No. 23-1426

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PRINCE BELO PAYE,

Petitioner,

v.

MERRICK B. GARLAND
Attorney General,

Respondent.

ON PETITION FOR REVIEW OF THE ORDERS OF THE BOARD OF IMMIGRATION APPEALS

BRIEF OF IMMIGRATION LAW PROFESSORS AND FORMER IMMIGRATION JUDGES AND BOARD OF IMMIGRATION APPEALS MEMBERS, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER PRINCE BELO PAYE AND REMAND

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Hon. Polly A. Webber, Immigration Judge, San Francisco, 1995-2016, are individual persons, have no parent companies, and have not issued shares of stock.

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INTEREST OF THE AMICI CURIAE[1]

This brief represents the views of two groups of amici curiae. *See* Corporate Disclosure Statement for names of amici curiae. The first group is comprised of thirty-two immigration law scholars and clinical professors. These amici teach immigration law and/or provide clinical instruction in law school clinics that provide representation to asylum seekers and noncitizens seeking relief under 8 U.S.C. § 1231 and 8 U.S.C § 1158. As such, amici are knowledgeable of the particular legal requirements of 8 U.S.C. § 1231 and 8 U.S.C § 1158 and have a special interest in the proper administration and interpretation of the nation's immigration laws, particularly asylum and withholding of removal.

The second group is comprised of forty-one former immigration judges ("IJs") and Board of Immigration Appeals ("BIA") members who have collectively presided over thousands of removal proceedings and have interest in this case based on their many years of dedicated service administering the immigration laws of the United States. Based on this experience, amici believe that withholding of removal

[1] Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, amici notes that all parties have consented to the filing of this brief.

Furthermore, pursuant to Rule 29 of the Federal Rules of Appellate Procedure, amici further certifies that no party's counsel authored the brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparation or submission of the brief, and no person, other than amici, their members, or counsel has contributed money intended to fund preparing or submitting the brief.

is the means whereby Congress provided for the United States to meet its international treaty obligation of "nonrefoulement" under Article 33 of the Refugee Convention. Withholding of removal is a vital legal tool upon which IJs rely to ensure that noncitizens appearing before them are not removed to countries for which they have proven it to be more likely than not that they have experienced (or will experience) persecution on account of a protected ground — an extremely high burden to meet. This relief is mandatory where the noncitizen's burden of proof is met and does not lead to permanent status or derivative status for immediate family members, in contrast to asylum, which is a discretionary form of relief that grants a permanent status and derivative status for immediate family members.

Amici contend that the more lenient "a reason" standard, as applied to the nexus between the protected ground and the persecution for withholding (as opposed to the "at least one central reason" standard for asylum) requires IJs to order withholding in cases where evidence of nexus may be insufficient for a discretionary grant of asylum. Such an interpretation would provide greater protection from violating the international treaty obligation of nonrefoulement. The instant case, where Petitioner is ineligible for asylum but may be protected from severe future persecution by withholding of removal, presents exactly the context in which Congress intended for the lesser "a reason" nexus standard to apply. Addressing this question here provides an opportunity for this Court to affirm Congress's clear

intent, expressed in the statutory language of 8 U.S.C. § 1231(b)(3)(C), to establish protection against nonrefoulement for this noncitizen and many others who, for any number of reasons, are ineligible for the discretionary relief of asylum.

ARGUMENT

I. INTRODUCTION AND SUMMARY OF THE ARGUMENT.

A noncitizen in immigration proceedings seeking relief from removal through either asylum or withholding of removal must show a connection between past or future persecution and one of five statutorily-protected grounds. This so-called "nexus" requirement is articulated in separate statutes for each form of relief, and amici argue here that in each case, the clear statutory language articulates a different standard: under 8 U.S.C. § 1158(b)(1)(B)(i), governing asylum, the protected ground must be "at least one central reason" for the persecution; by contrast, under 8 U.S.C. § 1231(b)(3)(C), governing withholding of removal, the protected ground must be only "a reason" for the persecution.

In *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010), the BIA ignored the plain language of the two different statutes, found 8 U.S.C. § 1231(b)(3)(C) to be ambiguous, and concluded that the "one central reason" standard should be applied in both the asylum and withholding contexts. The circuits have since split on this question. *Id.* at 348. The Sixth and Ninth Circuits reject *Matter of C-T-L-*, finding the statutory language unambiguously creates two standards. *See Guzman-Vazquez*

v. Barr, 959 F.3d 253, 274 (6th Cir. 2020); *Barajas-Romero v. Lynch*, 846 F.3d 351, 360 (9th Cir. 2017). The Second, Third, and Fifth Circuits have held that the "one central reason" standard at 8 U.S.C. § 1158(b)(1)(B)(i)[2] should be applied in adjudicating withholding cases under 8 U.S.C. § 1231(b)(3)(C). *See Quituizaca v. Garland*, 52 F.4th 103 (2d Cir. 2022); *Gonzalez-Posadas v. Att'y Gen.*, 781 F.3d 677, 685 n.6 (3d Cir. 2015); *Vazquez-Guerra v. Garland*, 7 F.4th 265, 271 (5th Cir. 2021).

This Court has declined to address this question directly, while upholding decisions that assume a common standard. *See Odei v. Garland*, 71 F.4th 75, 80 (1st Cir. 2023); *Sanchez v. Garland*, 74 F.4th 1, 6 (1st Cir. 2023). This question is critical to immigration law, with potential life-or-death consequences for individuals whom the United States government has undertaken an international legal obligation to protect from refoulement. Amici therefore asks this Court to consider this question

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[2] It is important to note that the full language of the asylum statute requires an applicant to show that a protected ground is "*at least* one central reason" why they suffered persecution. This language codifies the mixed motive nexus standard, as the Board of Immigration Appeals has acknowledged:

> The definition of the word "central" includes "[h]aving *dominant* power, influence, or control." Webster's II New College Dictionary 181 (1st ed. 1995) (emphasis added). Recognizing that this definition could pose problems for those seeking asylum based on "mixed motives," Congress purposely did not require that the protected ground be *the* central reason for the actions of the persecutors.

Matter of J-B-N- & S-M-, 24 I. & N. Dec. 208, 212 (BIA 2007).

in the instant case and to join the Sixth and Ninth Circuits by holding that 8 U.S.C. § 1231(b)(3)(C) is unambiguous in setting "a reason" as the nexus standard in the withholding context, rather than "one central reason," and that *Matter of C-T-L-* was wrongly decided.

II. PURSUANT TO RULES OF STATUTORY INTERPRETATION THE REAL ID ACT OF 2005 CREATED TWO SEPARATE NEXUS STANDARDS FOR ASYLUM AND WITHHOLDING OF REMOVAL.

A. There is no ambiguity in the meaning of the withholding of removal statute and its plain meaning requires a lower standard than the asylum statute.

A noncitizen in immigration proceedings may seek relief from removal through an application for asylum and/or withholding of removal. The Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. § 1101) (INA) is the statutory source of these immigration protections. Pursuant to the INA, a refugee, meaning a person who has been persecuted "on account of race, religion, nationality, membership in a particular social group, or political opinion," is eligible to apply for asylum. 8 U.S.C. § 1101(a)(42); *see also* 8 U.S.C. § 1158(a). Separately, the INA provides withholding of removal protections that restrict the United States from deporting a noncitizen to a country where the noncitizen's "life or freedom would be threatened in that country because of . . . race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A). Asylum and withholding of removal are similar in some

respects. Both protections restrict removal of a noncitizen to a country where the noncitizen would face serious harm, whether persecution or a threat to their life or freedom, on account of a protected ground (including race, religion, nationality, membership in a particular social group, or political opinion). Still, there are material differences between asylum and withholding of removal. Asylum is a form of discretionary relief, while withholding is mandatory if the noncitizen shows that it is more likely than not that they will face persecution. *See* H.R. Rep. No. 109-72, at 168-69 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 240, 293-94. Importantly, a grant of asylum also provides a noncitizen with substantial benefits and protections: a permanent right to live and work in the United States and the ability to travel as a refugee under the protection of the U.S. government (*see* 8 U.S.C. § 1158(c)(1)); a path to permanent residence and citizenship in the United States (*see* 8 U.S.C. § 1159); and a right for certain family members to receive derivative asylum status (*see* 8 U.S.C. § 1158(b)(3)). Withholding of removal, by contrast (and as its name indicates), (1) is issued concurrently with a final order of removal from the United States, (2) permits the noncitizen to apply for work authorization but offers none of these other rights, and (3) does not provide a path to permanent residence and citizenship. *See* 8 U.S.C. § 1231(a)(7). Moreover, withholding of removal does not prevent the U.S. government from removing the noncitizen to a third country that

agrees to accept the noncitizen (where that person will not face a serious risk of harm). *See* 8 U.S.C. § 1231(b)(2)(E)(vii).

Prior to the enactment of the REAL ID Act of 2005, Div. B of Pub. L. No. 109-13, 119 Stat. 302 (2005), Congress had not specified the thresholds that must be met for a noncitizen to satisfy the nexus requirement for relief under the asylum or withholding of removal statutes. Neither statute articulated the standard to show a sufficient relationship between a noncitizen's alleged persecution and the protected ground. When Congress enacted the REAL ID Act in 2005, the Act, in part, amended the INA to provide additional detail about the nexus requirements articulated in the asylum and withholding of removal statutes. For withholding of removal, Congress established the following nexus standard:

> In determining whether an [applicant] has demonstrated that the [applicant's] *life or freedom would be threatened* ***for a reason*** described in subparagraph (A), the trier of fact shall determine whether the [applicant] has sustained the [applicant's] burden of proof, and shall make credibility determinations, in the manner described in clauses (ii) and (iii) of section 1158(b)(1)(B) of this title.

8 U.S.C. § 1231(b)(3)(C) (emphasis added). Under the conditions for granting asylum, Congress articulated a distinct nexus standard. The relevant language states that "[t]o establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion *was or will be* ***at least one central reason*** *for persecuting the applicant*." 8 U.S.C. § 1158(b)(1)(B)(i) (emphasis added). The

plain text of the withholding of removal statute therefore clearly establishes a distinct, and lower, nexus standard than that of the asylum statute.

In *Matter of C-T-L-*, the BIA held that the withholding of removal statute, 8 U.S.C. § 1231(b)(3)(C), is silent on whether the "at least one central reason" standard from the asylum context also applies in the withholding context. 25 I&N Dec. at 344-45. As discussed above, the statute is *not* in fact silent. In its amendments to the INA through the REAL ID Act of 2005, Congress used different phrases when discussing the nexus standards for these two categories of relief. The linguistic use of the phrase "a reason" is not the same as the use of "at least one central reason." Moreover, the interpretive inquiry calls for the use of accepted tools of statutory construction to offer interpretive guidance. Through these canons of construction, the correct interpretation of the asylum and withholding of removal statutes present two separate nexus standards.

Statutory interpretation begins with an application of the plain meaning rule. *See Colon-Marrero v. Velez*, 813 F.3d 1, 11 (1st Cir. 2016) (stating that the appropriate starting point for statutory interpretation is its plain meaning). The plain meaning rule provides that "where the words of the statute are clear and free from ambiguity, the letter of the statute may not be disregarded under the pretext of pursuing its spirit. The intent of the authors of legislation is gleaned from what is said, not from what they may have intended to say." *See* 2A Shambie Singer &

Norman J. Singer, *Sutherland Statutes and Statutory Construction* § 46:1 (7th ed. & Supp. 2022) (internal quotations omitted). As discussed above, when Congress amended the INA through the REAL ID Act of 2005, it simultaneously promulgated the nexus requirements for asylum and withholding of removal. With this legislation, Congress stated that the required nexus standard for an asylum claim is that an applicant's protected ground is "at least one central reason" that the applicant will face persecution in their home country. By contrast, Congress established that the required nexus standard for a withholding of removal claim is that a noncitizen's protected ground must be "a reason" that the noncitizen's life or freedom would be threatened in another country. Congress used different language in these two statutes: "at least one central reason" is the codified phrase for asylum analysis and "a reason" is the codified language for withholding analysis. The plain meanings of these two phrases are not the same in light of the presence of the word "central" in the asylum statute but not the withholding of removal statute.[3] The use of "a reason" signifies that the existence of a reason alone – no matter the level of importance of that reason – is sufficient to for a noncitizen to meet the nexus requirement.

[3] According to Merriam-Webster Dictionary, the word "central" means "of primary importance." *Central*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/central (last visited July 14, 2023). Despite the meaning of the word "central," however, "an applicant need not prove that a protected ground was the most important reason why the persecution occurred." *Enamorado-Rodriguez v. Barr*, 941 F.3d 589, 596 (1st Cir. 2019) (quoting *Parussimova v. Mukasey*, 555 F.3d 734, 740 (9th Cir. 2009).

Following the logic of the plain meaning rule, the language presented in the asylum and withholding of removal statutes is unambiguous. As such, the plain meaning doctrine encourages the statutory interpretation inquiry to end here. *See United States v. Gordon*, 875 F.3d 26, 33 (1st Cir. 2017) (finding that a court's inquiry ends if the plain language of the statute supplies a plausible interpretation).

Courts, however, may look beyond the plain meaning of a statute if applying the plain meaning would lead to an absurd result or if there is some other compelling reason to disregard a statute's plain meaning. *See* 2A Singer & Singer, *supra*, § 46:1. Here, the creation of two separate nexus standards would not create an absurd result. On the contrary, the application of different nexus standards to asylum claims and withholding of removal claims is *logical* in light of the meaningful distinctions as between the two forms of relief: since asylum is discretionary and provides the noncitizen with substantially greater benefits and protections than afforded by withholding of removal, it follows that Congress would create a more stringent standard with regard to the nexus requirement for asylum than for withholding. Further, there are no compelling reasons to disregard each statute's plain meaning. The contrary is true: Congress *had* compelling reasons to purposefully design the REAL ID Act of 2005 amendments so that the asylum and withholding nexus standards differ. These reasons are further discussed in the subsequent section.

B. Even if the statute was ambiguous, the application of other canons of statutory construction shows that the withholding of removal statute sets out a lesser nexus than the asylum statute.

For the sake of argument, even if Congress's use of "a reason" and "one central reason" created ambiguity, courts may apply additional canons of construction to serve as interpretative aids to resolve such ambiguity. One such canon is that effect must be given to each word or phrase in legislative text. Following this canon, courts should construe a statute so that no part is void or insignificant. Courts also are encouraged to recognize that where Congress includes particular language in one section but omits that language from another section of the same act, such omission is indicative of Congress's intentional and purposeful choice "in the disparate inclusion or exclusion." *See* 2A Singer & Singer, *supra*, § 46:6. The omission of the same term or phrase from a similar section is significant because it demonstrates Congress's differing legislative intent for the two sections. *See id*; *see also, e.g.*, *Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1323 (2020) (stating that the Supreme Court generally presumes that when Congress includes particular language in one section of a statute but omits it in another that Congress intended a difference in meaning); *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1018 (2020) (stating that when Congress has simultaneously chosen to amend one statute in one way and a second statute in another way, the Supreme Court normally assumes the differences in language imply

differences in meaning); *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 86 (2017) (asserting that the Supreme Court presumes that differences in language convey differences in meaning).

The application of these canons reinforces what the plain language of the statutes at issue show: that Congress plainly intended to create different nexus standards for asylum and withholding of removal through the REAL ID Act of 2005. There are clear differences in the language used – namely the use of "one central reason" with respect to asylum claims versus "a reason" with respect to withholding claims. To hold that the "one central reason" nexus standard is the appropriate test for withholding of removal relief is to ignore completely the omission of the word "central" from the statutory language. This is exactly the incorrect maneuvering that was done in *Matter of C-T-L-*.

In pari materia is another fundamental canon of statutory construction that alleviates ambiguity between the asylum and withholding of removal statutes. Reading statutes *in pari materia* means that when statutes are dealing with the same or similar subject matter, such provisions should be interpreted in reference to one another. When reading provisions of a statute that are on related matters *in pari materia*, in instances "where sections of a statute do not include a specific term used elsewhere in the statute," the canon presumes that "the drafters did not wish such a requirement to apply." *United States v. Mobley*, 956 F.2d 450, 452-53 (3d Cir. 1992).

Courts, therefore, should generally assume that Congress had differing intents if it omitted words that were included in a statute on a similar subject. *See* 2B Singer & Singer, *supra*, § 51:2; *see also*, *Prewett v. Weems*, 749 F.3d 454, 461 (6th Cir. 2014) (asserting that by omitting a phrase from one statute that Congress used in another statute with a similar purpose Congress virtually commands the inference that the two statutes have two different meanings).

Applying the canon of *in pari materia* to the present inquiry, the asylum and withholding of removal statutes should be read in reference to one another. Asylum and withholding of removal are similar, but distinct forms of protection for immigrants. The asylum statute creates a protection for eligible refugees, while the withholding of removal provision creates a separate category of protection for noncitizens who have been ordered removed from the United States. However, the scope of the two protections, as articulated in the statutes and explained above, are markedly different. These statutes use different language in establishing the nexus requirements that a noncitizen must meet to be eligible for either asylum or withholding of removal. The asylum statute requires that a protected ground must be "one central reason" for the applicant's persecution. The withholding statute does not use the "one central reason" language; rather it states that a protected ground must be "a reason" that a noncitizen has faced or will face persecution. Further, the nexus standards are articulated in distinct sections of the asylum and withholding of

removal statutes (8 U.S.C. § 1158(b)(1)(B)(i) and 8 U.S.C. § 1231(b)(3)(C), respectively). When Congress amended the withholding of removal statute to clarify the applicable burden of proof, it cross-referenced clauses (ii) and (iii) of the asylum statute's burden-of-proof provision, but not clause (i), the provision that imposed the "one central reason" standard for asylum claims. 8 U.S.C. § 1231(b)(3)(C). Reading these statutes *in pari materia*, Congress's choice to omit the "one central reason" language in the withholding of removal statute was not inadvertent. The omission of "one central reason" is indicative of Congress's legislative intent to create one the nexus standard in the asylum context and another dissimilar standard in the withholding context. Interpreting "a reason" to have a separate meaning from "one central reason" allows for a reading that flows from fundamental tools of statutory construction, such as the plain meaning rule, each word given effect, and *in pari materia*. The creation of two separate nexus standards does not create an irreconcilable conflict between the asylum and withholding statutes; rather, it is entirely consistent with Congress's creation of two distinct forms of protection. For this reason, the BIA's reasoning in *Matter of C-T-L-* was flawed and that the BIA was obligated to undertake a more thoughtful statutory interpretation exercise in its assessment of the asylum and withholding of removal nexus standards.

C. The legislative history of the REAL ID Act of 2005 demonstrates that Congress intended to implement a lesser nexus standard for withholding of removal claims than for asylum claims.

An act's legislative history can also be used as an extrinsic interpretative aid. *See Brock v. Pierce County*, 476 U.S. 253, 262-65 (1986); *see also* 3 Shambie Singer, *Sutherland Statutes and Statutory Construction* § 57:4 (8th ed. & Supp. 2022). When Congress amended the INA through the REAL ID Act of 2005, it dramatically increased the standard that a refugee must meet in order to obtain asylum. While drafting the REAL ID Act, Republican legislators included amendments to the asylum statute. This move was an effort to include elements of immigration reform into the REAL ID Act, which was considered "must-pass legislation," rather than undergo a separate legislative process for comprehensive immigration reform. *See* 151 Cong. Rec. H2997-02, H3015, 2005 WL 1047342 (reciting Rep. Pelosi's statement that House Republicans demanded that the REAL ID Act include controversial immigration provisions that would make asylum harder to obtain). As the bill was in conference, House Democrats voiced their concerns about the impact of implementing stricter asylum laws. *See* 151 Cong. Rec. H2997-02, H3023, 2005 WL 1047342 (recounting Rep. Udall's belief that the asylum provisions would create undue difficulties for asylum seekers); *see, e.g.*, 151 Cong. Rec. H2997-02, H3013-14, 2005 WL 1047342 (sharing Rep. Jackson-Lee's view that the bill included ill-advised immigration provisions that would restrict the grant

of asylum to refugees); *see also*, 151 Cong. Rec. H2997-02, H3017, 2005 WL 1047342 (indicating Rep. Roybal-Allard's disappointment that controversial changes to asylum standards were included in the bill); *see also*, 151 Cong. Rec. H2997-02, H3018, 2005 WL 1047342 (stating that Rep. Ortiz did not agree with the inclusion of stricter asylum laws); *see also*, 151 Cong. Rec. H2997-02, H3021, 2005 WL 1047342 (discussing Rep. Honda's concerns with the provisions of the bill that would negatively impact asylum seekers). The vibrant and vocal opposition to the changes in asylum law, as shown throughout the REAL ID Act conference reports, indicates that Democratic members of the House believed that proposed revisions to the asylum statute would increase the difficulty that refugees would face when seeking asylum protection.[4]

The conference reports, however, do *not* demonstrate vigorous Democratic opposition to the changes to the withholding of removal statute. The silence regarding the revisions to the withholding of removal statute suggest that the Democratic lawmakers were not under the impression that the changes would

[4] As noted above, the "at least one central reason" language that was adopted in the asylum statute codified the mixed motive standard. *See Matter of J-B-N- & S-M-*, 24 I. & N. Dec. 208, 212 (BIA 2007) ("Congress purposely did not require that the protected ground be *the* central reason for the actions of the persecutors."). This is in contrast to the original language in the bill, which would have required an asylum applicant to prove "that one of the five protected grounds 'was or will be *a* central reason for persecuting the applicant.'" *Id.* at 212-13 (quoting H.R. 418, 109th Cong. § 101(a)(3) (2005)).

increase the burden on noncitizens seeking withholding relief. Withholding of removal is a critical protection for immigrants who are ineligible for asylum, and it is the mechanism that allows the United States to satisfy certain immigration obligations under international law. Since withholding of removal is tied to the nation's international law obligations, it is likely that the House members understood that the nexus standard for withholding could not be increased to an unduly burdensome level. It follows that the REAL ID Act of 2005 intentionally created two separate nexus standards: one that is increasingly onerous for asylum's discretionary relief, requiring applicants to show that their membership in one of the five protected grounds is "one central reason" for their past or future persecution, and another that does not impose the same level of rigor for a noncitizen to receive withholding of removal's mandatory relief.

III. HEIGHTENING THE NEXUS STANDARD FOR WITHHOLDING OF REMOVAL CASES CONTRADICTS THE U.S. GOVERNMENT'S NON-REFOULEMENT OBLIGATIONS AND THE ESTABLISHMENT OF WITHHOLDING AS A FORM OF PROTECTION AGAINST PURSECUTION AND TORTURE.

The United States' nonrefoulement obligations under international law require that the less burdensome "a reason" standard be applied in evaluating the nexus between a noncitizen's protected ground and past persecution or likelihood of future persecution for withholding of removal. Because withholding of removal is the mechanism through which the United States satisfies its nonrefoulement

obligations under international law and often offers a critical form of protection for individuals who are not eligible for asylum, a lesser nexus standard should apply to withholding claims than is used in the asylum context.

The application of the "a reason" standard for withholding is consistent with international law governing nonrefoulement. The principle of "nonrefoulement" prohibits states from returning a refugee or asylum seeker to territories where there is a risk that such person's life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion. Nonrefoulement is recognized in many international treaties and obligations governing human rights and prevention of torture. Article 33 of the 1951 Convention Relating to the Status of Refugees requires that no contracting state expel or return 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 relating to the Status of Refugees (adopted 28 July 1951) 189 U.N.T.S. 137 (1951 Refugee Convention). Article 3 of the 1967 Declaration on Territorial Asylum, adopted unanimously by the United Nations General Assembly (UNGA) as Resolution 2132 (XXII) on December 14, 1967, holds that no person seeking asylum from persecution may be subjected to measures such as rejection at the border or, if such person has already entered the territory in which they seek asylum,

expulsion or compulsory return to any state where such person may be subjected to persecution. U.N. General Assembly, *Declaration on Territorial Asylum*, U.N. Doc. A/RES/2312(XXII) (Dec. 14, 1967). Article 22 of the 1969 American Convention on Human Rights similarly prohibits countries from deporting or returning a noncitizen to another country, regardless of whether it is such noncitizen's country of origin, if in that country such noncitizen's right to life or personal freedom is in danger of being violated because of their race, nationality, religion, social status or political opinions. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123. Further, on October 21, 1994, the United States joined the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Article 3 of which prohibits refoulement where there are "substantial grounds for believing that [a noncitizen] would be in danger of being subjected to torture." U.N. General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, United Nations, Treaty Series, vol. 1465, p. 85 (Dec. 10, 1984). Each of the 1951 Convention Relating to the Status of Refugees, 1967 Declaration on Territorial Asylum and 1969 American Convention on Human Rights emphasize the requisite link between a noncitizen's protected class and their subjection to persecution. None, however, require such noncitizen's protected class to be "one central reason" for the

persecution, and in all cases, subject countries must grant withholding where the protected class and persecution factors are met.

Withholding of removal was clearly established by Congress to satisfy the United States' nonrefoulement obligation and align United States immigration jurisprudence with international human rights law. Congress codified the main provisions of the 1951 Convention Relating to the Status of Refugees and its Protocol through the Refugee Act of 1980, which adopted both the 1951 Convention's definition of "refugee" and "refoulement," with the latter, based on Article 33 of the Convention, referred to in the United States as "withholding of removal." Refugee Act of 1980, Pub. L. No. 96-212 § 201, 94 Stat. 102 (Refugee Act). Congress's legislative intent in passing the 1980 Act was to conform U.S. law to international refugee law. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987) (stating one of Congress's "primary purposes" in enacting the Refugee Act of 1980 was to "bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to Status of Refugees.") The Refugee Act of 1980 was passed as an amendment to the Immigration and Nationality Act. The Immigration and Nationality Act defines a refugee as:

> [a]ny person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group,

> or political opinion, clearly mirroring the language used in international nonrefoulement obligations.

8 U.S.C. § 1101(a)(42)(A). As withholding of removal is a mechanism designed to fulfill the United States' national and international nonrefoulement obligations, Courts have a compelling reason to not impose an unduly burdensome nexus requirement on those seeking lawful relief thereunder.

The express availability of withholding as a form of relief where other forms of relief, such as asylum, are not available, emphasize the Court's obligation to uphold the United States' nonrefoulement obligations through just application of the withholding statute. The United Nations High Commissioner for Refugees Executive Committee has affirmed the application of non-refoulement principles in cases where other forms of relief would be unavailable or an exception may apply, including in cases of large-scale influx and circumstances involving the irregular movement of refugees and asylum seekers, noting in its Conclusion No. 22 "in all cases the fundamental principle of non-refoulement . . . must be scrupulously observed." U.N. High Commissioner for Refugees (UNHCR), *UNHCR Note on the Principle of Non-Refoulement*, November 1997.

The UNHCR Executive Committee further emphasizes that any exceptions to non-refoulement must be interpreted restrictively and applied with particular caution. *Id*. The UNHCR states that where a noncitizen is subject to being returned to a country where they are in danger of persecution, the exception provided for in

Article 33(2) of the 1951 Convention Relating to the Status of Refugees, which allows state parties to the Convention to expel a refugee to persecutory places to safeguard their security or the safety of the community in which the refugee is staying, should be applied with the "greatest caution." *Id*. The UNHCR notes, "it is necessary to take fully into account all the circumstances of the case and, where the refugee has been convicted of a serious criminal offence, any mitigating factors and the possibilities of rehabilitation and reintegration within society." *Id*. Adopting a more stringent, "one central reason" nexus standard not only contradicts the plain language of the statute, it runs afoul of the spirit of withholding as a mechanism for relief. In summarizing the principle of nonrefoulement in the refugee context, the UNHCR Opinion on The Scope and Content of the Principle of Non-Refoulement states:

> no person shall be rejected, returned, or expelled in any manner whatever where this would compel him or her to remain in or return to a territory where substantial grounds can be shown for believing that he or she would face a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment. This principle allows of no limitation or exception.

Elihu Lauterpacht & Daniel Bethlehem, *U. N. High Commissioner for Refuges, The Scope and Content of the Principle of Non-Refoulement (Opinion)* ¶ 252 (June 20, 2001), https://www.refworld.org/docid/3b3702b15.html.

Further, the significant practical and applicational differences between asylum and withholding of removal make clear Congress's intent to apply distinct nexus

standards in each case. Withholding of removal is available only as defensive form of relief before the immigration court; one may not apply for withholding affirmatively. As a matter of practice, when an individual in removal proceedings fears persecution in their home country, such individual typically applies for asylum and withholding of removal (as well as protection under CAT) in the same application in a standard removal proceeding. *See* The Application of the "One Central Reason" Standard in Asylum and Withholding of Removal Cases. However, withholding is explicitly made available to certain noncitizens ineligible for asylum, including applicants who fail to apply for asylum within one year of entry to the United States, have received prior deportation orders or have certain criminal convictions. *See* Am. Immigr. Council & Nat'l Immigrant Just. Ctr., *The Difference Between Asylum and Withholding of Removal*, https://www.americanimmigrationcouncil.org/sites/default/files/research/the_difference_between_asylum_and_withholding_of_removal.pdf (last visited Aug. 8, 2023). In 2019 alone, of the 543,997 cases that were filed in immigration court, 3,652 were withholding-only proceedings — demonstrating that a distinction exists between the two types of proceedings, which may be available to different populations of noncitizens. *Id.* Given the distinct eligibility requirements and procedures for asylum and withholding cases, including that most individuals placed in withholding-only proceedings are held in ICE detentions, which further limits

their access to relief, Congress could not have intended to create a "single national standard" that would apply to all applicants across these separate forms of relief as the BIA concludes in *Matter of C-T-L-*. Instead, amici urge this Court to conclude, similar to the Ninth Circuit in Barajas-Romero, that Congress's "decision to adopt the 'one central reason' standard for asylum but not withholding of removal claims appears to have been the product of a deliberate choice, rather than a mere drafting oversight." *Barajas-Romero v. Lynch*, 846 F.3d 351, 358 (9th Cir. 2017). The Ninth Circuit went on to conclude that Congress "may have diluted the nexus requirement [in withholding cases] in order to afford more protection against mistaken deportations where a protected ground played into that likelihood." *Id*. at 360.

IV. CORRECTLY INTERPRETING THE NEXUS STANDARD IN APPLICATIONS FOR WITHHOLDING OF REMOVAL AS USING THE "A REASON" STANDARD LEADS TO FAIR, CONSISTENT, AND PREDICTABLE DECISIONS ISSUED BY IMMIGRATION JUDGES AND DOES NOT CREATE A FLOODGATE EFFECT OF APPLICATIONS OR GRANTS FOR WITHHOLDING OF REMOVAL.

This Court should interpret the nexus standard in applications for withholding of removal as using the "a reason" standard because doing so results in fair, consistent, and predictable decisions and does not create a floodgate effect in applications (or grants) for withholding of removal under 8 U.S.C. § 1231(b)(3)(A)-(C). As evidenced by recent statistics released by the Executive Office for Immigration Review ("EOIR") in the second quarter of 2023, only 722 initial case

decisions in removal, deportation and exclusions cases granted withholding under INA and CAT, with an additional 30 initial case decisions in asylum-only and withholding-only cases granting withholding under CAT. *See* EOIR, *Adjudication Statistics* (as of April 21, 2023), https://www.justice.gov/eoir/page/file/1105111/download; *see also FY 2022 Seeing Rapid Increase in Immigration Court Completions*, TRAC Immigration (Sept. 16, 2022), https://trac.syr.edu/reports/711/ (highlighting that compared to fiscal year 2017, fiscal year 2022 showed a 5% increase in removal orders, with approximately 89,676 receiving a deportation order and only 879 granted withholding under INA and CAT).

These numbers and percentages tell a story that is familiar to immigration practitioners: winning withholding of removal is generally harder than winning asylum because the burden of proof on the applicant is five times higher. *See* Am. Immigr. Council & Nat'l Immigrant Just. Ctr., *The Difference Between Asylum and Withholding of Removal*; *see also 25 Years of Immigration Court Decisions*, TRAC Immigration (Mar. 9, 2023), https://trac.syr.edu/reports/711/ (indicating that fiscal year 2023 is on pace thus far for asylum to reach 72% of all grants of relief).

Congress also clearly created this increased burden on the noncitizen, as acknowledged by the BIA in *Matter of C-T-L-*, with regard to establishing the likelihood of experiencing harm. In the asylum context, a noncitizen must meet the

definition of a "refugee" by proving a "well founded fear" of persecution. *See* 8 U.S.C. § 1158(b)(1)(A). By contrast, in the withholding context, a noncitizen must prove that it is "more likely than not" that they will experience harm. *See* 8 C.F.R. § 208.16(b). The Supreme Court has spoken definitively on the stark contrast between these two burdens, holding that the burden for withholding here is substantially higher than for asylum, and that Congress clearly demonstrated its intent to set these different standards in the statutory language. *See INS v. Cardoza Fonseca*, 480 U.S. 421 (1987).

In amici's experience, IJs and attorneys in the Office of the Principal Legal Advisor in the Department of Homeland Security, are more likely to grant and stipulate to grants of withholding, respectively, in cases where the nexus standard for asylum has not been satisfied, because the noncitizen has met the higher burden of likelihood of harm. This contradicts the notion that applying a bifurcated analysis on the nexus standard in asylum and withholding of removal cases would lead to unclear adjudications, as asserted in *Matter of C-T-L-*: adjudicators already are conducting a bifurcated analysis on the standard for harm. *See Matter of C-T-L-*, 25 I. & N. Dec. at 346-47 (B.I.A. 2010).

CONCLUSION

For the foregoing reasons, amici ask this court to hold that the statutory language of 8 U.S.C. § 1231(b)(3)(c): (1) is clear on its face, (2) establishes the nexus standard of "a reason" — which is less stringent than the asylum "one central reason" standard — and (3) requires the lesser "a reason" standard to be applied in the withholding context. It is for these reasons that *Matter of C-T-L-* was wrongly decided.

Dated: August 25, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned certifies that this brief was prepared in 14-point Times New Roman proportional font and, excluding exempted portions of the brief, contains 6,478 words. The brief therefore complies with the type-volume limitation set forth in Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B).

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CERTIFICATE OF SERVICE

I hereby certify this Amicus Brief is served to all counsel of record registered on ECF on August 25, 2023.

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