CAPITAL AREA IMMIGRANTS' RIGHTS (CAIR) COALITION
IMMIGRATION CONSEQUENCES OF COMMON VIRGINIA OFFENSES
SECTION V – FIREARMS OFFENSES

OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY ?	COMMENTS AND PRACTICE TIPS
Shooting, etc., in attempt or commission of a felony	18.2-53	Yes	Yes, under 8 U.S.C. § 1101(a)(43)(F) if sentence imposed is at least one year Maybe, under 8 U.S.C. § 1101(a)(43)(E)[1]	Maybe, under 8 U.S.C. § 1227(a)(2)(C) (firearms offense)	Keep sentence under one year (for example, 364 days) to avoid a "crime of violence" aggravated felony under 8 U.S.C. §1101(a)(43(F). If allegations do not involve a firearm, emphasize that fact in the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact to avoid firearm offense ground of deportability and firearms-related aggravated felony. Otherwise keep the specific weapon involved out of these documents to

[1] A person can be convicted under Virginia Code § 18.2-53 for unlawfully shooting, stabbing, cutting or wounding another person in the commission or attempted commission of a felony. Only the act of shooting would arguably qualify as a firearms aggravated felony under 8 U.S.C. § 1101(a)(43)(E) via 18 U.S.C. § 844(h)(1) or a firearms offense under 8 U.S.C. § 1227(a)(2)(C). *See U.S. v. Davis* 202 F.3d 212 (4th Cir. 2000) (holding that "shooting" falls under the ambit of 18 U.S.C. § 844 since it involves the use of gunpowder, an explosive under the statute). As the statute criminalizes conduct (i.e. stabbing) that is not encompassed by 8 U.S.C. §§ 1101(a)(43)(E) or 1227(a)(2)(C), and the Commonwealth of Virginia prosecutes such conduct under this statute(*see, e.g.*, *Blythe v. Commonwealth*, 284 S.E.2d 796, 797 (Va. 1981) (convicting for stabbing)), an immigration practitioner could argue that it is overbroad and therefore categorically not an aggravated felony or a firearms offense. However, the government could attempt to rebut this argument by alleging that § 18.2-53 is divisible, i.e. that shooting, stabbing, cutting, and wounding are alternative elements of distinct offenses, rather than alternative means of committing a single offense. Virginia law does not appear to clarify whether these alternatives are "elements" or "means" since no court has addressed this question; the alternatives do not carry different punishments; there is no model jury instruction for this offense; and the statute itself does not list these alternatives as illustrative examples or state whether they must be charged in isolation or not. *See Mathis v. U.S.*, 136 S.Ct. 2243, 2256 (2016). An immigration judge may therefore be able to look at the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact to determine whether these alternatives are elements of distinct offenses or means of committing a single offense. *Id.* at 2256–57. If the underlying conduct is shooting, advocate for the use of the statutory phrase "shoot, stab, cut, or wound" instead of "shoot" in the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact to create evidence that these alternatives are means of committing a single offense that is broader than 8 U.S.C. § 1101(a)(43)(E).

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					preserve overbreadth arguments.[2] Consider alternative plea under 18.2-282 or 18.2-286 to decrease chance that offense will be considered a CIMT or aggravated felony (but this will not necessarily avoid the firearms ground of deportability).
Use or display of firearm in committing felony	18.2-53.1	Maybe	Yes, under 8 U.S.C. § 1101(a)(43)(F), if sentence of one year or	Most likely not, under 8 U.S.C. § 1227(a) (2)(C) (firearms offense)[4]	Keep sentence under one year (for example, 364 days) to avoid a "crime of violence" aggravated felony under 8 U.S.C. §1101(a)(43(F).

[2] *See id*.

[4] A conviction under § 18.2-53.1 is most likely not categorically a firearms offense under 8 U.S.C. § 1227(a)(2)(C) since the definition of firearm for § 18.2-53.1 is broader than that of 18 U.S.C. § 921(a). 18 U.S.C. § 921(a) limits the federal definition of a firearm to a weapon "which will or is designed to or may readily be converted to expel a projectile by the action of an explosive" while Virginia courts have expanded the Virginia definition beyond that to include "any instrument that is capable of expelling a projectile by force or gunpowder [or] is not capable of expelling a projectile of force or gunpowder *but gives the appearance of being able to do so.*" *Startin v. Commonwealth*, 706 S.E.2d 873, 879 (Va. 2011)(emphasis added). Additionally, under *Conroy Gordon v. Barr*, the Fourth Circuit held that the use of the language "any firearm" as opposed to "a firearm" in § 18.2-280(A) demonstrates the General Assembly of Virginia's clear intent to include all firearms in the scope of the statute. 965 F.3d, 252, 258. The same reasoning can be applied here. The use of the language "any pistol, shotgun, rifle, or other firearm" as opposed to the language "a firearm" in § 18.2-53.1 indicates that all firearms, including antique firearms, are included in the scope of the statute. For additional support, the immigration practitioner may cite *Matter of Ortega Quezada*, 28 I&N Dec. 598 (BIA 2022), where the BIA held that Conviction for unlawfully selling or otherwise disposing of a firearm or ammunition in violation of 18 U.S.C. § 922(d) (2018) does not render an individual removable as charged under section 237(a)(2)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(C) (2018), because § 922(d) is categorically overbroad and indivisible relative to the definition of a firearms offense (as 992(d) includes "any firearm" while 237(a)(2)(C) only includes certain firearms. Thus, an immigration practitioner would have a strong argument that the statute is categorically overbroad. For further discussion of *Conroy Gordon, see infra* note 42.

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			more is imposed Maybe, under `8 U.S.C. § 1101(a)(43)(E)[3]		If type of firearm is not included in federal definition, e.g. a fake firearm or an antique firearm, emphasize in the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact; otherwise, keep type of firearm outside these documents. If applicable, keep reference to shooting firearm out of the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact. Consider alternative plea under 18.2-282 or 18.2-286 to decrease chance that offense will be considered a CIMT or

[3] A person can be convicted under Va. Code § 18.2-53.1 for using, attempting to use, or displaying a shotgun, rifle, or other firearm. While "displaying" is not explicitly prohibited under 8 U.S.C. 1101(a)(43)(E) via 18 U.S.C. § 844(h), there may be a circumstances where "displaying" could be construed as "using" under Virginia law. *See U.S. v. Ressam*, 553 U.S. 722, 724 (not disputing that the defendant was carrying explosives when they were in the trunk of a car he was operating). However, an immigration practitioner may argue that Va. Code § 18.2-53.1 is not categorically an aggravated felony under 8 U.S.C. § 1101(a)(43)(E) via 18 U.S.C. § 844(h)(prohibiting carrying an explosive during the commission of a felony) for a few reasons. First, Virginia courts have interpreted the term "use a firearm" to include beyond instances where a firearm expels a projectile by force or explosion. *See, e.g., Rose v. Commonwealth*, 673 S.E.2d. 489, 491 (Va. Ct. App. 2009) (holding that using a firearm as a club satisfies Va. Code § 18.2-53.1). Second, the definition of firearm for Va. Code § 18.2-53.1 is broader than that of explosive in 18 U.S.C. § 844(j), which is repeated in *U.S. v. Davis* 202 F.3d 212 (4th Cir. 2000)).Unlike 18 U.S.C. § 844(j), Va Code. § 18.2-53.1 includes instruments not capable of expelling a projectile of force or gunpowder *but giving the appearance of being able to do so*. *See Startin v. Commonwealth*, 706 S.E.2d 873, 877 (Va. 2011) (convicting on the basis of a replica firearm); *Holloman v. Commonwealth*, 221 Va. 196 (Va. 1980) (convicting on the basis of a spring-operated BB gun). For additional support, the immigration practitioner may cite *Matter of Ortega Quezada*, 28 I&N Dec. 598 (BIA 2022), where the BIA held that Conviction for unlawfully selling or otherwise disposing of a firearm or ammunition in violation of 18 U.S.C. § 922(d) (2018) does not render an individual removable as charged under section 237(a)(2)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(C) (2018), because § 922(d) is categorically overbroad and indivisible relative to the definition of a firearms offense (as 992(d) includes "any firearm" while 237(a)(2)(C) only includes certain firearms. Therefore, an immigration practitioner may argue that Va. Code §18.2-53.1 is categorically overbroad as to 8 U.S.C. § 1101(a)(43)(E).

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					aggravated felony (but this will not necessarily avoid the firearms ground of deportability)
Reckless handling of firearms; reckless handling while hunting	18.2-56.1(A)	Maybe[5]	No[6]	Most likely not, under 8 U.S.C. § 1227(a) (2)(C) (firearms offense)[7]	If type of firearm is not included in federal definition (e.g. is an antique or fake firearm), emphasize that fact in charging document, written plea agreement, transcript of

[5] The BIA has held that in order for a statute with a reckless *mens rea* to constitute a CIMT, it "must be coupled with an offense involving the infliction of serious bodily injury." *Matter of Fualaau*, 21 I&N Dec. 475, 478 (BIA 1996). Va. Code §§ 18.2-56.1, 56.2 require a reckless state of mind but allow for conviction as a result of any danger to "life, limb or property," which is broader than infliction of serious bodily injury. The BIA requires a showing of a realistic probability for prosecuting conduct that does not involve moral turpitude under the state statute to find that statute overbroad. *Matter of Silva-Trevino*, 26 I&N Dec. 826, 831–33 (BIA 2016). The Commonwealth has successfully prosecuted individuals under Va. Code § 18.2-56.1 absent the infliction of serious bodily injury. *See, e.g.*, *Kirby v. Commonwealth*, 570 S.E.2d 832, (Va. 2002) (affirming a conviction in which defendant fired two shots into bedroom floor and victim was in another room). Thus, an immigration practitioner could establish that 18.2-56.1 is not a CIMT. However, the Fourth Circuit has not yet ruled on whether the realistic probability doctrine applies to CIMT, and some circuits have rejected its application. *See Jean-Louis v. U.S. Attn'y Gen.*, 582 F.3d 462, 481–82 (3d Cir. 2009); *Cisneros-Guerrerro v. Holder*, 774 F.3d 1056, 1058–59 (5th Cir. 2014).

[6] Recklessness is not a sufficiently culpable mens rea for an offense to constitute a crime of violence. *Garcia v. Gonzales*, 455 F.3d 465, 469 (4th Cir. 2006) (citing *Bejarano-Urrutia v. Gonzales*, 413 F.3d, 444 447 (4th Cir. 2005)). As such, an offense whose mens rea is recklessness is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F). In June 2021, the U.S. Supreme Court affirmed the Fourth Circuit on this point, holding in *Borden v. U.S.* No. 19-5410 (June 10, 2021) that a mens rea of recklessness does not qualify as "violent felonies" under the Armed Career Criminal Act's (ACCA) elements clause. Slip op. at 16. Because the ACCA elements clause is materially the same as the definition of crime of violence under 18 U.S.C. § 16(a), crimes that include a recklessness mens rea (and are indivisible with respect to mens rea) are no longer a categorical match to 8 U.S.C. § 1101(a)(43)(F) via 18 U.S.C. §16(a) and would not trigger the immigration consequences associated with an aggravated crime of violence (COV). For further analysis, *see* IDP, NIP-NLG, and NILA, Practice Advisory: Overview of *Borden v. United States* for Immigration Counsel, (June 22, 2021), available at https://www.immigrantdefenseproject.org/wp-content/uploads/2021_22Jun_Borden_PA_withAppendix.pdf

[7] A conviction under Va. Code § 18.2-56.1(A) and (A1) is most likely not a firearms offense under 8 U.S.C. § 1227(a)(2)(C). First, the language "any firearm" used in both sections most likely renders the statute categorically overbroad. In *Conroy Gordon v. Barr*, the Fourth Circuit held that the use of the language "any firearm" as opposed to "a firearm" in Va. Code § 18.2-280(A) demonstrates the General Assembly of Virginia's clear intent to include all firearms, including antique

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	18.2-56.1(A1)	Probably[8]	No[9]	Most likely not, under 8 U.S.C. § 1227(a) (2)(C) (firearms offense)[10]	plea colloquy, and judicial findings of fact; otherwise, keep type of firearm outside these documents.
	18.2-56.1(D)	No	No[11]	Maybe, under 8 U.S.C. § 1227(a)	

firearms, rendering the statute categorically overbroad in comparison to 8 U.S.C. § 1227(a)(2)(C). The reasoning here would be the same. Moreover, the *Conroy Gordon* Court held that the use of "any firearm" rendered Va. Code § 18.2-280(A) "unambiguously" overbroad obviating any need to engage in a "reasonable probability" analysis. *Id.* at 261. S*ee* discussion of *Conroy Gordon v. Barr*, 965 F.3d 252 (4th Cir. 2020) *infra* note 42. Second, even before *Gordon*, precedent from the Virginia Court of Appeals supported a reading of the statute as overbroad. *Compare Jones v. Commonwealth*, 777 S.E.2d 229, 230 (Va. Ct. App. 2015) (defining firearm for the purpose of Va. Code § 18.2-56.1 as "an instrument designed, made, and intended to expel a projectile by means of an explosion") *with* 18 U.S.C. § 921(a)(3) (defining firearm as "any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive [but] such term does not include an antique firearm"). Therefore, a conviction under § 18.2-56.1(A) and §18.2-56.1(B) is unlikely to constitute a firearms offense. However, § 18.2-56.1(D) uses the language "a firearm," meaning that the *Gordon* analysis alone will likely not suffice to demonstrate that the statute is categorically overbroad. 965 F.3d at 258. However, an immigration practitioner can still argue that the definition of a firearm for the purpose of Va. Code § 18.2-56.1 is overbroad using the definition of "firearm" for purposes of the statute in *Jones. See supra*. That said, unlike the language in *Gordon*, the plain language of §18.56.1(D) is not "unambiguously" overbroad. *Id.* at 261. *Matter of Chairez-Castrejon* requires there to be a realistic probability of the state firearm statute being applied to instruments that federal law does not consider firearms in order to find the state statute categorically overbroad. 26 I&N Dec. 349, 356 (BIA 2014). An immigration practitioner may have difficulty finding the evidence necessary to make this showing.

[8] *See supra* fn 5.

[9] *See supra* fn 6.

[10] See supra fn 7.

[11] An immigration practitioner could argue that Va. Code § 18.2-56.2 is not a firearms offense because neither: (1) recklessly leaving a firearm in a loaded, unsecured manner nor (2) knowingly authorizing a child under the age of twelve to use a firearm without supervision-- necessarily involves "purchasing, selling,

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				(2)(C) (firearms offense)[12]	
Allowing access to firearms by children	18.2-56.2(A)	Maybe[13]	No[14]	Maybe, under 8 U.S.C. § 1227(a)(2)(C) (firearms offense)[15]	Plead to 18.2-56.2(A) rather than 18.2-56.2(B) Make clear in charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact that defendant did not take any of the actions in 8 U.S.C. § 1227(a)(2)(C) to preserve over breadth argument.[16]

offering for sale, exchanging, using, owning, possessing, or carrying" a firearm or destructive device." 8 U.S.C. § 1227(a)(2)(C). Both Va. Code §§ 18.2-56.2(A), 18.2-56.2(B) are therefore arguably overbroad and categorically not a firearms offense.

[12] An immigration practitioner could argue that Va. Code §§ 18.2-154, 18.2-279 are not categorically an aggravated felonies under 8 U.S.C. § 1101(a)(43)(E) via 8 U.S.C. § 844(h). 8 U.S.C. § 844(h) provides that it is unlawful to use fire or an explosive (including shooting a firearm) to commit a felony which can be prosecuted in a court of the United States, and Va. Code §§ 18.2-154, 18.2-279 punish the unlawful/malicious shooting or throwing a missile at a building, vehicle, etc. with sufficient incarceration to constitute a felony. While certain conduct under Va. Code §§ 18.2-154, 18.2-279 matches the conduct criminalized in 8 U.S.C. § 844(h), some does not. For instance, the term "missile" is not defined by Virginia code and could include objects, such as a rock, that lie outside the scope of the definition of "explosives" in 8 U.S.C. § 844(j). Likewise, the term "shooting" is not defined by Virginia code and could include actions, such as of firing a projectile by mechanical force, that lie outside the conduct criminalized in 8 U.S.C. § 844(h). The BIA, however, requires a showing of a realistic probability for prosecuting the posited conduct under Va. Code 18.2-154 to find the statute overbroad. *Matter of Chairez-Castrejon*, 26 I&N Dec. 349, 357 (BIA 2014). An immigration practitioner may have difficulty finding the evidence necessary to make this showing.

[13] *See supra* fn 5.

[14] *See supra* fn 6.

[15] An immigration practitioner could argue that Va. Code § 18.2-56.2 is not a firearms offense because neither recklessly leaving a firearm in a loaded, unsecured manner nor knowingly authorizing a child under the age of twelve to use a firearm without supervision necessarily involves "purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying" a firearm or destructive device." 8 U.S.C. § 1227(a)(2)(C). Both Va. Code §§ 18.2-56.2(A), 18.2-56.2(B) are therefore arguably overbroad and categorically not a firearms offense.

[16] *See id*.

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	18.2-56.2(B)	Maybe	No	Maybe, under 8 U.S.C. § 1227(a)(2)(C) (firearms offense)[17]	If type of firearm is not included in federal definition, emphasize that fact in charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact; otherwise, keep type of firearm outside these documents.
Shooting at or throwing missiles, etc., at train, car, vessel, etc.	18.2-154 (with malice)	Yes	Maybe, under 8 U.S.C. §1101(a)(43)(E)[18] Yes, under 8	Maybe, under 8 U.S.C. § 1227(a)	Keep sentence under one year (for example, 364 days) to avoid "crime of violence" aggravated felony pursuant to § 1101(a)(43)(E). If applicable, emphasize in the charging document, written plea agreement, transcript of plea colloquy, and judicial

[17] *See id.*

[18] An immigration practitioner could argue that Va. Code §§ 18.2-154, 18.2-279 are not categorically an aggravated felonies under 8 U.S.C. § 1101(a)(43)(E) via 8 U.S.C. § 844(h). 8 U.S.C. § 844(h) provides that it is unlawful to use fire or an explosive (including shooting a firearm) to commit a felony which can be prosecuted in a court of the United States, and Va. Code §§ 18.2-154, 18.2-279 punish the unlawful/malicious shooting or throwing a missile at a building, vehicle, etc with sufficient incarceration to constitute a felony. While certain conduct under Va. Code §§ 18.2-154, 18.2-279 matches the conduct criminalized in 8 U.S.C. § 844(h), other do not. For instance, the term "missile" is not defined by Virginia code and could include objects, such as a rock, that lie outside the scope of the definition of "explosives" in 8 U.S.C. § 844(j). Likewise, the term "shooting" is not defined by Virginia code and could include actions, such as of firing a projectile by mechanical force, that lie outside the conduct criminalized in 8 U.S.C. § 844(h). The BIA, however, requires a showing of a realistic probability for prosecuting the posited conduct under Va. Code 18.2-154 to find the statute overbroad. *Matter of Chairez-Castrejon*, 26 I&N Dec. 349, 357 (BIA 2014). For additional support, the immigration practitioner may cite *Matter of Ortega Quezada*, 28 I&N Dec. 598 (BIA 2022), where the BIA held that Conviction for unlawfully selling or otherwise disposing of a firearm or ammunition in violation of 18 U.S.C. § 922(d) (2018) does not render an individual removable as charged under section 237(a)(2)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(C) (2018), because § 922(d) is categorically overbroad and indivisible relative to the definition of a firearms offense (as 992(d) includes "any firearm" while 237(a)(2)(C) only includes certain firearms. However, an immigration practitioner may have difficulty finding the evidence necessary to make this showing.

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			U.S.C. § 1101(a)(43)(F) if sentence of at least one year is imposed[19]	(2)(C) (firearms offense)[20]	findings of fact that offense was committed "unlawfully" but not maliciously. If applicable, note in the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact that that object used to commit offense was not any type of firearm, not a firearm whose discharge involves gunpowder or an explosion, or not any other explosive device to maintain overbreadth arguments against 8 U.S.C. §§ 1101(a)(43)(E), 1227(a)(2)(C). Otherwise, keep type of firearm outside these documents. (Note that this does not avoid the crime of violence
	18.2-154 (with malice & causing death)	Yes	Yes, under 8 U.S.C. § 1101(a)(43)(A) Maybe, under 8 U.S.C. § 1101(a)(43)	Maybe, under 8 U.S.C. § 1227(a)(2)(C) (firearms offense)[22]	

[19] The conduct contemplated in this statute has elements of the use or attempted use of physical force against property, in line with the elements of 8 U.S.C. § 1101(a)(43)(F) via 18 U.S.C. §16(a).

[20] An immigration practitioner may argue that Va. Code §§ 18.2-154, 18.2-279 are not firearms offenses under 8 U.S.C. § 1227(a)(2)(C) since neither the Va. Code nor the Va. courts have defined the terms "shooting" or "missile," and they may be read to be broader than the definition of firearm in 18 U.S.C. § 921(a)(3) (defining firearm as "any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive [but] such term does not include an antique firearm"). However, *Matter of Chairez-Castrejon* requires there to be a realistic probability of the state statute being used to prosecute conduct that federal law does not criminalize in order to find the state statute categorically overbroad. 26 I&N Dec. 349, 357 (BIA 2014). For additional support, the immigration practitioner may cite *Matter of Ortega Quezada*, 28 I&N Dec. 598 (BIA 2022), where the BIA held that Conviction for unlawfully selling or otherwise disposing of a firearm or ammunition in violation of 18 U.S.C. § 922(d) (2018) does not render an individual removable as charged under section 237(a)(2)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(C) (2018), because § 922(d) is categorically overbroad and indivisible relative to the definition of a firearms offense (as 992(d) includes "any firearm" while 237(a)(2)(C) only includes certain firearms. However, an immigration practitioner may have difficulty finding the evidence necessary to make this showing.

[22] See supra fn 20.

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			(E)[21] Yes, under 8 U.S.C. § 1101(a)(43) (F) if sentence of at least one is imposed		aggravated felony ground under §1101(a)(43)(F) for malicious acts if a sentence of at least one year is imposed) If applicable, emphasize in the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact that offense was committed "unlawfully" but not maliciously, and did not result in death. If there is malice, consider alternative plea under 18.2-282 or 18.2-286 to decrease chance that offense will be considered a CIMT or aggravated felony (this will not necessarily avoid the firearms ground of deportability).
	18.2-154 (unlawfully)	No[23]	Maybe, under 8 U.S.C. § 1101(a)(43)(E) [24] No, under 8 U.S.C. §	Maybe, under 8 U.S.C. § 1227(a)(2)(C) (firearms offense)[26]	

[21] *See supra* fn 18.
[23] Immigration practitioners may argue that unlawful commission of Va. Code §§ 18.2-154, 18.2-279 is not CIMT because it lacks the requisite scienter. The Virginia Court of Appeals has held that the unlawful shooting inside a building or at an occupied vehicle resulting in death entails criminal negligence. *See Commonwealth v. Gregg*, 811 S.E.2d 254, 300–01 (Va. Ct. App. 2018) (holding that the mens rea for unlawful acts under Va. Code § 18.2-154 is criminal negligence); *Bryant v. Commonwealth*, 798 S.E.2d 459, 462 (Va. Ct. App. 2017) (holding that the mens rea for unlawful acts under Va. Code § 18.2-279 is criminal negligence; *See also Scott v. Commonwealth*, 707 S.E.2d 17, 26 (Va. Ct. App. 2011) (finding that Virginia courts' traditional understanding of "unlawfully" is criminal negligence). In *Sotnikau v. Lynch*, the Fourth Circuit noted that "criminal negligence," is a *mens rea* lower than the scienter of specific intent or recklessness necessary for a CIMT finding and held that Virginia involuntary manslaughter is categorically overbroad as a result. F.3d 731, 735–36 (4th Cir. 2017).
[24] *See supra* fn 18.
[26] *See supra* fn 20.

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?	COMMENTS AND PRACTICE TIPS
			1101(a)(43)(F) even if sentence of at least one year is imposed[25]		
	18.2-154 (unlawfully & causing death)	No[27]	Maybe, under 8 U.S.C. § 1101(a)(43)(E)[28] No, under 8 U.S.C. § 1101(a)(43)(F) even if sentence of at least one year is imposed	Maybe, under 8 U.S.C. § 1227(a)(2)(C) (firearms offense)[29]	

[25] Unlawful here is the equivalent of a criminally negligent mens rea. *See Commonwealth v. Gregg*, 811 S.E.2d 254, 300–01 (Va. Ct. App. 2018). Crimes of violence require a mens rea higher than negligence. *Leocal v. Ashcroft*, 543 U.S. 1, 10 (2004). *See also United States v. Castleman*, 134 S. Ct. 1405, 1414 n.8 (2014) (observing that "the Courts of Appeals have almost uniformly held that recklessness is not sufficient" to satisfy the "use" of physical force requirement of 18 U.S.C. § 16) (listing cases).
[27] *See supra* fn 23.
[28] *See supra* fn 18.
[29] *See supra* fn 20.

This chart only analyzes whether convictions may fall within the primary categories of removability set forth in the Immigration and Nationality Act. Defenders should remember that it is also important to analyze whether a conviction leads to other immigration consequences, such as ineligibility for certain forms of relief from removal, Temporary Protected Status, naturalization, or Deferred Action for Childhood Arrivals. Please review the Cover Memorandum and relevant Practice Advisories on our website.

OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?	COMMENTS AND PRACTICE TIPS
Discharging firearms or missiles within or at a building or dwelling house	18.2-279 (with malice)	Yes	Maybe, under 8 U.S.C. § 1101(a)(43)(E)[30] Maybe, under 8 U.S.C. § 1101(a)(43) (F) if sentence imposed is at least one year[31]	Maybe, under 8 U.S.C. § 1227(a)(2)(C) (firearms offense)[32]	Keep sentence under one year (for example, 364 days) to avoid a "crime of violence" aggravated felony pursuant to 8 U.S.C. § 1101(a)(43)(E). If applicable, note in the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact that object used to commit offense was not any type of firearm, not a firearm whose discharge involves gunpowder or an explosion, or not any other explosive device to maintain overbreadth argument against 8 U.S.C. §§ 1101(a)(43)(E), 1227(a)(2)(C). Otherwise, keep type of firearm outside these documents. (Note that these tips do not avoid the crime of violence aggravated
	18.2-279 (with malice &	Yes	Yes, under 8 U.S.C. §	Maybe, under 8 U.S.C. § 1227(a)	

[30] *See supra* fn 18.

[31] An immigration practitioner may argue that committing Va. Code § 18.2-279 with malice and without causing the death of another is not categorically a crime of violence aggravated felony under 8 U.S.C. § 1101(a)(43)(F) via 18 U.S.C. § 16(a) since the malicious discharge a firearm within an occupied building does not have as an element the use, attempted use, or threatened use of force capable of causing physical injury *against a person or property of another*. However, this argument is untested as Va. Code § 18.2-279 was categorically a crime of violence under 8 U.S.C. § 1101(a)(43)(F) via 18 U.S.C. § 16(b) until *Dimaya v. Sessions* held 16(b) unconstitutionally vague. *See* 138 S.Ct. 1204, 1215–16 (2018). Moreover, it may be argued that committing Va. Code § 18.2-279 with malice and without causing the death of another is divisible into two separate offenses even though these offenses would bear the same punishment since there are separate jury instructions for maliciously discharging firearms within and occupied building and maliciously shooting at or throwing a missile at an occupied building. If committing Va. Code § 18.2-279 with malice and without causing the death of another is found to be divisible, shooting at or throwing a missile at an occupied building would be a crime of violence aggravated felony since it involves the use of force capable of causing physical injury against the property of another.

[32] *See supra* fn 20.

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY ?	COMMENTS AND PRACTICE TIPS
	causing death)		1101(a)(43)(A) Maybe, under 8 U.S.C. § 1101(a)(43)(E) [33] Yes, under 8 U.S.C. § 1101(a)(43) (F) if sentence of at least one year is imposed	(2)(C) (firearms offense)[34]	felony ground under §1101(a)(43)(F) for malicious acts if a sentence of at least one year is imposed.) If applicable, emphasize in the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact that offense was committed "unlawfully" but not maliciously. If there is malice, consider alternative plea under 18.2-282 or 18.2-286 to decrease chance that offense will be considered a CIMT or aggravated felony (this will not necessarily avoid the firearms ground of deportability).
	18.2-279 (unlawfully)	No[35]	Maybe, under 8 U.S.C. § 1101(a)(43)(E) [36]	Maybe, under 8 U.S.C. § 1227(a)	

[33] *See supra* fn 18.
[34] *See supra* fn 20.
[35] *See supra* fn 23.
[36] *See supra* fn 18.The Fifth Circuit held in *U.S. v. Alfaro*, 408 F.3d 204, 209 (5th Cir. 2005), that under USSG, § 2L1.2, 18 U.S.C.A., shooting into an occupied dwelling in violation of this statute is not one of the enumerated offenses that qualify as a "crime of violence." Additionally, Va Code § 18.2–279 does not have, as a necessary element, the use, attempted use, or threatened use of force against another.

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?	COMMENTS AND PRACTICE TIPS
			No, under 8 U.S.C. § 1101(a)(43) (F) even if sentence of at least one year is imposed[37]	(2)(C) (firearms offense)[38]	
	18.2-279 (unlawfully & causing death)	No[39]	Maybe, under 8 U.S.C. § 1101(a)(43)(E) [40] No, under 8 U.S.C. § 1101(a)(43) (F) even if sentence	Maybe, under 8 U.S.C. § 1227(a)(2)(C) (firearms offense)[41]	

[37] The mens rea for this offense is negligence. *See Bryant v. Commonwealth*, 798 S.E.2d 459, 462 (Va. Ct. App. 2017). Crimes of violence require a mens rea higher than negligence. *Leocal v. Ashcroft*, 543 U.S. 1, 10 (2004). *See also United States v. Castleman*, 134 S. Ct. 1405, 1414 n.8 (2014) (observing that "the Courts of Appeals have almost uniformly held that recklessness is not sufficient" to satisfy the "use" of physical force requirement of 18 U.S.C. § 16) (listing cases).
[38] *See supra* fn 20.
[39] *See supra* fn 23.
[40] *See supra* fn 18. *See also United States v. Castleman*, 134 S. Ct. 1405, 1414 n.8 (2014) (observing that "the Courts of Appeals have almost uniformly held that recklessness is not sufficient" to satisfy the "use" of physical force requirement of 18 U.S.C. § 16) (listing cases).
[41] *See supra* fn 20.

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY ?	COMMENTS AND PRACTICE TIPS
			of at least one year is imposed		
Willfully discharging firearms in public places	18.2-280 (A) (injury)	Yes	No, under 8 U.S.C. § 1101(a)(43)(E) Yes, under 8 U.S.C. § 1101(a)(43) (F) if sentenced imposed is at least one year	No, under 8 U.S.C. § 1227(a)(2)(C) (firearms offense)[42]	Keep sentence under one year (for example, 364 days) to avoid crime of violence aggravated felony. If type of firearm was an antique firearm, emphasize that fact in the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact of conviction; otherwise, keep type of firearm outside these documents. Otherwise, keep type of firearm outside these documents. If applicable, emphasize in the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact that there was no injury or substantial risk of injury. Otherwise keep references to injury outside these documents.

[42] In *Conroy Gordon v. Barr*, 965 F.3d 252 (4th Cir. 2020), the Fourth Circuit held that a conviction under VA Code § 18.2-280(A), does not qualify as a firearms offense under INA § 237(a)(2)(C). The Court reiterated the categorical approach, determining that the Virginia statute was overbroad compared to the federal firearms offense statute, as it includes antique firearms while the federal statute does not. The Court further held that the dictum in *Moncrieffe v. Holder*, 569 U.S. 184 (2013), stating that a respondent "would have to demonstrate that the State actually prosecutes the relevant offense in cases involving antique firearms," (*Id.* at 205-6) does not apply when, as here, "the language of the statute is unambiguously broader than the federal offense under comparison." *Gordon* at 16. The Court laid out four steps to guide its categorical approach analysis of the statute: (1) place the burden of establishing removability on the government; (2) observe the

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY ?	COMMENTS AND PRACTICE TIPS
	18.2-280 (A)(no injury)	Maybe[43]	No, under 8 U.S.C. § 1101(a)(43)(E) Maybe, under 8 U.S.C. §	No, under 8 U.S.C. § 1227(a)	Consider alternative plea under 18.2-282 or 18.2-286 to decrease chance that offense will be considered a CIMT or aggravated felony (this will not necessarily avoid the firearms ground of deportability)

over-breadth of the elements of the state offense under the plain statutory language of the state statute; (3) analyze the definitions of the term "firearm" in case law from the state's highest courts; and (4) identify the state legislature's deliberate exclusion of certain types of firearms in other firearms statutes for comparative purposes. Here, the Court found that the plain statutory language of the Virginia statute was overbroad, using the term "any firearm" rather than "a firearm." The Court further found that legislative intent of the Virginia General Assembly had been to "bring all firearms within the ambit of the statute, irrespective whether they are more recently manufactured or antique." *Id.* at 258. The Court assessed legislative intent by looking at the statute's purpose as well as comparing the statute to other Virginia firearms statutes which deliberately excluded antique firearms. *Id.* at 258. The Court further found that its interpretation of the statute as including antique firearms was supported by Virginia's appellate court decisions. *Id.* at 259. For further analysis, *see* CAIR Coalition, Practice Advisory: For additional support, the immigration practitioner may cite *Matter of Ortega Quezada*, 28 I&N Dec. 598 (BIA 2022), where the BIA held that Conviction for unlawfully selling or otherwise disposing of a firearm or ammunition in violation of 18 U.S.C. § 922(d) (2018) does not render an individual removable as charged under section 237(a)(2)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(C) (2018), because § 922(d) is categorically overbroad and indivisible relative to the definition of a firearms offense (as 992(d) includes "any firearm" while 237(a)(2)(C) only includes certain firearms. Virginia Firearms Offenses and the Categorical Approach in the Fourth Circuit Under *Gordon v. Barr*, (Jan. 26, 2021), *available at* https://www.caircoalition.org/sites/default/files/20210125%20Gordon%20Practice%20Advisory.pdf.

[43] An immigration practitioner may argue that Va. Code §§ 18.2-280 (A)(no injury), 18.2-280(B), 18.2-280(C) are not categorically CIMTs since the discharge of a firearm in a street in a city or town, or in any place of public business or public gathering is not inherently reprehensible behavior. The BIA found in an unpublished opinion that an Oklahoma statute criminalizing the use of a vehicle to "facilitate the intentional discharge of any kind of firearm […] in conscious disregard for the safety of any other person or persons" is a CIMT. *See Matter of Cadren Everald Todd*, No. AXXX XX5 194, 2006 WL 3485847 (BIA Oct. 26, 2006). However, it did so since "the willingness to risk the potential serious harm […] is enough to bring it within the realm of turpitudinous behavior." *Id.* An immigration practitioner may distinguish this case since Va. Code §§ 18.2-280, 18.2-286 does not have as element the conscious disregard of public safety. Please note that under *Belcher v. Commonwealth*, S.E.2d 2022 WL 4472825 (September 27, 2022), Class 1 misdemeanor in VA is not equivalent to "1 year." As such, those sentenced to Class 1 misdemeanor under this statute could avail themselves of the "petty offense" exception under 212(a)(2)(A)(ii)(II).

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			1101(a)(43) (F) if sentenced imposed is at least one year[44]	(2)(C) (firearms offense)[45]	
	18.2-280 (B)	Maybe[46]	Yes, under 8 U.S.C. § 1101(a)(43)(E) via 18 U.S.C. §§ 844(h)(1);	Most likely not, under 8 U.S.C. § 1227(a) (2)(C) (firearms offense)[48]	

[44] An immigration practitioner may argue that an offense under Va. Code § 18.2-280 that does not cause injury is not an crime of violence aggravated felony under 8 U.S.C. § 1101(a)(43)(F) since its commission does not necessarily have as an element the use, attempted use, or threatened use of force capable of causing physical pain or injury *against the person or property of another*. *See Sumner v. Davis* 340 F. App'x 937, 938 (4th Cir. 2009) (noting that the Commonwealth had prosecuted the defendant under Va. Code § 18.2-280 for drunkenly discharging a firearm into the air); *Commonwealth v. Sumner*, No. CR04003693-00 (Va. Cir. Ct. Oct. 29, 2004). However, this argument is untested as Va. Code § 18.2-280 was categorically a crime of violence under 8 U.S.C. § 1101(a)(43)(F) via 18 U.S.C. § 16(b) until *Dimaya v. Sessions* held 16(b) unconstitutionally vague. *See* 138 S.Ct. 1204, 1215–16 (2018).

[45] *See supra* fn 42.

[46] *See supra fn* 43.

[48] A conviction under § 18.2-280(B) or § 18.2-280(C) would likely not be found to be a firearms offense, as the use of the language "any firearm" as opposed to "a firearm" in these sections is exactly the same as the language in § 18.2-280 (A), which was determined to be categorically overbroad. *See supra* note 42. For additional support, the immigration practitioner may cite *Matter of Ortega Quezada*, 28 I&N Dec. 598 (BIA 2022), where the BIA held that Conviction for unlawfully selling or otherwise disposing of a firearm or ammunition in violation of 18 U.S.C. § 922(d) (2018) does not render an individual removable as charged under section 237(a)(2)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(C) (2018), because § 922(d) is categorically overbroad and indivisible relative to the definition of a firearms offense (as 992(d) includes "any firearm" while 237(a)(2)(C) only includes certain firearms.

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			922(3); 924(a)(1). Maybe, under 8 U.S.C. § 1101(a)(43) (F) if sentenced imposed is at least one year[47]		
	18.2-280 (C)	Maybe[49]	Yes, under 8 U.S.C. § 1101(a)(43)(E) Maybe, under 8 U.S.C. § 1101(a)(43) (F) if sentenced imposed is at least one year[50]	Most likely not, under 8 U.S.C. § 1227(a) (2)(C) (firearms offense)[51]	

[47] *See supra* fn 44.
[49] *See supra* fn 43.
[50] *See supra* fn 44.
[51] *See supra* fn 48.

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Pointing, holding, or brandishing firearm, air or gas operated weapon or	18.2-282	Maybe	No	Most likely not, under 8 U.S.C. § 1227(a) (2)(C) (firearms offense)[52]	If allegations involve an antique firearm or an antique firearm or do not involve a real firearm whose discharge involves gunpowder or an explosion, emphasize that in the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact to avoid

[52] Va. Code § 18.2-282 would likely not be found to be categorically a firearms offense under 8 U.S.C. § 1227(a)(2)(C) since the scope of objects whose brandishing or holding is criminalized is broader than the definition of a firearm in 18 U.S.C. § 922(a)(1)(3). *Compare* Va. Code § 18.2-282 (criminalizing holding or brandishing any air or gas operated weapon, *any weapon* (emphasis added) that will or is designed to or may readily be converted to expel a projectiles by the action of an explosion of a combustible material, or any object similar in appearance, whether capable of being fired or not) *with* 18 U.S.C. § 922(a)(1)(3) (defining a firearm as any weapon "which will or is designed to or may readily be converted to expel a projectile by the action of an explosive, excluding antique firearms). Under *Conroy Gordon v. Barr* 965 F.3d 252 (4th Cir., 2020), the Fourth Circuit found that a Virginia statute criminalizing conduct involving "any firearm" was categorically overbroad, as the Virginia law does not exclude antique firearms from this definition. *See* discussion of *Conroy Gordon v. Barr*, 965 F.3d 252 (4th Cir.) *supra* note 42. Given that the same language, "any firearm," is used in this statute, the logic in *Gordon* should apply. Precedent from the Virginia Court of Appeals further supports the proposition that the statute is overbroad. In *Gerald v. Commonwealth*, 805 S.E.2d 407 (Ct. App. Va. 2017), the Court of Appeals stated that pointing an object "in a manner intended to induce fear based upon its appearance as a weapon apparently capable of firing one or more times" is "legally sufficient to establish the requisite elements of brandishing a firearm." *Gerald*, 805 S.E.2d at 410-11. Therefore, Va. Code § 18.2-282 criminalizes more conduct, including an object bearing the appearance of a firearm, than the federal offense. An immigration practitioner should be able to rebut any argument that Va. Code. § 18.2-282 is divisible by type of firearm since the Virginia Supreme Court has found that the elements of the statute are "(1) pointing or brandishing a firearm, and (2) doing so in such a manner as to reasonably induce fear in the mind of a victim." *See Kelsoe v. Commonwealth*, 308 S.E.2d 104, (Va. 1983). The BIA generally requires there to be a realistic probability of the state firearm statute being applied to instruments that federal law does not consider firearms or explosives in order to find the state statute categorically overbroad. *Matter of Chairez-Castrejon*, 26 I&N Dec. 349, 356 (BIA 2014). The Court in *Gordon* did not engage in a "realistic probability" analysis, holding that such an analysis is not necessary when "the language of a statute unambiguously is broader than the federal offense under comparison." *Id.* at 16. An immigration practitioner should argue that the language of §18.2-282 is unambiguously broader than the federal offense, as in *Gordon.* However, to be safe, it is also advised to conduct a realistic probability analysis. An immigration practitioner should be able to meet this bar since the Commonwealth has successfully prosecuted individuals under Va. Code. § 18.2-282 for using firearms not included in the federal definition. *See, e.g., Aylor v. Commonwealth*, No. 3366-02-2, 2004 WL 384175 (Va. Ct. App. Mar. 2, 2004) (prosecuting a BB gun under Va Code. § 18.2-282). For further analysis, *see* CAIR Coalition, Practice Advisory: Virginia Firearms Offenses and the Categorical Approach in the Fourth Circuit Under *Gordon v. Barr,* (Jan. 26, 2021), *available*

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object similar in appearance					firearm-related immigration consequences. Otherwise keep type of weapon out of these documents to preserve overbreadth arguments.
Shooting in or across road or in street	18.2-286	Maybe[53]	No	Maybe, under 8 U.S.C. § 1227(a)(2)(C) (firearms offense)[54]	If allegations involve an antique firearm or do not involving a firearm whose discharge involves gunpowder or an explosion, emphasize that in the charging document, written plea agreement, transcript of plea colloquy, and

at https://www.caircoalition.org/sites/default/files/20210125%20Gordon%20Practice%20Advisory.pdf. For additional support, the immigration practitioner may cite *Matter of Ortega Quezada*, 28 I&N Dec. 598 (BIA 2022), where the BIA held that Conviction for unlawfully selling or otherwise disposing of a firearm or ammunition in violation of 18 U.S.C. § 922(d) (2018) does not render an individual removable as charged under section 237(a)(2)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(C) (2018), because § 922(d) is categorically overbroad and indivisible relative to the definition of a firearms offense (as 992(d) includes "any firearm" while 237(a)(2)(C) only includes certain firearms).

[53] S*ee supra* fn 43.

[54] An immigration practitioner may argue that Va. Code § 18.2-286 is not categorically a firearms offense 8 U.S.C. § 1227(a)(2)(C) since the scope of objects whose discharge the statute criminalizes is broader than the definition of a firearm in 18 U.S.C. § 922(a)(1)(3). *Compare* Va. Code § 18.2-286 (criminalizing the discharge of *a firearm, crossbow, slingbow, arrowgun, or bow and arrow*) *with* 18 U.S.C. § 922(a)(1)(3) (defining a firearm as any weapon "which will or is designed to or may readily be converted to expel a projectile by the action of an explosive, excluding antique firearms). The BIA requires there to be a realistic probability of the state firearm statute being applied to instruments that federal law does not consider firearms or explosives in order to find the state statute categorically overbroad. *Matter of Chairez-Castrejon*, 26 I&N Dec. 349, 356 (BIA 2014). An immigration practitioner should be able to meet this bar since the Commonwealth has successfully prosecuted individuals under Va Code. § 18.2-286 for using shooting a bow and arrow from a public road. *See, e.g., Commonwealth v. Wagoner*, No. CR96122181-02 (Va. Cir. Ct. Feb. 26, 1997). DHS, however, could argue that Va. Code § 18.2-286 is divisible by the object discharged and if the adjudicator agreed, DHS would be able to review the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact to determine whether or not a firearm was used to commit Va. Code § 18.2-286. For additional support, the immigration practitioner may cite *Matter of Ortega Quezada*, 28 I&N Dec. 598 (BIA 2022), where the BIA held that Conviction for unlawfully selling or otherwise disposing of a firearm or ammunition in violation of 18 U.S.C. § 922(d) (2018) does not render an individual removable as charged under section 237(a)(2)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(C) (2018), because § 922(d) is categorically overbroad and indivisible relative to the definition of a firearms offense (as 992(d) includes "any firearm" while 237(a)(2)(C) only includes certain firearms.

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?	COMMENTS AND PRACTICE TIPS
					judicial findings of fact to avoid firearm-related immigration consequences. Otherwise keep type of weapon out of these documents to preserve overbreadth arguments.
Shooting from vehicles so as to endanger persons	18.2-286.1	Yes	Probably, under 8 U.S.C. § 1101(a)(43) (F) if sentence imposed is at least one year[55]	Maybe, under 8 U.S.C. § 1227(a)(2)(C) (firearms offense)[56]	Keep sentence under one year to avoid crime of violence aggravated felony. If allegations involve an antique firearm or do not involving a firearm whose discharge involves gunpowder or an explosion, emphasize that fact in the charging

[55] An immigration practitioner may argue that Va. Code § 18.2-286.1 is not categorically a crime of violence aggravated felony under 8 U.S.C. § 1101(a)(43)(F) via 18 U.S.C. § 16(a) since "intentional discharge of a firearm so as to create the risk of injury or death to another person or thereby cause another person to have a reasonable apprehension of injury or death" does not categorically have as an element the "use, attempted use, or threatened use of force capable of causing physical injury *against a person or property of another*." However, this argument is untested as Va. Code § 18.2-286.1 was categorically a crime of violence under 8 U.S.C. § 1101(a)(43)(F) via 18 U.S.C. § 16(b) until *Dimaya v. Sessions* held 16(b) unconstitutionally vague. *See* 138 S.Ct. 1204, 1215–16 (2018).

[56] Neither the Virginia Code nor Virginia courts define the meaning of firearm in Va. Code § 18.2-286.1. Treatment of similar statutes suggests that Virginia courts may define firearm for purposes of Va. Code § 18.2-286.1 as "any instrument designed, made, and intended to fire or expel a projectile by means of an explosion." *See Armstrong v. Commonwealth*, 562 S.E.2d 139, 145 (Va. 2002) (excluding fake firearms from the definition of Va. Code § 18.2-308.2). Such a definition would include antique firearms, which 18 U.S.C. § 922(a)(1)(3) does not criminalize. *See note* 67 and accompanying text for a fuller analysis of how a conviction under §18.2-308.2 is unlikely to constitute a firearms offense. The BIA, however, requires a showing of a realistic probability analysis that the Virginia government would prosecute the use of antique firearms and other firearms lying outside the 18 U.S.C. § 922(a)(1)(3) definition under Va. Code 18.2-286.1 in order to find the Va. statute overbroad. *Matter of Chairez-Castrejon*, 26 I&N Dec. 349, 357 (BIA 2014). An immigration practitioner may have difficulty finding the evidence necessary to make this showing. For additional support, the immigration practitioner may cite *Matter of Ortega Quezada*, 28 I&N Dec. 598 (BIA 2022), where the BIA held that Conviction for unlawfully selling or otherwise disposing of a firearm or ammunition in violation of 18 U.S.C. § 922(d) (2018) does not render an individual removable as charged under section 237(a)(2)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(C) (2018), because §

This chart only analyzes whether convictions may fall within the primary categories of removability set forth in the Immigration and Nationality Act. Defenders should remember that it is also important to analyze whether a conviction leads to other immigration consequences, such as ineligibility for certain forms of relief from removal, Temporary Protected Status, naturalization, or Deferred Action for Childhood Arrivals. Please review the Cover Memorandum and relevant Practice Advisories on our website.

OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY ?	COMMENTS AND PRACTICE TIPS
			Maybe, under 8 U.S.C. § 1101(a)(43) (E)		document, written plea agreement, transcript of plea colloquy, and judicial findings of fact. Otherwise, keep type of firearm outside these documents. Consider alternative plea under 18.2-282 or 18.2-286 to decrease chance that offense will be considered a CIMT or aggravated felony (this will not necessarily avoid the firearms ground of deportability)
Carrying loaded firearms in public areas	18.2-287.4	No	No, under 8 U.S.C. § 1101(a)(43)(E) [57]	Yes, under 8 U.S.C. § 1227(a)(2)(C) (firearms offense)	Document in the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact that weapon involved in offense was not a

922(d) is categorically overbroad and indivisible relative to the definition of a firearms offense (as 992(d) includes "any firearm" while 237(a)(2)(C) only includes certain firearms).

[57] An immigration practitioner has a strong argument that 18.2-287.4 is not categorically an aggravated felony under 8 U.S.C. § 1101(a)(43)(E). 18 U.S.C. § 922(o) does criminalize the possession of a machinegun, i.e. "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. § 5845(b). But, this firearm has a different analogue in the Va. Code. *See* Va. Code §§ 18.2-288, 18.2-289, 18.2-290 (criminalizing the possession of a machinegun, i.e. "any weapon which shoots or is designed to shoot automatically more than one shot, without manual reloading, by a single function of the trigger" in the perpetration of a crime or for an offensive or aggressive purpose). Moreover, while 26 U.S.C. § 5845(b) may apply to some of the weapons described in Va. Code § 18.2-287.4 (such as a fully-automatic pistol with a 20 round magazine), it does not include other weapons described in Va. Code § 18.2-287.4, e.g. a semi-automatic rifle with a 20 round magazine, semi-automatic pistol with a 20 round magazine, or shotgun with a seven round magazine. DHS could argue that Va. Code § 18.2-287.4 lists two discrete offenses as enumerated alternatives for different types of firearms and so is divisible by firearm. *See Matter of Chairez*, 26 I&N Dec. 819, 822 (BIA 2016). If the adjudicator agreed, DHS would be able to review the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact to determine whether the firearm used to commit Va. Code § 18.2-287.4 was a (a) "semi-automatic center-fire rifle or pistol that expels single or multiple projectiles by action of an explosion of a combustible material" or (b) "shotgun with a magazine that will hold more than seven rounds of the longest ammunition. But, neither (a) or (b) is a categorical match for 26 U.S.C. § 5845(b)

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?	COMMENTS AND PRACTICE TIPS
					"machine gun" under 26 U.S.C § 5845(b). Otherwise, keep type of firearm outside these documents.
Use of machine gun for crime of violence	18.2-289	Maybe[58]	Maybe, under 8 U.S.C. § 1101(a)(43)(F) if sentence	Yes, under 8 U.S.C. § 1227(a)(2)(C) (firearms offense)	Keep sentence under one year (for example 364 days) to avoid crime of violence aggravated felony. Consider alternative plea under 18.2-287.4 to decrease chance that offense will be considered a CIMT or aggravated felony, or under 18.2-282 or 18.2-286 to decrease chance that offense will be considered an

and Virginia has successfully prosecuted firearms that do not satisfy 26 U.S.C. § 5845(b) under Va. Code § 18.2-287.4. *See, e.g.*, *Eley v. Commonwealth*, 826 S.E.2d 321, 322 (Va. Ct. App. 2019) (prosecuting a "center fire" .357-caliber, semiautomatic handgun load with a 31-cartridge extended magazine). For additional support, the immigration practitioner may cite *Matter of Ortega Quezada*, 28 I&N Dec. 598 (BIA 2022), where the BIA held that Conviction for unlawfully selling or otherwise disposing of a firearm or ammunition in violation of 18 U.S.C. § 922(d) (2018) does not render an individual removable as charged under section 237(a)(2)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(C) (2018), because § 922(d) is categorically overbroad and indivisible relative to the definition of a firearms offense (as 992(d) includes "any firearm" while 237(a)(2)(C) only includes certain firearms).

[58] An immigration practitioner may argue that Va. Code §§ 18.2-289, 18.2-300(A) are not categorically CIMTs. Possession crimes involve moral turpitude if accompanied by the intent to commit a crime involving moral turpitude. *See Matter of Serna*, 20 I&N Dec. 579, 584 (BIA 1992) *modified on other grounds by Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997); *Matter of Granados*, 16 I&N Dec. 726 (BIA 1979). The crimes of violence in which Va. Code §§ 18.2-289, 18.2-300(A) criminalize the use or possession of a machine gun or sawed-off shotgun/rifle, include manslaughter, the involuntary commission of which the Fourth Circuit has held to not be a CIMT. *See* Va. Code §§ 288(2), 18.2-299; *Sotnikau v. Lynch*, No. 15-2073, 2017 WL 2709572 (4th Cir. Jan. 24, 2017). The BIA, however, requires a showing of a realistic probability for prosecuting conduct that does not involve moral turpitude under the state statute to find that statute overbroad. *Matter of Silva-Trevino*, 26 I&N Dec. 826, 831–33 (BIA 2016). The Commonwealth does not appear to have prosecuted the possession or use of a machinegun, sawed-off shotgun, or sawed-off rifle in involuntary manslaughter under Va. Code §§ 18.2-289, 18.2-300(A). Thus, an immigration practitioner may have difficulty establishing that § 18.2-56.2 is not a CIMT. But, the Fourth Circuit has not yet ruled on whether the realistic probability doctrine applies to CIMTs, and some circuits have rejected its application. *See Jean-Louis v. U.S. Attn'y Gen.*, 582 F.3d 462, 481–82 (3d Cir. 2009); *Cisneros-Guerrerro v. Holder*, 774 F.3d 1056, 1058–59 (5th Cir. 2014).

This chart only analyzes whether convictions may fall within the primary categories of removability set forth in the Immigration and Nationality Act. Defenders should remember that it is also important to analyze whether a conviction leads to other immigration consequences, such as ineligibility for certain forms of relief from removal, Temporary Protected Status, naturalization, or Deferred Action for Childhood Arrivals. Please review the Cover Memorandum and relevant Practice Advisories on our website.

OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?	COMMENTS AND PRACTICE TIPS
			imposed is at least one year[59] Yes, under 8 U.S.C. § 1101(a)(43)(E)		aggravated felony (neither will not necessarily avoid the firearms ground of deportability)
Use of machine gun for aggressive purpose	18.2-290	Maybe[60]	Maybe, under 8 U.S.C. § 1101(a)(43)(E)	Yes, under 8 U.S.C. § 1227(a)(2)(C) (firearms offense)	Consider alternative plea under 18.2-287.4 to decrease chance that offense will be considered a CIMT, or 18.2-286 to decrease chance that offense will be considered an aggravated felony (neither will not necessarily avoid the firearms ground of deportability).

[59] An immigration practitioner may argue that Va. Code §§ 18.2-289, 18.2-300(A) are categorically not crimes of violence aggravated felonies under 8 U.S.C. § 1101(a)(43)(F) for a couple of reasons. First, the crimes of violence in which Va. Code §§ 18.2-289, 18.2-300(A) criminalize the use or possession of a machine gun or sawed-off shotgun/rifle, include manslaughter, the commission of which lacks the requisite mens rea to be a crime of violence under 18 U.S.C. § 16(a). *See Leocal v. Ashcroft*, 543 U.S. 1, 10 (2004) (holding that a negligent act lacks the requisite mens rea to be a crime of violence); *Garcia v. Gonzales*, 455 F.3d 465, 469 (4th Cir. 2006) (holding that a reckless act lacks the requisite mens rea to be a crime of violence). Second, the crimes of violence in which Va. Code §§ 18.2-289, 18.2-300(A) criminalize the use or possession of a machine gun or sawed-off shotgun/rifle include offenses like burglary and larceny, which do not have as an element the "use, attempted use, or threatened use of force capable of causing physical injury *against a person or property of another*" and so may no longer be crimes of violence under 18 U.S.C. § 16. Such offenses were previously held to be crimes of violence under 18 18 U.S.C. § 16(b), which *Dimaya v. Sessions* found to unconstitutionally vague. *See* 138 S.Ct. 1204, 1215–16 (2018). For additional support, the immigration practitioner may cite *Matter of Ortega Quezada*, 28 I&N Dec. 598 (BIA 2022), where the BIA held that Conviction for unlawfully selling or otherwise disposing of a firearm or ammunition in violation of 18 U.S.C. § 922(d) (2018) does not render an individual removable as charged under section 237(a)(2)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(C) (2018), because § 922(d) is categorically overbroad and indivisible relative to the definition of a firearms offense (as 992(d) includes "any firearm" while 237(a)(2)(C) only includes certain firearms).

[60] *See supra* fn 58.

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Possession or use of "sawed-off" shotgun or rifle	18.2-300(A)	Maybe[61]	Maybe, under 8 U.S.C. § 1101(a)(43)(F) if sentence imposed is at least one year[62] Yes, under 8 U.S.C. § 1101(a)(43)(E)	Yes, under 8 U.S.C. § 1227(a)(2)(C) (firearms offense)	Keep sentence under one year to avoid crime of violence aggravated felony. Plead to subsection (B) rather than (A). Or seek an alternative plea to 18.2-282 or 18.2-286 misdemeanor offenses to decrease chance that offense will be considered a CIMT or aggravated felony (this will not necessarily avoid the firearms ground of deportability).
	18.2-300(B)	No	No	Yes, under 8 U.S.C. § 1227(a)(2)(C) (firearms offense)	

[61] *See supra* fn 58.
[62] *See supra* fn 59.

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Carrying concealed weapon	18.2-308	No	Maybe under 101(a)(43)(E)(ii)[63]	Maybe, under 8 U.S.C. § 1227(a)(2)(C) (firearms offense)[64]	If allegations involve conduct involving an antique firearm or an instrument that is not a firearm, emphasize that in the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact to avoid firearm-related immigration consequences. Otherwise keep type of concealed weapon outside these documents.

[63] Please note that whether this constitutes an aggravated felony would depend on what kind of weapon a person is carrying. In an unpublished decision, *In Re: Keco Anthony Henry*, 2019 WL 4054087, at *3 (BIA) (unpublished), the BIA held that "because a flare gun can be a firearm under both federal law and Virginia law if the flare gun has the characteristics of a firearm, and because the characteristics of a firearm are the same under federal law and Virginia law," this statute is not overly broad and matches the generic definition under 101(a)(43)(E)(ii).

[64] An immigration practitioner may argue that this statute is overbroad with regard to the firearm ground of deportability under 8 U.S.C. § 1227(a)(2)(C) because the weapons whose concealed carry it prohibits are broader than the definition of firearm in 18 U.S.C. § 921(a)(3). An immigration court, however, will likely consider Va. Code § 18.2-308 divisible by weapon based on the statutory construction of Va. Code § 18.2-308 and the model jury instruction making the name of the weapon an element of Va. Code § 18.2-308. A divisibility finding allows the immigration judge to consult the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact to determine the identity of the concealed weapon. However, even if the concealed weapon is one "designed or intended to propel a missile of any kind by action of an explosion of any combustible material," under Va. Code § 18.2-308(A)(i) an immigration practitioner may still argue the statute is broader than 18 U.S.C. § 921(a)(3). *Compare* Va. Code § 18.2-308(A)(i) (not exempting antique firearms) *with* 18 U.S.C. § 921(a)(3) (exempting antique firearms). The plain language "any pistol, revolver, or other weapon" is similarly overbroad as the language "any firearm," which rendered the statute in *Gordon* unambiguously overbroad. *Gordon* at 16. The analysis here is similar. *See* discussion of *Conroy Gordon v. Barr*, 965 F.3d 252 (4th Cir. 2020) *supra* note 42. The Court in *Gordon* did not engage in a "realistic probability" analysis, holding that such an analysis is not necessary when "the language of a statute unambiguously is broader than the federal offense under comparison." *Id.* at 16. However, because a court may find that this statute does not

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Possession or transportation of firearms, firearms ammunition, stun weapons, explosives or concealed weapons by convicted felons; penalties; petition	18.2-308.2 (Effective until Jan 1, 2021)	Maybe[65]	Probably not, under 8 U.S.C. § 1101(a)(43)(C)[66] Maybe, under U.S.C. § 1101(a)(43) (E)	Most likely not, under 8 U.S.C § 1227(a) (2)(C)	

reach the same level of unambiguous over-breadth, an immigration practitioner should conduct a showing of a realistic probability that the Virginia government would prosecute carrying concealed antique firearms under Va. Code § 18.2-308(A)(i) to find it overbroad. *See Matter of Chairez-Castrejon*, 26 I&N Dec. 349, 357 (BIA 2014). An immigration practitioner may have difficulty finding the evidence necessary to make this showing. For additional support, the immigration practitioner may cite *Matter of Ortega Quezada*, 28 I&N Dec. 598 (BIA 2022), where the BIA held that Conviction for unlawfully selling or otherwise disposing of a firearm or ammunition in violation of 18 U.S.C. § 922(d) (2018) does not render an individual removable as charged under section 237(a)(2)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(C) (2018), because § 922(d) is categorically overbroad and indivisible relative to the definition of a firearms offense (as 992(d) includes "any firearm" while 237(a)(2)(C) only includes certain firearms).

[65] An immigration practitioner may argue that a conviction under either Va. Code §18.2-308.2 or § 18.2-308.2:01 is not categorically a CIMT since the statute lacks the requisite evil intent. The BIA has held that possession crimes in general and possession of a concealed weapon in particular only involve moral turpitude if accompanied by the intent to commit a crime involving moral turpitude. *See Matter of Serna*, 20 I&N Dec. 579, 584 (BIA 1992) *modified on other grounds by Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997); *Matter of Granados*, 16 I&N Dec. 726 (BIA 1979). While Va. Code §18.2-308.2 and Va. Code § 18.2-308.2:01 require the possession, transportation, or concealed carry of a firearm to be knowing and intentional, such knowledge is not necessarily equated with an intent to use the firearm for a turpitudinous purpose. *See Matter of Serna*, 20 I&N Dec. at 584–86.

[66] An immigration practitioner may argue that neither Va. Code § 18.2-308.2:01 or Va. Code §18.2-308.2:01 qualify as categorically an illicit trafficking in firearms aggravated felony under 8 U.S.C. § 1101(a)(43)(C) since neither possessing, transporting, or carrying a firearm categorically contains "an intent to sell or otherwise distribute the firearm to another individual" *See Joseph v. Att'y Gen'l*, 465 F.3d 123, 129 (3d Cir. 2006); *Cf Lopez v. Gonzales*, 549 U.S. 47 (2006) (holding that

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for permit; when issued				(firearms offense)[67]	

illicit trafficking in a controlled substance requires trading or dealing). Also, in *Gordon v. Barr*, 965 F.3d 252, 258 (4th Cir. 2020), the Fourth Circuit analyzed a willful discharge of a firearm under Virginia Code § 18.2-280(A) and held that it swept a much broader category because it included "any firearm" while the federal generic definition excluded "antique firearms," thus, it was not a removable offense. A practitioner may use this argument since the statute here also includes a broader category of "any firearm." Federal generic definition under18 U.S.C. § 921(a) excludes "antique firearms," but in an unpublished decision *In Re: Keco Anthony Henry*, 2019 WL 4054087, at *3 (BIA 2019), the BIA analyzed whether a VA's definition of a "flare gun" meets a federal generic definition and held that because a flare gun can be a firearm under both federal law and Virginia law, the statute is NOT overbroad. *Id.* However, the BIA did not specify which exact statute it was referring to. For additional support, the immigration practitioner may cite *Matter of Ortega Quezada*, 28 I&N Dec. 598 (BIA 2022), where the BIA held that Conviction for unlawfully selling or otherwise disposing of a firearm or ammunition in violation of 18 U.S.C. § 922(d) (2018) does not render an individual removable as charged under section 237(a)(2)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(C) (2018), because § 922(d) is categorically overbroad and indivisible relative to the definition of a firearms offense (as 992(d) includes "any firearm" while 237(a)(2)(C) only includes certain firearms.

[67] § 18.2-308.2 makes it unlawful for certain individuals, including people convicted of felonies, "to knowingly and intentionally possess or transport any firearm . . ." (emphasis added). The plain text of the statute indicates that it encompasses antique firearms and is therefore most likely overbroad. *See* discussion of *Conroy Gordon v. Barr*, 965 F.3d 252 (4th Cir. 2020) *supra* note 42. Precedent from Virginia Courts confirms the statute's overbroad definition of "firearm." In *Armstrong v. Commonwealth*, 562 S.E.2d 139 (Va. 2002), the Virginia Supreme Court held that the term "any firearm" in Section 18.2-308.2 encompasses all firearms, regardless of whether they are "'operable,' 'capable' of being fired, or had the 'actual capacity to do serious harm.'" *Armstrong*, 562 S.E.2d at 145. This broad definition, by the plain reading, includes antique firearms. The definition of "firearm" in § 18.2-308.2, as interpreted by the court in *Armstrong*, is thus

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY ?	COMMENTS AND PRACTICE TIPS
Possession or transportation of firearms, firearms ammunition, stun weapons, explosives or concealed weapons by convicted felons; penalties; petition for permit; when issued	18.2-308.2 (Effective Jan 1, 2021)	Maybe[68]	Probably not, under 8 U.S.C. § 1101(a)(43)(C)[69] Maybe, under U.S.C. § 1101(a)(43) (E)	Most likely, under 8 U.S.C § 1227(a)(2)(C) (firearms offense)[70]	

overbroad. Additionally, the Virginia legislature amended § 18.2-308.2 in 2017 to allow people convicted of felonies, save for a certain class of individuals convicted of violent felonies, to possess antique firearms. Va. Code §18.2-308.2(C)(2), effective July 1, 2017. This explicit carve-out demonstrates that prior to 2017, people convicted of felonies were not allowed to possess antique firearms under Section 18.2-308.2 and antique firearms were therefore included in the firearm definition. The pre-2017 amendment legislative schema thus confirms the overbreadth of the statute prior to July 1, 2017. Post-2017, there is an explicit antique firearms carveout, making the argument for overbreadth more challenging. Therefore, it is likely that a conviction under Va. Code § 18.2-308.2 as amended. in 2017, effective January 1, 2021, would be found to constitute a firearms offense. While the relevant language is similar enough to § 18.2-308.2. For additional support, the immigration practitioner may cite *Matter of Ortega Quezada*, 28 I&N Dec. 598 (BIA 2022), where the BIA held that Conviction for unlawfully selling or otherwise disposing of a firearm or ammunition in violation of 18 U.S.C. § 922(d) (2018) does not render an individual removable as charged under section 237(a)(2)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(C) (2018), because § 922(d) is categorically overbroad and indivisible relative to the definition of a firearms offense (as 992(d) includes "any firearm" while 237(a)(2)(C) only includes certain firearms.).

[68] *See supra* fn 65.

[69] *See supra* fn 66.

[70] *See supra* fn 67.

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Possession or transportation of certain firearms by certain persons	18.2-308.2:01(A)	Probably not[71]	Probably not under 8 U.S.C. § 1101(a)(43)(C)[72] Maybe, under U.S.C. § 1101(a)(43)(E)[73]	Yes, under 8 U.S.C. § 1227(a)(2)(C) (firearms offense)	If applicable, note the following in the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact: (1) Lawful presence of defendant (even if not a citizen or permanent resident); (2) No intent to sell or otherwise distribute the firearm to another individual. Otherwise, keep references to other contemporaneous crimes, firearm trafficking, and specific immigration status out of these

[71] *See supra*, note 65.
[72] *See supra*, note 66.
[73] An immigration practitioner may argue that Va. Code § 18.2-308.2:01(A) is not categorically firearms/explosive aggravated felony under 8 U.S.C. § 1101(a)(43)(C) via 18 U.S.C. § 922(g)(5) since it bars lawfully present immigrants from transporting and possession firearms that the federal statute does not. *Compare* Va. Code § 18.2-308.2:01 (criminalizing the transportation and possession of assault firearms by non-citizens and immigrants who are not lawful

This chart only analyzes whether convictions may fall within the primary categories of removability set forth in the Immigration and Nationality Act. Defenders should remember that it is also important to analyze whether a conviction leads to other immigration consequences, such as ineligibility for certain forms of relief from removal, Temporary Protected Status, naturalization, or Deferred Action for Childhood Arrivals. Please review the Cover Memorandum and relevant Practice Advisories on our website.

OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?	COMMENTS AND PRACTICE TIPS
	18.2-308.2:01(B)	Maybe[74]	Probably No, under 8 U.S.C. § 1101(a)(43)(C)[75]	Most likely not, under 8 U.S.C. § 1227(a)(2)(C) (firearms offense)[76]	documents. Consider alternate plea to 18.2-287.4 to minimize CIMT and aggravated felony risk (although such a plea will not avoid firearms ground of deportability)

permanent residents, e.g. noncitizens with valid non-immigrant visas) *with* 18 U.S.C. § 922(g)(5) (only criminalizing the transportation and possession of firearms by noncitizens who are unlawfully present). The BIA, however, will likely require the immigration practitioner to show a realistic probability for prosecuting lawfully present immigrants who are not legal permanent residents under Va. Code § 18.2-308.2:01(A) and an immigration practitioner may have difficulty finding the evidence necessary to meet this bar.

[74] *See supra*, note 65.

[75] *See supra*, note 66.

[76] An immigration practitioner may argue that this statute is overbroad with regard to the firearm ground of deportability under 8 U.S.C. § 1227(a)(2)(C) because the weapons it prohibits the use and possession of are broader than the definition of firearm in 18 U.S.C. § 921(a)(3). *Compare* Va. Code § 18.2-308.1:01(B) (not exempting antique firearms) *with* 18 U.S.C. § 921(a)(3) (exempting antique firearms). A conviction under § 18.2-308.2:01(B) would likely not be found to be a firearms offense, as the use of the language "any firearm" as opposed to "a firearm" in the statute indicates the statute is overbroad. *See* discussion of *Conroy Gordon v. Barr*, 965 F.3d 252 (4th Cir.) *supra* note 42. The Court in *Conroy Gordon* did not engage in a "realistic probability" analysis, holding that such an analysis is not necessary when "the language of a statute unambiguously is broader than the federal offense under comparison." *Id.* at 16. However, an immigration practitioner should conduct a realistic probability analysis in case the court finds that this statute does not qualify as unambiguously overbroad. The BIA requires a showing of a realistic probability for prosecuting carrying concealed antique firearms under Va. Code § 18.2-308(A)(i) to find it overbroad in such cases. *Matter of Chairez-Castrejon*, 26 I&N Dec. 349, 357 (BIA 2014). And, an immigration practitioner may have difficulty finding the evidence necessary to make this showing. For additional support, the immigration practitioner may cite *Matter of Ortega Quezada*, 28 I&N Dec. 598 (BIA 2022), where the BIA held that Conviction for unlawfully selling or otherwise disposing of a firearm or ammunition in violation of 18 U.S.C. § 922(d) (2018) does not render an individual removable as charged under section 237(a)(2)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(C) (2018), because § 922(d) is categorically overbroad and indivisible relative to the definition of a firearms offense (as 992(d) includes "any firearm" while 237(a)(2)(C) only includes certain firearms.).

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?	COMMENTS AND PRACTICE TIPS
			Yes, under U.S.C. § 1101(a)(43)(E)		
Sale, etc., of firearms to certain persons	18.2-308.2:1 (Effective until July 1, 2021)	Maybe[77]	Maybe, under 8 U.S.C. § 1101(a)(43)(C)[78]	Most likely not, under 8 U.S.C. § 1227(a)(2)(C) (firearms offense)[79]	If firearm is an antique firearm, emphasize that fact in the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact. Otherwise, keep type of firearm outside these documents.

[77] A crime involving moral turpitude (CIMT) "requires two essential elements: a culpable mental state and reprehensible conduct." *Guevara-Solorzano v. Sessions*, 891 F.3d 125, 135 (4th Cir. 2018). Va. Code 18.2-308.2:1 likely satisfies the scienter requirement since it requires, as an element, knowledge that the purchaser/recipient of the firearm is barred from possessing it. *See Matter of Kourn*, 21 I&N Dec. 1041, 1046 (BIA 1997). Several circuit courts have held that the unlicensed sale of firearms is not the reprehensible conduct requisite for a CIMT. *See Mayorga v. U.S. Att'y Gen.*, 757 F.3d 126, 133 –34 (3d Cir. 2012); *Ali v. Mukasey*, 521 F.3d 737, 740 (7th Cir. 2008). However, the unlicensed sale of firearms is a regulatory crime. *Mayorga*, 757 F.3d at 134; *Ali*, 521 F.3d at 740. Selling, bartering, giving, or furnishing firearms to persons known to be prohibited from possessing may be considered intrinsically wrong and inherently reprehensible making Va. Code 18.2-308.2:1 a CIMT.

[78] An immigration practitioner may argue that Va. Code 18.2-308.2:1 is not categorically an illicit trafficking in firearms aggravated felony under 8 U.S.C. § 1101(a)(43)(C) since committing Va. Code 18.2-308.2:1 does not necessarily entail "some element of illegal trading and dealing of firearms" *See* Va. Code 18.2-308.2:1 (criminalizing, inter alia, "giving" or "furnishing" of firearms in addition to selling and bartering them); *Joseph v. Att'y Gen'l*, 465 F.3d 123, 129 (3d Cir. 2006) (holding that illicit trafficking in firearms requires trading or dealing); *Cf Lopez v. Gonzales*, 549 U.S. 47 (2006) (holding that illicit trafficking in a controlled substance requires trading or dealing). The BIA, however, will likely require the immigration practitioner to show a realistic probability for giving or furnishing a firearm for no renumeration under Va. Code § 18.2-308.2:1 and an immigration practitioner may have difficulty finding the evidence necessary to meet this bar.

[79] A conviction under either Va. Code § 18.2-308.2:1 or §18.2-308.4 would likely not constitute a firearms offense because the state statutes are overbroad. The firearms whose distribution and possession with controlled substances they criminalize are broader than the definition of a firearm in 18 U.S.C. § 921(a)(3). *Compare Armstrong v. Commonwealth*, 562 S.E.2d 139, 145, (Va. 2002) (defining a firearm for the purposes of Va. Code 18.2-308.2 as "an instrument which was designed, made, and intended to expel a projectile by means of an explosion" without carving out an exemption for antique firearms) *with* 18 U.S.C. §

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY ?	COMMENTS AND PRACTICE TIPS
					Note in in the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact that offense involved giving or furnishing firearms for no renumeration. Otherwise, keep the means of commission outside these documents.
Sale, etc., of firearms to certain persons	18.2-308.2:1 (Effective July 1, 2021)	Maybe[80]	Maybe, under 8 U.S.C. § 1101(a)(43)(C)[81]	Most likely not, under 8 U.S.C. § 1227(a)(2)(C) .(firearms offense)[82]	If firearm is an antique firearm, emphasize that fact in the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact. Otherwise, keep type of firearm outside these documents. Note in in the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact

921(a)(3) (defining a firearm as "any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive" and exempting antique firearms from this definition). Additionally, both Va. Code § 18.2-308.2:1 and § 18.2-308-304 use the language "any firearm" rather than "a firearm" in describing the criminalized conduct. Pursuant to the reasoning in *Conroy Gordon v. Barr* 965 F.3d at 254, the plain language of the statute indicates that it is unambiguously overbroad. Therefore, under *Conroy Gordon*, there is also a strong argument that no "realistic probability" showing is required. The Court in *Conroy Gordon* did not engage in a "realistic probability" analysis, holding that such an analysis is not necessary when "the language of a statute unambiguously is broader than the federal offense under comparison." *Id.* at 16. However, an immigration practitioner should conduct a realistic probability analysis in case does not find this statute to be unambiguously overbroad. *See* discussion of *Conroy Gordon v. Barr*, 965 F.3d 252 (4th Cir.) *supra note* 42. *See Matter of Chairez-Castrejon*, 26 I&N Dec. 349, 357 (BIA 2014). An immigration practitioner may have difficulty finding the evidence necessary to make this showing. As a note, while this statute was amended (effective July 1, 2021), the relevant language remains unaltered. For additional support, the immigration practitioner may cite *Matter of Ortega Quezada*, 28 I&N Dec. 598 (BIA 2022), where the BIA held that Conviction for unlawfully selling or otherwise disposing of a firearm or ammunition in violation of 18 U.S.C. § 922(d) (2018) does not render an individual removable as charged under section 237(a)(2)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(C) (2018), because § 922(d) is categorically overbroad and indivisible relative to the definition of a firearms offense (as 992(d) includes "any firearm" while 237(a)(2)(C) only includes certain firearms.).

[80] *See supra* fn 77.

[81] *See supra* fn 78.

[82] *See supra* fn 79.

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					that offense involved giving or furnishing firearms for no renumeration. Otherwise, keep the means of commission outside these documents.
Possession of firearms while in possession of certain substances	18.2-308.4	Maybe[83]	Maybe, under 8 U.S.C. § 1101 (a)(43) (B) or (E)[84]	Most likely not, under 8 U.S.C. § 1227(a) (2)(C) (firearms	If firearm is an antique firearm and/or the controlled substance is less than 30g of marijuana or not federally controlled, emphasize that fact in the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact. Otherwise, keep type of firearm and controlled substance out of these documents.

[83] A crime involving moral turpitude (CIMT) "requires two essential elements: a culpable mental state and reprehensible conduct." *Guevara-Solorzano v. Sessions*, 891 F.3d 125, 135 (4th Cir. 2018). Many simple possession offenses do not constitute crimes involving moral turpitude because they contain no *mens rea* element. *Matter of Abreu-Semino*, 12 I&N Dec. 775 (BIA 1968). However, possession crimes do involve moral turpitude if accompanied by the intent to commit a crime involving moral turpitude. *See Matter of Khourn*, 21 I&N Dec. 1041, 1046–47 (BIA 1997); *Matter of Serna*, 20 I&N Dec. 579, 584 (BIA 1992) *modified on other grounds by Matter of Khourn*, 21 I&N Dec. at 1046–47; *Matter of Granados*, 16 I&N Dec. 726 (BIA 1979). An immigration practitioner may argue however that possession of a firearm (the "crime" accompanying controlled substance possession) is merely another possession offense that is not in of itself inherently reprehensible or intrinsically wrong.

[84] An immigration practitioner may argue that Va. Code § 18.2-308.4 is not categorically a drug trafficking aggravated felony under 8 U.S.C. § 1101(a)(43) (B) or a firearms aggravated felony under 8 U.S.C. § 1101(a)(43)(E) via 18 U.S.C. § 844(h)(2) since possession of a controlled substance is not categorically a felony or a drug trafficking crime. *See Moncrieffe v. Holder*, 569 U.S. 184, 192–94 (2013).

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				offense)[85] Maybe, under 8 U.S.C. § 1227(a)(2)(B) (controlled substance offense)[86]	

[85] *See supra* fn 79.

[86] An immigration practitioner could argue that the Va. Code § 18.2-308.4 not categorically a crime relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B) because it criminalizes the possession of controlled substances that while listed in Virginia Schedules I and II, are not included in the federal drug schedules found at 21 U.S.C. § 802. *See Mellouli v. Lynch*, 135 S. Ct. 1980 (2015); *Descamps v. United States*, 133 S. Ct. 2276 (2013). (For example, salvinorin a, MDAI, mexedrone, and numerous other substances are included in the Virginia drug schedules and not in the federal drug schedules. However, there is no binding decision on the overbreadth of the Virginia controlled substance schedules and an immigration practitioner will need to prove that there is a "realistic probability" that the state government prosecutes people based on controlled substances that are not included on the federal schedules. *See Matter of Navarro*, 27 I&N Dec. 560, 562–63 (BIA 2019); *Matter of Mendoza Osorio*, 26 I&N Dec. 703 (BIA 2016); *Matter of Ferreira*, 26 I. & N. Dec. 415 (BIA 2014). *See* Practice Advisory for Defending Immigrants Facing Controlled Substance Charges at https://www.caircoalition.org/sites/default/files/blog/2015/07/CSA-Practice-Advisory-Final-20150720.pdf

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