U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

Office of the Chief Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

December 20, 2021

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Re: A093-494-593 – Maitland, Keible
Request to Appear and Amicus Brief in Amicus Invitation No. 21-30-09

Dear Amici and Parties:

The Board of Immigration Appeals received on December 1, 2021, your request to file amicus curiae brief and the brief itself in the above referenced case currently pending at the Board.

Your brief has been accepted and placed in the record of proceedings. We thank you for your participation in this matter. However, please note that the acceptance of your brief does not signify that the Board will rely on its contents or analysis, nor does it guarantee that the authors of your brief will be specifically recognized in the Board's decision.

If the respondent, or the Department of Homeland Security wishes to file a response to the amicus brief, it is due no later than **January 10, 2021**. A copy of the reply brief should be filed directly with the Board, along with proof of service on opposing counsel. Please see Chapter 4.6(h) and 4.7(a)(ii) of the Board's Practice Manual.

Respectfully,

McKayla Bobiski

McKayla Bobiski
Information Management Team

Enclosure

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Re: [redacted]
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Respectfully,

McKayla Bobiski

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Information Management Team

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Office of the Chief Clerk

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November 10, 2021

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Re: Amicus Invitation No. 21-30-09

Dear Amici:

The Board of Immigration Appeals received on November 2, 2021, your request for extension of time in which to file your amicus curiae brief. Your request is hereby granted as follows:

Your brief and two copies should be submitted to the Board, no later than **December 1, 2021.** In addition please attach a copy of this letter to the front of your brief. Please note: No further extensions will be considered. The Board is also hereby increasing the page limit for the Amicus briefs to 30 pages.

Respectfully,

McKayla Bobitski
Appeals Examiner
Information Management Team

cc: James T. Dehn, Chief
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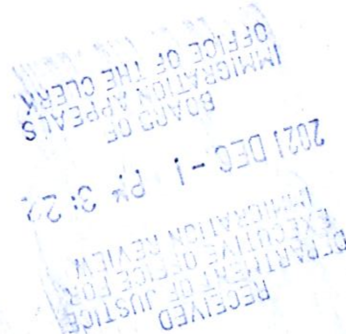

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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of **Amicus Invitation No. 21-30-09**	

REQUEST TO APPEAR AS *AMICUS CURIAE*

Human Rights First ("HRF") respectfully requests leave to file the accompanying amicus brief. HRF has subject-area expertise regarding asylum law and the legal issues concerning bars to protection. HRF submits this brief to provide the BIA perspective on the issues presented based on its extensive experience representing and advocating for individuals seeking asylum and other forms of protection.

Proposed *amicus curiae* HRF is a non-governmental organization established in 1978 that works to ensure U.S. leadership on human rights globally and compliance domestically with the country's human rights commitments. HRF operates one of the largest programs for *pro bono* legal representation of refugees, working in partnership with volunteer lawyers at leading law firms to provide legal representation without charge to asylum applicants unable to afford counsel. HRF has conducted research, issued reports and provided recommendations to the United States regarding compliance with its legal obligations under international law, including compliance with the 1951 U.N. Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees.

HRF therefore respectfully requests leave to appear as *amicus curiae* and file the following brief.

Dated: December 1, 2021

/s/ Sarah Sherman-Stokes
Sarah Sherman-Stokes
Charles Shane Ellison

Counsel for *Amicus Curiae*

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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of Amicus Invitation No. 21-30-09	

PROPOSED BRIEF OF *AMICUS CURIAE*
HUMAN RIGHTS FIRST

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STATEMENT OF INTERESTS OF *AMICUS CURIAE*

Amicus curiae Human Rights First ("HRF") has subject-matter expertise in the areas of immigration law surrounding asylum and withholding of removal. HRF regularly advocates on behalf of individuals seeking asylum and other forms of protection before the United States Citizenship and Immigration Services ("USCIS"), the Executive Office of Immigration Review ("EOIR"), and the U.S. courts of appeals. HRF has a longstanding interest in the proper application of the "exclusion" clauses of the Refugee Convention, which place refugees who have committed serious violations of the human rights of others or other serious crimes, outside the protection of the international refugee protection regime. HRF also regularly conducts trainings for attorneys representing asylum seekers and speaks nationally to asylum-related matters. Informed by its extensive experience representing and advocating for individuals seeking protection, HRF respectfully submit this brief to provide the Board of Immigration Appeals ("BIA" or "Board") perspective on the issues presented.

SUMMARY OF ARGUMENT

Amicus submits this brief in response to the third question posed by the Board in Amicus invitation 21-30-09: "In light of *Pereida* and section 240(c)(4)(A)(i) of the Act, can a noncitizen establish by a preponderance of the evidence his or her eligibility for asylum and withholding of removal if the record is inconclusive as to whether his or her conviction constitutes an aggravated felony and a particularly serious crime?"

Amicus respectfully contends that the correct statutory provision related to burden of proof in regards to eligibility for asylum and withholding of removal is contained within Immigration and Nationality Act ("INA") §§ 208(b)(1)(B) and 241(b)(3)(C), not INA § 240(c)(4)(A)(i). Since the Supreme Court's decision in *Pereida v. Wilkinson*, 141 S. Ct. 754

(2021) did not construe or discuss sections 208(b)(1)(B) or 241(b)(3)(C) of the Act, *Pereida* is inapposite to the resolution of the question the Board presents. However, when this question is analyzed within the proper statutory and regulatory schemes specific to claims for asylum and withholding of removal, and understood in light of the United States' treaty obligations, an answer to the Board's question emerges. An inconclusive record of conviction cannot justify per se or presumptive application of the particularly serious crime bar to asylum or withholding of removal. This conclusion is anchored both in international and U.S. refugee law.

The United States' international treaty obligations provide that the burden of exclusion for individuals otherwise eligible for refugee protection or protection under the principle of nonrefoulement rests with the state. Exceptions to protection must be construed restrictively. Thus, where there is uncertainty in regards to whether an exclusionary bar should be applied, that uncertainty inures to the favor of the refugee.

Domestic U.S. refugee law—which should be construed consistently with international law given explicit congressional intent to do so—leads to the same conclusion for at least four reasons. First, the Refugee Act and withholding of removal statutes require the Attorney General to *determine* that an applicant has actually "been convicted by a final judgment of a particularly serious crime" that renders the applicant "a danger to the community of the United States" in order to apply that bar. Where the record of conviction is insufficiently conclusive to *determine* the bar applies, then the statute prohibits application of the bar. Second, the REAL ID Act's burden of proof provisions specific to claims for asylum and withholding—which are distinct from the REAL ID Act's general burden of proof provision—make clear that an applicant does not bear the initial burden to disprove application of the bar; rather, the U.S. Department of Homeland Security ("DHS") must bear the burden to exclude. If the record is inconclusive such

that DHS cannot meet its burden by a preponderance of the evidence, then the bar should not be applied. Third, the specific regulatory framework applicable to claims for asylum and withholding confirm that the mere possibility that an applicant's conviction constitutes a particularly serious crime is insufficient to apply the bar. Finally, the Board's related precedent decisions in the context of other asylum and withholding bars, when viewed symmetrically and coherently, confirm that an inconclusive record cannot justify application of the particular serious crime bar.

ARGUMENT

I. INTERNATIONAL LAW PROVIDES THAT THE BURDEN OF EXCLUSION FOR INDIVIDUALS OTHERWISE ELIGIBLE FOR REFUGEE PROTECTION RESTS WITH THE STATE, AND EXCEPTIONS TO PROTECTION MUST BE CONSTRUED IN THE MOST RESTRICTIVE FASHION.

For more than fifty years, the United States has been legally obligated to protect refugees. Article 33 of the 1951 Refugee Convention enshrined the international legal norm of *non-refoulement* requiring that member states protecting individuals seeking protection from persecution and ensuring that they would not be forced to return to a country where they face torture, persecution, or other threats to their life or freedom. *See* U.N. High Commissioner for Refugees, Convention Relating to the Status of Refugees art. 33, July 28, 1951, 189 U.N.T.S. 137 (hereinafter "1951 Refugee Convention") (providing that "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened. . .").

Thereafter, the international community reaffirmed its commitment to ensuring that those fleeing harm would not be sent back to face the perils they fled by removing temporal and geographic limitations from the 1951 Convention and extending its protections indefinitely, thereby solidifying non-refoulement as a consistent and fundamental tenet of international law.

See U.N. GAOR, Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 ("Considering that it is desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline [1] January 1951. . ."). In 1968, the United States acceded to the Convention by signing on to the UN Protocol Relating to the Status of Refugees. *See I.N.S. v. Stevic*, 467 U.S. 407, 416 (1984); *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 429 (1987) (The United States acceded to Articles 2 through 34 of the Convention when it signed on to the Protocol in 1968). Non-refoulement has acquired status as a peremptory rule of international law. *See* Sir Elihu Lauterpacht & Daniel Bethlehem (U.N. High Commissioner for Refugees), *The Scope and Content of the Principle of Non-Refoulement,* ¶¶ 52, 102, Feb. 2003.

The obligation to protect refugees from persecution is subject only to limited exceptions, codified in the Convention at articles 1(F) and 33(2), which are jointly reflected in the statutory bars to protection contained within the INA. Article 1(F) of the 1951 Refugee Convention requires a State to exclude an eligible refugee from protection where that individual "has committed a crime against peace, a war crime, or a crime against humanity," has "committed a serious non-political crime," or "has been guilty of acts contrary to the purpose and principles of the United Nations." U.N. High Commissioner for Refugees, 1951 Convention and Protocol Relating to the Status of Refugees, Art. 1(F) (1951). Article 33(2) *permits,* but does not require, a State to return a refugee to their country of persecution where either the refugee is "a danger to the security of the country in which he is" or the refugee "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country." U.N. High Commissioner for Refugees, 1951 Convention and Protocol Relating to the Status of Refugees, Art. 33(2) (1951). For a refugee to be deemed a danger to the community and refouled for committing a "particularly serious crime" under Article 33(2), there must be proof of an

actual criminal conviction. In contrast to Article 1(F) the criteria in Article 33(2) of the 1951 Refugee Convention apply to individuals who have *already* been recognized as refugees and allows for refoulement to a country of feared persecution when the refugee is deemed to pose a danger to the host country.

The U.N. High Commissioner for Refugees itself has clarified that the burden to prove that someone seeking refugee status should be excluded on criminal grounds under Article 1(F) rests with the host State; acknowledging the particular vulnerabilities among the refugee population, the United Nations also requires that the "applicant be given the benefit of the doubt" in determining whether or not the refugee should be admitted, notwithstanding criminal history. *See* UNHCR, Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees (Sep. 4, 2003) ("The burden of proof with regard to exclusion rests with the State (or UNHCR) and, as in all refugee status determination proceedings, the applicant should be given the benefit of the doubt."); *see also* James C. Simeon, The Developing Jurisprudence on Exclusion Under Article 1F(a) of the 1951 Convention in Selected Western Industrialized States, Canadian Assoc. for Refugee and Forced Migration Stud. (Oct. 2015) ("A key principle in the application and interpretation of the exclusion clauses is that the burden of proof rests with the State or when a refugee application is being decided under the UNHCR's mandate...the UNHCR. . ."). By placing the burden on the State to exclude a potential refugee for criminal conduct (that in the context of Article 1(F) typically occurred *outside* of the host nation), the international legal system recognizes the impracticality in asking a refugee to produce evidence that may be inaccessible – such as in the case of a dysfunctional justice system in the country of alleged criminal activity or an applicant's flight from their home country to escape persecution. *See*

Brian Gorlick, Common Burdens and Standards: Legal Elements in Assessing Claims to Refugee Status, New Issues in Refugee Res., at 5 (Oct. 2002) (stating that "evidentiary requirements should not be applied too strictly in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds him or herself").

Additionally, under international law, when a State seeks to remove, or refoule, a refugee to their country of claimed persecution under Article 33(2), the State bears the burden of persuading the factfinder that a refugee is a threat to safety and thus permissible to refoule. *See* James C. Hathaway & Anne K. Cusick, *Refugee Rights are Non-Negotiable*, 14 Geo. Immigr. L. J. 481, 537 (2000) (noting that "[b]ecause the most vital interests of refugees are involved. . . A restrictive approach is clearly called for, with the state asserting the right to expel a refugee bearing the burden of persuasion.").

In addition to conclusively placing a burden of proof on the State with respect to refoulement of refugees based on criminal concerns under Article 33(2), the international law framework establishes a high evidentiary standard to exclude potential refugees under Article 1(F). This standard, similar to a preponderance of the evidence, must be met by a State in order to deny protection to an otherwise eligible refugee. *See* United Nations High Commissioner for Refugees, *Guidelines on the Application of the Exclusion Clauses (Article 1(F) of the 1951 Convention)* ¶ 2 (Sept. 4, 2003) (stating that due to the serious consequences of returning a refugee to persecution, the Convention's exclusion clauses are to be applied only with "great caution"); *Al-Sirri v. Sec'y of State for the Home Dep't; DD (Afghanistan) v. Sec'y of State for the Home Dep't* [2012] UKSC 54 ¶ 16 (UK Sup. Ct. Nov. 12, 2012) (citing Grahl-Madsen, at 283) (emphasizing that Article 1F "should be interpreted restrictively and applied with caution" and that "[t]here should be a high threshold. . ."); *see also AS (s.55 "exclusion" certificate –*

process) Sri Lanka [2013 UKUT 00571 (IAC) [43] (quoting *Al-Sirri* and noting that "although a domestic standard of proof could not be imported into the Refugee Convention . . . '[t]he reality is that there are unlikely to be sufficiently serious reasons for considering the applicant to be guilty unless the decision-maker can be satisfied *on the balance of probabilities* that he is.'") (emphasis added). The stringent evidentiary standard placed on a State seeking to exclude a refugee from protection requires a careful, diligent application of the exclusionary provision Article 1(F), and is justified in large part due to the dire consequences of exclusion for a refugee applicant. *See* UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1992).

Seemingly in contrast to decisions from other nations' judicial bodies, courts in the United States have occasionally denied protection to individuals fleeing harm on less restrictive grounds than the international law framework calls for. *See N-A-M- v. Holder*, 587 F.3d 1052 (10th Cir. 2009) (denying application for withholding of removal based on the commission of a serious crime without separately considering whether the applicant was a danger to the community). In these instances, the UNHCR has been quick to remind the United States of its international legal obligations: protecting individuals fleeing persecution in all but a very limited set of circumstances. *See* Shirley Llain Arenilla, *Violations to the Principle of Non-Refoulement Under the Asylum Policy of the United States*, 15 Anuario Mexicano de Derecho Internacional 283 (2015) (explaining that because the exceptions to the obligation of non-refoulement "must be constructed in the most restrictive fashion". . . *N-A-M-*'s interpretation is "contrary to United States obligations under international law.").

Domestically, Congress enacted the Refugee Act of 1980, codifying the pledge of non-refoulement that the United States made on an international level, and with the express intention

to bring U.S. law into conformity with those international treaty obligations. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 2012, § 101 (a), (b) (asserting that "it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution . . . The objectives of this Act are to provide a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern."); H.R. REP. NO. 96-608 (1979) ("All witnesses appearing before the Committee strongly endorsed the new [refugee] definition, which will finally bring United States law into conformity with the internationally-accepted definition of the term 'refugee' set forth in the . . . Convention and the Protocol. . . ."); *id.* at 18 (explaining that the statutory bars within the Refugee Act "are those provided in the Convention.").

While the statute outlines six scenarios in which noncitizens are ineligible for asylum, Congress asserted that the United States has a responsibility to be at the forefront of refugee resettlement efforts and inspire all countries to support refugees "to the fullest extent possible." *Id.*

The Supreme Court has made clear that acts of Congress should not be presumed to violate the U.S.'s international obligations. Indeed, a Congressional act "ought never to be construed to violate the law of nations if any other possible construction remains[.]" *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804). "It should not be assumed that Congress proposed to violate the obligations of this country to other nations." *MacLeod v. United States*, 229 U.S. 416, 434 (1913). The 1980 Refugee Act can, and should, be read consistently with the international obligations of the United States not to return refugees to countries where they face persecution. *See I.N.S. v. Stevic*, 467 U.S. 407, 416 (1984) ("The 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 . . . ."); *Hamama v. I.N.S.*, 78 F.3d 233, 239 (6th Cir. 1996) ("The legislative

history . . . indicates that the 'particularly serious crime' concept is the codification of federal treaty obligations under the Multilateral Protocol Relating to the Status of Refugees, *see* H.R. REP. NO. 781, 96th Cong., 2d Sess. 20 (1980) (Conf. Rep.), *reprinted in* 1980 U.S.C.C.A.N. 141, 161, an agreement to which the United States is a party.") To bar otherwise eligible refugees from durable asylum or withholding protections when their criminal histories are incomplete would violate this country's international legal obligations.

II. AN INCONCLUSIVE RECORD OF CONVICTION CANNOT JUSTIFY PER SE OR PRESUMPTIVE APPLICATION OF THE PARTICULARLY SERIOUS CRIME BAR TO ASYLUM OR WITHHOLDING OF REMOVAL.

Consistent with the international legal obligations of the United States, the INA requires a determination that an applicant actually has been convicted of a particularly serious crime; a mere possibility is not enough to apply the bar. In the instant case, the Immigration Judge ("IJ") held in regards to an inconclusive record of conviction that the applicant's crime was both a *per se* particularly serious crime for asylum and *presumptively* a particularly serious crime for withholding.[1] IJ Decision at 34-35. The IJ erred. The statute, regulations, and agency decisions specific to claims for asylum and withholding of removal—interpreted in light of U.S. treaty obligations—demonstrate that an inconclusive record of conviction cannot justify *per se* or *presumptive* application of the particularly serious crime bar to protection for asylum or

[1] An aggravated felony is a *per se* particularly serious crime for asylum regardless of the sentence imposed. INA § 208(b)(2)(B)(i). For withholding of removal, an aggravated felony is a *per se* particularly serious crime where the applicant received an aggregated sentence of five years or more. INA § 241(b)(3)(B); *Bastardo-Vale v. Att'y Gen. United States*, 934 F.3d 255, 266 (3d Cir. 2019) (*en banc*). And, the Attorney General has held that even where an aggregated sentence is less than five years, an aggravated felony that involves unlawful trafficking in a controlled substance is *presumptively* a particularly serious crime for withholding, but an applicant must be given an opportunity to rebut that presumption by showing extraordinary and compelling extenuating circumstances. *See Matter of Y-L-*, 23 I&N Dec. 270, 274 (A.G. 2002).

withholding of removal. In additional to the international legal authorities discussed above, the foregoing conclusion flows from four discrete sources of U.S. legal authority.

First, unless the record of conviction is sufficiently clear that the Attorney General can *determine or decide* that the applicant has *actually* "been convicted by a final judgment of a particularly serious crime," then the asylum and withholding statutes do not permit application of the bar. Second, the REAL ID Act's burden of proof provisions specific to asylum and withholding—which are distinct from the Act's general burden of proof provisions—demonstrate that an applicant does not bear the initial burden to disprove application of the bar; instead, that burden rests with DHS. If the record is inconclusive and thus DHS cannot meet its burden by a preponderance of the evidence, then the bar should not be applied. Third, the specific regulatory frameworks for asylum and withholding confirm that the mere possibility that an applicant's conviction constitutes a particularly serious crime is insufficient to bar relief. Finally, the Board's analogous precedent decisions issued in the context of other asylum and withholding bars show that an inconclusive record cannot justify application of the particular serious crime bar.

A. To Apply the Particularly Serious Crime Bar, a Record of Conviction Must Be Sufficiently Clear such that the Attorney General Can *Determine* the Applicant has *Actually* Been Convicted of a Particularly Serious Crime.

The Refugee Act requires the Attorney General "*determines* that ... [the applicant]" *actually* has "been convicted by a final judgment of a particularly serious crime" that renders the applicant "a danger to the community of the United States" to apply the particularly serious crime bar to an individual otherwise eligible for asylum. *See* INA § 208(b)(2)(A)(ii). The withholding statute contains nearly identical language. INA § 241(b)(3)(B)(ii) (emphasis added) (explaining that an applicant is not eligible for asylum if the Attorney General "*decides* that . . .

the [applicant] . . . has been convicted by a final judgment of a particularly serious crime" that renders the applicant "a danger to the community of the United States.") (emphasis added).[2] A preponderance of the evidence is required to make such a determination; the *mere possibility* that an applicant was convicted of a particularly serious crime would not be sufficient to *determine* the bar applies consistent with the statute. *See id.*; Charles Shane Ellison, *Defending Refugees: A Case for Protective Procedural Safeguards in the Persecutor Bar Analysis*, 33 GEO. IMMIGR. L.J. 213, 240-48 (2019).

In both the withholding and asylum contexts, facts established for purposes of evaluating claims for protection are found using a preponderance of the evidence standard. *Matter of Acosta*, 19 I&N Dec. 211, 214-216 (BIA 1985) ("It is the general rule" that the truth of allegations is established "by a preponderance of the evidence"); *see e.g.*, *Matter of C-A-L-*, 21 I&N Dec. 754, 759 (BIA 1997) (holding that "internal resettlement [ground for denial] should be applied only if" the IJ or BIA can make that finding by "a *preponderance of the evidence*") (emphasis added). Facts material to the frivolous asylum bar to relief are likewise held to the preponderance standard. *See e.g.*, *Matter of Y-L-*, 24 I&N Dec. 151, 157-58 (BIA 2007) (holding that the IJ "must provide cogent and convincing reasons for finding by a preponderance of the evidence" the substantive elements of a frivolous finding). As such, the same preponderance standard must be required for application of the particularly serious crime bar.

That interpretation—that the particularly serious crime bar cannot be applied with any quantum of proof less than a preponderance of the evidence—is confirmed when that bar is read

[2] The Board has held that there is no separate dangerousness requirement in particularly serious crime determinations. *Matter of N-A-M-*, 24 I&N Dec. 336, 342 (BIA 2007). *Amicus* contends this interpretation is unmoored from the statute, but assuming the Board continues to adhere to this position, it is even more reason to ensure that an inconclusive record of conviction is not employed to bar an application for asylum or withholding.

alongside the neighboring bars to asylum and withholding. *See* INA §§ 241(b)(3)(B) and 208(b)(2)(A); *McMullen v. INS*, 788 F.2d 591, 598 n.2 (9th Cir. 1986) (noting that "[a] finding that there are 'serious reasons' to believe the [noncitizen] committed a serious nonpolitical crime is far less stringent than a *determination* that the [noncitizen] actually" engaged in persecution) (emphasis added), *overruled in part on other grounds by Barapind v. Enomoto*, 400 F.3d 744, 751 (9th Cir. 2005).

The particularly serious crime bar was lifted verbatim from Art. 33(2), thus requiring an actual conviction, rather than serious reasons to believe that the applicant has been convicted of a crime. Unless the record of conviction is sufficiently clear to permit the Attorney General to *determine* or *decide* that the applicant has *actually* "been convicted . . . of a particularly serious crime," then the statutes do not countenance application of the bar. *See* INA § 208(b)(2)(A)(ii); INA § 241(b)(3)(B)(ii).

B. The REAL ID Act's Burden of Proof Provisions Specific to Asylum and Withholding Provide that an Applicant Does Not Bear the Burden to Disprove Application of a Bar; Uncertainty Tilts in Favor of an Applicant.

DHS bears the burden of demonstrating the applicability of the particularly serious crime bar. Although the plain language of the statute assigns an applicant for asylum or withholding of removal the burden of establishing *eligibility* for protection, Congress has been equally clear that this burden does not extend to disproving application of the bars, or *exceptions* to eligibility. *See* INA §§ 208(b)(1)(B); 241(b)(3)(C); REAL ID Act of 2005, Pub. L. 109-13.

More than three decades ago, the Board held in the context of the persecutor bar that even though that bar is referenced within INA § 101(a)(42)(A)'s refugee definition, an applicant does not bear the initial burden of proving the applicant did not engage in persecution to establish she is a refugee. *See Matter of Acosta*, 19 I&N Dec. 211, 219 n.4 (BIA 1985), *overruled on other*

grounds by Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987). The Board in *Acosta* reasoned that:

> "While the language of section 101(a)(42)(A) excludes from the definition of a refugee any person who 'ordered, incited, assisted, or otherwise participated in the persecution of any person,' *we do not construe this language as establishing a fifth statutory element an [applicant] must initially prove before he qualifies as a refugee*. This provision is one of *exclusion*, not one of inclusion…." *Id.* (emphasis added).

The REAL ID Act of 2005, Pub. L. 109-13, reinforced *Acosta's* assignment of the applicant's burden of proof, confirming that the applicant does not bear any statutory burden to prove that the bars do not apply. Section 241(b)(3)(C), as amended by the REAL ID Act, provides that, in determining whether an applicant has demonstrated eligibility for withholding of removal, "the trier of fact shall determine whether the [applicant] has sustained [the applicant's] burden of proof … in the manner described in clause (ii) and (iii) of section 208(b)(1)(B)," which describes in detail burdens of proof relevant to asylum. In turn, section 208(b)(1)(B), also amended by REAL ID, states that "the burden of proof is on the applicant to establish that the applicant is a refugee within the meaning of 101(a)(42)(A)."

To meet that burden, section 208(b)(1)(B)(i) explicitly provides that "the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant." *Id.* Consistent with *Acosta*, this "burden of proof" section makes no reference at all to any affirmative duty on the applicant to prove a negative: i.e., that a bar *does not apply*. *Id.*; *Matter of Acosta*, 19 I&N Dec. 211, 219 n.4 (BIA 1985). Rather, the statutory bars to asylum and withholding are styled as "exceptions" to eligibility and clearly provide that instead of the applicant bearing any burden in regards to those exceptions, it falls to the Attorney General to *determine* or *decide* whether the applicant falls within an exception. *See* INA §§ 208(b)(2); 241(b)(3)(B). The statutory scheme

for asylum and withholding, consistent with international law principles, places that burden to exclude a putative refugee on the State. *See* INA §§ 208(b)(1)(B); 241(b)(3)(C).

In this way, the statutory burden of proof schemes specific to asylum and withholding stand in marked contrast to the generic burden of proof provision of INA § 240(c)(4)(A)(i), though the current form of all three burden of proof provisions were fashioned through the same enactment. REAL ID Act, Division B of Pub. L. No. 109-13, 119 Stat. 231; *see also Matter of Almanza-Arenas*, 24 I&N Dec. 771, 773 (BIA 2009). While INA § 240(c)(4)(A)(i) applies generally to "[a]pplications for relief from removal," the burden of proof provisions in sections 208(b)(1)(B) and 241(b)(3)(C) are specifically tailored to claims for asylum and withholding respectively. Therefore, INA § 240(c)(4)(A)(i) is simply the wrong statutory provision to apply to the asylum/withholding question presented here. And the Supreme Court's construction of 240(c)(4)(A)(i) in *Pereida v. Wilkinson*, 141 S. Ct. 754, 760 (2021) is thus irrelevant to the proper construction of the burden of proof provisions of INA §§ 208(b)(1)(B) and 241(b)(3)(C). To superimpose this generic burden of proof provision of INA § 240(c)(4)(A)(i) onto claims for asylum and withholding would be to render the more specific burden of proof provisions of INA §§ 208(b)(1)(B) and 241(b)(3)(C) mere surplusage, violating a cardinal principle of statutory construction. *See United States v. Menasche*, 348 U.S. 528, 538–39 (1955) (A statute should be interpreted to "give effect, if possible, to every clause and word" therein) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)); *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (describing the canon against surplusage as a "cardinal principle of statutory construction"); *Bastardo-Vale v. Att'y Gen. United States*, 934 F.3d 255, 266 (3d Cir. 2019) (*en banc*).

The more specific burden of proof provisions related to asylum and withholding—which, as described above, differ from the language of the generic provision within section §

240(c)(4)(A)(i) by specifically listing what must be show for eligibility—must be given full effect. *Yates v. United States*, 135 S. Ct. 1074, 1085 (2015) (plurality opinion) ("We resist a reading of [a statutory provision] that would render superfluous an entire provision passed in proximity as part of the same Act."). The rule against surplusage here is especially important given that all three burden of proof provisions were added through the REAL ID Act. *Id.* Several decisions by the U.S. courts of appeals have recognized that Congress has placed the initial burden related to asylum and withholding bars squarely upon the government. *See e.g.*, *Xu Sheng Gao v. U.S. Att'y Gen.*, 500 F.3d 93, 103 (2d Cir. 2007) (noting in the context of the persecutor bar, which uses the same *determine/decide* language, that "the government [must] satisf[y] its initial burden of demonstrating that the [] bar applies"); *Castañeda–Castillo v. Gonzales*, 488 F.3d 17, 21 (1st Cir. 2007) (same); *Pastora v. Holder*, 737 F.3d 902, 906-07 (4th Cir. 2013) (applying the bar only after the "totality of the specific evidence ... was sufficient to indicate that the persecutor bar applied"); *Hernandez v. Reno*, 258 F.3d at 812, 814 (8th Cir. 2001) (same).

The Board and Attorney General have likewise affirmed that the government bears an initial burden with respect to neighboring bars to protection. *See e.g.*, *Matter of Negusie*, 27 I&N Dec. 347, 366 (BIA 2018) ("the initial burden is on the DHS to show evidence that indicates that the [applicant] assisted or otherwise participated in persecution") (citing *Matter of A-H-*, 23 I&N Dec. 744, 786 (A.G. 2005) (same)), overruled by *Matter of Negusie*, 28 I&N Dec. 120 (A.G. 2020);[3] *Matter of Y-L-*, 24 I&N Dec. 151 at 155 ("the ultimate burden of proof [is] on the Government"); *Matter of A-G-G-*, 25 I&N Dec. 486, 501 (BIA 2011) ("DHS bears the initial

[3] The Board's decision on remand from Attorney General Barr's decision in *Matter of Negusie* is currently under review by Attorney General Garland. *See Matter of Negusie*, 28 I&N Dec. 399 (A.G. 2021).

burden of establishing that [the] evidence indicates that a mandatory bar to relief applies" in the firm resettlement context); *see Matter of J.M. Alvarado*, 27 I&N Dec. 27, 28 n.2 (BIA 2017) (citing *Castañeda–Castillo v. Gonzales, supra*, for the proposition that it is up to "DHS [to] introduce[] evidence of" the applicant's involvement "with persecution");[4] *Matter of Y-L-*, 24 I&N Dec. 151 at 160 (holding in the context of the frivolous asylum bar that "the ultimate *burden of proof* [is] *on the Government*") (emphasis added).

Thus, if a record of conviction is inconclusive such that DHS cannot meet its burden by a preponderance of the evidence, the uncertainty inures to the favor of the applicant and the particularly serious crime bar should not be applied.

C. The Asylum and Withholding Regulatory Frameworks Confirm that the Mere Possibility That An Applicant's Conviction Constitutes a Particularly Serious Crime Is Insufficient to Apply the Bar.

The regulations specific to asylum and withholding of removal demonstrate that the particularly serious crime bar should not exclude an applicant from protection where the evidence indicates merely that the bar *may apply*. *Compare* 8 C.F.R. § 1208.13(c)(1) (stating "[f]or [asylum] applications filed after April 1, 1997, an applicant shall not qualify for *asylum* if [the particularly serious crime bar] *applies* to the applicant") (emphasis added) and 8 C.F.R. § 1208.16(d)(2) (requiring the evidence to show "the *applicability* of . . . [a] ground[] for denial" for withholding of removal) (emphasis added) *with* 8 C.F.R. § 1240.8(d) (stating generically in

[4] While *Alvarado*, 27 I&N Dec. 27, citing 8 C.F.R. § 1240.66, states that that an applicant for NACARA relief must show that he has not assisted or participated in persecution, that regulation does not apply in the asylum or withholding context. Moreover, *Alvarado* adopts *Castañeda–Castillo*, which correctly placed an initial burden on the government in the asylum and withholding contexts. *See 488 F.3d at 21*. *Amicus* contends that the withholding and asylum statutes—when considered in light of the Act as a whole, the frameworks of *A-G-G-* and *Y-L-*, and considered in context with other sources of congressional intent and international law—require DHS to bear the initial burden. *Alvarado's* burden allocation in the case of NACARA is irrelevant in this context.

the context of "applications for relief" that an applicant bears a burden to disprove application of a ground for denial where that disqualifying ground "*may apply*") (emphasis added).

Indeed, the "generic-relief regulation was only intended to apply to applications for relief that do not otherwise have a more specific regulatory regime." *See Defending Refugees, supra* at 235. Overlaying "the generic-relief regulation (which uses the words "may apply") onto the asylum/with-holding-specific regulations (which do not use the words "may apply") render[s] superfluous the precise language selected in the more specific asylum/withholding regulations." *Id.* As such, the BIA must not apply section 1240.8(d) to the question presented here. *See Black & Decker Corp. v. Comm'r of Internal Revenue*, 986 F.2d 60, 65 (4th Cir. 1993) ("Regulations, like statutes, are interpreted according to canons of construction. Chief among these" is the rule against superfluousness.); *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019) ("First and foremost, a court should not afford *Auer* deference unless the regulation is genuinely ambiguous.").

Notwithstanding the disparate nature of these regulatory schemes, the BIA at times has reflexively used the generic regulatory provision of 8 C.F.R. § 1240.8(d) in its analysis of asylum and withholding bars. However, *Amicus* respectfully submits that this approach is flawed. Not only does it disregard the more specific asylum/withholding regulations, several courts have also cast doubt upon or explicitly rejected this approach as inconsistent with the statute. *See Pastora v. Holder*, 737 F.3d 902, 906, FN 5 (4th Cir. 2013) (noting that 8 C.F.R. § 1240.8(d)'s language "may apply" could be "in tension with the language of the statute") (emphasis added); *Diaz–Zanatta v. Holder*, 558 F.3d 450, 455 (6th Cir. 2009) (holding that "the record must reveal that the [applicant] *actually* assisted or otherwise participated in the persecution of another") (emphasis in original); *Gao v. U.S. Att'y Gen.*, 500 F.3d 93, 100 (2d Cir. 2007) (finding the evidence in that case insufficient "to trigger the persecutor bar without

evidence indicating that Gao *actually* assisted in an identified act of persecution") (emphasis in original); *Singh v. Gonzales*, 417 F.3d 736, 740 (7th Cir. 2005) ("for the statutory bars contained in ... [the withholding and asylum statutes] to apply, the record must reveal that the alien *actually* assisted or otherwise participated in the persecution") (emphasis in original); *Budiono v. Lynch*, 837 F.3d 1042, 1048 (9th Cir. 2016) (explaining that in *Kumar v. Holder*, 728 F.3d 993 (9th Cir. 2013), the Court was "[f]aced with ... evidentiary gaps," and "did not hold—as the government would have us do here—that the persecutor bar should apply because the applicant failed" to rebut "the circumstantial evidence suggesting that he *might have* assisted in persecution) (emphasis added).

Moreover, the text of the generic-relief regulation only applies to "application[s] for relief," and Courts have held unequivocally that withholding of removal is not "relief." *See Ramirez-Mejia v. Lynch*, 794 F.3d 485, 489 (5th Cir. 2015) (recognizing that withholding of removal is a form of protection, not "relief"); Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478 (Feb. 19, 1999) (providing that individuals with a reasonable fear who would otherwise be subject to 8 U.S.C. § 1231(a)(5)'s bar to "all relief under [the] Act," are still entitled to seek withholding of removal); *Cazun v. Attorney Gen. United States*, 856 F.3d 249, 255-56 (3d Cir. 2017) (same). Thus, the generic-relief regulation, by its own terms, must not be used in the context of a withholding claim.

When read together, the specific regulatory framework applicable to claims for asylum and withholding reaffirm that the mere possibility that an applicant's conviction constitutes a particularly serious crime is insufficient to apply the bar or otherwise impose a burden on the applicant to disprove application of a bar.

D. Board Precedent in the Context of Related Asylum and Withholding Bars, When Viewed Symmetrically and Coherently, Confirm that an Inconclusive Record Cannot Justify Application of the Particular Serious Crime Bar.

The framework for applying the particularly serious crime bar must be more protective—not less—than the procedural safeguards provided by the Board in separate statutory bars carrying less grave consequences. Analysis of the frameworks the BIA has required in the firm resettlement bar and frivolous asylum bar contexts reveals the minimum procedural safeguards for applying the particularly serious crime bar. *See Matter of A-G-G-*, 25 I&N Dec. 486, 501 (BIA 2011); *Matter of Y-L-*, 24 I&N Dec. 151, 155-60 (BIA 2007). Given the relative gravity of these three bars—the particularly serious crime bar being by far the most serious—the agency cannot reasonably adopt in the particularly serious crime bar context a set of procedures *less* protective than those it has already adopted in the frivolous asylum bar context. *See Matter of Khan*, 26 I&N Dec. 797, 804 (BIA 2016) (noting the importance of adopting a standard that would result in a "harmonious [and symmetrical] statutory scheme") (citing *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (explaining that in determining the meaning of a statute, a court must "interpret the statute 'as a symmetrical and coherent regulatory scheme' … and 'fit, if possible, all parts into an harmonious whole'"); *accord Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019).

While the firm resettlement bar renders an applicant ineligible for asylum, it is not a bar to withholding. *Compare* INA 208 § (b)(2)(A)(vi) (containing a firm resettlement bar to asylum) *with* INA § 241(b)(3)(B) (omitting any firm resettlement bar for withholding). Similarly, the frivolous asylum bar—though carrying extremely serious and far-reaching consequences by rendering an applicant permanently ineligible for asylum and other relief under the Act—does not bar eligibility for withholding. *See Matter of Y-L-*, 24 I&N Dec. 151 at 154-155 (holding that the frivolous asylum bar makes one "permanently ineligible for any benefits under [the INA],"

but it "shall not preclude [an applicant] from seeking withholding of removal"). Of the three bars, it is only the particularly serious crime bar that results in permanent ineligibility for *both* asylum *and* withholding.

Therefore, *Matter of A-G-G-* and *Matter of Y-L-* provide a floor for the minimum procedural safeguards required in the particularly serious crime bar context. Both *Matter of A-G-G-* and *Matter of Y-L-* place the initial burden of proof squarely on the government. *Matter of A-G-G-*, 25 I&N Dec. at 496 ("DHS bears the initial burden"); *Matter of Y-L-*, 24 I&N Dec. 151 at 158 ("the ultimate burden of proof [is] on the Government"). And, while *A-G-G-* states that the government's burden is to produce *prima facie* evidence, *id.* at 501, the more serious frivolousness bar requires "cogent and convincing reasons for finding by a *preponderance of the evidence*." *Id.* at 158 (emphasis added). If these decisions are read symmetrically and coherently, DHS must bear the burden of proof by a preponderance of the evidence to justify application of the particularly serious crime bar.

It makes no sense to think Congress would intend to bar mandatory withholding protection even to refugees who face a certainty of persecution on the basis of *less* evidence and with *fewer* procedural safeguards than it requires in order to bar discretionary asylum relief to refugees who face only a reasonable possibility of persecution. *See Defending Refugees*, *supra* at 248-58.

Given the gravity that accompanies application of the particularly serious crime bar, it must not be applied cavalierly. *See Gao v. U.S. Att'y Gen.*, 500 F.3d 93, 98 (2d Cir. 2007) ("In evaluating" the application of a bar to withholding, "it must be remembered that this provision authorizes the deportation of individuals who have established that they would likely be persecuted ... [so] courts must be cautious before permitting generalities or attenuated links to"

apply a bar to protection.). Unless DHS has been able to show by a preponderance of the evidence that an applicant has been convicted of a crime that *actually* constitutes a particular serious crime, the bar should not be applied consistent with the Board's analogous precedents.

CONCLUSION

For the foregoing reasons, the Board should conclude that an inconclusive record of conviction cannot justify *per se* or *presumptive* application of the particularly serious crime bar to asylum or withholding of removal. Any contrary conclusion would stand in an irreconcilable conflict with the U.S.'s international treaty obligations, the relevant statutory provisions, the specific regulatory framework, and decades of agency precedent.

Dated: December 1, 2021

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PROOF OF SERVICE

I, Sarah Sherman-Stokes, certify that on December 1, 2021, I caused three copies of the foregoing request to file amicus brief and proposed brief to be delivered to the Board of Immigration Appeals at the following address:

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