Christopher J. Hajec
Ralph L. Casale
Gina M. D'Andrea
Immigration Reform Law Institute
25 Massachusetts Ave, NW
Suite 335
Washington, DC 20001
(202) 232-5590

Attorneys for Amicus Curiae Immigration Reform Law Institute

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In the Matter of: Amicus Invitation No. 21-09-11 Request to Appear As *Amicus Curiae*	Amicus Invitation No. 21-09-11

REQUEST TO APPEAR AS *AMICUS CURIAE* AND BRIEF FOR *AMICUS CURIAE* IMMIGRATION REFORM LAW INSTITUTE

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REQUEST TO APPEAR AS *AMICUS CURIAE*

The Immigration Reform Law Institute ("IRLI") respectfully requests leave to file this *amicus curiae* brief at the invitation of the Board of Immigration Appeals. *See* Amicus Invitation No. 21-09-11 (BIA 2021). The *amicus curiae* brief is submitted with this request.

INTEREST OF *AMICUS CURIAE*

IRLI is a nonprofit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of United States citizens and lawful permanent residents, as well as organizations and communities seeking to control illegal immigration and reduce lawful immigration to sustainable levels. IRLI has litigated or filed *amicus curiae* briefs in many immigration-related cases before federal courts and administrative bodies. For more than twenty years, the Board of Immigration Appeals (the "Board") has solicited *amicus* briefs, drafted by IRLI staff, from the Federation for American Immigration Reform, of which IRLI is a supporting organization, because the Board considers IRLI an expert in immigration law.

ISSUE PRESENTED

Whether all aggravated felonies under section 101(a)(43) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43), per se come within the ambit of a particularly serious crime, such that it is unnecessary to examine the elements of the relevant aggravated felony offense pursuant to the first step of Matter of N-A-M-, 24 I&N Dec. 336 (BIA 2007).

SUMMARY OF ARGUMENT

The need to interpret statutory terms in the Immigration and Nationality Act ("INA") uniformly is rooted in the Constitution itself. Thus, because it is provided in the asylum statute

that all aggravated felonies are particularly serious crimes, and no contrary definition is given elsewhere in the INA, the definition of particularly serious crimes provided in the asylum statute should hold throughout the INA. Since, then, all aggravated felonies should be treated as particularly serious crimes, no examination of the elements of a given aggravated felony is necessary to determine whether it is such a crime.

ARGUMENT

I. The aggravated felonies enumerated in the Immigration and Nationality Act are particularly serious crimes.

Congress has the power both to exclude certain aliens from admission and to deem them ineligible for relief from a final order of removal. The INA reflects Congress's determination that an alien who "ha[s] been convicted by a final judgement of a particularly serious crime is a danger to the community of the United States." 8 U.S.C § 1231(b)(3)(B)(ii). One subsection, without defining the term particularly serious crime, provides that "an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime." 8 U.S.C. § 1231(b)(3)(B). Congress made clear, however, that this example "shall not preclude the Attorney General from determining that, notwithstanding the length of the sentence imposed, an alien has been convicted of a particularly serious crime." 8 U.S.C. § 1231(b)(3)(B).

Prior to 1996, the INA included explicit language "declaring that *all* aggravated felonies are particularly serious crimes." *In re Y-L; In re A-G; In re R-S-R;* 23 I&N Dec. 270, 273 (A.G. 2002) (emphasis in original; footnote omitted). The 1996 amendment was a response to an expansion of the definition of aggravated felony under the United Nations Protocol Relating to

the Status of Refugees, 19 U.S.T. 6223 (the "Protocol"). The Protocol included more aggravated felonies than the INA, so the statute was amended to give the Attorney General discretion to eliminate crimes that are aggravated felonies under the protocol as particularly serious crimes. *Valerio-Ramirez v. Sessions*, 882 F.3d 289, 296 (1st Cir. 2018) (explaining that the amendment "was intended to offset the AEDPA's expansion of the definition of aggravated felonies 'by preserv[ing] the Attorney General's flexibility in assessing whether crimes now defined as aggravated felonies were, in fact, particularly serious within the meaning of the Protocol.'"). *See also Matter of N-A-M-*, 24 I&N. Dec. 336, 336 (BIA 2007) (explaining that "Congress intentionally withdrew much of its prior equation of particularly serious crimes with aggravated felonies . . . in order to allow a more flexible analysis in determining whether an offense is a particularly serious crime."). In fact, the Attorney General determined that "the discretionary authority reserved to the Attorney General with respect to offenses from which less severe sentences flow is clearly intended to enable him to emphasize factors *other than* length of sentence." *In re Y-L; In re A-G; In re R-S-R;* 23 I&N Dec. 270, 274 (A.G. 2002) (emphasis in original; footnote omitted). *See also Nethagani v. Mukasey*, 532 F.3d 150, 157 (2d Cir. 2008) (explaining that *Matter of N-A-M-* "clarifies that an aggravated felony may be a particularly serious crime regardless of sentence length," which is "permissible because it naturally and reasonably reads the second sentence of § 1231(b)(3)(B) as a caution against drawing an available inference from the prior sentence.").

In that regard, certain drug offenses are *per se* considered to be particularly serious crimes. *In re Y-L, In re A-G, In re R-S-R*, 23 I&N Dec. at 275; *see id.* at 274 ("[I]t is my considered judgment that aggravated felonies involving unlawful trafficking in controlled substances presumptively constitute 'particularly serious crimes' within the meaning of section

241(b)(3)(B)(ii). Only under the most extenuating circumstances that are both extraordinary and compelling would departure from this interpretation be warranted or permissible.") (footnote omitted).

Statutory interpretation requires the court to consider provisions in question in the context of the entire law. *See Negusie v. Holder*, 555 U.S. 511, 545-46 (2009) (Thomas, J., dissenting) (quoting *Varity Corp.* v. *Howe*, 516 U.S. 489, 519 (1996) (Thomas, J., dissenting)) ("Where 'Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions,' courts should not read one part of the legislative regime (the INA) to provide a different, and conflicting solution. . . ."); *K-Mart Corp. v. Cartier*, 486 U.S. 281, 291 (1988) (instructing courts to look to "the language and design of the statute as a whole") (citations omitted); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.") (citations omitted); *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) (explaining that "statutory language cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.") (citations omitted). Consideration of statutory provisions in context is especially important in immigration due to the need for consistency in immigration laws. *Gerbier v. Holmes*, 280 F.3d 297, 311 (3d Cir. 2002) ("Indeed, the policy favoring uniformity in the immigration context is rooted in the Constitution.") (citation omitted).

The term "particularly serious crime" is used throughout the INA to include all aggravated felonies enumerated in 8 U.S.C. § 1101(a)(43). Section 101(a)(43) of the INA, 8 U.S.C. §

1101(a)(43), defines the term "aggravated felony." The provision lists serious crimes, such as murder, drug trafficking, crimes of violence, and other crimes based on sections of the INA. *Id*.

As explained by the Ninth Circuit, "[a]s used in immigration law, 'aggravated felony' is a term of art referring to the offenses enumerated under § 1101(a)(43)." *Delgado v. Holder*, 648 F.3d 1095, 1101 (9th Cir. 2011). *See also Biskupski v. AG of the United States*, 503 F.3d 274, 280 (3d Cir. 2007) ("By placing the term 'aggravated felony' in quotations followed by 'means' Congress made absolutely clear that 'aggravated felony' is a term of art defined by the subsections that follow. We must apply the definition of that term provided by Congress.").

Because the term "particularly serious crime" is used throughout the INA, it should be interpreted to mean the same thing in all instances. *See, e.g., Bastardo-Vale v. AG United States*, 934 F.3d 255, 267 (3d Cir. 2019) (internal quotation marks omitted) (explaining that "the phrase 'particularly serious crime' is used in both the asylum and withholding of removal statutes and should be interpreted to mean the same thing."); *Vechter v. Barr*, 953 F.3d 361, 369 (5th Cir. 2020) ("[B]ecause the phrase is used in different sections of the same statute and in the same context of deportation relief, we agree that there should be a singular meaning of the one phrase 'particularly serious crime' so that there is consistency in the interpretation of the INA as a whole.").

For example, under the asylum rules, "an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime," thus rendering him or her ineligible for asylum. 8 U.S.C. § 1158 (b)(2)(B)(i). Because the asylum provision reflects the same congressional priority found in §1231(b)(3)(B)(ii)—that illegal aliens who commit particularly serious crimes are a threat to American citizens—its terms should be interpreted to have the same meaning. A lawful permanent resident is ineligible for cancellation

of removal if convicted of an aggravated felony. 8 U.S.C. § 1229b(a)(3). Holding that the list of aggravated felonies in Section 101(a)(43) of the INA constitute *per se* particularly serious crimes would ensure that illegal aliens who commit serious crimes are consistently excluded or removed from the United States.

II. Because the aggravated felonies enumerated in 8 U.S.C. § 1101(a)(43) are particularly serious crimes, the first step of the analysis set forth in *Matter of N-A-M-* is unnecessary.

In *Matter of N-A-M-*, the Board addressed whether a criminal offense must be defined as an aggravated felony to be considered a particularly serious crime under the INA. *Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007). The test laid out in *Matter of N-A-M-* is used to determine whether a non-aggravated felony conviction was for a particularly serious crime. *See Matter of N-A-M-*, 24 I&N Dec. at 337. The Third Circuit described the legal standard in *N-A-M* applicable to particularly serious crime determinations as follows:

> First, adjudicators consider whether the elements of an offense "potentially bring the crime into a category of particularly serious crimes." . . . . If not, then "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." …. If, however, the elements do "potentially bring the offense within the ambit of a particularly serious crime," then an adjudicator may make the determination by considering "all reliable information[,] . . . including the conviction records and sentencing information, as well as other information outside the confines of a record of conviction."

Luziga v. Attorney General of the United States, 937 F.3d 244, 252-253 (3d Cir. 2019) (internal citation and other citation omitted). "[O]nce 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." *Matter of N-A-M-*, 24 I&N Dec. at 342. Therefore, because the aggravated felonies enumerated in 8 U.S.C. § 1101(a)(43) are particularly serious crimes, the test is not required.

CONCLUSION

For the foregoing reasons, the Board should conclude and hold that all aggravated felonies under section 101(a)(43) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43), *per se* come within the ambit of a particularly serious crime, such that it is unnecessary to examine the elements of the relevant aggravated felony offense pursuant to the first step of *Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007).

/s/ Ralph L. Casale
Christopher J. Hajec
Ralph L. Casale
Gina M. D'Andrea
Immigration Reform Law Institute
25 Massachusetts Ave, NW
Suite 335
Washington, DC 20001
Tel: (202) 232-5590
Fax: (202) 464-3590
Email: rcasale@irli.org

Attorneys for Amicus Curiae
Immigration Reform Law Institute

CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2021, I submitted three (3) copies of the foregoing request to appear as *amicus curiae* and *amicus curiae* brief to the Board of Immigration Appeals at the following address:

Amicus Clerk
Board of Immigration Appeals
Clerk's Office
5107 Leesburg Pike, Suite 2000
Falls Church, VA 22041

by hand delivery by private courier.

November 30, 2021

/s/ Ralph L. Casale
Ralph L. Casale
Attorney for Immigration Reform Law Institute