No. 19-1496

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

AMREYA RAHMETO SHEFA,
Petitioner,

v.

WILLIAM P. BARR, Attorney General,
Respondent.

ON PETITION FOR REVIEW OF
AN ORDER OF THE BOARD OF IMMIGRATION APPEALS
Immigration File No.: A062-398-350

BRIEF OF *AMICI CURIAE* BOSTON COLLEGE LAW SCHOOL IMMIGRATION CLINIC, HARVARD IMMIGRATION AND REFUGEE CLINICAL PROGRAM, IMMIGRANT LEGAL RESOURCE CENTER, AND THE ADVOCATES FOR HUMAN RIGHTS IN SUPPORT OF PETITIONER'S PETITION FOR REVIEW AND REVERSAL

Counsel for Amici Curiae

Michael A. Stick
Andrew J. Foreman
Porter Wright Morris & Arthur LLP
321 North Clark Street, Suite 400
Chicago, Illinois 60654
(312) 756-8500
mstick@porterwright.com
aforeman@porterwright.com

June 4, 2019

CORPORATE DISCLOSURE STATEMENT

The *amici curiae*, Boston College Law School Immigration Clinic, Harvard Immigration and Refugee Program, Immigrant Legal Resource Center, and The Advocates for Human Rights, through their undersigned counsel, submit this Corporate Disclosure Statement pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A).

The *amici curiae* are non-stock, nonprofit organizations, none of which has any parent corporation, and no publicly held corporation owns them or any part of them.

/s/ Michael A. Stick

Michael A. Stick
Porter Wright Morris & Arthur LLP
321 North Clark Street, Suite 400
Chicago, Illinois 60654
(312) 756-8500
mstick@porterwright.com

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

INTEREST OF AMICI CURIAE[1]

Amici curiae defend the legal and human rights of immigrants and refugees and have a direct interest in ensuring both that the "particularly serious crime" bar to the withholding of removal statute is interpreted properly and that their clients are not unjustly barred from protection under the Refugee Convention and can rely on established Board of Immigration Appeals case law.

The Boston College Law School Immigration Clinic is a not-for-profit provider of legal services to indigent clients. The Clinic represents clients seeking protection from removal in the form of asylum and withholding of removal. Several of the Clinic's clients have been convicted of offenses that the government believes are "particularly serious crimes." Other clients are charged criminally with offenses, and the Clinic must advise defense

---

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

counsel whether a guilty plea would bar protection under the Refugee Convention.

The Harvard Immigration and Refugee Program has been a leader in the field of refugee law for over thirty-five years. The Program's staff includes Harvard Law School faculty members who teach courses on refugee law, immigration policy, and the intersection of criminal law and immigration law. The Program's publications have been cited frequently by tribunals, including the U.S. Supreme Court, and its Director authors the leading treatise on U.S. refugee law, *Law of Asylum in the United States*. The Program has extensive experience representing noncitizens seeking immigration protection, including those with criminal convictions.

The Immigrant Legal Resource Center is a national nonprofit resource center whose mission is to work with and educate immigrants, community organizations, and the legal sector in building a democratic society that values diversity and the rights of all people. The Center provides assistance to attorneys defending noncitizens in criminal

prosecutions and removal proceedings throughout the Ninth Circuit and nationally.

The Advocates for Human Rights is a nongovernmental, nonprofit organization whose mission is to implement internationally recognized human rights by promoting civil society and reinforcing the rule of law. The Advocates provides free legal representation to asylum seekers, and in 2018, with the help of hundreds of volunteer attorneys, provided representation to over 1,100 people fleeing persecution, torture, and trafficking.

SUMMARY OF ARGUMENT

The Immigration and Nationality Act ("INA") limits the ability of the United States to remove a noncitizen in certain circumstances. 8 U.S.C. § 1231(b)(3)(A). But the limitation does not apply where "the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States." *Id.* at (b)(3)(B)(ii). This *amici curiae* brief addresses the legal standard that must be applied by an Immigration Judge ("IJ") and the Board of Immigration Appeals ("BIA") in determining whether a noncitizen has been convicted of a "particularly serious crime."

The BIA's own precedent provides that the determination of whether a crime that is not *per se* particularly serious is nevertheless particularly serious requires consideration of "the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and, most importantly, whether the type and circumstances of the crime indicate that the alien will be a danger to the community." *Matter of Frentescu*, 18 I. & N. Dec. 244, 247 (BIA 1982). In fact, the "'essential key'"

and "'pivotal standard'" for "determining whether a crime is particularly serious . . . is 'whether the nature of the crime is one which indicates that the alien poses a danger to the community.'" *Matter of G-G-S-*, 26 I. & N. Dec. 339, 343–44 (BIA 2014) (citations omitted). All reliable information is to be considered in making this determination. *See In re N-A-M-*, 24 I. & N. Dec. 336, 342–45 (BIA 2007). Thus, the noncitizen must be allowed to explain and introduce mitigating evidence as to why a crime does not indicate that the noncitizen poses a danger to the community and therefore, why the crime is not particularly serious. *Id.*

In this case, neither the IJ nor the BIA conducted an evidentiary hearing addressing whether Petitioner's conviction was for a particularly serious crime. Thus, neither the IJ nor the BIA considered all reliable information, as Petitioner was deprived of the opportunity to offer mitigating evidence. In addition, both the IJ and BIA applied the wrong legal standard for such a determination, since both ignored the "essential key" and "pivotal standard" for determining whether a crime is particularly serious: whether the type, nature, circumstances, and

underlying facts of the crime indicate that the noncitizen will be a danger to the community.

This Court should reverse the BIA's February 14, 2019 decision and remand this case to the BIA to determine whether Petitioner was convicted of a particularly serious crime by 1) holding an evidentiary hearing to consider all reliable information related to the crime and sentence, including the type, nature, circumstances, and underlying facts, and 2) assessing whether all of the information considered justifies a determination that Petitioner is a danger to the community.

ARGUMENT

This *amici curiae* brief addresses the proper legal standard for determining whether Petitioner was convicted of a particularly serious crime making her ineligible for withholding of removal. This Court's analysis of the standard should begin with a review of the history of the INA and the decisions from the BIA and Circuit Courts of Appeals interpreting the INA.

I. Background

Under the INA, "the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A). However, withholding of removal "does not apply . . . if the Attorney General decides that . . . the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States." *Id.* at (b)(3)(B)(ii).

This legislation mirrors the 1967 United Nations Protocol Relating to the Status of Refugees ("1967 Protocol"), Jan. 31, 1967, 19 U.S.T. 6223, 606

U.N.T.S. 267, to which the United States is a party.[2] The 1967 Protocol incorporates the United Nations Convention Relating to the Status of Refugees of 1951 ("Refugee Convention"), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150, which contains a *non-refoulement* mandate. Article 33 of the Refugee Convention provides that "[n]o 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, nationality, membership of a particular social group or political opinion." Refugee Convention art. 33(1), 19 U.S.T. 6259; 1967 Protocol art. 33(1), 19 U.S.T. 6223. The Refugee Convention contains a single exception to *non-refoulement* for a refugee "who, having been convicted by a final judgment of a particularly serious crime, constitutes a

[2] *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 449–50 (1987) (holding that congressional intent was clear in light of statute's plain language and "symmetry" with 1967 Protocol); *INS v. Stevic*, 467 U.S. 407, 416 (1984) (1967 "Protocol bound parties to comply with the substantive provisions of Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees . . . with respect to 'refugees' as defined in Article 1.2 of the Protocol.").

danger to the community of that country." Refugee Convention art. 33(2), 19 U.S.T. 6259; 1967 Protocol art. 33(2), 19 U.S.T. 6223.

Although neither the Refugee Convention nor the INA in its original form specifies precisely what crimes qualify as "particularly serious," they provide guidance for making the determination. A crime is particularly serious in the context of withholding of removal if it demonstrates that the refugee "constitutes a danger to the community." 8 U.S.C. § 1231(b)(3)(B)(ii); Refugee Convention art. 33(2), 19 U.S.T. 6259. Indeed, the "goal of protecting the public . . . is at the heart of the 'particularly serious crime' bar." *In Re N-A-M-*, 24 I. & N. Dec. 336, 341 (BIA 2007). The phrasing of the rule shows a forward-looking orientation on the issue of dangerousness. Although the noncitizen will necessarily have "been convicted"—past tense—the question is whether the noncitizen "constitutes"—present tense—a danger.

Congress amended the withholding of removal exception in 1990 by designating all aggravated felonies as *per se* particularly serious crimes, *see* Immigration Act of 1990, Pub. L. No. 101-649, § 515, 104 Stat. 4978, 5053

(formerly codified at 8 U.S.C. § 1253(h)(2)), then expanded the list of aggravated felonies in 1996, *see* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(e), 110 Stat. 1214, 1277–78 (1996) (codified at 8 U.S.C. § 1101(a)(43)), only to pare back the rule to its present form five months later, *see* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208 § 305(a)(3), 110 Stat. 3009-546, 3009-602 (codified at 8 U.S.C. § 1231(b)). The only crimes that are now *per se* particularly serious are aggravated felonies with a prison sentence of five years or more. 8 U.S.C. § 1231(b)(3)(B). In all other cases, whether the commission of a given crime is particularly serious requires a "case-by-case analysis," *Gomez-Sanchez v. Sessions*, 892 F.3d 985, 991 (9th Cir. 2018), the scope of which is explained in more detail below.

In 1982, the BIA established a multifactor test in *Matter of Frentescu*, 18 I. & N. Dec. 244 (BIA 1982), to determine whether an offense constitutes a particularly serious crime.

> In judging the seriousness of a crime, we look to such factors as the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and, *most*

> *importantly, whether the type and circumstances of the crime indicate that the alien will be a danger to the community.*

Id. at 247 (emphasis added). The "most important[]" final factor ties directly into the language of the INA and Refugee Convention, justifying withholding of removal where the noncitizen "constitutes a danger to the community of the United States." 8 U.S.C. § 1231(b)(3)(B)(ii); *see* Refugee Convention art. 33(2), 19 U.S.T. 6259. Like the INA, as noted above, the orientation of this factor in *Frentescu* is forward-looking, asking whether "the alien *will* be a danger to the community" based on "the type and circumstances of the crime."

The BIA reinforced the importance of the dangerousness analysis four years later in *Matter of Carballe*, 19 I. & N. Dec. 357 (BIA 1986), explaining that "[i]n determining whether a conviction is for [a particularly serious] crime, the essential key is whether the nature of the crime is one which indicates that the alien poses a danger to the community." *Id.* at 360. But the BIA also rejected as unnecessary a second "separate determination of dangerousness" *after* the IJ has already determined that the crime was

particularly serious. *Id.* And in *N-A-M-*, the BIA reiterated the conclusion in *Carballe*, explaining that there is no "separate determination" of dangerousness "once an alien is found to have committed a particularly serious crime." 24 I. & N. Dec. at 342.

In *N-A-M-*, the BIA set forth a two-step test for analyzing crimes that are not *per se* particularly serious—that is, that are not aggravated felonies with a prison sentence of five years or more—which depends first on the elements of the crime:

> If the elements of the offense do not *potentially* bring the crime into a category of particularly serious crimes, the individual facts and circumstances of the offense are of no consequence, and the alien would not be barred from a grant of withholding of removal. On the other hand, once the elements of the offense are examined and found to *potentially* bring the offense within the *ambit* of a particularly serious crime, *all reliable information may be considered in making a particularly serious crime determination, including the conviction records and sentencing information, as well as other information outside the confines of a record of conviction*.

Id. (emphasis added). If the crime could not even potentially be particularly serious on its elements alone, the inquiry ends. But if the crime could

potentially be particularly serious, the BIA may consider "all reliable information" in determining whether the crime *is* particularly serious. The BIA also explained that both parties may introduce evidence going either way—for or against a finding that the crime is particularly serious:

> It has been our practice to allow both parties to explain and introduce evidence as to why a crime is particularly serious or not. We see no reason to exclude otherwise reliable information from consideration in an analysis of a particularly serious crime once the nature of the crime, as measured by its elements, brings it within the range of a "particularly serious" offense.

Id. at 344.

The BIA in *N-A-M-* specifically rejected application of a categorical approach in determining whether crimes not designated by Congress as *per se* particularly serious nonetheless constitute particularly serious crimes. "[T]he 'particularly serious crime' determination . . . represents the sort of inherently judgmental calculus, once the elements of the offense have been found to potentially bring it within the parameters of a particularly serious

crime, that the categorical approach is unsuited to the determination." *Id.* at 344 n.9.[3]

II. The IJ and BIA Must Consider All Reliable Information in Evaluating an Offense That Congress Has Not Designated as *Per Se* Particularly Serious

As originally drafted, the INA did not designate any crimes as *per se* particularly serious. Nevertheless, the BIA suggested in *Frentescu* in 1982 that "there are crimes which, on their face, are 'particularly serious crimes.'" *Frentescu*, 18 I. & N. Dec. at 247. Then in *Carballe*, the BIA again noted in 1986 that "there are some crimes that are inherently 'particularly serious.'" *Carballe*, 19 I. & N. Dec. at 360.

Congress identified for the first time in 1990 offenses that constituted *per se* particularly serious crimes, making a noncitizen ineligible for withholding of removal without consideration of any mitigating circumstances relating to the crime or conviction. As noted above, initially,

---

[3] This brief takes no position on whether the standards set forth in *Frentescu* and *N-A-M-* are appropriate, although it does address some confusion created by *N-A-M-*. Rather, the focus of this brief is that the BIA in this case has not complied with its own precedent set forth in those and other BIA decisions.

all aggravated felonies were *per se* particularly serious crimes. In IIRIRA, Congress amended the INA to identify as *per se* particularly serious only those aggravated felonies for which a noncitizen has been sentenced to an aggregate term of imprisonment of at least five years. Because the INA is not silent or ambiguous as to which crimes Congress has determined are *per se* particularly serious for purposes of applying the withholding-of-removal exception, the intent of Congress is clear: aggravated felonies with a prison sentence of five years or more are *per se* particularly serious crimes—and only those crimes. *See Blandino-Medina v. Holder*, 712 F.3rd 1338, 1343–47 (9th Cir. 2013); *Matter of L-S-*, 22 I. & N. Dec. 645, 650-54 (BIA 1999). The consequence of Congress's clear and unambiguous designation of a finite category of crimes as *per se* particularly serious is that neither the Attorney General nor the BIA has any authority in the context of withholding of removal to treat any crimes as *per se* particularly serious that have not been so designated by Congress.[4] By extension, the Attorney

[4] The designation of other crimes by the Attorney General or the BIA as *per se* particularly serious in the context of withholding of removal would constitute an *ultra vires* act and would be entitled to no deference by the

General and the BIA necessarily have no authority to limit the type of information to be considered when evaluating a crime that is *not* among those designated by Congress as *per se* particularly serious, even if such crimes appear to be "on their face" or "inherently" particular serious. Any such limitation on the information to be considered would be tantamount to a determination that the crime is *per se* particularly serious and would effectively, and inappropriately, expand Congress's designation of *per se* particularly serious crimes. Although the BIA previously suggested that some crimes were "on their face" or "inherently" particularly serious, if the crime is not an aggravated felony with a prison sentence of five years or more, the noncitizen is entitled to offer any and all reliable mitigating information.

---

courts. *See Chevron U.S.A., Inc. v. N.R.D.C., Inc.*, 467 U.S. 837, 842–44 (1984). It is important to recognize that, while Congress has granted the Attorney General discretion to designate by regulation offenses that are considered particularly serious crimes in the context of asylum cases, *see* 8 U.S.C. § 1158(b)(2)(B)(ii) (stating that "Attorney General may designate by regulation offenses that will be considered to be a crime" in asylum context), Congress has granted the Attorney General no such discretion to enact regulations designating particularly serious crimes in the context of the withholding of removal exception.

The BIA's decision in *N-A-M-* is consistent with this, requiring that all crimes not designated by Congress as *per se* particularly serious be fully analyzed on a case-by-case basis. Indeed, under *N-A-M-*, "all reliable information may be considered, . . . including the conviction records and sentencing information, as well as other information outside the confines of a record of conviction."[5] *N-A-M-*, 24 I. & N. Dec. at 342. In *Frentescu*, the BIA set forth the categories of "reliable information" to be considered in determining whether a crime is particularly serious, including "the nature of the conviction, *the circumstances and underlying facts of the conviction*, the

[5] There is also language in *N-A-M-* suggesting that a crime may be particularly serious based "solely on its elements." However, *N-A-M-* cannot be read as granting either the Attorney General or the BIA authority in the withholding-of-removal context to designate certain crimes as particularly serious based solely on the crime's elements or to limit the scope of evidence to be considered in making a particularly serious crime determination. As explained above, such an interpretation of the INA by the BIA would constitute an *ultra vires* act entitled to no deference under a *Chevron* analysis. Moreover, designating crimes as particularly serious based solely on their elements is inconsistent with the BIA's rejection of a categorical approach in *N-A-M-*. Determining that a crime is particularly serious based solely on its elements is also patently inconsistent with the "case-by-case" analysis mandated in *N-A-M-*. If a crime could be determined to be particularly serious based solely on its elements, there would be no way to differentiate on a "case-by-case basis" convictions entered against two or more separate noncitizens for that same crime.

type of sentence imposed, and . . . *the type and circumstances of the crime*." *Frentescu*, 18 I. & N. Dec. at 247 (emphasis added).

"All reliable information" necessarily includes all reliable information tending to establish that a crime is particularly serious and all reliable information tending to establish that a crime is not particularly serious. Indeed, the BIA recognized that the noncitizen facing potential removal must be provided an opportunity to offer all reliable information tending to mitigate the seriousness of the crime: "It has been our practice to allow both parties to explain and introduce evidence as to why a crime is particularly serious or not." *Id.* at 344 (finding "no reason to exclude otherwise reliable information from consideration in an analysis of a particularly serious crime"). This Court has held that an applicant for withholding of removal is entitled, under the Due Process Clause of the United States Constitution, to a fair hearing, which requires that the applicant "be given the opportunity to fairly present evidence, offer arguments, and develop the record." *Naing Tun v. Gonzales*, 485 F.3d 1014, 1025 (8th Cir. 2007) (citing 8 U.S.C. § 1229a(b)(4)(B), which provides that a

noncitizen has a statutory right "to present evidence on the alien's own behalf"). *N-A-M-* provides that the IJ and BIA "may" consider all reliable evidence and it is the BIA's practice to allow the noncitizen to explain and introduce evidence as to why a crime is not particularly serious, and this Court's decision in *Naing Tun* confirms that the noncitizen must be given an opportunity to present evidence and offer argument regarding all reliable mitigating facts and circumstances.

In this case, the IJ conducted a two-day evidentiary hearing on May 21 and June 8, 2018. The IJ limited the scope of the evidentiary hearing—and the testimony and documentary evidence offered by the parties during that hearing—to consideration of Petitioner's Convention Against Torture claim. The hearing did not address whether Petitioner's conviction was for a particularly serious crime, because the IJ had previously pretermitted Petitioner's withholding of removal application on May 21, 2018 on the grounds that Petitioner had been convicted of a *per se* particularly serious crime (AR 93)—a determination the BIA ultimately did not affirm (AR 6 n.4).

On July 16, 2018, the IJ denied Petitioner's Motion for Reconsideration and reaffirmed her determination that the crime was *per se* particularly serious. (AR 93–96.) Additionally, the IJ stated that, even if she were to find Petitioner's conviction was not *per se* particularly serious, she would still find that it constituted a particularly serious crime. (AR 95–96.) Although the IJ acknowledged that she was allowed to consider all reliable information relevant to the determination (AR 96), she did not schedule another hearing to take evidence regarding whether Petitioner had been convicted of a particularly serious crime. Thus, the IJ did not have the benefit of and consider all reliable information regarding the circumstances and underlying facts of Petitioner's conviction. In particular, the IJ did not have all reliable information regarding whether the circumstances of the crime indicated that Petitioner will be a danger to the community—the "essential key," as explained below, to determining whether a crime is particularly serious. Indeed, the IJ's limited description of the evidence she considered did not include any discussion or analysis of the evidence

tending to establish that Petitioner is not a danger to the community. (AR 96.)

In its February 14, 2019 decision, the BIA stated that it "need not determine whether [Petitioner's] conviction is per se a particularly serious crime" (AR 6 n.4), but nonetheless affirmed the IJ's determination that Petitioner had been convicted of a particularly serious crime. The BIA articulated the categories of information to be considered in determining whether a non-*per se* crime nonetheless constitutes a particularly serious crime.

> If an applicant has not been convicted of an aggravated felony for which she was sentenced to an aggregate term of imprisonment of at least 5 years, the Immigration Judge and the Board *must* "examine the nature of the conviction, the type of sentence imposed, and the circumstances and underlying facts of the conviction" to determine whether the applicant has been convicted of a particularly serious crime under section 241(b)(3)(B)(ii) of the Act. *Matter of N-A-M-*, 24 I. & N. Dec. 336, 342 (BIA 2007).

(AR 5 (emphasis added).)

However, the BIA relied on the same incomplete record considered by the IJ, and its limited analysis of the evidence, mentioning mitigating circumstances only in passing, included no discussion of how the evidence might establish that Petitioner was not a danger to the community and thus, how the crime may not have been particularly serious. (AR 5–6.)

Because neither the IJ nor the BIA heard or considered all reliable mitigating information regarding the facts and circumstances of Petitioner's conviction, this Court should reverse the BIA's February 14, 2019 decision and remand this case for an evidentiary hearing to consider all reliable information, including the type, nature, circumstances, and underlying facts of the crime and sentence, in its assessment of whether Petitioner's conviction was for a particularly serious crime.

III. Whether the Noncitizen Constitutes a Danger to the Community of the United States Is the Key to Whether a Crime Is Particularly Serious

As noted above, danger to the public "is at the heart of the 'particularly serious crime' bar" to withholding of removal. *N-A-M-*, 24 I. & N. Dec. at 341. Whether "the alien will be a danger to the community" is at

the core of the multifactor test in *Frentescu*, 18 I. & N. Dec. at 247 (emphasis added). Or as *Carballe* explained: the "essential key" to whether a crime is particularly serious "is whether the nature of the crime is one which indicates that the alien poses a danger to the community." *Carballe*, 19 I. & N. Dec. at 360.

Nevertheless, confusion has developed over whether dangerousness remains part of the analysis of *whether* a crime is particularly serious. That confusion can be traced back to the BIA's analysis in *N-A-M-*, which described the holding in *Carballe* incorrectly. The BIA first explained in *N-A-M-*: "*once* an alien is *found to have committed a particularly serious crime*, we no longer engage in a *separate* determination to address whether the alien is a danger to the community." *N-A-M-*, 24 I. & N. Dec. at 342 (emphasis added). According to the BIA, there is no dangerousness analysis *after* finding that the crime was particularly serious, which itself requires assessing whether the noncitizen is a danger to the community based on the type, nature, circumstances, and underlying facts of the crime. The noncitizen in *Carballe* had argued that there were two separate questions:

whether the noncitizen "has committed a particularly serious crime" and whether the noncitizen "constitutes a danger to the community of the United States." *Carballe*, 19 I. & N. Dec. at 359. The noncitizen in *Carballe* asserted that the "'second question should be appraised in light of present circumstances and the record should therefore be carefully scrutinized for evidence of rehabilitation or other factors indicating that [the] applicant may not now be a danger to the community.'" *Id.*

As in *Carballe*, the BIA in *N-A-M-* also rejected such a "second question" focused on evidence unconnected to the type, nature, circumstances, and underlying facts of the crime. But in *N-A-M-*, the BIA explained—incorrectly—that under *Carballe* "the proper focus for determining *whether* a crime is *particularly serious* is on the nature of the crime and *not the likelihood of future serious misconduct*." *N-A-M-*, 24 I. & N. Dec. at 342 (emphasis added). But *Carballe* found that there is no second dangerousness analysis *after* the BIA has already concluded that the crime was particularly serious. *Carballe*, 19 I. & N. Dec. at 360. The BIA in *Carballe* did not find that there is no dangerousness analysis—no assessment of the

"likelihood of future serious misconduct"—*as part of* determining whether a crime is particularly serious. Indeed, as noted above, *Carballe* held that "[i]n determining whether a conviction is for such a crime, the *essential key* is whether the nature of the crime is one which indicates that the alien *poses a danger to the community*." *Id.* Rather than saying that the test for "whether a crime is particularly serious" does not look to "the likelihood of future serious misconduct," it seems likely the BIA meant to say either that there should be no second assessment of "the likelihood of future serious misconduct" looking at evidence untethered from the crime or that the assessment of "the likelihood of future serious misconduct" in determining whether a crime is particularly serious is based on facts connected to the crime.[6] To illustrate the issue, consider the following chart showing two separate analyses of dangerousness based on different sets of evidence:

[6] Some maintain that the INA requires a separate, independent determination of dangerousness and that *Carballe* and *N-A-M-* were incorrectly decided. This brief takes no position on whether *Carballe* and *N-A-M-* were correct in finding that no second, separate determination of dangerousness is required under the INA. Instead, this brief takes the position that, even under the standard set forth in those cases, whether the

	Particularly Serious Crime Determination	Second Danger Determination
Evidence to evaluate . . .	All reliable information related to the crime and sentence, including the type, nature, circumstances, and underlying facts	Evidence of present circumstances, including rehabilitation or other factors
. . . to answer this question	Does the evidence justify a determination that the noncitizen is a danger to the community?	Does the evidence justify a determination that the noncitizen is a danger to the community?

Subsequent BIA and circuit court decisions reinforce the conclusion that "danger to the community" remains the focus of the test for whether a crime is particularly serious. For example, although the Ninth Circuit in *Gomez-Sanchez v. Sessions*, 892 F.3d 985 (9th Cir. 2018), vacated the BIA's decision in *Matter of G-G-S-*, 26 I. & N. Dec. 339 (BIA 2014), both the Ninth Circuit and BIA agreed on the importance of a dangerousness analysis to determining whether a crime is particularly serious. In *G-G-S-*, decided seven years after *N-A-M-*, the BIA explained that "[t]he language of the statute provides the '*essential key*' to determining *whether* a crime is particularly serious, which is 'whether the nature of the crime is one which

---

alien poses a danger to the community remains the key to determining whether the alien's conviction was for a particularly serious crime.

indicates that the alien *poses a danger to the community*.'" *Id.* at 344 (emphasis added) (citation omitted). In fact, the BIA has "identified '"dangerousness," [as] *the pivotal standard* by which particularly serious crimes are judged.'" *Id.* at 343 (emphasis added) (citation omitted). The Ninth Circuit expanded on the explanation, describing "'the currently operative legal standard as follows: "[A] crime is particularly serious if the nature of the conviction, the underlying facts and circumstances[,] and the sentence imposed *justify the presumption that the convicted immigrant is a danger to the community*."'" *Gomez-Sanchez*, 892 F.3d at 991 (citation omitted).

The Eighth Circuit articulated the standard in *Tian v. Holder*, 576 F.3d 890 (8th Cir. 2009). The court first quoted the multifactor test in *Frentescu* for determining whether a claim is particularly serious, then explained that there is no "'separate'" dangerousness analysis "'once an alien is found to have committed a particularly serious crime,'" quoting *N-A-M-*. *Id.* at 897 (quoting *N-A-M-*, 24 I. & N. Dec. at 342). The court also quoted the confusing passage in *N-A-M-*, noted above, that seems to indicate that dangerousness is no longer part of the analysis of *whether* a crime is

particularly serious. *Id.* But *Tian* should not be read as saying that dangerousness is no longer part of the equation. The noncitizen in *Tian* argued "that the 'BIA failed to consider whether . . . [he] would be a danger to the community.'" *Tian*, 576 F.3d at 897. But the Eighth Circuit rejected the appeal and explained that the BIA "specifically referred to Tian's argument" that he was not a danger to the community, finding it "'speculative' and ultimately 'unpersuasive,'" and refused to make "'a *separate* determination of danger to the community.'" *Id.* (emphasis added). Thus, the BIA had in fact assessed dangerousness in applying what the Eighth Circuit held was the "correct legal standard." *Id.*[7]

In this case, the IJ and BIA both applied the wrong legal standard, misunderstanding the effect of *N-A-M-*, which did not remove an assessment of dangerousness to the community from the evaluation of *whether* a crime is particularly serious. The IJ quoted *Tian* quoting the

[7] To the extent any of the confusion in *N-A-M-* carried over into *Tian*, this Court should clarify that *Tian* did not change the standard, which remains that the "'essential key' to determining whether a crime is particularly serious . . . is 'whether the nature of the crime is one which indicates that the alien poses a danger to the community.'" *G-G-S-*, 26 I. & N. Dec. at 344.

Frentescu multifactor test for determining whether an offense constitutes a particularly serious crime. (AR 95–96.) But although *Tian* quoted the test in full, *Tian*, 576 F.3d at 897, the IJ omitted the final and "most important[]" factor of the test: the dangerousness analysis. A telltale "[and]" flags the IJ's omission: "When determining if a crime is 'particularly serious,' the Court looks '"to such factors as the nature of the conviction, the circumstances and underlying facts of the conviction, *[and]* the type of sentence imposed."'" (AR 95–96 (emphasis added) (quoting *Tian*, 576 F.3d at 897).) The BIA, which affirmed the IJ's "determination, for the reasons stated therein," also omitted the final factor of the *Frentescu* test. (AR 5–6.) The following chart, which compares *Tian* with the IJ's and BIA's opinions and which numbers the factors according to the order in *Tian*, makes the omission clear:

Tian v. Holder	IJ Here	BIA Here
. . . "look[s] to such factors as [1] the nature of the conviction, [2] the circumstances and underlying facts of the conviction, [3] the type of sentence imposed, and, [4] most importantly, whether the type and circumstances of the crime indicate that the alien will be a danger to the community." *Tian*, 576 F.3d at 897.	. . . looks '"to such factors as [1] the nature of the conviction, [2] the circumstances and underlying facts of the conviction, [and] [3] the type of sentence imposed." (AR 95–96.)	. . . must "examine [1] the nature of the conviction, [3] the type of sentence imposed, and [2] the circumstances and underlying facts of the conviction" (AR 5.)

The IJ also stated that "courts would not engage in a separate determination of whether the alien is a danger to the community but instead would focus on the nature of the crime as opposed to the likelihood of future serious misconduct" (AR 96), and the BIA cited *N-A-M-* in support of this proposition (AR 6). This incorporates and repeats the confusion in *N-A-M-* between a dangerousness analysis as part of determining whether a crime is particularly serious—an analysis that must

occur—and a separate, second analysis after such a determination has been made—an analysis that *Carballe* and *N-A-M-* rejected. "[F]ocus[ing] on the nature of the crime *as opposed to* the likelihood of future serious misconduct" in the context of determining *whether* a crime is particularly serious misunderstands the rule. (AR 95–96 (emphasis added).) In determining whether a crime is particularly serious, there is no opposition between the two points, no mutually exclusive analysis of either "the nature of the crime" or "the likelihood of future serious misconduct." The question to be answered is whether "the nature of the crime," including its "type and circumstances," indicates a "likelihood of future serious misconduct." Or as the Ninth Circuit explained: "[A] crime is particularly serious if the nature of the conviction, the underlying facts and circumstances[,] and the sentence imposed *justify the presumption that the convicted immigrant is a danger to the community*." *Gomez-Sanchez*, 892 F.3d at 991 (internal quotation marks omitted).

Nowhere in the IJ's and BIA's decisions in this case is danger to the community acknowledged as part of the analysis of whether a crime is

particularly serious, let alone as the "essential key" and "pivotal standard." This omission, plus the missing final *Frentescu* factor, and the reference to the confusing passage in *N-A-M-* noted above make clear that the IJ and BIA made no assessment of danger to the community. This despite the fact that such an analysis, with the "goal of protecting the public," remains "at the heart" of the exception to withholding of removal. *N-A-M-*, 24 I. & N. Dec. at 341; *G-G-S-*, 26 I. & N. Dec. at 343; *Gomez-Sanchez*, 892 F.3d at 991. Thus, the IJ and BIA did not apply the correct legal standard.

The analyses that the IJ and BIA actually performed in this case reinforce this conclusion. Neither the IJ nor the BIA analyzed the nature, circumstances, and facts of the crime with an eye toward whether they "indicate that the alien will be a danger to the community," *Frentescu*, 18 I. & N. Dec. at 247. But as the court in *Gomez-Sanchez* explained, facts like those at issue in this case might have a substantial effect on the determination of whether the person is a danger to the community:

> Consider, for instance, a situation in which an individual, who had suffered from intimate partner violence, was convicted of assaulting his or her abuser, and reliable evidence showed that the

> individual's diagnosed post-traumatic stress disorder had played a substantial motivating role in the assault. Such a set of facts might well provide *no defense to criminal conviction*, even while *bearing substantially* on an IJ's determination of *whether that individual poses a danger to the community*.

Gomez-Sanchez, 892 F.3d at 996 n.10 (emphasis added). The IJ and BIA here made no mention of the fact that the crime was committed to prevent an ongoing rape, that Petitioner's husband had provoked her, and that she was defending herself in the heat of passion. (*See* AR 1003–1025.) Acts committed in the heat of passion "'may not necessarily constitute the refugee as a danger to the community.'" Fatma Marouf, *A Particularly Serious Exception to the Categorical Approach*, 97 B.U.L. Rev. 1427, 1457 (2017) (quoting Research Ctr. for Int'l Law, Univ. of Cambridge, *The Refugee Convention, 1951: The Travaux Preparatoires Analysed* 342 (Paul Weis ed., 1995)). Thus, the same crime may be particularly serious in some cases and not in others, depending on the circumstances. *Cf. id.* As a result—and as explained above—*all* of the facts and circumstances must be considered on a case-by-case basis. The failure to consider the mitigating facts and circumstances in this case reveals the IJ's and BIA's legal error.

Given the clear legal error on the part of the IJ and BIA, this Court should reverse the BIA's February 14, 2019 decision and remand for a determination of whether "the nature of the conviction, the underlying facts and circumstances[,] and the sentence imposed *justify the presumption that the convicted immigrant is a danger to the community*,"'" *Gomez-Sanchez*, 892 F.3d at 991 (citation omitted).

CONCLUSION

For the foregoing reasons, this Court should reverse the BIA's February 14, 2019 decision and remand this case to the BIA to determine whether Petitioner was convicted of a particularly serious crime by 1) holding an evidentiary hearing to consider all reliable information related to the crime and sentence, including the type, nature, circumstances, and underlying facts, and 2) assessing whether all of the information considered justifies a determination that Petitioner is a danger to the community.

Dated: June 4, 2019

Respectfully submitted,

/s/ Michael A. Stick

Michael A. Stick
Andrew J. Foreman
Porter Wright Morris & Arthur LLP
321 North Clark Street, Suite 400
Chicago, Illinois 60654
(312) 756-8500
mstick@porterwright.com
aforeman@porterwright.com

Counsel for Amici Curiae

CERTIFICATE OF BRIEF LENGTH

The undersigned counsel for *amici curiae* certifies, pursuant to Federal Rule of Appellate Procedure 32(g)(1), that this brief complies with the requirements of Federal Rules of Appellate Procedure 29(a)(5), 32(a)(5), and 32(a)(7)(B)(i) in that it is printed in 14-point, proportionally spaced typeface using Microsoft Word 2010 and contains 6,495 words, including headings, footnotes, and quotations.

/s/ Michael A. Stick

Michael A. Stick
Porter Wright Morris & Arthur LLP
321 North Clark Street, Suite 400
Chicago, Illinois 60654
(312) 756-8500
mstick@porterwright.com

Counsel for Amici Curiae

CERTIFICATE OF VIRUS CHECK

The undersigned counsel for *amici curiae* certifies under 8th Circuit Rule 28A(h)(2) that this brief has been scanned for computer viruses and is virus free.

/s/ Michael A. Stick

Michael A. Stick
Porter Wright Morris & Arthur LLP
321 North Clark Street, Suite 400
Chicago, Illinois 60654
(312) 756-8500
mstick@porterwright.com

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

The undersigned counsel for *amici curiae* certifies that on June 4, 2019, he electronically filed the Brief of *Amici Curiae* Boston College Law School Immigration Clinic, Harvard Immigration and Refugee Clinical Program, Immigrant Legal Resource Center, and The Advocates for Human Rights in Support of Petitioner's Petition for Review and Reversal with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. He certifies that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: June 4, 2019

/s/ Michael A. Stick

Michael A. Stick
Porter Wright Morris & Arthur LLP
321 North Clark Street, Suite 400
Chicago, Illinois 60654
(312) 756-8500
mstick@porterwright.com

Counsel for Amici Curiae

559897