of Appellate Procedure 29(a)(2), *amici curiae* further state that all parties have consented to the filing of this *amici curiae* brief.

522–23 (2009). The Court then remanded the case to the Board so that it could perform a more complete analysis. *Id*. at 524. In response to the Supreme Court's reversal and remand, the Board invited interested individuals to present argument on: (1) whether involuntariness or duress limits application of the persecutor bar in asylum and withholding of removal; and if so, (2) what standards apply.

The Department of Homeland Security ("DHS") initially submitted a brief endorsing a duress exception to the persecutor bar in light of the purpose of the Refugee Act of 1980. A.R. 1329 (2016 DHS Br.). Just one year later, however, DHS reversed course and submitted a new brief, arguing against a duress exception. A.R. 948 (2017 DHS Br.). The Board rejected DHS's revised opinion and correctly concluded that a duress exception "fulfills the purposes of the persecutor bar[,]" as well as the purposes of the 1980 Refugee Act, Refugee Convention, and Protocol. *Matter of Negusie*, 27 I. & N. Dec. 347, 353 (BIA 2018). Attorney General ("A.G.") William Barr, in turn, certified the decision to himself and vacated the Board's opinion. He asserted, without basis, that the persecutor bar's "statutory context and history" indicate that Congress did not intend the bar to contain a duress exception. *Matter of Negusie*, 28 I. & N. Dec. 120, 125–27 (A.G. 2020). This interpretation is inconsistent with legislative history and with the international treaties Congress incorporated into U.S. law through the Refugee Act.

Accordingly, *amici* address (1) why the persecutor bar cannot be properly

construed to include acts committed under duress, and (2) why the standard for duress that was widely recognized at the time Congress adopted the Refugee Act should be applied. Section I explains that in keeping with the history, purpose, and text of the Convention along with statements of Congressional intent and historical application of the persecutor bar, the bar cannot apply where acts were committed under duress. Section II describes the standard for duress that was well established at the time the Convention was drafted and the Refugee Act was adopted.

ARGUMENT

I. Acts Committed Under Duress Are Outside the Scope of the Immigration and Nationality Act's ("INA") Persecutor Bars.

Congress expressly intended to conform the scope of the persecutor bar—including a duress exception—to the history, purpose, and text of the Convention and Protocol. The A.G.'s interpretation directly contravenes Congressional intent and flies in the face of the international standards Congress incorporated into U.S. law with the Refugee Act.

A. *The A.G. Misunderstands the Context and Content of the Refugee Convention and Protocol.*

The A.G.'s position that the Convention and Protocol lack an exception for duress or coercion, *see Negusie*, 28 I. & N. Dec. at 121, is completely unfounded. The history of the Convention and its connection to the post-World War II military tribunals reflect the drafters' intent to exclude from protection only refugees who

bore individual criminal responsibility for their actions, not those who acted under duress. Indeed, the exclusions in the Convention and Protocol invoke principles of criminal responsibility and individual culpability, which the A.G. fails to consider.

Following the humanitarian crisis of the Holocaust, Member States of the United Nations ("UN") drafted the Convention and Protocol to ensure that persons at risk of persecution in their home countries could find refuge elsewhere. *See* Guy S. Goodwin-Gill & Jane McAdam, *The Refugee in International Law* 19 (3d ed. 2007); *see also* James C. Hathaway, *The Rights of Refugees under International Law* 8–9 (2021). The United States acceded to the Protocol in 1968, thereby binding itself to recognize qualified persons as refugees and to comply with the Convention. *See* Protocol relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6224, 606 U.N.T.S. 267, art. 1(1); *I.N.S. v. Stevic*, 467 U.S. 407, 416 (1984); *Nicosia v. Wall*, 442 F.2d 1005, 1006 n.4 (5th Cir. 1971) ("[T]he United States, by being a signatory to the 1967 Refugee Protocol, accepted by reference substantive Articles 2 through 34 of the Convention.").

Under Article 1F of the Convention, an individual is excluded from protection where, *inter alia*, "there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes[.]" Convention relating to the Status of Refugees, July 28, 1951, 19

U.S.T. 6259, 189 U.N.T.S. 137, art. 1F(a). Although the persecutor bar under the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, is not identical to Article 1F of the Convention, the Board has recognized that Congress intended the bar to be construed consistent with Article 1F(a). *See Matter of J.M. Alvarado*, 27 I. & N. Dec. 27, 30 n.3 (BIA 2017); *Morales Lopez v. Garland*, No. 18-60251, 2021 WL 1084737, at *4 (5th Cir. Mar. 19, 2021) ("[O]ne of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol[.]" (quoting *Cardoza-Fonseca*, 480 U.S. at 436)). Additionally, Congressional acts are presumed consistent with U.S. treaty obligations absent explicit Congressional intent to the contrary. *See Rest. (Fourth) of Foreign Rel. L.* § 309 (Am. L. Inst. 2018); *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

1. The Refugee Convention balances the need for protection against the need for accountability.

The purpose of the Convention is to provide surrogate protection to individuals who fear harm in their countries of origin—not to exclude bona fide refugees for acts performed under duress and put them at risk of serious harm. *See* Deborah E. Anker, *Law of Asylum in the United States* § 6.1 (2020). Article 1F thus aims to "exclude persons whose international criminal conduct means that their admission as a refugee threatens the integrity of the international refugee regime." James C. Hathaway, *The Michigan Guidelines on the Exclusion of International*

Criminals, 35 Mich. J. Int'l L. 3, 7 (2013); *see also Pushpanathan v. Canada (Minister of Citizenship and Immigr.)*, [1998] S.C.R. 982, para. 63 (Can.) (noting that "those who are responsible for the persecution . . . should not enjoy" protection).

As multiple courts have recognized, excluding persons from refugee status who are not criminally responsible for their actions undercuts the protective goals of the Convention.[2] *See, e.g.*, *Ezokola v. Canada (Citizenship & Immigr.)*, [2013] 2 S.C.R. 678, para. 36, 68–71 & 86 (Can.) (holding that "voluntary, knowing, and significant contribution to the crime or criminal purpose of a group" is required); Joined Cases C-57/09 & C-101/09, *Bundesrepublik Deutschland v. B and D*, 2010 E.C.R. I-10979, ¶ 104 (Nov. 9, 2010) (explaining that Article 1F excludes from protection persons considered undeserving); *see also R (on the application of JS) (Sri Lanka) v. Sec'y of State for Home Dep't* [2010] UKSC 15, [2] (appeal taken from EWCA Civ) ("[B]ecause of the serious consequences of exclusion . . . more than mere membership of an organisation is necessary[.]"); Case C-573/14, *Commissaire général aux réfugiés et aux apatrides v. Mostafa Lounani*, ECLI:EU:C:2017:71, ¶ 79 (Jan. 31, 2017) (noting that evidence of specific involvement is "of particular importance").

[2] *Rodriguez v. Yanez*, 817 F.3d 466, 477–78 (5th Cir. 2016) ("As with the interpretation of any treaty, [t]he opinions of our sister signatories . . . are entitled to considerable weight when interpreting [a] Convention[.]" (internal quotations and citations omitted)).

Accordingly, the persecutor bar should be narrowly interpreted in keeping with its history and purpose. *See* U.N. High Comm'r for Refugees ("UNHCR"), *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection* ¶¶ 147–50 (2019) ("[C]onsidering the serious consequences . . . interpretation of these exclusion clauses must be restrictive[.]") [hereinafter "UNHCR Handbook"]; *Al-Sirri v. Sec'y of State for the Home Dep't & DD (Afghanistan) v. Sec'y of State for the Home Dep't* [2012] UKSC 54, [16] (appeal taken from EWCA Civ) (emphasizing that Article 1F "should be . . . applied with caution"); A.R. 1347 (2016 DHS Br.); *Alvarado*, 27 I. & N. Dec. at 27–30 (invoking affirmative acts of harm and knowledge of consequences to trigger bar). A refugee may only be excluded from protection under Article 1F where "a general consensus" exists "in contemporary international criminal instruments regarding both the affirmative elements of the relevant crime, and applicable defenses." James C. Hathaway & Michelle Foster, *The Law of Refugee Status* 569, 572 (2d ed. 2014) (noting the "open-ended" framing of Article 1F and the drafters' intent that evolving understandings of international criminal liability and defenses be considered).

Multiple State Parties, including Canada, the UK, Australia, New Zealand, and Norway, have explicitly recognized that conduct performed under duress is not encompassed within Article 1F. *See, e.g.*, *Ezokola*, [2013] 2 S.C.R. 678, para. 86 ("It

goes without saying that the contribution to the crime or criminal purpose must be voluntarily made [for exclusion under Article 1F].”); *Indra Gurung v. Sec’y of State for the Home Dep’t* [2002] UKIAT 04870, [110] (noting relevance of “duress” to analysis of Article 1F exclusion); *VWYJ v Minister for Immigr & Multicultural & Indigenous Affs.*, [2005] FCA 658 (18 April 2005) ¶ 9 (Austl.) (same); *Refugee Appeal No. 74646*, [2003] NZRSAA at [54] (N.Z.) (same); Maria Bergram Aas, *Exclusion from Refugee Status: Rules and Practices in Norway, Canada, Great Britain, The Netherlands and Denmark* 80 (2013) (noting that Norway requires “intent and knowledge” to commit Article 1F offense); *see also Ramirez v. Canada (Minister of Emp. & Immigr.)*, [1992] 2 F.C. 306, para. 17 (Can.) (requiring “existence of a shared common purpose [to persecute]”); *R (on the application of JS)* [2010] UKSC 15, [38] (requiring voluntary contribution “in a significant way”); William A. Schabas, *General Principles of Criminal Law in the International Criminal Court Statute (Part III)*, 6 European J. Crime, Crim. L. & Crim. Just. 84, 109 (1998) (describing Rome Statute’s recognition of duress defense).[3]

2. The text of Article 1F requires a finding of individual criminal liability prior to exclusion.

The A.G. concluded that a duress exception is not required to align the

[3] *See Roper v. Simmons*, 543 U.S. 551, 578 (2005) (“The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”).

persecutor bar with the Convention and Protocol and that nothing "in the drafting and negotiation records [] support a duress defense." *Negusie*, 28 I. & N. Dec. at 138, 139. The text of Article 1F and the international instruments it incorporates demonstrate precisely the opposite.

The text of Article 1F(a) underscores the Convention's requirement of individual criminal responsibility for exclusion from protection. Article 1F(a) requires "a *crime* against peace, a war *crime*, or a *crime* against humanity, *as defined in the international instruments* drawn up to make provision in respect of such crimes." Convention, art. 1F(a) (emphasis added). The text thus expressly incorporates international criminal law principles and focuses on those culpable individuals who bear criminal responsibility for persecuting others. *See* Geoff Gilbert, *Current Issues in the Application of the Exclusion Clauses*, *in Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* 427–29 (Erika Feller et al. eds., 2003).

Article 1F(a) not only uses terms that reflect criminal liability, it also references "international instruments" that incorporate defenses to liability, including duress. At the time of drafting, the "international instruments" referenced included foundational documents for war criminal trials following WWII, as well as the 1949 Geneva Conventions and the 1950 report of the International Law Commission ("ILC"). UNHCR, *Background Note on the Application of the*

Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees ¶¶ 23–24 (2003).

An initial draft of Article 1F(a) specifically referred to the Charter of the International Military Tribunal [hereinafter "Charter"]. Goodwin-Gill & McAdam, *supra*, at 163–65. The Charter defined crimes against humanity to include "*persecutions on political, racial or religious grounds* in execution of or in connection with any crime within the jurisdiction of the Tribunal." Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and the Charter of the International Military Tribunal, art. 6, Aug. 8, 1945, 59 Stat. 1544, 1556 (emphasis added). The final draft referenced "international instruments" more generally to incorporate the ILC's work to define these offenses and to allow for the evolution of criminal liability standards. *See* Atle Grahl-Madsen, 1 *The Status of Refugees in International Law* 276 (1966); Hathaway & Foster, *supra*, at 569 & 585. Through its reference to "international instruments," the exclusions in Article 1F(a) are inextricably linked to the requirements for international criminal liability, including the established defenses to that liability. Hathaway & Foster, *supra*, at 572.

The military tribunals adjudicating crimes defined in the Charter and ILC explicitly recognized that conduct performed under duress did not confer individual criminal responsibility. *See* U.N. War Crimes Comm'n, XV *Law Reports of Trials of War Criminals* 174 (1949) [hereinafter "U.N. War Crimes Report"]. The

International Military Tribunal, for example, held that coercion deprived a defendant of any "moral choice," thus excusing what was otherwise criminal conduct. *See* 1 *Trial of the Major War Criminals before the International Military Tribunal* 224 (1947) ("The true test . . . is . . . whether moral choice was in fact possible."). *See also Report of the International Law Commission to the General Assembly*, U.N. Doc A/1316 (1950), *reprinted in* [1957] 2 Y.B. Int'l L. Comm'n 375, U.N. Doc A/CN.4/SER.A/1950/Add.1.

U.S. war crimes tribunals likewise recognized the duress defense as a way to distinguish when an individual was "deprive[d] . . . of the freedom to choose the right and refrain from the wrong." *See, e.g.*, The *High Command* Case, *in* 11 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, at 509 [hereinafter "*High Command* Case"]; The *I.G. Farben* Case, *in* 8 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, at 1176 (1952) [hereinafter "*I.G. Farben* Case"] (noting that duress "is a complete defense"). As one tribunal emphasized, "there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns." The *Einsatzgruppen* Case, *in* 4 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, at 480 (1950) [hereinafter "*Einsatzgruppen* Case"] ("No court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal

lever.").

The standards developed by these tribunals, including the duress defense, were well established at the time of the Convention's drafting. *See generally* Kate Evans, *Drawing Lines Among the Persecuted*, 101 Minn. L. Rev. 453, 524–33 (2016) (describing military tribunal jurisprudence on duress and its connection to the Convention); G.A. Res. 95(I), U.N. GAOR, 1st Sess., pt. 2, at 188, U.N. Doc. A/64 (1947) (U.N. General assembly affirming Charter principles and International Military Tribunal judgment). The U.N. War Crimes Commission reviewed 1,900 tribunal decisions and found duress to be a broadly recognized defense. U.N. War Crimes Report, *supra*, at 174. The ILC subsequently reviewed these standards and designated duress as an exception to criminal liability. *See Draft Code of Offences Against the Peace and Security of Mankind—Report by J. Spiropoulos, Special Rapporteur*, U.N. Doc. A/CN.4/25 (1950), *reprinted in* [1957] 2 Y.B. Int'l L. Comm'n 275, U.N. Doc. A/CN.4/SER.A/1950/Add.1.

Contrary to the A.G.'s assessment, concern for freedom of choice and individual criminal responsibility permeated the environment in which the Convention was drafted. *See Draft Code of Offences Against the Peace and Security of Mankind—Second Report by Mr. J. Spiropoulos, Special Rapporteur*, U.N. Doc. A/CN.4/44 (1951), *reprinted in* [1957] 2 Y.B. Int'l L. Comm'n 52–53, U.N. Doc. A/CN.4/SER.A/1951/Add.1 (discussing need to incorporate Nuremberg principles

into draft offenses, including requirement for moral choice). Through their reference to "international instruments," the Convention's drafters invoked principles enunciated by post-war military tribunals—including the need to consider individual criminal responsibility and whether acts were committed under duress—in defining the Convention's exclusions. *See* Goodwin-Gill & McAdam, *supra*, at 163–69; Grahl-Madsen, *supra*, at 273–77.[4] They further provided space for the exclusions to evolve alongside developments in the standards for international criminal culpability. Hathaway & Foster, *supra*, at 569. At no point did these tribunals or the Convention's drafters contemplate that Article 1F(a) would encompass actions taken under duress. *See* A.R. 1490 (2016 DHS Br.) (quoting U.N. War Crimes Report, *supra*, at 174); *Negusie*, 27 I. & N. Dec. at 353–60.

B. *Congress Incorporated the Scope of the Refugee Convention's Exclusions into U.S. Law When It Adopted the Refugee Act.*

In concluding that the persecutor bar is categorical, the A.G. ignored express

[4] The ILC has, to this day, recognized intent as an important requirement in assessing culpability for crimes, including in recent efforts to draft a statute punishing "crimes against humanity." *See* ILC, *Summaries of the Work of the International Law Commission*, http://legal.un.org/ilc/summaries/7_7.shtml; Sean D. Murphy, *First Report on Crimes against Humanity* ¶¶ 13, 175, U.N. Doc.A/CN.4/680 (2015) (using Rome Statute's definition of crimes against humanity, which includes "other inhumane acts of a similar character intentionally causing great suffering"); Sean D. Murphy, *Second Report on Crimes against Humanity* ¶ 2, U.N. Doc.A/CN.4/690 (2016) (noting that ILC was "proceeding in a manner that was complementary to the system of the Rome Statute"); The Rome Statute, art. 7(1), 2187 U.N.T.S. 90, *entered into force* July 1, 2002.

statements of Congressional intent to the contrary as well as the bar's historical application. For the Refugee Act to conform U.S. law to the Convention and Protocol as Congress intended, *Negusie*, 555 U.S. at 519–20, the persecutor bar must include a duress defense.

1. Congress included a duress defense when enacting the persecutor bar.

At every turn, Congress tied the bar's scope to its role in the Displaced Persons Act of 1948 ("DPA"), the jurisprudence of the war crimes tribunals, and its consistency with international obligations. Each of these sources recognized the duress defense. The persecutor bar first appeared in U.S. law in the DPA, which incorporated the bar wholesale from the Constitution of the International Refugee Organization ("IRO"). Evans, *supra*, at 511–14. The DPA limited eligibility to those persons who are "the concern of the International Refugee Organization." Displaced Persons Act of 1948, Pub. L. No. 80-774, § 2(b), 62 Stat. 1009, 1009 (1948). The IRO, in turn, excluded from its "concern" anyone who "assisted the enemy in persecuting civil populations." IRO Const., annex I, pt. II, ¶ 2(a) *reprinted in* 18 U.N.T.S. 20 (1948).

The bar's drafting history, the IRO's eligibility directives, and nearly 1,500 appellate decisions applying IRO eligibility criteria demonstrate that the IRO required individual culpability before excluding someone from IRO protection. *See* Evans, *supra*, at 487–510. Critically, the IRO never applied the persecutor bar to

victims of persecution. *Id*. at 499–503. Adjudicators instead looked for indicia of culpability, including being promoted based on merit, moving to a more brutal unit, personally gaining from Nazi policies, occupying positions of trust, or taking direct actions to cause harm. *Id.* at 503–10.[5]

Congress replicated the bar in other immigration provisions, all the while defining the bar's scope by reference to international agreements, military tribunals, and earlier legislation. Through the Holtzman Amendment, Congress inserted the persecutor bar in the INA, including as a bar to withholding of deportation—the precursor to withholding of removal. Holtzman Amendment, Pub. L. 95-549 §§ 101–05, 92 Stat. 2065, 2065–66 (1978) (limiting bar to persecution in connection with Nazi government).

The accompanying House Judiciary Committee report "specifically acknowledged the inclusion of the persecutor bar in the DPA, the RRA, and the IRO Constitution and explained that the amendment would 'establish within the permanent U.S. immigration law a provision which has appeared previously in [these] special refugee measures.'" Evans, *supra*, at 516 (quoting H.R. Rep. No. 95-1452, at 3). The report explained that the statute "would require 'difficult and very

[5] The bar was incorporated into the text of the DPA when it was amended in 1950. Pub. L. No. 81-555, § 11, 64 Stat. 219, 227 (1950). The Refugee Relief Act of 1953 ("RRA") replaced the DPA and retained the bar without further discussion of its scope. Pub. L. No. 83-203, § 14, 67 Stat. 400, 406 (1953).

delicate determinations,'" indicating that Congress did not foresee an absolute bar to protection. *Id.* (quoting H.R. Rep. No. 95-1452, at 8). The Committee "described the INA's provision for withholding of deportation, in its amended form to include a persecutor bar, as meeting the United States' obligations under the [Protocol] and 'coextensive' with the [Convention]." *Id*. (quoting H.R. Rep. No. 95–1452, at 5).

The Committee further explained that the "accepted precept of international law in which 'persecution' is a 'crime against humanity'" should guide the administration of the bar, consistent with "international material on the subject such as the opinions of the Nuremberg tribunals." *Id*. at 516–17 (quoting H.R. Rep. No. 95-1452, at 7–8). The Committee emphasized that "the conduct envisioned [by the persecutor bar] must be of a deliberate and severe nature." *Id*. Conduct performed under duress, however, did not result in liability at the Nuremberg tribunals nor is such conduct deliberate or intentional in the way Congress required for the bar to apply.

With the Refugee Act, Congress again excluded "any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion" from protection. Refugee Act of 1980, Pub. L. No. 96-212, §§ 201(a), 203(e), 94 Stat. 102, 107 (1980). The House Judiciary Committee explained that this provision was "consistent with the U.N. Convention (which does

not apply to those who, *inter alia*, 'committed a crime against peace, a war crime, or a crime against humanity') and with . . . the Displaced Persons Act of 1948 and the Refugee Relief Act of 1953." H.R. Rep. No. 96–608, at 10 & 18 (1979) (noting that the bar reflected the exception "provided in the Convention relating to [individuals] who themselves participated in persecution"); *see also* H.R. Rep. No. 96-781, at 19–20 (1980).

The Committee emphasized that the Act will "finally bring the United States law into conformity with the internationally-accepted definition of the term 'refugee,'" H.R. Rep. No. 96-608, at 9, which was well understood not to exclude individuals forced to perform acts under duress. *See supra*, Section I.A. By stating that the Refugee Act's definitions and exclusions are consistent with the DPA, the RRA, the Convention and the Protocol, Congress intended the persecutor bar to be circumscribed. These statutes and agreements did not exclude persons for acts performed under duress and the Refugee Act must be interpreted accordingly.

2. A duress exception is consistent with the historical application of the persecutor bar.

When adopting the Refugee Act, Congress described the persecutor bar as consistent with the Convention and Protocol as well as its first appearance in the DPA. Under the DPA, adjudicators did not apply the persecutor bar categorically. Both IRO documents and statements by U.S. officials show that application of the persecutor bar was determined by IRO officials. Evans, *supra*, at 513–14. Indeed,

members of the Displaced Persons Commission "relied almost exclusively on the IRO file containing its eligibility determinations." *Id.* And, as explained in Section I.B.1, IRO officials looked for indicia of criminal culpability to trigger the bar and did not apply the bar to victims of persecution.

The Supreme Court made the same distinctions between culpable and non-culpable participants in persecution. Though the A.G. cited *Fedorenko v. United States* in support of a categorical bar to refugee protection, *Negusie*, 28 I. & N. Dec. at 127, *Fedorenko* made no such rule. *Fedorenko v. United States*, 449 U.S. 490 (1981).[6] In two critical footnotes, the Court recognized that certain conduct *cannot* "be considered assisting in the persecution of civilians." *Id.* at 512 nn.33–34 (contrasting "an individual who did no more than cut the hair of female inmates before they were executed" and prisoners who led other prisoners from the trains to the lazaret with "a guard who was issued a uniform and armed with a rifle and a pistol," "paid a stipend," "regularly allowed to leave the concentration camp," and "who admitted to shooting at escaping inmates," and finding that only the latter "fit[] within the statutory language about persons who assisted in the persecution of

[6] The Supreme Court granted *certiorari* in *Fedorenko* to review a question completely distinct from the meaning of the persecutor bar. *Fedorenko*, 449 U.S. at 493. Proper interpretation of the bar was therefore never briefed by the parties. *Id*. at 530 (White, J., dissenting).

civilians"). The Court then acknowledged that other distinctions "may present more difficult line-drawing problems." *Id.*

Indeed, the parties agreed throughout the *Fedorenko* litigation that "involuntary" assistance in the persecution of others was not disqualifying, and the Solicitor General maintained that position before the Court. *See* Evans, *supra*, at 466. The consular officer, who served as the government's key witness, noted that after reviewing thousands of cases he knew of no Jewish prisoner disqualified under the persecutor bar for forced supervision of other prisoners. *Fedorenko*, 449 U.S. at 498. Furthermore, the facts on which the Court distinguished prisoners who assisted in operations from the camp guard channel the test for duress—one Fedorenko failed. The Court emphasized that Fedorenko was armed and paid, that he could leave the camp, that other guards had escaped, and that he admitted to shooting at inmates. *Id*. at 500, 512 n.34, & 513 n.35.

Nearly thirty years later, the Court again expressed concern over excluding victims of persecution from refugee protection and returned to the meaning of "persecution" as a mechanism to determine who deserves protection. *See Negusie*, 555 U.S. at 520, 524. Recognizing a duress defense to the persecutor bar meets this demand, conforms to Congressional intent, is consistent with the bar's historical application, and reconciles U.S. law with international obligations.

II. The Standard for Duress Was Firmly Established at the Time the Refugee Convention Was Drafted, the United States Acceded to the Protocol, and Congress Adopted the Refugee Act.

When Congress enacted the Refugee Act, it incorporated into U.S. law the contemporary understanding of the limited scope of the exclusions clause, along with the well-settled recognition that conduct under duress is not encompassed within the persecutor bar. Indeed, DHS itself has recognized that conduct under duress does not trigger the persecutor bar. *See* A.R. 1337–38 (2016 DHS Br.). Thus, analysis of duress demands a flexible, contextualized approach, consistent with U.S. obligations under the Refugee Act, international law, and practice of other State Parties.

Countries around the world, including the UK, Canada, Australia, and New Zealand, employ that same basic test for duress, drawing first on the ILC's formulation and then on the Rome Statute. *See, e.g.*, *MT (Article 1 F(a)-aiding and abetting) Zimbabwe v. Sec'y of State for the Home Dep't* [2012] UKUT 00015(IAC), [106]; *Guerra Diaz v. Canada (Minister of Citizenship and Immigr.)* [2013] F.C. 88, para. 51 (Can.); *VWYJ*, FCA 658, ¶ 9; *Refugee Appeal No. 75634*, [2006] NZRSAA at [79] (N.Z.). Generally, duress is found where:

(1) the acts committed resulted from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person;
(2) they were reasonable and necessary actions to avoid that threat; and

(3) there was no intention to cause greater harm than that threatened.[7]

The practices of these other State Parties are "entitled to considerable weight." *See Air France v. Saks*, 470 U.S. 392, 404 (1985); *Negusie*, 555 U.S. at 520; *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."); *Rodriguez*, 817 F.3d at 477–78. U.S. obligations under the Convention and Protocol should therefore be interpreted consistently with other State Parties, which have addressed the scope of the exclusion clauses and the role of duress in assessing individual criminal responsibility. *See Vimar Seguros y Reaseguros v. M/V Sky Reefer*, 515 U.S. 528, 537 (1995) (declining "to interpret our version of [a treaty] in a manner contrary to every other nation to have addressed this issue").

A. *The Threat of Imminent Death or Serious Bodily Harm Should Be Evaluated Comprehensively.*

To establish duress, an applicant must show that the acts committed resulted from an imminent threat. This simple, flexible standard, which tribunals trying the

[7] Hathaway & Foster, *supra*, at 585 (emphasis omitted). These principles, codified by the Rome Statute, reflect international jurisprudence on the subject of duress. Although the United States is not a party to the Rome Statute, it voted in favor of referring Libya to the International Criminal Court for violating the statute. U.N. Security Council, resolution 1970, S/RES/1970 (2011) (Feb. 26, 2011), https://www.undocs.org/S/RES/1970%20(2011).

worst human rights violators in modern history employed, requires no modification. The military tribunals that addressed the applicability of this defense understood that the immediacy of the threat must be judged based on the entire course of conduct of both the coercive regime and the individual asserting the defense.

The U.S. Nuremberg Military Tribunal addressed this factor in the *Flick* Case, when it found that industrialist defendants charged with crimes against humanity for use of slave labor to meet Nazi production quotas were not guilty. The *Flick* Case, in 6 *Trials of War Criminals Before the Nuernberg Military Tribunal Under Control Council Law No. 10*, at 1196, 1201 (1952) [hereinafter "*Flick* Case"]. The Tribunal accepted the defendants' duress defense, concluding that the Nazi regime presented a "constant 'reign of terror'" with agents "ready to go into instant action and to mete out savage and immediate punishment." *Id.* at 1202. The Tribunal relied on the continuous nature of the threat and the possibility that opposition could be met with serious harm at any time. *See* Evans, *supra*, at 428.

Other State Parties to the Convention have adopted this same approach to imminence. *See Guerra Diaz* [2013] F.C. 88, para. 54 (finding that applicant "was in a situation of clear and imminent danger," despite "some delay between the threats" and crime committed); *Canada (Minister of Citizenship & Immigr.) v. Maan* [2007] F.C. 583, para. 19 (Can.) ("[T]he threat need not operate instantly, but must be a present one in the sense that it creates an immediate pressure to act[.]") (internal

quotations omitted)); *Canada (Minister of Citizenship & Immigr.) v. Asghedom*, [2001] F.C.T. 972, para. 27–37 (Can.) (finding that applicant, who served in army for two years without fleeing or disobeying orders, faced an "imminent, real, and inevitable threat" to his life since "another soldier who had tried to escape, had been killed").

B. *Establishing Duress Requires Showing that Actions Were Reasonable and Necessary to Avoid the Threat and that There Was No Adequate Means of Escape.*

The defense of duress is premised on the existence of moral objection but the absence of moral choice. *See* Evans, *supra*, at 530–31. DHS previously agreed to this factor's relevance and its source in international law. A.R. 1358 (2016 DHS Br.). To establish the absence of moral choice, State Parties assess whether the applicant's actions were reasonable and necessary to avoid the harm and whether the applicant had no adequate means of escape. *See* Rome Statute, art. 31(d); *see also, e.g.*, *Maan*, [2007] F.C. 583, para. 20 (noting that this requirement "involves a realistic appreciation of the alternatives open to a person; the accused . . . must have no reasonable legal alternative"); *Guerra Diaz*, F.C. 88, para. 47, 55; *CM (Article 1F(a)-superior orders) Zimbabwe v. Sec'y of State for the Home Dep't* [2012] UKUT 00236(IAC), [29]; *MT (Article 1F(a)-aiding and abetting)*, UKUT 00015(IAC), [109]. If escape were possible or the acts were not necessary, the applicant for protection may be complicit in the persecutory conduct. *See Refugee*

Appeal No. 74646, NZRSAA at [53] & [58] (finding that applicant at no time "shared a common purpose" with or any "ideological commitment" to the militant organization he assisted); *see also Refugee Appeal No. 2142*, [1997] NZRSAA (N.Z.) (finding that applicant did not adhere to organization's principles and was forced to supply dynamite and other items until he and his mother could escape, which they did "with reasonable alacrity in all the circumstances").

C. *Duress Requires that the Person Did Not Intend to Cause Harm Greater Than the Threat Avoided.*

Conduct performed under duress does not preclude the grant of refugee status so long as the applicant "does not *intend* to cause greater harm than the one sought to be avoided." *See* UNHCR Handbook, *supra*, ¶ 22 (emphasis added). As a result, State Parties to the Convention and Protocol look to the intent of the applicant in causing the harm. *See, e.g.*, *Refugee Appeal No. 74646*, NZRSAA at [53] (recognizing duress defense where forcibly-conscripted applicant identified innocent civilians for torture and murder because he had been tortured and had "witnessed his deceased brother's battered body"); *Asghedom*, [2001] F.C.T. 972, para. 7, 38–39 (affirming finding that forcibly-recruited Eritrean teenager acted under duress when standing guard during raids by Ethiopian military, facilitating transport of people to be tortured and killed, and burying dead bodies where he would have faced execution if caught deserting); *Maan*, [2007] F.C. 583, para. 26 (finding that "harm caused [in transporting drugs] was not disproportionate to the

harm [applicant] avoided given that the consequences of refusing to act meant death to him and his family").

D. *The Three-Part Test for Duress Must Take into Account the Applicant's Subjective Perspective and Be Assessed in the Aggregate.*

In the aftermath of WWII, military tribunals tasked with evaluating moral choice emphasized the need to assess individuals' subjective perspective and the totality of evidence in determining whether they had lost their freedom of choice. As the U.N. War Crimes Commission reported, the test for duress must "be applied according to the facts as they were honestly believed to exist by the accused." U.N. War Crimes Report, *supra*, at 174. A U.S. military tribunal explained the importance of subjective evidence, noting that "the contemplated compulsion must actually operate upon the will of the accused to the extent he is thereby compelled to do what otherwise he would not have done." The *Krupp* Case, 9 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, at 1438–39 ("The effect of the alleged compulsion is to be determined not by objective but by subjective standards" from the "standpoint of the honest belief of the particular accused in question.") [hereinafter "*Krupp* Case"]. Military tribunals also assessed evidence of duress in the aggregate to determine whether individuals pleading the defense had lost their freedom of choice. *See, e.g.*, *Flick* Case, *supra*, at 1194–1202; *Krupp* Case, *supra*, at 1435–49; The *Einsatzgruppen* Case, *supra*, at 470–88, 509–87.

State Parties to the Convention and Protocol have similarly applied a fact-intensive assessment of an individual's role in persecutory conduct, as well as surrounding circumstances, to determine whether the person acted under duress. Canadian courts have, for example, concluded that, when determining whether an asylum applicant "voluntarily made a significant and knowing contribution to a crime or criminal purpose," or acted under duress, adjudicators must bear in mind the "diverse circumstances encompassing different social and historical contexts." *Ezokola*, 2 S.C.R. 678, para. 100 (stating that the exclusion clause requires a "full contextual analysis [which] would include any viable defences" such as "duress"); s*ee also Maan*, F.C. 583, para. 23–25 (considering actions and threat in aggregate to affirm "situation of clear and imminent danger").

UK tribunals have emphasized that "[a]n assessment of whether an appellant is excluded from refugee protection . . . must take account of his evidence as a whole, not just a part of it." *AS (s.55 "exclusion" certificate-process) Sri Lanka v. Sec'y of State for the Home Dep't* [2013] UKUT 00571(IAC) [27]; *see also Gurung*, UKIAT 04870 at [39] (noting that "a holistic approach" must be adopted and "exclusion issues should never be examined in complete isolation from the examination of the appellant's overall claim"); *Al-Sirri*, UKSC 54, [15] ("[R]equir[ing] an individualised consideration of the facts of the case."). The European Court of Justice has also noted that a finding of "individual responsibility for acts committed

[requires] . . . examin[ing] all the relevant circumstances." *B and D*, E.C.R. I-10979, ¶ 98; *see also B and D*, E.C.R. I-10979, (Opinion of Advocate General Mengozzi), ¶ 78 (emphasizing that individual responsibility requires consideration of "possible physical or psychological constraints" and "whether that person had a genuine opportunity to prevent the acts in question or to distance himself from them (without jeopardising his own safety)").

This flexible standard thus allows for the comprehensive evaluation of each applicant's circumstances to determine whether conduct occurred under duress and whether the persecutor bar applies.

CONCLUSION

To meet U.S. obligations under the Refugee Protocol and Convention and comply with Congressional intent, the Court should vacate the A.G.'s decision, hold that the persecutor bar does not include acts committed under duress, and remand for further proceedings consistent with the persecutor bar's source in international law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2021, I electronically filed the foregoing, Brief of *Amici Curiae* in Support of Petitioner's Petition for Review, with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that the following counsel of record for Petitioner and Respondent in this case are registered CM/ECF users and will therefore be served by the appellate CM/ECF system:

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CERTIFICATE OF COMPLIANCE

This brief complies with Federal Rule of Appellate Procedure 29(a)(5) and 32(a)(7)(B) as it contains 6,490 words, excluding those parts exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Local Rule 32.2. Additionally, this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface in Microsoft Word, using Times New Roman in 14-point font.

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