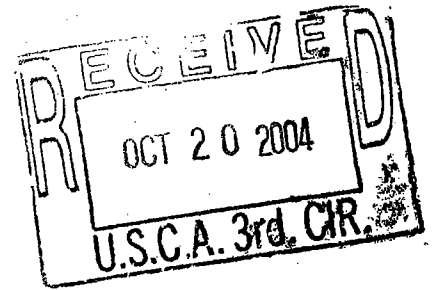


No. 04-1999



IN THE
**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

WALTER ANTONIO AMAYA ARIAS,

Petitioner,

v.

JOHN ASHCROFT,

Respondent.

PETITION FOR REVIEW FROM THE BOARD OF IMMIGRATION APPEALS
FILE NO. A97 133 248 - ELIZABETH

**BRIEF *AMICUS CURIAE* OF HUMAN RIGHTS FIRST IN
SUPPORT OF PETITIONER WALTER AMAYA ARIAS**

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[F.R.A.P. 26.1]

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TABLE OF CONTENTS

| | Page |
|--|------|
| INTEREST OF <i>AMICUS CURIAE</i> AND SOURCE OF AUTHORITY TO FILE | 1 |
| SUMMARY OF ARGUMENT | 3 |
| FACTUAL CONTEXT..... | 6 |
| ARGUMENT..... | 10 |
| I. Congress Could Not Have Intended, and Did Not Intend, to Subject <i>Victims</i> of Terror to the Same Legal Bars Applied to Terrorists..... | 10 |
| II. The BIA’s Ruling Violates the Canon that Statutes Should Not Be Interpreted to Violate International Law, Where an Alternative Construction Is “Fairly Possible” | 14 |
| A. The BIA Ruling Violates the Refugee Convention and 1967 Protocol | 16 |
| 1. The Exception to Refugee Protection Contained in Article 1(F) Does Not Apply..... | 17 |
| 2. The Exception to the Non- <i>Refoulement</i> Rule Contained in Article 33(2) Does Not Apply..... | 20 |
| B. The Court Should Reverse the BIA’s Ruling, Given These Conflicts with International Law, and Given a Reasonable Alternative Construction of the Statute..... | 23 |
| III. DHS’s Position That Mr. Amaya Is Barred From Relief Because His Payment of “War Taxes” to the FARC Was “Voluntary” Is Not Supported By Substantial Evidence, Violates International Law, and Would Have Broad Implications for Refugees Throughout the World | 24 |

CONCLUSION.....28
CERTIFICATE OF BRIEF LENGTH COMPLIANCE29
CERTIFICATE OF THIRD CIRCUIT BAR MEMBERSHIP30

TABLE OF AUTHORITIES

| | Page |
|---|------------|
| FEDERAL CASES | |
| <i>Ahmed v. Ashcroft</i> , 341 F.3d 214 (3d Cir. 2003)..... | 14 |
| <i>Borja v. INS</i> , 175 F.3d 732 (9th Cir. 1999) | 13, 26 |
| <i>Canada v. Asghedom</i> , 2001 F.C.T. 972, 210 F.T.R. 294 (Federal Ct. of Canada 2001)..... | 20 |
| <i>Cheema v. Ashcroft</i> , 383 F.3d 848 (9th Cir. 2004)..... | 14, 21, 22 |
| <i>Fogleman v. Mercy Hospital</i> , 283 F.3d 561 (3d Cir. 2002), <i>cert. denied</i> , 537 U.S. 824 (2002)..... | 13 |
| <i>Gambashidze v. Ashcroft</i> , 381 F.3d 187 (3d Cir. 2004) | 25, 26, 27 |
| <i>Gonzales-Neyra v. INS</i> , 122 F.3d 1293 (9th Cir. 1997), <i>amended</i> , 133 F.3d 726 (9th Cir. 1998)..... | 13 |
| <i>Heong v. United States</i> , 112 U.S. 536 (1884)..... | 23 |
| <i>INS v. Aguirre-Aguirre</i> , 526 U.S. 415 (1999)..... | 19 |
| <i>INS v. Cardoza-Fonseca</i> , 480 U.S. 421 (1987) | 16 |
| <i>INS v. Stevic</i> , 467 U.S. 407 (1984) | 16 |
| <i>Knezevic v. Ashcroft</i> , 367 F.3d 1206 (9th Cir. 2004) | 27 |
| <i>Lukwago v. Ashcroft</i> , 329 F.3d 157 (3d Cir. 2003) | 26 |
| <i>MacLeod v. United States</i> , 229 U.S. 416 (1913) | 23 |
| <i>Marincas v. Lewis</i> , 92 F.3d 195 (3d Cir. 1996)..... | 16 |
| <i>Murray v. Schooner Charming Betsy</i> , 6 U.S. (2 Cranch) 64 (1804) | 5, 15, 23 |
| <i>Singh-Kaur v. Ashcroft</i> , __ F.3d __, 2004 WL 2109978 (3d Cir. Sept. 23, 2004)..... | 14 |

| | |
|--|--------|
| <i>Suresh v. Canada</i> , 41 I.L.M. 954 (Can. 2002)..... | 21, 22 |
| <i>The Nereide</i> , 13 U.S. (9 Cranch) 388 (1815)..... | 23 |
| <i>The Paquete Habana</i> , 175 U.S. 677 (1900)..... | 23 |
| <i>United States v. American Trucking Ass 'ns</i> , 310 U.S. 534 (1940)..... | 13 |
| <i>United States v. Bailey</i> , 444 U.S. 394 (1980) | 12 |
| <i>United States v. Schneider</i> , 14 F.3d 876 (3d Cir. 1994) | 13 |

STATUTES AND REGULATIONS

| | |
|---|--------|
| 8 C.F.R. § 208.16(b)(1)(i)..... | 26 |
| 8 U.S.C. § 1158(b)(2)(A)(v) | 3, 22 |
| 8 U.S.C. § 1182(a)(3)(iv)(VI)..... | passim |
| 8 U.S.C. § 1231(b)(3)(B) | 3 |
| 8 U.S.C. § 1231(b)(3)(iv)..... | 22 |
| Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, § 601 | 11 |
| Immigration and Nationality Act, Section 219 | 6 |
| Model Penal Code § 2.09 | 12 |
| Refugee Act of 1980 (Pub. L. No. 96-212, 94 Stat. 102) | 16 |

COURT RULES

| | |
|---|---|
| Federal Rule of Appellate Procedure 29(a) | 3 |
|---|---|

OTHER

| | |
|--|--------|
| 1951 Refugee Convention..... | passim |
| Anker, Deborah E., <i>Law of Asylum in the United States</i> 2 (1999)..... | 16 |

| | |
|--|------------|
| BBC News, “Hardliner Elected Colombian President” (May 27, 2002)..... | 7 |
| Chaloka Beyani, et al., <i>Special Supplementary Issue on Exclusion</i> , INT’L J. OF REFUGEE LAW (Vol. 12) (2000)..... | 10 |
| Germain, Regina, <i>Rushing to Judgment: The Unintended Consequences of the USA Patriot Act for Bona Fide Refugees</i> , 16 GEO IMMIGR. L.J. 505 (Winter 2002) | 11 |
| James C. Hathaway & Colin J. Harvey, <i>Framing Refugee Protection in the New World Disorder</i> , 34 CORNELL INT’L L. J. 257, 266-70 (2001) | 18, 21 |
| <i>Hearing on Narco-Terrorism Before the Senate Committee on the Judiciary</i> (statement of Steve McCraw, Assistant Director for Intelligence, Federal Bureau of Investigation) (May 20, 2003) | 8 |
| Human Rights Watch Report on Colombia 1998 | 8 |
| Human Rights Watch, <i>Americas Overview</i> (1996)..... | 9 |
| Kathleen M. Keller, <i>A Comparative and International Law Perspective on the United States (Non)Compliance With Its Duty of Non-Refoulement</i> , 2 YALE HUM. RTS. & DEV. L. J. 183, 187 (1999)..... | 22 |
| Lawyers Committee for Human Rights, <i>Refugees, Rebels and the Quest for Justice</i> (2002)..... | 10, 12, 20 |
| Preamble ¶ 4, Declaration of State Parties to the 1951 Refugee Convention and/or its 1967 Protocol Relating to the Status of Refugees (Dec. 13, 2001), HCR/MMSP/2001/10 | 15 |
| <i>Restatement (Third) of the Law of Foreign Relations</i> § 114 | 15, 23 |
| Rome Statute of the International Criminal Court, U.N. Doc. No. 2187 U.N.T.S. 90, entered into force July 1, 2002, art. 31(d)..... | 20 |
| U.S. Department of State Web Page (http://www.state.gov/s/ct/rls/fs/2003/17067.htm) | 6 |
| U.S. State Department, <i>Country Report on Human Rights Practices (Colombia) – 2001</i> | 7 |

| | |
|---|----------|
| U.S. State Department, <i>Country Report on Human Rights Practices (Peru) – 2003</i> | 9 |
| U.S. State Department, <i>Country Report on Human Rights Practices (Philippines) – 2003</i> | 10 |
| U.S. State Department, <i>Country Report on Human Rights Practices (Sri Lanka) – 2003</i> | 9 |
| UNHCR <i>International Protection Considerations Regarding Colombian Asylum-Seekers and Refugees (“Colombia Guidelines”)</i> (Sept. 2002)..... | 8 |
| UNHCR, <i>Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees, Protection Policy and Legal Advice Section, Department of International Protection (Sept. 2003), reprinted in INT’L J. OF REFUGEE LAW, Vol. 15, No. 3 ¶ 3 (2003)</i> | 19 |
| UNHCR, <i>Background Paper on Refugees and Asylum-Seekers from Sri Lanka</i> at 11 (April 2004)..... | 9 |
| UNHCR, <i>Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees ¶ 2</i> , UNHCR Doc. No. HCR/GIP/03/05 (Sept. 2003)..... | 18 |
| <i>United Nations Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol</i> | 19 |
| United Nations High Commissioner for Refugees Working Paper, “Protecting Colombian Refugees in the Andean Region: The Fight Against Invisibility,” at 5 (March 2003)..... | 7, 8, 27 |
| United Nations Security Council Resolution 1373..... | 18 |
| United Nations, <i>Resolution on Measures to Eliminate International Terrorism, A/RES/51/210</i> , dated Dec. 22, 1996..... | 18 |
| Voice of America, <i>Discovery of MILF Explosives Cache Could Endanger Peace Talks</i> (June 26, 2003) | 10 |

INTEREST OF *AMICUS CURIAE* AND SOURCE OF AUTHORITY TO FILE

Human Rights First (formerly known as the Lawyers Committee for Human Rights) submits this brief *amicus curiae* in support of Petitioner Walter Antonio Amaya Arias. Since 1978, Human Rights First has worked to protect and promote fundamental human rights and to ensure protection of the rights of refugees, including the right to seek and enjoy asylum. Human Rights First grounds its refugee protection work on the international standards of the 1951 Convention Relating to the Status of Refugees (the “Refugee Convention”), the 1967 Protocol Relating to the Status of Refugees (the “1967 Protocol”), the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (the “Torture Convention”), and other international human rights instruments, and advocates adherence to these standards in U.S. law and policy.

Human Rights First also operates one of the largest and most successful *pro bono* asylum representation programs in the country. With the assistance of volunteer attorneys, Human Rights First provides legal representation, without charge, to hundreds of indigent asylum applicants each year, from countries all over the world. Human Rights First is committed to ensuring that the remedy of asylum remains available to victims of persecution, even as all nations tighten border controls to face the dangers of the post-September 11, 2001 world. Human Rights First is particularly concerned that all eligible aliens have the opportunity to

apply for asylum or withholding of removal, and to have their claims adjudicated through a fair and humane process.

This case raises an issue of particular importance to Human Rights First and to its clients, for the ruling by the Board of Immigration Appeals (“BIA”) would have profound implications – not only for potential refugees, but for our Nation’s struggle against terrorism. Were the BIA’s view to be upheld, it would mean that innocent civilians who are compelled to pay “war taxes” extorted by terrorist organizations in their countries of origin would forever be barred from obtaining relief from persecution or torture in the United States. Such a rule would enhance the ability of terrorist organizations to prey upon vulnerable populations. Congress cannot have intended this result in enacting legislation against terrorists. Further, if this *were* the law, it would place the United States squarely in conflict with its international obligations under the Refugee Convention, the 1967 Protocol, and customary international law.

This issue has implications well beyond the facts of this case, and even beyond the civil war in Colombia, as similar situations are presented by the civil strife in Sri Lanka, Lebanon, the Philippines, Peru, the Congo, and many other war-torn regions where violent terrorist organizations compel “taxes” from vulnerable civilians.

For these reasons, Human Rights First has a profound interest in the outcome of this case, and believes it is well-situated to assist the Court in resolving the important issues presented.

Pursuant to Federal Rule of Appellate Procedure 29(a), Mr. Amaya consents to the filing of this *amicus curiae* brief. The Department of Homeland Security (“DHS”), however, has declined to take an official position on whether this brief should be filed – although it does not object to its filing. Accordingly, Human Rights First has concurrently filed a Motion for Leave to File this *amicus curiae* brief.

SUMMARY OF ARGUMENT

This case concerns the BIA’s holding that civilians who are extorted by terrorist organizations or forced to pay “taxes” to them – even under threat of bodily injury or death – have “engaged in terrorist activity” within the meaning of 8 U.S.C. § 1182(a)(3)(iv)(VI). As a result, the BIA has held that these civilians are barred from asylum or withholding of removal. *See* 8 U.S.C. § 1158(b)(2)(A)(v) (asylum); § 1231(b)(3)(B) (withholding).

The BIA’s holding arises from a literalist misreading of the definition of “engaging in terrorist activity” contained in 8 U.S.C. § 1182(a)(3)(iv)(VI), which includes “an act that the actor knows, or reasonably should know, *affords material support*, including . . . *funds* . . . to any individual who the actor knows, or

reasonably should know, has committed or plans to commit a terrorist activity” or is a member of a terrorist organization. *Id.* (emphasis added). Under the BIA’s reading of the statute, if a civilian has been coerced by armed terrorists to “afford material support” or “funds” to a terrorist organization, that civilian has “engaged in terrorist activity,” and should be treated as a terrorist under the immigration laws. Thus, the BIA has applied a legal bar meant for terrorists to the *victims* of terrorism.

As a matter of common sense, this result is clearly wrong and should be reversed for all the reasons articulated in the brief filed by Petitioner Walter Antonio Amaya Arias (“Mr. Amaya”). Human Rights First writes separately to emphasize three points, further demonstrating why the result below must be reversed.

First, the BIA’s interpretation of the “engaging in terrorist activity” statute (8 U.S.C. § 1182(a)(3)(iv)(VI)) – holding that *victims* of terrorist extortion should be treated as terrorists under the law – is wrong on its face. In enacting the various bars on terrorists obtaining asylum and related relief in the United States, Congress simply did not and could not have intended such an absurd result – one that would punish innocent civilians for submitting to extortion at the hands of terrorist organizations threatening bodily harm.

Second, the BIA's interpretation of 8 U.S.C. § 1182(a)(3)(iv)(VI) would place the statute in violation of international law as expressed in the Refugee Convention, the 1967 Protocol, and in the customary international legal protections against the *refoulement* of persons who will be persecuted, tortured, or killed upon return to their home country. Given the availability of a reasonable alternative statutory construction – *i.e.*, limiting the terrorism bar to actual terrorists or terrorist supporters (*i.e.*, those who commit intentional and voluntary acts aimed at supporting terrorism) – the BIA's interpretation must be reversed. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”).

Third, the position that DHS advanced below – *i.e.*, that Mr. Amaya's payments to soldiers of the Revolutionary Armed Forces of Colombia (“FARC”) were, in fact, “voluntary” – is not supported by substantial evidence. Indeed, the evidence – including the uncontroverted testimony that armed guerrillas would collect the “taxes” every month, and Mr. Amaya feared death if he did not comply – is to the contrary. Moreover, the necessary implication of the DHS's position – namely, that civilians should flee or risk death, rather than pay “taxes” to terrorist organizations controlling their territory – would require victims of terrorism to pick up stakes and potentially join the ranks of displaced, unemployed

persons seeking refuge. Moreover, the “war tax” situation in Colombia is hardly unique – innocent civilians are often forced to pay “taxes” to rebel or terrorist factions in civil wars, as is demonstrated by similar situations in Sri Lanka, the Congo, Lebanon, and other locations discussed below. DHS’s position could therefore have profound adverse consequences and complicate refugee crises in war torn regions all over the world.

For these reasons, Human Rights First urges reversal of the BIA’s ruling.

FACTUAL CONTEXT

As discussed in Mr. Amaya’s brief and in further detail below, the BIA’s interpretation of 8 U.S.C. § 1182(a)(3)(iv)(VI) is manifestly wrong. This is especially apparent when placed in the context of the Colombian Civil War.

By any definition, Colombia is a “failed state,” with its beleaguered government fighting a civil war against three separate guerrilla forces hostile to one another. All three – the FARC, the United Self-Defense Forces of Colombia (the “AUC”), and the National Liberation Army (“ELN”) – have been designated by the U.S. State Department as “Foreign Terrorist Organizations” under Section 219 of the Immigration and Nationality Act (“INA”). *See* U.S. Department of State Web Page (<http://www.state.gov/s/ct/rls/fs/2003/17067.htm>). At any given time, as much as 75% of Colombia’s territory has been “either controlled or contested” by one or several of these three terrorist organizations. *See* United

Nations High Commissioner for Refugees (“UNHCR”) Working Paper, “Protecting Colombian Refugees in the Andean Region: The Fight Against Invisibility,” at 5 (March 2003).¹

Mr. Amaya, like millions of others, is a victim of this war. For several years, he lived in territory controlled by the FARC, beyond the reach of the Colombian government’s protection or power. Every month, he was compelled to pay “taxes” to 50 or so FARC soldiers armed with machine guns. (Certified Administrative Record (“CAR”) at 109-13.) These FARC soldiers would also pillage the farm at which Mr. Amaya worked, taking animals for their own use without compensation. (*Id.* at 113.) Mr. Amaya paid the “taxes” *not* because he was a supporter of the FARC, but because he feared that the FARC soldiers would harm or kill him if he did not. (CAR at 113-14, 122).²

Mr. Amaya’s situation is not unusual. The U.S. State Department’s Human Rights Reports on Colombia regularly note the FARC’s tactic of forcing civilians to pay “war taxes” to FARC guerrillas. *See, e.g.*, CAR at 375 (U.S. State Department, *Country Report on Human Rights Practices (Colombia) – 2001*).

¹ A copy of this UNHCR Working Paper is attached for the Court’s convenience as Exhibit A. Copies of other documents cited are similarly attached for the Court’s convenience as exhibits.

² In fact, in the last presidential election, Mr. Amaya supported current President Alvaro Uribe (*id.*) – who campaigned on a platform of escalating the war *against* the FARC. *See* “Hardliner Elected Colombian President,” BBC News (May 27, 2002) (attached as Exh. B).

Additionally, in September 2002, the United Nations High Commissioner for Refugees (“UNHCR”) – in light of worsening “guerrilla and paramilitary violence” – took the extraordinary step of issuing *Guidelines* specifically highlighting the difficulties facing Colombian refugees, reporting that “[e]xtortion practices, including . . . ‘war taxes’ and other forced payments are commonplace” in Colombia, and “take place both as a form of persecution . . . and to finance political/military activities.” (CAR at 221, 227 (UNHCR *International Protection Considerations Regarding Colombian Asylum-Seekers and Refugees* (“*Colombia Guidelines*”) (Sept. 2002) ¶ 27)). “[R]efusal or inability to pay is viewed as an act or indication of political opposition,” marking those who refuse as a “military target” (*id.*), and “at risk of reprisal from the FARC.” (*Id.* at 149 (UNHCR Advisory Opinion (Aug. 12, 2003))); *see also* CAR at 296 (Human Rights Watch Report on Colombia 1998 (“The FARC also holds so-called popular trials for civilians accused of misdeeds, like . . . failing to pay a ‘war tax.’”)); UNHCR Working Paper, “Protecting Colombian Refugees,” at 2 (Exh. A) (noting that the FARC finances itself “mostly by extortion, kidnapping, and ‘taxes’”); *Hearing on Narco-Terrorism Before the Senate Committee on the Judiciary* (statement of Steve McCraw, Assistant Director for Intelligence, Federal Bureau of Investigation) (May 20, 2003) (noting that the FARC has “forced businesses to pay ‘war taxes’”) (attached as Exh. C)).

The situation in Colombia is far from unique. In civil wars throughout the world, civilians are commonly extorted or forced to pay “taxes” to guerrilla groups – many of which have been designated as “Foreign Terrorist Organizations” by the United States. For example, in Sri Lanka, the LTTE – a designated Foreign Terrorist Organization, also known as the “Tamil Tigers” and one of the “deadliest guerrilla terrorist groups in the world” (UNHCR, *Background Paper on Refugees and Asylum-Seekers from Sri Lanka* at 11 (April 2004) (attached as Exh. D)) – controls large sections of the country, and regularly taxes “civilians traveling through the areas it control[s].” (U.S. State Department, *Country Report on Human Rights Practices (Sri Lanka) – 2003*) (attached as Exh. E)).

The same is true in Peru, where the Sendero Luminoso (or “Shining Path”), also a designated Foreign Terrorist Organization, regularly coerces “indigenous peasants into joining its ranks and demand[s] war taxes.” (U.S. State Department, *Country Report on Human Rights Practices (Peru) – 2003*) (attached as Exh. F)). When war taxes are not paid, the Sendero Luminoso has been known to “slaughter . . . entire communit[ies]” in retribution. (See Human Rights Watch, *Americas Overview* (1996) (attached as Exh. G)).

And in the Philippines, the New People’s Army (“NPA”) – also a designated Foreign Terrorist Organization – similarly collects “revolutionary taxes” from

civilians, and has been known to “harass[] businesses and burn[] buses to enforce . . . collection[.]” (U.S. State Department, *Country Report on Human Rights Practices (Philippines) – 2003*) (attached as Exh. H); *see also* Voice of America, *Discovery of MILF Explosives Cache Could Endanger Peace Talks* (June 26, 2003) (attached as Exh. I) (noting that the NPA “has a history of threatening villagers with violence unless they pay, so-called, revolutionary taxes”)).

These are just a few examples. The BIA’s ruling must be viewed in light of the experience of innocent civilians in war-torn regions around the globe – from Sri Lanka, to Peru, the Philippines, Liberia, the Congo, Sudan, Afghanistan, and elsewhere – who are forced to pay “war taxes,” and would be barred under the BIA’s ruling from seeking shelter from persecution in the United States.³ Simply put, this is not what Congress intended.

ARGUMENT

I. Congress Could Not Have Intended, and Did Not Intend, to Subject Victims of Terror to the Same Legal Bars Applied to Terrorists

The definition of “engaging in terrorist activity” contained now at 8 U.S.C. § 1182(a)(3)(iv)(VI) – and at issue in the BIA’s ruling – first entered the law as part of the Immigration Act of 1990. *See* Immigration Act of 1990, Pub. L. No.

³ *See also generally* Lawyers Committee for Human Rights, *Refugees, Rebels and the Quest for Justice* (2002) (discussing the refugee crises arising out of the Rwandan genocide and the wars in West Africa, and the victimization of civilians by terrorist combatants); Chaloka Beyani, et al., *Special Supplementary Issue on Exclusion*, INT’L J. OF REFUGEE LAW (Vol. 12) (2000).

101-649, 104 Stat. 4978, § 601. Nothing in the legislative history of that Act nor subsequent legislation indicates that Congress intended to punish civilians subjected to extortion by armed terrorist organizations, or bar such civilians from seeking shelter in the United States from persecution or torture.

Nor does the text of the statute require such an result – applying the same legal bars meant for terrorists to the *victims* of terrorism. *See* Regina Germain, *Rushing to Judgment: The Unintended Consequences of the USA Patriot Act for Bona Fide Refugees*, 16 GEO IMMIGR. L.J. 505, 512-13 (Winter 2002) (describing a letter sent by the U.S. Committee for Refugees to Attorney General John Ashcroft, noting that, in reference to the payment of “war taxes” to Colombian guerrillas, “it was ‘ludicrous’ to label the payment of ransom or other extortion fees as ‘material support to a terrorist organization,’” given that “‘Colombian civilians make such payments only because the guerrillas threaten their lives or those of their loved ones.’”).

Yet this is the impact of the BIA’s ruling. In the BIA’s view, all of the civilians who have been forced to pay “war” or “revolutionary” taxes in the 75% of Colombia controlled by terrorist organizations – and, by extension, the large parts of Sri Lanka controlled by the Tamil Tigers, the parts of Peru controlled by the Sendero Luminoso, and the parts of Lebanon controlled by Hezbollah, among others – have “engaged in terrorist activity” under 8 U.S.C. § 1182(a)(3)(iv)(VI),

and are barred from seeking relief in the United States from persecution or torture. The practical effect of the BIA's hyper-literalist interpretation of the section is to deny refugee protection to a significant portion of the world's population that happens to live in areas of the world dominated by terrorists.

As discussed in Mr. Amaya's brief at pages 29-36, the text of the statute does not require such an absurd result. The concept of "voluntariness" is part-and-parcel of the terms used in the law – including "commit" and "support," both of which imply deliberate action. *See* Amaya Brief at 29-30. Moreover, the concept of "duress" is well-recognized in the law, and implied as a defense to conduct violating even criminal statutes. *See, e.g., United States v. Bailey*, 444 U.S. 394, 409 (1980) (under the common law, duress "excuse[s] criminal conduct where the actor was under an unlawful threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law"); Model Penal Code § 2.09 (defining duress). The same concept plainly should apply here to the interpretation of the asylum and withholding statutes – where a civilian in a war zone has been forced by armed soldiers to pay "taxes" to a terrorist organization. *See* Lawyers Committee, *Refugees, Rebels* at 143 ("As in a criminal trial, in determining whether or not the asylum seeker is excludable, the adjudicator must permit the asylum seeker to present evidence concerning defenses and mitigating circumstances . . . *e.g.*, duress[.]").

Finally, it is a well-recognized canon of statutory construction that “[i]t is the obligation of the court to construe a statute to avoid absurd results, if alternative interpretations are available and consistent with the legislative purpose.” *United States v. Schneider*, 14 F.3d 876, 880 (3d Cir. 1994). *Accord United States v. American Trucking Ass’ns*, 310 U.S. 534, 543-44 (1940) (noting that when the “plain meaning” of a statute’s language leads to “absurd or futile results,” a court may look “beyond the words to the purpose of the act”); *Fogleman v. Mercy Hospital*, 283 F.3d 561, 569 (3d Cir. 2002), *cert. denied*, 537 U.S. 824 (2002) (“there are cases in which a blind adherence to the literal meaning of a statute would lead to a patently absurd result that no rational legislature could have intended”).

In other contexts, courts have held that extortion itself constitutes persecution on account of political opinion. *See Borja v. INS*, 175 F.3d 732 (9th Cir. 1999) (holding that applicant had been persecuted by NPA, the Philippine terrorist organization, where organization forced her to pay money, based on threats of violence); *Gonzales-Neyra v. INS*, 122 F.3d 1293 (9th Cir. 1997), *amended*, 133 F.3d 726 (9th Cir. 1998) (extortion by Peruvian Sendero Luminoso constituted political persecution). It would be an odd result indeed if submitting to *this* persecution by one terrorist organization in the context of a civil war resulted in a bar to relief from *subsequent* persecution by a different terrorist organization.

The correct interpretation of 8 U.S.C. § 1182(a)(3)(iv)(VI), and one that expresses congressional intent, limits its application to *terrorists* themselves, or those who intentionally and voluntarily commit acts aimed at supporting terrorism. *Cf. Cheema v. Ashcroft*, 383 F.3d 848 (9th Cir. 2004) (reversing BIA, and finding that donations to Sikh organizations helping widows and orphans, unconnected to Sikh militant organization, was not “engaging in terrorist activity”); *see also Singh-Kaur v. Ashcroft*, ___ F.3d ___, 2004 WL 2109978 (3d Cir. Sept. 23, 2004) (finding that intentional, non-coerced provision of food and shelter to Sikh militants at religious meetings was “engaging in terrorist activity”).

For this reason alone, the BIA’s ruling should be reversed.⁴

II. The BIA’s Ruling Violates the Canon that Statutes Should Not Be Interpreted to Violate International Law, Where an Alternative Construction Is “Fairly Possible”

The BIA’s interpretation of 8 U.S.C. § 1182(a)(3)(iv)(VI) – barring asylum and withholding relief to victims of extortion – also places the statute in square conflict with international law as expressed in the Refugee Convention, the 1967 Protocol, and the customary international law and *jus cogens* protections against the *refoulement* of refugees. As discussed in further detail below, these sources of

⁴ The fact that this Court is reviewing an agency interpretation of the INA does not mandate a different result. For all the reasons discussed above, the BIA’s application of the “engaging in terrorist activity” bar to extortion victims is quintessentially “arbitrary, capricious or manifestly contrary to the statute.” *Ahmed v. Ashcroft*, 341 F.3d 214, 216-17 (3d Cir. 2003).

international law have been incorporated into U.S. law, and uniformly mandate that countries offer shelter to individuals fleeing persecution or torture – except in very limited circumstances, such as where the individuals are persecutors or terrorists themselves.⁵ By applying the “engaging in terrorist activity” definition to *victims* of terror, including civilians extorted to pay “war taxes” by terrorist organizations, the BIA has rendered the United States in violation of its international obligations.

For this additional reason, the BIA’s ruling should be reversed. The Supreme Court has held “an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . .” *Charming Betsy*, 6 U.S. at 118; *see also Restatement (Third) of the Law of Foreign Relations* § 114 (“Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.”). The BIA violated this principle, for a reasonable alternative construction of the “engaging in terrorist activity” definition, not violating international law, is “fairly possible” here. As discussed above, limiting the definition of “engaging in terrorist activity” to intentional and voluntary acts aimed at supporting terrorism,

⁵ *See* Preamble ¶ 4, Declaration of State Parties to the 1951 Refugee Convention and/or its 1967 Protocol Relating to the Status of Refugees (Dec. 13, 2001), HCR/MMSP/2001/10, in which States acknowledged “the continuing relevance and resilience of this international regime of rights and principles, including at its core the principle of *non-refoulement*, whose applicability is embedded in customary law”).

resulting in a danger to the United States, accords with the reasonable objectives of Congress – which could not reasonably have intended for the *victims* of terrorism to be affected by the same legal bars intended for the terrorists themselves.

Accordingly, the Court should reverse BIA’s ruling below.

A. The BIA Ruling Violates the Refugee Convention and 1967 Protocol

Modern asylum protections arise out of the 1951 Refugee Convention, which, broadly speaking, requires states to “provide protection and to guarantee specific rights to persons who face serious violations of their human rights in their home countries, where those violations are on account of certain statuses and beliefs[.]” Deborah E. Anker, *Law of Asylum in the United States* 2 (1999). The United States adopted the dictates of the Refugee Convention in 1968 by ratifying the 1967 Protocol (which incorporates the substantive provisions of the Refugee Convention), and then by passing the Refugee Act of 1980 (Pub. L. No. 96-212, 94 Stat. 102). *Id.* at 2-3. *See generally INS v. Stevic*, 467 U.S. 407, 416-24 (1984) (providing a history of the incorporation of the Refugee Convention standards into U.S. law via the 1967 Protocol and the Refugee Act of 1980); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987) (same, and noting that “one of Congress’ primary purposes [in passing the Refugee Act] was to bring United States refugee law into conformance with the 1967 United Nations Protocol”); *Marincas v. Lewis*, 92 F.3d 195, 198 (3d Cir. 1996) (“the Refugee Act was enacted

to fulfill our treaty obligations under the U.N. Protocol for the benefit of aliens . . . who claim to be fleeing persecution”).

The broad principles of refugee protection contained in the Convention that govern Mr. Amaya’s situation are conceivably subject to two relevant exceptions meriting discussion: Article 1(F) and Article 33(2). Neither is applicable here.

1. The Exception to Refugee Protection Contained in Article 1(F) Does Not Apply

Article 1(F) provides:

- F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
 - (a) He has committed a crime against peace, a war crime, or a crime against humanity . . . ;
 - (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
 - (c) He has been guilty of acts contrary to the purposes and principles of the United Nations.

Refugee Convention, July 28, 1951, 1989 U.N.T.S. 150, Art. 1(F). Under this provision, those who have committed serious international crimes and serious non-political crimes are excluded from the definition of “refugee” under the Convention. As stated by the United Nations High Commissioner on Refugees (“UNHCR”), the rationale for the Article 1(F) exclusion “is that certain acts are so grave as to render their perpetrators undeserving of international protection as refugees. [Its] primary purpose is to deprive those guilty of heinous acts, and

serious common crimes, of international refugee protection and to ensure that such persons do not abuse the institution of asylum in order to avoid being held legally accountable for their acts.” UNHCR, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees* ¶ 2, UNHCR Doc. No. HCR/GIP/03/05 (Sept. 2003) (“*Exclusion Guidelines*”).

Certain acts considered to be “terrorist” acts have also been interpreted as falling under the rubric of the Article 1(F) exceptions to refugee protection. *See generally* James C. Hathaway & Colin J. Harvey, *Framing Refugee Protection in the New World Disorder*, 34 CORNELL INT’L L. J. 257, 266-70 (2001). *Cf.* United Nations Security Council Resolution 1373 (post-September 11, 2001 resolution calling upon all member states to “deny safe haven to those who finance, plan, support or commit terrorist acts, or provide safe haven to terrorists”); United Nations, *Resolution on Measures to Eliminate International Terrorism*, A/RES/51/210, dated Dec. 22, 1996 (General Assembly Resolution providing that “the Convention relating to the Status of Refugees . . . does not provide a basis for the protection of perpetrators of terrorist acts”).

Article 1(F) clearly does not apply here, however. Extortion victims – or a civilians forced to pay “war taxes” by a terrorist organization – cannot conceivably be viewed as committing “heinous” acts “so grave as to render [them] undeserving

of international protection as refugees.” UNHCR, *Exclusion Guidelines* ¶ 2. See also *United Nations Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol* (the “*UNHCR Handbook*”) ¶¶ 147-63 (interpretation of Article 1(F) exclusions from refugee protection must be “restrictive,” and is limited to acts “of a criminal nature”);⁶ UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees*, Protection Policy and Legal Advice Section, Department of International Protection (Sept. 2003), reprinted in *INT’L J. OF REFUGEE LAW*, Vol. 15, No. 3 ¶ 3 (2003) (noting that Article 1(F) should “always be interpreted restrictively and should be used with great caution”).

Moreover, Article 1(F) has been consistently interpreted to include a “duress” defense – as with criminal statutes or common law. As the UNHCR has noted, Article 1(F) exclusion does not apply “where the act in question results from the person concerned necessarily and reasonably avoiding a threat of imminent death, or of continuing or imminent serious bodily harm to him-or herself or another person[.]” UNHCR, *Exclusion Guidelines* ¶ 22.⁷

⁶ The U.S. Supreme Court has deferred to the *UNHCR Handbook* as a “useful interpretive aid” in refugee law. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 426-27 (1999).

⁷ The Rome Statute of the International Criminal Court also identifies “duress” as a defense to international criminal liability or war crimes. See Rome

Thus, in cases involving conduct more serious than being forced to pay “war taxes,” courts have declined to apply the Article 1(F) bar on refugee relief. *See, e.g., Canada v. Asghedom*, 2001 F.C.T. 972, 210 F.T.R. 294 (Federal Ct. of Canada 2001) (refusing to apply the Article 1(F) exception against asylum applicant who had been conscripted into the Ethiopian Army, and forced under threat of death to participate in raids against civilians).

Mr. Amaya’s circumstance is obviously far less severe. Even if paying “war taxes” to a terrorist organization could be seen as a crime coming under the rubric of Article 1(F), the fact that Mr. Amaya was *coerced* into doing so by armed FARC soldiers threatening to harm or kill him plainly exempts him from the Article 1(F) bar. Mr. Amaya must therefore be viewed as a refugee protected by the Refugee Convention, and the BIA’s ruling violates international law.

2. The Exception to the Non-Refoulement Rule Contained in Article 33(2) Does Not Apply

It could be suggested that even if Mr. Amaya were not excludable under Article 1(F), he could be excluded under Article 33, which provides:

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

Statute of the International Criminal Court, U.N. Doc. No. 2187 U.N.T.S. 90, *entered into force* July 1, 2002, art. 31(d). *See also* Lawyers Committee, *Refugees, Rebels* at 143 (similarly discussing the duress defense to excludability under Article 1(F)).

nationality, membership of a particular social group or political opinion.

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

Refugee Convention, July 28, 1951, 1989 U.N.T.S. 150, Art. 33 (emphasis added).

Under these provisions, which codify the international protections against *refoulement*, a refugee may not be returned to face persecution unless there are “reasonable grounds for regarding [that person] as a danger to the security of the country in which he is.” *Id.*; see Hathaway & Harvey, 34 CORNELL INT’L L. J. at 286-92 (discussing Article 33); *Suresh v. Canada*, 41 I.L.M. 954 (Can. 2002) (Canadian Supreme Court emphasizing that, under Article 33, a “Convention refugee” cannot be removed from Canada unless “the person constitutes a danger to the security of Canada”).

But for similar reasons discussed with regard to Article 1(F), Article 33(2) does not apply to Mr. Amaya. Moreover, there is no evidence here that Mr. Amaya poses a danger to the United States, as is required by Article 33(2). *Cf. Cheema*, 383 F.3d at 857-58 (evidence that applicant provided funds to Sikh militant organization not adequate to show he presented a danger to the *United*

States).⁸ See also Kathleen M. Keller, *A Comparative and International Law Perspective on the United States (Non)Compliance With Its Duty of Non-Refoulement*, 2 YALE HUM. RTS. & DEV. L. J. 183, 187 (1999) (the “danger to the security of the country” exception contained in Article 33(2) is “typically applied only in the case of immigrants who have manifested their dangerousness by criminal acts”); *Suresh*, 41 I.L.M. at 981 (Canadian Supreme Court finding that “those who innocently contribute to or become members of terrorist organizations” do not fall under the Article 33(2) exception to the refugee protection).

Thus, the BIA’s ruling – which denied Mr. Amaya both asylum and withholding of removal on this very ground – also violates Article 33 of the Refugee Convention.

⁸ *Cheema* applied prior versions of the withholding and asylum statutes, which required the government to show both that the applicant had engaged in terrorist activity *and* that the applicant presented “a danger to the security of the United States.” *Cheema*, 383 F.3d at 855-56. Subsequent legislation has arguably collapsed this inquiry, providing that any alien engaging in terrorist activity “shall be considered to be an alien with respect to whom there are reasonable grounds for regarding as a danger to the security of the United States.” 8 U.S.C. § 1231(b)(3)(iv) (withholding); see also 8 U.S.C. § 1158(b)(2)(A)(v) (asylum provision with similar effect). To the extent that the asylum and withholding statutes could be interpreted to permit the *refoulement* of a person who has technically “engaged in terrorist activity” under 8 U.S.C. § 1182(a)(3)(iv)(VI), but who – as in *Cheema* – presents no danger to the United States, they violate Article 33 of the Refugee Convention.

B. The Court Should Reverse the BIA’s Ruling, Given These Conflicts with International Law, and Given a Reasonable Alternative Construction of the Statute

The international standards discussed above are binding, not only because they have been incorporated into U.S. law by Acts of Congress, but also because “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction[.]” *The Paquete Habana*, 175 U.S. 677, 700 (1900). *See also The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) (holding that U.S. courts are “bound by the law of nations which is part of the law of the land”).

Under the *Charming Betsy* principle, “an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains” *Charming Betsy*, 6 U.S. at 118; *see also MacLeod v. United States*, 229 U.S. 416, 434 (1913) (“it should not be assumed that Congress proposed to violate the obligations of this country to other nations”); *Chew Heong v. United States*, 112 U.S. 536, 539-40 (1884) (interpreting immigration statute so as to not conflict with treaty right of Chinese alien to enter the United States). The BIA’s ruling violates this canon because an alternative construction of the statute not violating international law is “fairly possible” here. *Restatement* § 114. An alternative construction – limiting the definition of “engaging in terrorist activity” to intentional and voluntary acts aimed at supporting terrorism, presenting a danger

to the United States – accords with the reasonable objectives of Congress. Simply put, Congress could not reasonably have intended for the *victims* of terrorism to be affected by the same legal bars intended for the terrorists themselves.

For this additional reason, the BIA ruling must be reversed.

III. DHS’s Position That Mr. Amaya Is Barred From Relief Because His Payment of “War Taxes” to the FARC Was “Voluntary” Is Not Supported By Substantial Evidence, Violates International Law, and Would Have Broad Implications for Refugees Throughout the World

The weakness of the BIA’s interpretation of the definition of “engaging in terrorist activity” contained in 8 U.S.C. § 1182(a)(3)(iv)(VI) is further demonstrated by the fact that *even DHS disagrees with it*. (See CAR at 11 (agreeing that an alien must “voluntarily” afford material support to fall under the definition of “engaging in terrorist activity”). DHS asserted below, however, that even if 8 U.S.C. § 1182(a)(3)(iv)(VI) is interpreted to contain a “voluntariness” component, Mr. Amaya still is barred from relief because his payment of “taxes” to the FARC was “voluntary.” (CAR at 13.) DHS’s position is without merit.

For all the reasons discussed in Mr. Amaya’s brief, DHS’s assertion that Mr. Amaya’s payment of “war taxes” to the FARC was “voluntary” is not supported by *any* evidence, let alone “substantial evidence.”⁹ See *Gambashidze v. Ashcroft*, 381

⁹ The sole basis for the BIA’s denial of relief to Mr. Amaya was its ruling that “[t]he plain language of the statute does not expressly require that the alien voluntarily commit the act that he or she knows or reasonably should have known affords material support to a terrorist organization.” (CAR at 3.) While the BIA

F.3d 187, 191 (3d Cir. 2004) (factual findings in immigration cases must be supported “with substantial evidence”). All evidence demonstrates that the FARC soldiers coerced Mr. Amaya to pay the “war taxes” at the point of a gun. Additionally, Mr. Amaya’s experience accords with that of many other Colombians, as discussed by the UNHCR in its *Colombia Guidelines*. Neither the Immigration Court nor the BIA contested Mr. Amaya’s credibility. (CAR at 71 (Immigration Court noting that it “does not take issue with his credibility”). And DHS offers no support for the proposition that potential refugees must affirmatively stand up to coercion, risking death or bodily injury, in order to be eligible for protection in the United States.

Regardless, DHS asserts that Mr. Amaya’s payments were “voluntary” and not made under duress because Mr. Amaya could have left his job and fled FARC-controlled territory to another location in Colombia. (*See* CAR at 14 (asserting that Mr. Amaya “made a conscious decision to support a terrorist organization because it was easier to do than disrupt his lifestyle and career plans”). DHS’s position is specious, unsupported by any evidence, and could have significant

offered some support to the Government’s position, noting that the “evidence in the record *suggests* that the respondent’s act was not involuntary” (*id.* (emphasis added)), the BIA did *not* make a factual finding that Mr. Amaya’s payment of taxes to the FARC was “voluntary,” or rest its denial of relief on that ground. Nor did the Immigration Court, which similarly and solely rested its denial of relief on a plain language interpretation of the statute. (CAR at 65-73.) Thus, the Government’s theory is just that – a theory unsupported by any ruling or finding below.

adverse consequences. If taken to its logical conclusion, DHS's position would require civilians facing extortion by terrorist organizations to flee, regardless of physical dangers and economic uncertainties, and potentially join the ranks of displaced, unemployed persons seeking refuge. It should be rejected.

First, given Mr. Amaya's uncontested testimony that the FARC soldiers would have "harmed" or "killed" him had he refused to pay taxes (CAR at 113-14), the retribution (or threat of retribution) of the FARC in and of itself constitutes persecution under the refugee laws. *Borja v. INS*, 175 F.3d 732 (9th Cir. 1999) (holding that applicant had been persecuted by NPA, the Philippine terrorist organization, where organization forced her to pay money, based on threats of violence); *cf. Lukwago v. Ashcroft*, 329 F.3d 157, 169-70 (3d Cir. 2003) (forced conscription by a guerrilla force can constitute persecution).

DHS contests this presumptive entitlement to asylum – and thus the applicability of a duress defense to Mr. Amaya's situation – by arguing that Amaya could have relocated internally. But DHS offers no evidence showing that an individual who refuses to pay "war taxes" can be safely relocated within Colombia.¹⁰ *See Gambashidze*, 381 F.3d at 191, 193 (citing 8 C.F.R. § 208.16(b)(1)(i)) (reversing denial of withholding, where Government failed to

¹⁰ The fact that Mr. Amaya moved to Baranquilla to escape the AUC is irrelevant to whether he could have safely moved there *after* defying the FARC soldiers seeking payment.

meet burden of proving safety of internal relocation). Nor does DHS offer any suggestions as to where Mr. Amaya could have gone – a difficult proposition, given that 75% of Colombia is “controlled or contested” by terrorist organizations. *See* UNHCR Working Paper at 5.

DHS has also failed to meet its burden of demonstrating that such an internal relocation would have been reasonable. *See Gambashidze*, 381 F.3d at 192 (Government has the burden of showing that an internal relocation to escape persecution must both be “successful” and “reasonable”). As the Ninth Circuit has recently held, even if a relocation would have been safe from persecutors, it would be “unreasonable” to require an internal relocation where the applicant “would have great difficulty finding employment, and . . . [he] would have no means of supporting [himself].” *Knezevic v. Ashcroft*, 367 F.3d 1206, 1214 (9th Cir. 2004). And yet this “unreasonable” and “exceptionally harsh” recourse is just what DHS asserts Mr. Amaya and his family should have taken to preserve a withholding or asylum claim, instead of paying the coerced “war taxes” to the FARC.

Second, the necessary implication of DHS’s position is that innocent civilians forced to pay “war taxes” by terrorist organizations should flee from the terrorist organizations – *regardless of the physical dangers and economic uncertainties associated with fleeing* – and potentially join the ranks of displaced, unemployed persons seeking refuge. This could have profound adverse

consequences, and complicate refugee crises in war torn regions all over the world – not only in Colombia, but also in the Congo, Philippines, Peru, Lebanon, Sri Lanka, Liberia, and numerous other areas where armed terrorists control territory and force civilians to pay “war taxes.”

Third, the DHS’s position violates Article 33 of the Refugee Convention, and customary international law, for it would require the *refoulement* of individuals – such as Mr. Amaya – who present no danger to the security of the United States. *See* Refugee Convention, Article 33(2). For the reasons discussed above, and under the *Charming Betsy* principle, the law should not be interpreted to place U.S. law in conflict with well-established international human rights laws.

For these additional reasons, DHS’s position should be rejected and the BIA’s ruling should be reversed.

CONCLUSION

For the foregoing reasons, the Court should grant Mr. Amaya’s Petition for Review, and reverse the decision of the Board of Immigration Appeals.

Respectfully submitted,

Dated: October 19, 2004

**AKIN GUMP STRAUSS HAUER &
FELD LLP**

By



Seth M.M. Stodder

**ATTORNEYS FOR *AMICUS CURIAE*
HUMAN RIGHTS FIRST**

CERTIFICATE OF BRIEF LENGTH COMPLIANCE

[F.R.A.P. 32(a)(7)(C)]


Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and (C), I hereby certify that this brief contains 6,827 words (including headings, footnotes, and quotations), on the basis of a count made by the word processing system used to prepare this brief.


Seth M.M. Stodder

CERTIFICATE OF THIRD CIRCUIT BAR MEMBERSHIP

[Third Circuit Rule 28.3(d)]

Pursuant to Third Circuit Local Rule 28.3(d), I hereby certify that I am a member of the Bar of the United States Court of Appeals for the Third Circuit.



Seth M.M. Stodder

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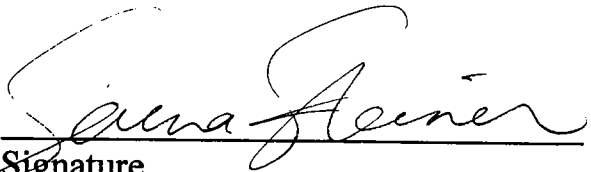
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