No. 23-1270

In the Supreme Court of the United States

PIERRE RILEY,

Petitioner,

v.

MERRICK GARLAND, U.S. ATTORNEY GENERAL,

Respondent.

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

BRIEF OF AMICUS CURIAE JUAN E. MÉNDEZ, FORMER U.N. SPECIAL RAPPORTEUR ON TORTURE, IN SUPPORT OF PETITIONER

MARYANN T. ALMEIDA
ERWIN RESCHKE
Davis Wright Tremaine LLP
920 Fifth Avenue
Suite 3300
Seattle, WA 98104

DAVID M. GOSSETT
Counsel of Record
Davis Wright Tremaine LLP
1301 K Street NW
Suite 500 East
Washington, DC 20005
(202) 973-4200
davidgossett@dwt.com

Counsel for Amici Curiae

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INTRODUCTION AND INTEREST OF THE *AMICUS CURIAE*

Professor Juan E. Méndez submits this brief as *amicus curiae*. Professor Méndez has spent his career advising on matters of international law, including those related to the prohibition of torture and other cruel, inhuman, or degrading treatment or punishment, and he has extensive experience related to, and a specific interest in, this matter. He presents this brief to explain why this Court should consider the United States' non-refoulement obligations under international law in construing the provisions of the Immigration and Nationality Act ("INA") at issue in this case.[1]

From 2010 to 2016, Professor Méndez served as the United Nations Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment, pursuant to General Assembly Resolution 60/251 and Human Rights Council Resolution 16/23.

Professor Méndez is the author, with Marjory Wentworth, of TAKING A STAND (New York: Palgrave-MacMillan, October 2011), which examines the uses of arbitrary detention, torture, disappearances, rendition, and genocide in countries around the world.

He was the Co-Chair of the Human Rights Institute of the International Bar Association, London in 2010 and 2011 and Special Advisor on Crime Prevention to the Prosecutor, International Criminal Court, The Hague from mid-2009 to late 2010. Until

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amicus* and his counsel made a monetary contribution to the preparation or submission of this brief.

May 2009, Professor Méndez was the President of the International Center for Transitional Justice (ICTJ). Concurrently, he was Kofi Annan's Special Advisor on the Prevention of Genocide (2004 to 2007). Between 2000 and 2003 he was a member of the Inter-American Commission on Human Rights of the Organization of American States, and its President in 2002. Before that, he directed the Inter-American Institute on Human Rights in San Jose, Costa Rica (1996-1999) and worked for Human Rights Watch (1982-1996). In July 2020, Professor Méndez was appointed to the Board of Trustees of the United Nations Voluntary Fund for the Victims of Torture for a three-year term.

Professor Méndez currently teaches human rights law at American University in Washington D.C. and at Oxford University in the United Kingdom. He has previously taught at Notre Dame Law School, Georgetown University, and Johns Hopkins University.

SUMMARY OF ARGUMENT

The United Nations Convention Against Torture ("CAT" or "Convention")[2] grants individuals absolute protection against refoulement—that is, removal to another country if there are substantial grounds for believing they would be in danger of being subjected to torture there. To guarantee this protection, signatory states must, prior to effecting a removal determination when refoulement is implicated, provide noncitizens with judicial review of that removal determination. The Fourth Circuit's

[2] G.A. Res. 39/46, Convention Against Torture & Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984).

interpretation of "final order of removal" in Section 242(b)(1) the INA, 8 U.S.C. 1252(b)(1), thwarts this guarantee by preventing noncitizens from obtaining judicial review of their refoulement determination if that determination takes place in a withholding-only proceeding. This Court should reject that interpretation.

CAT was designed to be the most comprehensive instrument in international law to prohibit torture. To that end, Article 3 of the treaty codifies the long-standing *jus cogens* norm of non-refoulement and builds upon the non-refoulement obligations of prior international treaties. Unlike its predecessors, however, Article 3's non-refoulement obligation is absolute by design. There are no exceptions to Article 3's non-refoulement protection.

The United States has long recognized that the obligations imposed by CAT, including the prohibition on refoulement, are mandatory and absolute. When negotiating CAT, U.S. diplomats played a pivotal role in ensuring the terms were concrete and enforceable. And when ratifying and implementing CAT, the legislative and executive branches confirmed that CAT's Article 3 prohibition on refoulement would be honored domestically, including by judicial review of CAT claims.

Since the Convention, international tribunals repeatedly have held that CAT signatory states must provide judicial review of refoulement determinations, including the opportunity to meaningfully appeal. The Committee against Torture (the "Committee"), the U.N. body charged with interpreting CAT, has repeatedly clarified that Article 3 requires these procedural safeguards, as have other international tribunals.

These considerations militate in favor of reversal here. Interpreting "final order of removal" in INA Section 242(b)(1) to exclude decisions rendered in withholding-only proceedings would violate the principle of non-refoulement in Article 3 of CAT by effectively eliminating the required independent and impartial judicial review. The consequence would be to prevent noncitizens whose removal status was adjudicated prior to their withholding-only proceeding from receiving the absolute protection against refoulement that CAT Article 3 provides.

ARGUMENT

I. The Convention Against Torture Imposes An Absolute Duty Not To Return A Person To A State Where They Are Likely To Be Tortured.

The United Nations Commission on Human Rights designed CAT as the "most comprehensive instrument in international law to prohibit torture under any circumstances,"[3] codifying *jus cogens* norms prohibiting torture and cruel, inhuman, or degrading punishment or treatment.[4]

Article 3 of CAT specifically enshrined the long-standing international norms against refoulment, providing that "[n]o State shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." U.N. Convention Against

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[3] U.N. Hum. Rts. Off. of High Comm'r, Joint Statement – UDHR70 (June 26 2018), https://www.ohchr.org/en/statements/2019/03/26-june-joint-statement-udhr70.

[4] Manfred Nowak, et al., THE UNITED NATIONS CONVENTION AGAINST TORTURE AND ITS OPTIONAL PROTOCOL: A COMMENTARY 7 (2d. ed. 2019).

Torture & Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 114. There are no exceptions to Article 3's restriction on refoulement.

A. The international community was not writing on a blank slate in negotiating CAT.

To appreciate CAT and its absolute restriction on refoulement, it is important to understand the international community's repeated, progressive efforts throughout the 20th Century to prevent countries from sending individuals to countries where they would be tortured.

When the United Nations General Assembly tasked the Commission on Human Rights with drafting CAT, the Commission borrowed from and built upon other treaties and bodies of international law prohibiting torture. *See* G.A. Res. 32/62 at 137 (Dec. 8, 1977); *see also* David Weissbrodt & Isabel Hortreiter, *The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties*, 5 BUFF. HUM. RTS. L. REV. 1, 6-7 (1999) [hereinafter Weissbrodt & Hortreiter].

The Commission largely based CAT's text on the United Nations' Declaration Against Torture,[5] as well as Article 5 of the Universal Declaration of Human

[5] G.A. Res. 3452 (XXX) at 91 (Dec. 9, 1975). The Declaration Against Torture was the United Nations' first step in the process of drafting CAT. *See* Nowak, *supra* note 4 at 3.

Rights[6] and Article 7 of the International Covenant of Civil and Political Rights.[7] *Id*. Article 3's prohibition on refoulement, however, specifically drew inspiration from Article 33 of the 1951 Geneva Convention Relating to the Status of Refugees ("1951 Convention") and case law interpreting Article 3 of the European Convention on Human Rights.[8]

Article 33(1) of the 1951 Convention bars states from returning a refugee to "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 Relating to the Status of Refugees art. 33, July 28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 137. Notably, Article 33 of the 1951 Convention—unlike CAT—included exceptions to its prohibition on refoulement, allowing states to return a refugee when there are "reasonable grounds for regarding [him] 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

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[6] Article 5 of the Declaration of Human Rights provides "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." G.A. Res. 217A (III) at 73 (Dec. 10, 1948).

[7] Article 7 of the International Covenant of Civil and Political Rights states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation." G.A. Res. 2200A (XXI), at 53 (Dec. 16, 1966).

[8] Herman Burgers & Hans Danelius, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 125 (1988).

serious crime, constitutes a danger to the community of that country." *Id*.

Article 3 of the European Convention on Human Rights provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment." European Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Sept. 3, 1953, 213 U.N.T.S. 222, 224. Although this article did not guarantee noncitizens a right of residence or to asylum, the European Commission on Human Rights frequently interpreted Article 3 as prohibiting removal in certain exceptional cases, including where removal would subject the person to torture. *Altun* v. *Germany*, App. No. 103008/83, 36 Eur. Comm'n H.R. Dec. & Rep. 231-32 (1984); *see also Slepcik* v. *Netherlands*, App. No. 30913/96, Eur. Comm'n H.R. (1996).

B. Article 3's non-refoulement obligation is unique because it is absolute.

Article 3 of CAT differed from its antecedents in several fundamental ways: The non-refoulement obligation it imposes applies in narrower circumstances, but where it applies it is significantly more robust than that provided for in any prior treaty or source of international law.

Unlike the pre-existing non-refoulement obligations it emulated, CAT Article 3 prohibits refoulement for noncitizens facing a narrower set of risks: CAT only protects against the risk of torture or cruel, inhuman, or degrading treatment or punishment. The 1951 Convention, by contrast, protected against refoulement for all refugees whose "life or freedom would be threatened" upon return. Similarly, the European Convention on Human Rights protected against myriad human rights

abuses. Weissbrodt & Hortreiter, 5 BUFF. HUM. RTS. L. REV. at 6-7 & n.26.

At the same time, the protection against refoulement Article 3 affords is far less flexible than its predecessors. Unlike these sources, Article 3 contains no exceptions to the prohibition on refoulement. Article 3 instead guarantees protections "in absolute terms." *Id*. at 16.

C. The United States' ratification and execution of CAT confirms its commitment to non-refoulement.

Both the negotiation history of CAT and the treaty's ratification and execution within the United States confirm the United States' commitment to Article 3's absolute prohibition on refoulement.

During the entire period during which CAT was being drafted and negotiated—from its inception in the 1970s to the final text adopted in 1984—the United States played an active and critical role. *See* TRENT BUATTE, *The Convention against Torture and Non-Refoulement in U.S. Courts*, 35 GEO. IMMIGR. L.J. 701, 706 (2021). For seven years, United States diplomats "labored to make the convention more than just words on paper" and endeavored to make its obligations—including Article 3's prohibition on refoulement— "concrete, meaningful, and, as never before, enforceable." 136 CONG. REC. S36,007, S36,196 (daily ed. Oct. 27, 1990) (statement of Sen. Moynihan).

President Reagan signed the Convention on April 18, 1988, and transmitted it to the Senate for advice and consent on May 20, 1988. President Reagan, *Message to the Senate Transmitting the Convention Against Torture and Inhuman Treatment or Punishment* (May 20, 1988). Along with the

transmittal, President Reagan included proposed reservations, understandings, and declarations, including a reservation addressing the United States' obligations under Article 3 of the CAT. *Id.* This reservation provided: "The United States does not consider itself bound by Article 3 insofar as it conflicts with the obligations of the United States toward States not party to the Convention under bilateral extradition treaties with such States." Convention Against Torture & Other Cruel, Inhuman or Degrading Treatment or Punishment, S. Exec. Rep. No. 101-30 at 17 (1990). But critically, President George H.W. Bush later withdrew this reservation, explaining that it was "never the intent" for the United States to avoid Article 3's absolute prohibition on refoulement by retaining "the juridical right to send a person back to a country where that person would be tortured." *Id.* at 37.

After transmittal, the Senate Foreign Relations Committee voted unanimously to report CAT with a resolution of ratification to the full Senate for its advice and consent. *Id.* at 3. The Senate Foreign Relations Committee recognized that CAT built upon a long line of international legal antecedents, including Article 3 of the European Convention on Human Rights, and that CAT's substantive terms reflected customary international law on torture. *Id.* at 11-12. Accordingly, the Committee understood CAT to "codif[y] international law as it has evolved." *Id.* at 3.

The Committee also recognized that, although Article 3 of CAT was similar to the non-refoulement obligations contained in the 1951 Convention, it imposed distinct non-refoulement obligations on the United States. *See* Buatte, 35 GEO. IMMIGR. L.J. at

708. Because the Committee understood CAT not to be self-executing, the Committee noted that refoulement determinations would be subject to domestic judicial review only after the Convention's implementation. S. Exec. Rep. 101-30 at 18.

Two-thirds of the Senate provided advice and consent to the ratification of CAT on October 27, 1990. 136 CONG. REC. at S36,196. The President ratified CAT four years later on September 19, 1994, and the United States deposited its instrument of ratification with the United Nations on October 21, 1994. Convention Against Torture & Other Cruel, Inhuman or Degrading Treatment or Punishment, Apr. 18, 1998, T.I.A.S. No. 94-1120.1.

CAT was thereafter implemented domestically through the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277, 112 Stat. 2681. Section 2242 of FARRA addressed the United States' obligations under Article 3, making clear that: "It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture[.]" FARRA § 2242(a), *codified at* 8 U.S.C. § 1231 Note.

Although in FARRA Congress specifically *precluded* judicial review of certain determinations related to CAT, Congress specifically *included* language implementing judicial review for refoulement determinations under Article 3 of CAT, "as part of the review of a final order of removal." FARRA § 2242(d), *codified at* 8 U.S.C. § 1252 Note. In so doing, the United States confirmed its understanding that the absolute prohibition on refoulement Article 3 imposed requires the law to

afford noncitizens the opportunity to seek judicial review of CAT claims.

II. To Comply With Its International Law Obligations Under Article 3 Of CAT, The United States Must Provide Impartial And Independent Review Of Refoulement Determinations.

Article 3 of CAT guarantees noncitizens absolute protection against refoulement—which the United States, through ratification and execution of CAT, has committed itself to provide. For the United States to hold firm to this commitment, it must provide judicial review for noncitizens' CAT claims. Accordingly, the 30-day deadline under Section 242(b)(1) of the INA must be understood as beginning *after* the conclusion of agency withholding-only proceedings. Otherwise, noncitizens whose removability status is determined separately and prior to a withholding-only proceeding will not be afforded judicial review—and will thus be deprived of the absolute protection against refoulement guaranteed by Article 3.

A. The Court must construe the INA consistent with the United States' treaty obligations.

Although CAT constitutes a commitment in international law, because it is not self-executing CAT does not itself "function as binding federal law." *Medellín* v. *Texas*, 552 U.S. 491, 504 (2008); *see also Sanchez-Llamas* v. *Oregon*, 548 U.S. 331, 346–47 (2006). That said, this Court must necessarily consider the United States' international obligations when construing the INA—the statute that implements CAT—because the INA implicates the rights of noncitizens seeking CAT relief. Indeed, "[i]t has been a maxim of statutory construction since the

decision in *Murray* v. *The Charming Betsy*, 2 Cranch 64, 118, 2 L.Ed. 208 (1804), that an 'act of congress ought never to be construed to violate the laws of nations if any other possible construction remains.'" *Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982) (quoting *McColloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20–21 (1963)); *see also Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained … by the courts … of appropriate jurisdiction.").

This principle "has for so long been applied by this Court that it is beyond debate." *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Courts "should not lightly presume that Congress has shut off avenues of judicial review that ensure this country's compliance with its obligations under an international treaty." *Wanjiru* v. *Holder*, 705 F.3d 258, 265 (7th Cir. 2013).

B. The principle of non-refoulement requires states to afford noncitizens with an opportunity to seek independent and impartial review of their refoulement determinations.

The international law body charged with interpretating Article 3 of CAT, as well as those tasked with interpreting the treaties from which CAT drew inspiration, all agree that the principle of non-refoulement requires more than a hollow guarantee not to return a noncitizen to a country where they would be subject to torture. These bodies uniformly recognize that to give the principle of non-refoulement meaningful effect, a state must provide judicial review of refoulement determinations.

1. The Committee Against Torture's authoritative interpretations of Article 3 call for signatory states to provide noncitizens with the ability to seek review of their refoulement determinations.

The Committee Against Torture monitors implementation of CAT and is responsible for interpreting its requirements. *See* U.N. Convention Against Torture & Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, art. 17, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85. The Committee does so through General Comments, "observations" responding to reports submitted by CAT signatory states, and legal decisions under CAT Article 22. U.N. Comm. Against Torture, *Rules of Procedure*, U.N. Doc. CAT/C/3/Rev.7 (July 5, 2023). In these various documents, the Committee has consistently interpreted Article 3 to require signatory states to provide noncitizen petitioners with independent and impartial review of their claims, as well as the right to a meaningful appeal.

Consider the Committee's fourth General Comment regarding CAT, issued to "provide[] guidance to States … on the scope of [A]rticle 3." U.N. Comm. Against Torture, *General comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22*, U.N. Doc. CAT/C/GC/4 (Sept. 4, 2018). There, the Committee explained that Article 3 requires signatory states to examine noncitizens' claims for CAT relief "individually, impartially and independently … in conformity with essential procedural safeguards[.]" *Id*. In particular, these procedural safeguards must include "a review of the deportation decision." *Id*.

Observations the Committee has made in response to periodic reports submitted by signatory states likewise reflect the Committee's interpretation of Article 3 as requiring judicial review.

When responding to Greece's periodic reports, for example, the Committee observed that Greece "should ensure full protection from refoulement by establishing the necessary safeguards in forced return procedures" and "should also ensure that appeals against return or expulsion orders have an automatic and immediate suspensive effect." U.N. Comm. Against Torture, *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Greece*, U.N. Doc. CAT/C/GRG/CO/5-6 (June 27, 2012). Similarly, when responding to Italy's periodic reports, the Committee recommended Italy "[a]mend its legislation in order to provide rejected asylum seekers with an effective judicial remedy with an automatic suspensive effect against expulsion decisions[.]" U.N. Comm. Against Torture, *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Italy*, U.N. Doc. CAT/C/ITA/CO/5-6 (Dec. 18, 2017).

The same holds true for the Committee's judicial determinations under Article 22 of the CAT. Under this provision, the Committee may hear CAT claims from or on behalf of individuals subject to a signatory state's jurisdiction, so long as the signatory state recognizes the Committee's Article 22 adjudicatory competence. Although not every signatory state allows the Committee to adjudicate disputes under Article 22, the Committee's decisions nonetheless provide legitimate and "authoritative interpretation[s]" of CAT. Nowak, *supra* note 4 at 631.

The Committee recognized that Article 3 requires states to provide noncitizens with the right to judicial

review in *Arana v. France*, for example, a case concerning France's deportation to Spain of a Spanish national convicted in France for having ties to a Basque separatist organization. U.N. Comm. Against Torture, *Arana v. France*, U.N. Doc. CAT/C/23/D/63/1997 (June 5, 2000), https://www.refworld.org/jurisprudence/caselaw/cat/2000/en/36532. The Committee found that France had violated Article 3 by deporting the noncitizen, in part because France had deported him "without the intervention of judicial authority." *Id.* ¶ 11.5.

The Committee confirmed this interpretation of Article 3 in *Agiza v. Sweden,* which concerned an Egyptian national's claims that Sweden violated Article 3 of CAT when it deported him back to Egypt despite the substantial risk of torture he faced upon return. U.N. Comm. Against Torture, *Agiza v. Sweden*, ¶¶ 2.1–2.10, U.N. Doc. CAT/C/34/D/233/2003 (May 24, 2005), https://www.refworld.org/jurisprudence/caselaw/cat/2005/en/36673. The Committee there observed that "[A]rticle 3 should be interpreted … to encompass a remedy for its breach" because "the right to an effective remedy for a breach of the Convention underpins the entire Convention." *Id.* ¶ 13.6. For Article 3, this right to an effective remedy requires "an opportunity for effective, independent and impartial review of the decision to expel or remove, once that decision is made." *Id.* ¶ 13.7. The Committee thus concluded Sweden had violated Article 3 in deporting the petitioner because its "absence of any avenue of judicial or independent administrative review" did "not meet the procedural obligation to provide for effective, independent, and impartial review required by [A]rticle 3 of the Convention." *Id.* ¶ 13.8. Indeed, because Sweden failed to provide this meaningful procedural

safeguard, the Egyptian national Sweden removed to Egypt was indeed tortured upon his return. *Id.* ¶ 2.5–2.10.

2. The non-refoulement obligations Article 3 built upon likewise require states to provide impartial and independent review.

The international bodies responsible for interpreting the non-refoulement obligations upon which the CAT was based—Article 3 of the European Convention on Human Rights and Article 33 of the 1951 Convention, *see supra*, pp. 6–7, have also declared that the principle of non-refoulement requires states to provide noncitizens with the right to judicial review of removal determinations, with removal suspended during that appeal.

The European Court of Human Rights is the international body charged with interpreting the European Convention on Human Rights. *See* Protocol 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms Nov. 22, 1984, E.T.S. No. 155, (1994). In its decisions interpreting that Convention, the court has repeatedly found that states must provide a person "alleging that his or her removal to a third country would have consequences contrary to Article 3 of the Convention" with "independent and rigorous scrutiny" of their claims and "the possibility of suspending the implementation of the measure impugned." European Ct. of Hum. Rts., *Gaberamadhien* v. *France*, App. No. 25389/05, ¶ 58 (Apr. 26, 2007), https://hudoc.echr.coe.int/eng?i=001-80333; *see also* European Ct. of Hum. Rts., *Jabari* v. *Turkey*, App. No. 40035/98, ¶ 50 (July 11, 2000), https://hudoc.echr.coe.int/eng?i=001-58900.

Likewise, the Office of the United Nations High Commissioner for Refugees ("UNHCR"), entrusted with supervising the implementation of the 1951 Convention[9] has clarified that a the right to obtain review of a refoulement determination "is an important principle that should guide all asylum procedures" because it "would minimise the risk of erroneous decisions" and refoulement. UNHCR, Note on the Principle of Non-Refoulement (Nov. 1997), https://www.refworld.org/policy/legalguidance/unhcr/1997/en/36258; *see also* UNHCR Exec. Comm., Non-Refoulement, No. 6 (XXVIII), U.N. Doc. No. 12A A/32/12/Add.1 (Oct. 12, 1977).

Together, each of the above sources of international law confirms that the principle of non-refoulement, both as a *jus cogens* norm of international law and as incorporated in Article 3 of CAT, requires states to provide judicial review of a noncitizen's refoulement determination. Without this procedural safeguard, states cannot provide the absolute protection against refoulement guaranteed by Article 3 of CAT, let alone the protection imposed by the *jus cogens* norm.

C. The Fourth Circuit's interpretation of "final order of removal" in Section 242(b)(1) of the INA undermines CAT's absolute protection against refoulement.

Petitioner Pierre Riley sought to utilize his right to an effective remedy under Article 3 of CAT by petitioning for judicial review of the Board of Immigration Appeals' ("the Board") decision denying his CAT claim. He did so within 30 days of the Board's

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[9] Convention Relating to the Status of Refugees art. 35, July 28, 1951, 189 U.N.T.S. 137.

decision, as required under Section 242(b)(1) of the INA. Nonetheless, the Fourth Circuit dismissed his petition, holding that it lacked jurisdiction because the Board's determination in Riley's withholding-only proceeding was not a "final order of removal" within the ambit of Section 242(b)(1). This holding must be reversed.

The interpretation of "final order of removal" adopted by both the Fourth and Second Circuit compromises the absolute prohibition on refoulement and right to an effective remedy guaranteed in Article 3 of CAT. The interpretation these Courts adopted effectively "forecloses judicial review of agency decisions in withholding-only proceedings in some cases." *Bhaktibhai-Patel* v. *Garland*, 32 F.4th 180, 187–88 (2d Cir. 2022).

To construe Section 242(b)(1) of the INA in accordance with Article 3's non-refoulement obligations, this Court must reverse. For CAT petitioners whose removal status is determined separately from and prior to their CAT claim, judicial review is possible only if the finality requirement of Section 242(b)(1) refers to decisions rendered at the end of the administrative process in withholding-only proceedings. This is the interpretation the majority of the federal circuit courts of appeals have adopted. *See F.J.AP.* v. *Garland*, 94 F.4th 620, 634 (7th Cir. 2024); *Alonso-Jaurez* v. Garland, 80 F.4th 1039, 1056 (9th Cir. 2023); *Argueta-Hernandez* v. *Garland*, 87 F.4th 698, 705-06 (5th Cir. 2023); *Kolov* v. *Garland*, 78 F.4th 911, 919 (6th Cir. 2023); *Arostegui-Maldonado* v. *Garland*, 75 F.4th 1132, 1143 (10th Cir. 2023).

Critically, this interpretation preserves judicial review of agency decisions in withholding-only proceedings, ensuring that noncitizens receive "the

basic standards of procedural fairness" that both the Due Process Clause of the Constitution and Article 3 of the CAT require. *Alonso-Juarez*, 80 F.4th at 1052. And it ensures the United States' compliance with Article 3's non-refoulement obligations, which United States ardently fought to make "concrete, meaningful, and … enforceable." 136 CONG. REC. at S36,196. The Court should adopt this interpretation

CONCLUSION

For the reasons stated above and in Petitioner's briefs, the Court should reverse the Fourth Circuit's judgment.

Respectfully submitted.

MARYANN T. ALMEIDA
ERWIN RESCHKE
Davis Wright Tremaine LLP
920 Fifth Avenue
Suite 3300
Seattle, WA 98104

DAVID M. GOSSETT
Counsel of Record
Davis Wright Tremaine LLP
1301 K Street NW
Suite 500 East
Washington, DC 20005
(202) 973-4200
davidgossett@dwt.com

Counsel for Amicus Curiae

JANUARY 10, 2025