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UNITED STATES COURT OF APPEALS

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On Petition for Review from the Board of Immigration Appeals

**BRIEF OF *AMICUS CURIAE* FAIR TRIALS AMERICAS
IN SUPPORT OF NEITHER PARTY**

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TABLE OF CONTENTS

	<u>Page</u>
CORPORATE DISCLOSURE STATEMENT	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iii
INTEREST OF <i>AMICUS CURIAE</i>	1
INTRODUCTION AND SUMMARY OF ARGUMENT.....	2
ARGUMENT	4
I. INTERPOL and Red Notices.....	4
A. Background on INTERPOL.....	4
B. INTERPOL Red Notices.....	9
C. The Troubled History of Red Notices.....	13
II. The Legal Significance of Red Notices	23
A. The U.S. Government’s Position	24
B. Treatment of Red Notices in Other Contexts Governed by U.S. Law	27
C. Treatment of Red Notices by International Authorities	36
CONCLUSION.....	39
CERTIFICATE OF COMPLIANCE	40
CERTIFICATE OF SERVICE	41

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Alvarez-Machain v. United States</i> , 331 F.3d 604 (9th Cir. 2003)	12
<i>Collins v. Loisel</i> , 259 U.S. 309 (1922)	31
<i>Flynn v. Brown</i> , 395 F.3d 842 (8th Cir. 2005)	29, 35
<i>In re Extradition of Atuar</i> , 300 F. Supp. 2d 418 (S.D. W. Va. 2003).....	31
<i>Marroquin-Retana v. Attorney General of the U.S.</i> , 675 F. App'x 216 (3d Cir. 2017).....	35
<i>Matter of W-E-R-B-</i> , 27 I&N Dec. 795 (BIA 2020)	3, 4, 23, 31
<i>Radiowala v. Attorney General of the U.S.</i> , 930 F.3d 577 (3d Cir. 2019).....	35–36
<i>Tatintsyan v. Barr</i> , 799 F. App'x 965 (9th Cir. 2020)	34
<i>United States v. Fernandez-Morris</i> , 99 F. Supp. 2d 1358 (S.D. Fla. 1999)	30
<i>United States v. Krueger</i> , 809 F.3d 1109 (10th Cir. 2015)	13
<i>United States v. Ortiz-Cervantes</i> , 868 F.3d 695 (8th Cir. 2017)	12–13

Statutes

18 U.S.C. § 3184..... 30

Other Authorities

European Parliament, *Question for Written Answer E-011459/13 to the Commission: Risk of Exclusion from Asylum Under the Refugee Qualification Directive*, 2014 O.J. (C 86 E) 1, available at <https://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2013-011459+0+DOC+XML+V0//EN&language=EN> 38

Fair Trials, *Dismantling the Tools of Oppression: Ending the Misuse of INTERPOL* (2018), available at https://www.fairtrials.org/sites/default/files/publication_pdf/Dismantling%20the%20tools%20of%20oppression.pdf..... *passim*

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Instrument Amending the Treaty of 31 March 2003, U.K.-U.S., Annex, Dec. 16, 2004, T.I.A.S. No. 10-201.23 33

INTERPOL Const. art. 25, 6, 17

INTERPOL Const. art. 3 17

INTERPOL, *About Notices*, <https://www.interpol.int/en/How-we-work/Notices/About-Notices> (last visited May 26, 2020)..... 9

INTERPOL, <i>Commission for the Control of INTERPOL's Files (CCF)</i> , https://www.interpol.int/en/Who-we-are/Commission-for-the-Control-of-INTERPOL-s-Files-CCF (last visited May 26, 2020)	21
INTERPOL, <i>Commission for the Control of INTERPOL's Files (CCF), Frequently Asked Questions</i> , https://www.interpol.int/en/Who-we-are/Commission-for-the-Control-of-INTERPOL-s-Files-CCF/Frequently-Asked-Questions (last visited May 26, 2020).....	23
INTERPOL, <i>How to Submit a Request</i> , https://www.interpol.int/en/Who-we-are/Commission-for-the-Control-of-INTERPOL-s-Files-CCF/How-to-submit-a-request (last visited May 26, 2020)	21, 22
INTERPOL, <i>INTERPOL's Rules on the Processing of Data</i> art. 83, III/IRPD/GA/2011 (2019).....	10, 18
INTERPOL, <i>Member Countries</i> , https://www.interpol.int/en/Who-we-are/Member-countries (last visited May 26, 2020).....	6
INTERPOL, <i>National Central Bureaus (NCBs)</i> , https://www.interpol.int/en/Who-we-are/Member-countries/National-Central-Bureaus-NCBs (last visited May 26, 2020)	7
INTERPOL, <i>Our 18 Databases</i> , https://www.interpol.int/en/How-we-work/Databases/Our-18-databases (last visited May 26, 2020)	5
INTERPOL, <i>Red Notices</i> , https://www.interpol.int/en/How-we-work/Notices/Red-Notices (last visited May 26, 2020)	<i>passim</i>

INTERPOL, <i>What Is INTERPOL?</i> , https://www.interpol.int/en/Who-we-are/What-is-INTERPOL (last visited May 26, 2020).....	5
Reuters, <i>Merkel Attacks Turkey’s ‘Misuse’ of Interpol Warrants</i> , Aug. 20, 2017, https://reut.rs/360gYpI	16
U.N. High Comm’r for Refugees, Guidance Note on Extradition and International Refugee Protection (Apr. 2008), available at https://www.refworld.org/docid/481ec7d92.html	38
U.S. Dep’t of Justice, Justice Manual § 1-1.100 (2018), available at https://www.justice.gov/jm/jm-1-1000-introduction	12
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U.S. Dep’t of State, 7 FAM 1616 (2018), available at https://fam.state.gov/FAM/07FAM/07FAM1610.html	32

U.S. Dep't of State, 7 FAM 1634 (2018), available at
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2020) 27

INTEREST OF *AMICUS CURIAE*¹

Amicus curiae Fair Trials submits this brief in support of neither party for the limited purpose of explaining the function, legal consequences, and limitations of INTERPOL Red Notices. Fair Trials works worldwide to promote respect for the right to a fair trial according to internationally recognized standards of justice. Fair Trials pursues its mission in three main ways: by helping people exercise their rights through the provision of information and engagement in strategic casework; by fighting the underlying causes of unfair trials; and by building an international network of fair trial defenders. This work has enabled Fair Trials to develop and apply a body of research and practical expertise in the criminal justice systems of a wide range of jurisdictions, as well as in international practice and procedure on cross-border justice.

¹ Pursuant to Fed. R. App. P. 29(a)(4)(E), no counsel for a party authored this brief in whole or in part. No person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Pursuant to Fed. R. App. P. 29(a)(2), the parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Fair Trials submits this brief to provide an independent, research-based explanation of INTERPOL Red Notices. Because the general public and even government officials often misunderstand Red Notices, this brief will explain what they are and what they are not. Red Notices *are* one of many mechanisms for communication among national law enforcement authorities. They *are* international “wanted” notices INTERPOL disseminates at the request of a member country to inform member nations that another country is seeking someone. They are *not* “international arrest warrants” authorizing that person’s arrest. They *are* a form of international law enforcement cooperation among governments, although they serve limited functions that depend on the circumstances of the particular Red Notice and the domestic laws of the relevant INTERPOL member states.

As explained below, in all relevant U.S. contexts, a Red Notice alone is not sufficient to show probable cause that a crime has occurred. Thus, Red Notices are *not*, in the United States, evidence

sufficient to support an arrest for purposes of prosecution, an arrest pending extradition proceedings, the issuance of a criminal indictment, or a finding of extraditability—all of which require a showing of probable cause. These limitations on the legal consequences of Red Notices in the United States are directly relevant to the question before this Court, which is whether a Red Notice, by itself, constitutes evidence sufficient to trigger the “serious nonpolitical crimes” bar for asylum and withholding of removal. That bar to admissibility exists where “there are serious reasons for believing that the alien committed a serious nonpolitical crime” before arriving in the United States.² The Board of Immigration Appeals (“BIA”) interprets the “serious reasons for believing” standard as equivalent to probable cause.³ According to the decision below, “the serious nonpolitical crimes bar requires . . . *commission of* . . . a

² *Matter of W-E-R-B-*, 27 I&N Dec. 795, 796 (BIA 2020).

³ *Id.* at 796–97 (quoting *Matter of E-A-*, 26 I&N Dec. 1 (BIA 2012)).

crime”; it is not enough to show that charges are pending in another country.⁴

Fair Trials takes no position on the correctness of the BIA’s interpretation of the “serious reasons for believing” standard. Rather, starting from the premise that the “serious reasons for believing” standard is equivalent to probable cause, this brief focuses solely on the limited legal weight U.S. law and practice afford Red Notices. Part I provides basic information about INTERPOL and Red Notices, including their limitations. Part II addresses (1) the positions of relevant U.S. agencies on the legal effect of Red Notices; (2) the treatment of Red Notices in various contexts and proceedings governed by U.S. law; and (3) statements by international entities regarding the reliability of Red Notices.

ARGUMENT

I. INTERPOL and Red Notices

A. Background on INTERPOL

“INTERPOL,” formally known as the International Criminal

⁴ *See id.* at 798 n.3 (emphasis added).

Police Organization, is an inter-governmental body founded to advance two broad aims: “[t]o ensure and promote the widest possible mutual assistance between all criminal police authorities,” and “[t]o establish and develop all institutions likely to contribute effectively to the prevention and suppression of ordinary law crimes.”⁵

INTERPOL is not a global police force. It has no mandate to arrest anyone, or to investigate or prosecute crimes.⁶ Rather, INTERPOL acts primarily as an information-sharing platform intended to help national police forces to cooperate worldwide.⁷ For example, it maintains 18 databases on everything from stolen art works to crime-scene fingerprints.⁸ Occasionally, INTERPOL offers

⁵ INTERPOL Const. art. 2.

⁶ Fair Trials Int’l, *Strengthening Respect for Human Rights, Strengthening INTERPOL* 12 (2013), available at <https://www.fairtrials.org/wp-content/uploads/Strengthening-respect-for-human-rights-strengthening-INTERPOL4.pdf>.

⁷ INTERPOL, *What Is INTERPOL?*, <https://www.interpol.int/en/Who-we-are/What-is-INTERPOL> (last visited May 26, 2020).

⁸ INTERPOL, *Our 18 Databases*, <https://www.interpol.int/en/How-we-work/Databases/Our-18-databases> (last visited May 26, 2020).

technical and operational support, sometimes even deploying “Incident Response Teams” to assist national police forces during joint cross-border operations or events such as during the immediate aftermath of a terrorist attack.⁹ But such operations are unusual and secondary to INTERPOL’s principal mission of facilitating communications between national police forces.

INTERPOL’s membership spans 194 countries worldwide, ranging from Algeria and Austria to Zambia and Zimbabwe, reflecting the organization’s longstanding institutional goal of promoting police cooperation at “the widest possible” level.¹⁰ INTERPOL’s inclusive, big-tent approach means its membership encompasses nations with a broad variety of criminal justice systems. Some INTERPOL members, like the United States and United Kingdom, have well-developed criminal justice systems featuring robust due process protections. Others have less-developed criminal justice

⁹ *See Strengthening INTERPOL*, *supra* note 6, at 12.

¹⁰ INTERPOL, *Member Countries*, <https://www.interpol.int/en/Who-we-are/Member-countries> (last visited May 26, 2020); INTERPOL Const. art. 2.

systems, some of which have been criticized for being misused for political purposes—some even in ways that violate human rights.

Each INTERPOL member has a National Central Bureau (“NCB”). An NCB is the entity within each member state designated to act as the organization’s contact point for that country.¹¹ An NCB will typically be a division of the national police force responsible for serious crime or cross-border cooperation.¹² Each NCB communicates with the NCBs in other countries and with INTERPOL, in addition to other agencies in the country where it is located.¹³ The NCBs work through INTERPOL’s secure global police communications network, “I-24/7.”¹⁴ Using I-24/7, an NCB can access INTERPOL’s databases as well as share information with INTERPOL and other NCBs.¹⁵ An NCB can also authorize other law

¹¹ See INTERPOL, *National Central Bureaus (NCBs)*, <https://www.interpol.int/en/Who-we-are/Member-countries/National-Central-Bureaus-NCBs> (last visited May 26, 2020).

¹² See *Strengthening INTERPOL*, *supra* note 6, at 12.

¹³ See INTERPOL, *National Central Bureaus*, *supra* note 11.

¹⁴ *Id.*

¹⁵ *Id.*

enforcement agencies within its host country to access INTERPOL databases.¹⁶ Some INTERPOL systems are designed to be consulted in the field, and they are often used by border control officials carrying out routine identity and travel document checks.¹⁷

Consider an example of how this system might work in practice. One of Country A's local law enforcement agencies learns of a child abduction. Suspecting that the child has been taken abroad, the agency alerts its nation's NCB, which in turn uploads a missing person notice through INTERPOL's I-24/7 system. Shortly afterward, the suspect tries to enter Country B with the missing child. Country B's immigration authorities have access to the relevant parts of the INTERPOL database, so they are able to cross-reference the child's name. Country B's immigration authorities are therefore able to notify Country A that they have located the child and to take appropriate actions.

¹⁶ *See Strengthening INTERPOL*, *supra* note 6, at 12.

¹⁷ *Id.*

B. INTERPOL Red Notices

INTERPOL allows its members to quickly share certain kinds of alerts and requests for information through a system of color-coded notices.¹⁸ For example, a Black Notice seeks information on an unidentified body, while a Yellow Notice aims to locate missing persons, including abducted children.¹⁹ Orange Notices warn of a serious and imminent threat to public safety, and Purple Notices are used to seek information about criminal methods.²⁰

Red Notices seek the locations of wanted persons and request their provisional arrest pending their extradition or surrender.²¹ Sometimes described as a “wanted poster with teeth,”²² every Red Notice contains two categories of information: (1) information that

¹⁸ See INTERPOL, *About Notices*, <https://www.interpol.int/en/How-we-work/Notices/About-Notices> (last visited May 26, 2020).

¹⁹ *Id.*

²⁰ *Id.*

²¹ See INTERPOL, *Red Notices*, <https://www.interpol.int/en/How-we-work/Notices/Red-Notices> (last visited May 26, 2020). As INTERPOL puts it, “[a] Red Notice is a request to law enforcement worldwide to locate and provisionally arrest a person pending extradition, surrender, or similar legal action.” *Id.*

²² See *Strengthening INTERPOL*, *supra* note 6, at 16.

identifies the wanted person, such as name, birth date, nationality, and physical characteristics; and (2) information about the underlying crime, including a summary of the alleged facts, specifics of the alleged offense, and the relevant legal framework.²³

Every Red Notice must include a reference to a national arrest warrant or judicial decision.²⁴ INTERPOL, however, does not require that the warrant be issued pursuant to any particular process (*e.g.*, by a neutral judicial magistrate who would seek to ensure that the charge has a legitimate law enforcement purpose). Based on the warrant or decision, the nation's NCB will submit a request to INTERPOL to publish a Red Notice, and INTERPOL's General Secretariat will then conduct a preliminary review to determine whether the request appears to comply with INTERPOL's Constitution and Rules.²⁵ For example, the General Secretariat will look

²³ See INTERPOL, *Red Notices*, *supra* note 21.

²⁴ See INTERPOL, *INTERPOL's Rules on the Processing of Data* art. 83(2)(b)(v), III/IRPD/GA/2011 (2019).

²⁵ See Fair Trials, *Dismantling the Tools of Oppression: Ending the Misuse of INTERPOL* 11 (2018), available at

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to see that the Red Notice provides all the required information, as well as that the underlying offense is sufficiently serious and not overtly political or cultural.²⁶ If satisfied that the requirements appear to be met, the General Secretariat will publish the Red Notice, which will be made available to every member country through the I-24/7 system.²⁷ INTERPOL's review is not extensive or probing: from start to finish, the process usually takes no longer than 24 hours.²⁸

A Red Notice is “*not* an international arrest warrant.”²⁹ INTERPOL emphasizes this point in public statements, adding that individuals who are the subject of Red Notices are not “wanted by

https://www.fairtrials.org/sites/default/files/publication_pdf/Dismantling%20the%20tools%20of%20oppression.pdf.

²⁶ See *Strengthening INTERPOL*, *supra* note 6, at 21. Since 2012, a Red Notice must involve an alleged crime that meets certain minimum sentence thresholds, including that the offense charged be punishable by at least two years of detention. *Id.*

²⁷ See *Dismantling*, *supra* note 25, at 12.

²⁸ See *Strengthening INTERPOL*, *supra* note 6, at 14.

²⁹ INTERPOL, *Red Notices*, *supra* note 21 (emphasis added).

INTERPOL” in any sense.³⁰ Likewise, the U.S. Department of Justice’s Justice Manual, which is the authoritative public source for DOJ policies and procedures,³¹ observes that “[i]n the United States, national law prohibits the arrest of the subject of a Red Notice issued by another INTERPOL member country, based upon the notice alone.”³² Under ordinary principles of law respecting the sovereignty of states, warrants presumptively have no effect outside of the jurisdiction in which they are issued.³³ A Red Notice is thus

³⁰ *Id.*

³¹ See U.S. Dep’t of Justice, Justice Manual § 1-1.100 (2018), available at <https://www.justice.gov/jm/jm-1-1000-introduction>.

³² U.S. Dep’t of Justice, Justice Manual, Organization and Functions Manual § 3(A), available at <https://www.justice.gov/jm/organization-and-functions-manual-3-provisional-arrests-and-international-extradition-requests>.

³³ Generally speaking, one country cannot issue a warrant to arrest an individual present in another country; as the *en banc* Ninth Circuit once observed, “a federal arrest warrant, without more, hardly serves as a license to effectuate arrests worldwide.” *Alvarez-Machain v. United States*, 331 F.3d 604, 623 (9th Cir. 2003) (*en banc*), *rev’d on other grounds sub nom. Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), *vacated*, 374 F.3d 1384 (9th Cir. 2004). The Eighth Circuit recently held that “when a magistrate judge issues a search warrant outside his jurisdiction, that search warrant is ‘invalid at its inception’” *United States v. Ortiz-Cervantes*, 868 F.3d 695,

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only “a *request* . . . to locate and provisionally arrest a person,” and individual nations must decide how much weight—if any—they want to give that request.³⁴

C. The Troubled History of Red Notices

The use of Red Notices has occasioned some controversy. They have served as an increasingly popular tool for law enforcement authorities, but they have also been subject to serious abuse and, in recent years, significant criticism.

Red Notices were used relatively infrequently for most of INTERPOL’s history.³⁵ In 2009, however, INTERPOL enabled NCBs for the first time to upload the content of Red Notices directly onto INTERPOL’s databases.³⁶ Since then, INTERPOL’s issuance of Red Notices has jumped dramatically, rising from 3,126 in 2008 to

702 (8th Cir. 2017) (citation omitted); *see also United States v. Krueger*, 809 F.3d 1109, 1124 (10th Cir. 2015) (Gorsuch, J., concurring in the judgment) (“The principle animating the common law at the time of the Fourth Amendment’s framing was clear: a warrant may travel only so far as the power of its issuing official.”).

³⁴ INTERPOL, *Red Notices*, *supra* note 21 (emphasis added).

³⁵ *See Strengthening INTERPOL*, *supra* note 6, at 14.

³⁶ *Id.*

5,020 in 2009, and increasing every year thereafter.³⁷ Last year, INTERPOL issued 13,377 new Red Notices, bringing the total of active Red Notices to approximately 62,000.³⁸

Alongside the fast rise of Red Notices came mounting evidence of abuse and calls for reform. In some cases, member states issued Red Notices not for legitimate law enforcement purposes but to harass political dissidents by restricting their movements, damaging their reputations, and making it more difficult for them to secure employment.³⁹ In fact, in several cases, the subjects of the Red Notices had already been granted asylum precisely because of the politically motivated charges on which the Red Notices were based.⁴⁰ Red Notices were also used by some countries as a public relations instrument to signal disfavor of individuals or groups. Other Red Notices were deployed by well-connected individuals to push

³⁷ *See Dismantling*, *supra* note 25, at 6.

³⁸ INTERPOL, *Red Notices*, *supra* note 21.

³⁹ For examples of the problems described in this paragraph, see generally *Strengthening INTERPOL*, *supra* note 6.

⁴⁰ *See, e.g., id.* at 23.

prosecutors and judges into commencing unfounded criminal proceedings. Finally, in some cases, countries had INTERPOL publish Red Notices even though they had no intention of seeking extradition, sometimes because the charges were stale, mistaken, or insufficiently serious to warrant extradition.

In 2013, Fair Trials issued a report, *Strengthening Respect for Human Rights, Strengthening INTERPOL*, that shone a spotlight on many of these problems and recommended reforms.⁴¹ Several of Fair Trials' criticisms were amplified by major media outlets, including *The New York Times*, *The Washington Post*, *The Economist*, *The Telegraph*, *Deutsche Welle*, *El Pais*, and *Al Jazeera*.⁴² Prominent politicians have echoed many of these concerns.⁴³ For example, German Chancellor Angela Merkel criticized Spain's detention of a German-Turkish writer based on a Turkish Red Notice that she said was politically motivated, commenting that "[w]e

⁴¹ *See generally id.*

⁴² *See Dismantling*, *supra* note 25, at 26–29.

⁴³ *Id.* at 36.

must not misuse international organizations like Interpol for such purposes.”⁴⁴

INTERPOL responded by starting the process of reform. For example, INTERPOL stopped allowing countries to circulate requests for Red Notices before they were formally reviewed and approved by the General Secretariat. INTERPOL also adopted a rule requiring the deletion of Red Notices for persons the General Secretariat determines are recognized refugees. And INTERPOL has created a more effective redress mechanism for individuals who believe that they are wrongly the subjects of Red Notices.⁴⁵

Despite those reforms, however, the Red Notice process continues to have major shortcomings. INTERPOL’s objectives of broadening membership and facilitating international communication means that some trade-offs are inevitable. The upshot is that Red Notices should be considered with a complete understanding of

⁴⁴ Reuters, *Merkel Attacks Turkey’s ‘Misuse’ of Interpol Warrants*, Aug. 20, 2017, <https://reut.rs/360gYpI>.

⁴⁵ *See generally Dismantling*, *supra* note 25, at 31–37, 39.

their purpose and limitations, as well as an understanding of the problems that have accompanied their rapid growth.

First, INTERPOL has only minimal authority, staffing, and knowledge of individual cases to bring to bear on the task of vetting proposed Red Notices for consistency with INTERPOL’s Constitution and Rules before their publication. The relevant INTERPOL documents are broadly worded. For example, Article 2 of INTERPOL’s Constitution states that the organization’s activities should be carried out “in the spirit of the ‘Universal Declaration of Human Rights,’”⁴⁶ and Article 3 prohibits INTERPOL from engaging in any “activities of a political, military, religious or racial character.”⁴⁷ INTERPOL has recognized that one of Article 3’s primary objectives is to protect individuals from persecution.⁴⁸ As part of its recent reforms, INTERPOL has clarified that all data processed through INTERPOL’s systems—including Red Notices—should comply with

⁴⁶ INTERPOL Const. art. 2.

⁴⁷ *Id.* art. 3.

⁴⁸ *See Dismantling*, *supra* note 25, at 16.

these principles.⁴⁹

Unfortunately, INTERPOL's structure is not conducive to filtering legitimate Red Notices from those that are abusive or ill-founded before dissemination. Part of the problem is that the General Secretariat has no way to validate the information given to it by an NCB.⁵⁰ For example, there is usually no effective way for the General Secretariat to confirm an NCB's assertion that it has issued a valid arrest warrant for a non-political crime. Indeed, INTERPOL's Rules on the Processing of Data do not require an NCB to furnish a copy of the underlying arrest warrant.⁵¹ On rare occasions, a case will generate significant-enough media coverage that it will be clear at the outset that a request for a Red Notice is political or inappropriate in some way.⁵² Often, however, the General

⁴⁹ *Id.*

⁵⁰ *See id.* at 17–19, 33–37.

⁵¹ *See* INTERPOL, *INTERPOL's Rules on the Processing of Data*, *supra* note 24, art. 83(2)(b)(v); *see also Dismantling*, *supra* note 25, at 19.

⁵² *See Dismantling*, *supra* note 25, at 34–35.

Secretariat must review Red Notice requests quickly and likely with little context to evaluate whether they comply with INTERPOL requirements. Fair Trials has encountered numerous cases in which Red Notices were issued although even a quick internet search would have revealed that the notice likely violated INTERPOL's Constitution or Rules.⁵³

INTERPOL's review process is also hampered by its limited capacity. The specific INTERPOL team that reviews Red Notices has only 30–40 staff members.⁵⁴ They must evaluate well over 10,000 new Red Notices each year, in addition to periodically reviewing the 62,000 active Red Notices.⁵⁵ On top of that, this team is also responsible for reviewing annually over 20,000 “Diffusions,” which function as informal Red Notices passed directly between NCBs.⁵⁶ Until INTERPOL ensures that it has a team able to handle this

⁵³ *Id.* at 35–36.

⁵⁴ *Id.* at 34.

⁵⁵ *Id.* at 36–37.

⁵⁶ *See id.* at 11–13, 31, 36.

heavy workload, it is likely that the review process will remain superficial and vulnerable to error.

Second, despite the adverse consequences of being named in a Red Notice, most are secret. Only 7,000 of the 62,000 currently valid Red Notices are public.⁵⁷ The general need for secrecy is understandable; wanted persons may be harder to apprehend if they know that they are the subject of a Red Notice. But the non-public nature of most Red Notices also means that individuals subject to them—even those founded on inaccurate information or improper motives—may not know, and thus have no opportunity to challenge them. Often, the first time someone learns that they are the subject of a Red Notice is when they are detained by a foreign country.⁵⁸

Third, even when individuals know they are the subject of a Red Notice, challenging them can be time-consuming and unproductive. Challenges to Red Notices are handled by the Commission for the Control of INTERPOL's Files ("CCF"), an entity with

⁵⁷ See INTERPOL, *Red Notices*, *supra* note 21.

⁵⁸ See, e.g., *Strengthening INTERPOL*, *supra* note 6, at 16.

supervisory powers that consults with the General Secretariat.⁵⁹ INTERPOL has sought to strengthen CCF's capacity and expertise in recent years.⁶⁰ Significantly, the CCF recently adopted a presumption that information in Red Notices should be disclosed to applicants who request it.⁶¹ But despite this presumption, INTERPOL continues to consider NCBs to have ultimate control over the information they provide, meaning that the CCF will not disclose information before seeking the relevant NCB's permission.⁶² Sometimes this leads to absurd results; in one case, the CCF refused to confirm whether China had issued a Red Notice against Dolkun Isa, a leader of the World Uyghur Congress, even though the Chinese

⁵⁹ See INTERPOL, *Commission for the Control of INTERPOL's Files (CCF)*, <https://www.interpol.int/en/Who-we-are/Commission-for-the-Control-of-INTERPOL-s-Files-CCF> (last visited May 26, 2020); INTERPOL, *How to Submit a Request*, <https://www.interpol.int/en/Who-we-are/Commission-for-the-Control-of-INTERPOL-s-Files-CCF/How-to-submit-a-request> (last visited May 26, 2020).

⁶⁰ See *Dismantling*, *supra* note 25, at 43.

⁶¹ See *id.* at 44.

⁶² See *id.*

Ministry of Foreign Affairs had publicly admitted that fact.⁶³

Even when individuals can access the information necessary to challenge a Red Notice, success can be elusive. INTERPOL has explained that the CCF “is not empowered to lead an investigation, to weigh evidence, or to make a determination on the merits of a case,” as these tasks are the responsibility of national authorities.⁶⁴ The CCF also refrains from making general assessments about a country’s legal system.⁶⁵ Challengers bear the burden of convincing the CCF that a Red Notice violates INTERPOL’s Constitution or Rules, even where those challengers have incomplete information about the substance of a request.

Finally, although the CCF has instituted internal deadlines for reviewing requests to correct or delete the data in Red Notices, its deadlines still allow the organization to take up to nine months

⁶³ *See id.* at 45, 58. Fair Trials was eventually able to help have Dolkun’s Red Notice deleted by demonstrating to the CCF that he had previously been recognized as a refugee and that several attempts to extradite him had failed. *See id.* at 58.

⁶⁴ INTERPOL, *How to Submit*, *supra* note 59.

⁶⁵ *See Dismantling*, *supra* note 25, at 48.

before reaching a decision.⁶⁶ In the meantime, even ultimately successful challengers face significant reputational, practical, and political consequences while their submissions are pending, including restricted travel and, in some places, the constant risk of arrest.

II. The Legal Significance of Red Notices

The central question before this Court is whether a Red Notice alone can provide “serious reasons for believing” that a person committed a serious nonpolitical crime prior to arriving in the United States, sufficient to bar that person from eligibility for asylum or withholding of removal. According to the BIA, the “serious reasons for believing” standard is equivalent to probable cause.⁶⁷ In considering whether a Red Notice, by itself, can satisfy that standard, three reference points are instructive: (1) the position of U.S.

⁶⁶ INTERPOL, *Commission for the Control of INTERPOL’s Files (CCF), Frequently Asked Questions*, <https://www.interpol.int/en/Who-we-are/Commission-for-the-Control-of-INTERPOL-s-Files-CCF/Frequently-Asked-Questions> (last visited May 26, 2020).

⁶⁷ *Matter of W-E-R-B-*, 27 I&N Dec. 795, 796–97 (BIA 2020) (quoting *Matter of E-A-*, 26 I&N Dec. 1 (BIA 2012)).

authorities on the legal effect of Red Notices; (2) the treatment of Red Notices in other contexts and proceedings governed by U.S. law; and (3) the treatment of Red Notices by international authorities such as INTERPOL and the UN High Commissioner for Refugees. All three suggest that a Red Notice, by itself, is not sufficient to establish probable cause as a matter of U.S. law.

A. The U.S. Government's Position

As explained above, a Red Notice is a request from one INTERPOL member country to other members about persons sought for prosecution or to serve a sentence.⁶⁸ It is not an international arrest warrant; rather, each member country decides what effect should be given to a Red Notice within its jurisdiction.⁶⁹ In the United States, all relevant authorities agree that a Red Notice is simply an international “wanted” notice: it is not, by itself, sufficient to support an arrest for purposes of criminal prosecution, an arrest pending extradition proceedings, or any other action that depends on a

⁶⁸ INTERPOL, *Red Notices*, *supra* note 21.

⁶⁹ *Id.*

showing of probable cause.

The U.S. agencies principally responsible for international law enforcement cooperation—the Department of Justice, the Department of Homeland Security, and the Department of State—are also the key players in U.S. immigration proceedings and share this view of the limited significance of a Red Notice within the United States.⁷⁰ Thus, their statements regarding the legal effect of Red Notices are highly relevant here.

All three agencies have taken the position—memorialized in authoritative manuals and public statements—that a Red Notice is not, by itself, sufficient to support legal action that requires a showing of probable cause. For example, the FAQ for INTERPOL Washington (a component of DOJ that is co-managed by DHS) explains:

Can a person be arrested based on an INTERPOL Red Notice? Once published by INTERPOL, each member country determines what effect to give a Notice within its jurisdiction according to its national law and

⁷⁰ See U.S. Dep't of State, 7 FAM 1614 (2018), available at <https://fam.state.gov/FAM/07FAM/07FAM1610.html> (describing the roles of U.S. agencies and INTERPOL in locating, transporting, and extraditing fugitives).

practice. *The United States does not consider a Red Notice alone to be a sufficient basis for the arrest of a subject because it does not meet the requirements for arrest under the 4th Amendment to the Constitution.* Instead, the United States treats a foreign-issued Red Notice only as a formalized request by the issuing law enforcement authority to “be on the look-out” for the fugitive in question, and to advise if they are located.⁷¹

The authoritative policies set forth in the manuals of the Department of Justice and the Department of State reflect the same understanding. The Justice Department cautions in its Organization and Functions Manual: “In the United States, *national law prohibits the arrest of the subject of a Red Notice issued by another INTERPOL member country, based upon the notice alone.*”⁷² The State Department’s Foreign Affairs Manual (“FAM”) likewise explains: “INTERPOL issues ‘red notices’, which are in effect international all point’s bulletins. Some countries also view red notices as

⁷¹ See U.S. Dep’t of Justice, *INTERPOL Washington: Frequently Asked Questions*, last updated Oct. 29, 2019, <https://www.justice.gov/interpol-washington/frequently-asked-questions> (emphasis added).

⁷² Organization and Functions Manual, *supra* note 32, § 3(A) (emphasis added).

international arrest warrants and, in effect, international requests for provisional arrest. *The United States does not provisionally arrest a person simply because of a red notice.*⁷³

These statements confirm that the U.S. agencies principally responsible for international law enforcement all agree that Red Notices alone do not permit them to act in situations that require a showing of probable cause. These agency positions are borne out in practice, as discussed below.

B. Treatment of Red Notices in Other Contexts Governed by U.S. Law

The treatment of Red Notices is consistent across many U.S. legal and law enforcement contexts: as a matter of law and practice, U.S. courts and agencies refuse to treat Red Notices, by themselves,

⁷³ U.S. Dep't of State, 7 FAM 1614.2(a) (2018) (emphasis added), available at <https://fam.state.gov/FAM/07FAM/07FAM1610.html>. The FAM is the “single, comprehensive, and authoritative source for the Department’s organization structures, policies, and procedures that govern the operations of the State Department, the Foreign Service and, when applicable, other federal agencies.” U.S. Dep't of State, *Foreign Affairs Manual and Handbook*, <https://fam.state.gov/> (last visited May 26, 2020).

as sufficient to establish probable cause. Two such contexts, domestic criminal justice and international extradition, are particularly instructive. Like the “serious reasons for believing” inquiry, both involve a threshold assessment of whether there is enough information to believe that a crime was *committed*, rather than simply charged or alleged. In each setting, courts and agencies require independent evidence of probable cause, such as witness statements, rather than simply relying upon the existence of a Red Notice. Indeed, to the extent U.S. authorities act upon Red Notices, they do so in ways that do not require a showing of probable cause, such as routine law enforcement communications on the locations or movements of suspects. In line with these principles, federal appellate courts have required more than an unsupported Red Notice to satisfy the “serious reasons for believing” standard.

1. Domestic Criminal Proceedings

In domestic criminal proceedings, probable cause is the threshold standard that determines whether an arrest warrant may issue, a grand jury may return an indictment, or a magistrate may “hold

a defendant to answer in the district court.”⁷⁴ Failure to establish probable cause is “an absolute bar to initiating a federal prosecution.”⁷⁵ In the Eighth Circuit, probable cause exists where “the totality of facts based on reasonably trustworthy information would justify a prudent person in believing the individual arrested had committed . . . an offense.”⁷⁶

As discussed, DOJ recognizes that a Red Notice issued by a foreign government is insufficient to establish probable cause in a criminal case.⁷⁷ Because a Red Notice “does not meet the requirements for arrest under the 4th Amendment to the Constitution,” an arrest based solely on such a notice would be inconsistent with U.S. law.⁷⁸ Likewise, DOJ’s Organization and Functions Manual

⁷⁴ U.S. Dep’t of Justice, Justice Manual § 9-27.200 cmt. (2018), available at <https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution#9-27.200> (citing Fed R. Crim. P. 4(a), 5.1(a)).

⁷⁵ *Id.*

⁷⁶ *Flynn v. Brown*, 395 F.3d 842, 844 (8th Cir. 2005) (quoting *Hannah v. City of Overland*, 795 F.2d 1385, 1389 (8th Cir. 1986)).

⁷⁷ *See INTERPOL Washington: Frequently Asked Questions*, *supra* note 71.

⁷⁸ *Id.*

prohibits “the arrest of the subject of a Red Notice issued by another INTERPOL member country, based upon the notice alone,” as a matter of “national law.”⁷⁹

Of course, as in any other criminal case, U.S. authorities may arrest a person subject to a Red Notice based on an *independent* showing of probable cause. They simply may not do so based on a Red Notice alone.

2. U.S. Extradition Practice

The U.S. extradition context is also instructive because, as a matter of U.S. law, a magistrate or district judge must make a finding of probable cause before determining that a person is extraditable for purposes of prosecution by a foreign country.⁸⁰ The Supreme Court has described this standard as requiring “competent evidence

⁷⁹ Organization and Functions Manual, *supra* note 32, § 3(A).

⁸⁰ *See, e.g., United States v. Fernandez-Morris*, 99 F. Supp. 2d 1358, 1360 (S.D. Fla. 1999); *see also* 18 U.S.C. § 3184 (providing for a determination of whether there is evidence “sufficient to sustain the charge under the provisions of the proper treaty or convention, or under section 3181(b)”).

to justify holding the accused to await trial.”⁸¹ This assessment mirrors both the probable cause analysis in the criminal context and the “serious reasons for believing” inquiry as defined by the BIA.⁸²

U.S. extradition practice is governed by both treaty and domestic legislation, codified at 18 U.S.C. § 3181 *et seq.* When a foreign state requests a person’s extradition for purposes of prosecution, before a court will authorize extradition, the individual must appear before a magistrate or district court judge for proceedings, generally including an initial appearance, bail determination, and probable cause hearing. The extradition judge must determine whether: (1) there is a treaty in force; (2) the person arrested is in

⁸¹ *Collins v. Loisel*, 259 U.S. 309, 316 (1922).

⁸² *See In re Extradition of Atuar*, 300 F. Supp. 2d 418, 426 (S.D. W. Va. 2003) (collecting cases in support of the premise that “[t]he probable cause standard [in extradition proceedings] is identical to the probable cause standard applicable in preliminary hearings in federal criminal proceedings”), *aff’d sub nom. Atuar v. United States*, 156 F. App’x 555 (4th Cir. 2005); *Matter of W-E-R-B-*, 27 I&N Dec. 795, 798 n.3 (BIA 2020) (“[T]he serious nonpolitical crimes bar requires only *commission of*, not conviction for, a crime.” (emphasis added)).

fact the person sought by the requesting state; (3) the crime in question is extraditable under the treaty; (4) *the request sets out probable cause to believe that the person committed the charged crime*; and (5) there are no treaty grounds that would require denial of extradition.⁸³

In determining whether probable cause exists, the extradition judge does not defer to the existence of a Red Notice or the requesting state's bare representations. Rather, the requesting state must submit specific supporting documents to establish probable cause, and the person sought for extradition may challenge the sufficiency of that evidence in court.⁸⁴ For example, the 2003 extradition treaty between the United States and the United Kingdom, as amended by an instrument incorporating provisions from the U.S.–E.U. Treaty, provides that a request for extradition of a person sought

⁸³ U.S. Dep't of State, 7 FAM 1616(d) (2018), available at <https://fam.state.gov/FAM/07FAM/07FAM1610.html> (emphasis added).

⁸⁴ See U.S. Dep't of State, 7 FAM 1634.2(c) (2018), available at <https://fam.state.gov/FAM/07FAM/07FAM1630.html>.

for prosecution must include: “a copy of the warrant or order of arrest issued by a judge or other competent authority”; “a copy of the charging document, if any”; and, “for requests to the United States, such information as would provide a reasonable basis to believe that the person sought committed the offense for which extradition is requested.”⁸⁵ These requirements ensure that a person is returned to the foreign country only upon an independent showing of probable cause—a showing that goes beyond the request itself.

3. Other Law Enforcement Cooperation

While U.S. authorities frequently cooperate with foreign law enforcement partners in connection with Red Notices, that activity occurs in contexts that do not require a showing of probable cause. For example, INTERPOL Washington may notify a foreign law enforcement partner that the subject of a Red Notice is present in the United States; the State and Justice Departments may interface

⁸⁵ Instrument Amending the Treaty of 31 March 2003, U.K.-U.S., Annex, art. 8(3), Dec. 16, 2004, T.I.A.S. No. 10-201.23; *see also* U.S. Dep’t of State, 7 FAM 1634.2(b) (2018) (explaining extradition judge’s determination of probable cause).

with treaty partners regarding prospective extradition requests; and a federal prosecutor may coordinate with INTERPOL Washington to publish a Red Notice for a suspect located outside the United States. These activities are fully consistent with the U.S. government position that a foreign Red Notice constitutes an international “wanted” notice, rather than independent evidence rising to the level of probable cause that a crime has occurred.

4. “Serious Reasons for Believing” Standard

In general, decisions by other federal appellate courts are in accord with the above principles. In *Tatintsyan v. Barr*, for example, the Ninth Circuit recently held that the BIA’s finding of “serious reasons” was not supported by substantial evidence where the agency relied solely on “a single conclusory document”—a Russian Red Notice—and the petitioner had presented credible evidence undermining the reliability of that notice.⁸⁶ Likewise, in upholding the application of the serious nonpolitical crimes bar in *Marroquin-*

⁸⁶ 799 F. App’x 965, 966–67 (9th Cir. 2020).

Retana v. Attorney General of the U.S., the Third Circuit cited to “substantial evidence” that included, but went far beyond, a Red Notice issued by a Central American country.⁸⁷ In that case, which involved a foreign conviction rather than pending charges, DHS also submitted extensive evidence related to the criminal proceedings abroad.⁸⁸ That evidence included the conviction record, sentencing order, and letters from the Commissioner at the Chief of Police Intelligence Center.⁸⁹ The court could thus rely on multiple sources of “reasonably trustworthy information” to conclude that “the individual arrested had committed . . . an offense.”⁹⁰

The reasoning of these cases is consistent with the U.S. government position that a Red Notice, by itself, is not sufficient to establish probable cause that a crime was committed.⁹¹ The inherent

⁸⁷ 675 F. App’x 216, 219–20 (3d Cir. 2017).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *See Flynn v. Brown*, 395 F.3d 842, 844 (8th Cir. 2005) (quoting *Hannah v. City of Overland*, 795 F.2d 1385, 1389 (8th Cir. 1986)) (describing probable cause standard).

⁹¹ *See also Radiowala v. Attorney General of the U.S.*, 930 F.3d 577,
Footnote continued on next page

limitations of Red Notices, as recognized by U.S. authorities and INTERPOL itself, mean that there is a critical distinction between a notice *saying* that a foreign country seeks the return of a person for prosecution and documentation *showing* the basis for the charges or conviction, such as witness statements or sworn statements of foreign law enforcement officials.

C. Treatment of Red Notices by International Authorities

The U.S. government's position finds additional support in statements by international actors, including INTERPOL itself, urging countries to exercise caution in taking legal action based on Red Notices alone.

Notably, INTERPOL itself has cautioned that “[a] Red Notice is an international wanted persons notice, but it is not an arrest warrant.”⁹² When the Red Notice relates to a potential prosecution rather than a conviction following fair and impartial proceedings in

580 n.1 (3d Cir. 2019) (explaining reasons *not* to credit a Red Notice in removal proceedings).

⁹² INTERPOL, *Red Notices*, *supra* note 21.

the foreign country, it is even less reliable for purposes of determining whether the underlying crime occurred. INTERPOL has recognized that additional caution is warranted under such circumstances, advising: “When a person is sought for prosecution, they have not been convicted and should be considered innocent until proven guilty.”⁹³

The European Union Commission and the UN High Commissioner for Refugees have also drawn attention to the limitations of Red Notices. In 2013, the EU Commission responded to a parliamentary question about exclusion from asylum on the basis of Red Notices by stating that “the existence of an Interpol Red Notice is only one of the elements which need to be considered” and that a Red Notice “cannot constitute in itself the sole basis for the exclusion from refugee status, in particular where the Red Notice is issued by the alleged country of persecution and might, potentially,

⁹³ *Id.*

constitute an act of persecution in itself.”⁹⁴ Similarly, the UN High Commissioner for Refugees has noted that “[i]nformation brought to the attention of the requested State in connection with a ‘red notice’ must be examined in the same way as if it were submitted directly by the requesting State.”⁹⁵ In other words, the fact that the information is communicated through INTERPOL has little bearing on its credibility or the accuracy of its content.

* * * * *

INTERPOL and all relevant U.S. agencies agree that Red Notices do not, by themselves, constitute evidence rising to the level of probable cause that a crime has occurred. The serious nonpolitical crimes bar requires a showing of probable cause that the crime in

⁹⁴ European Parliament, *Question for Written Answer E-011459/13 to the Commission: Risk of Exclusion from Asylum Under the Refugee Qualification Directive*, 2014 O.J. (C 86 E) 1, available at <https://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2013-011459+0+DOC+XML+V0//EN&language=EN> (click button labeled “Answer(s)”).

⁹⁵ U.N. High Comm’r for Refugees, *Guidance Note on Extradition and International Refugee Protection* 28 n.100 (Apr. 2008), available at <https://www.refworld.org/docid/481ec7d92.html>.

question was *committed*, rather than simply charged. Red Notices in this context should be treated with caution and evaluated with their purpose, history, and limitations in mind.

CONCLUSION

This Court should apply the above principles in considering whether a Red Notice, on its own, is sufficient to establish “serious reasons for believing” that a person committed a serious nonpolitical crime prior to arriving in the United States, sufficient to bar that person from eligibility for asylum or withholding of removal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 6,496 words, excluding the parts exempted by Fed. R. App. P. 32(f).

I also certify that the foregoing brief complies with the requirements of Fed. R. App. P. 32(a)(5)–(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point New Century Schoolbook.

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/s/ John Elwood
John P. Elwood

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I hereby certify that on May 26, 2020, I caused the foregoing brief to be electronically filed using the CM/ECF system. I certify that counsel for the parties are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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