IN THE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 10-72459

MANUEL OLIVAS-MOTTA

Petitioner,

v.

ERIC H. HOLDER, JR., U.S. Attorney General,

Respondent.

Petition for Review of the Board of Immigration Appeals in file A021-179-705

BRIEF OF *AMICI CURIAE* IMMIGRANT DEFENSE PROJECT, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, IMMIGRANT LEGAL RESOURCE CENTER, U.C. DAVIS IMMIGRATION LAW CLINIC, AND IMMIGRATION JUSTICE CLINIC OF THE BENJAMIN N. CARDOZO SCHOOL OF LAW IN SUPPORT OF PETITIONER AND REVERSAL OF THE DECISION OF THE BOARD OF IMMIGRATION APPEALS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *amici curiae* submit the following corporate disclosure statements:

Immigrant Defense Project states that its parent corporation is the Fund for the City of New York (FCNY), a nonprofit corporation operating under § 501(c)(3) of the Internal Revenue Code that does not issue stock. As it has no stock, no publicly held corporation owns 10% or more of FCNY's stock.

National Immigration Project of the National Lawyers Guild states that it does not have a parent corporation. It is a nonprofit corporation operating under § 501(c)(3) of the Internal Revenue Code that does not issue stock. As it has no stock, no publicly held corporation owns 10% or more of its stock.

Immigrant Legal Resource Center states that it does not have a parent corporation. It is a nonprofit corporation operating under § 501(c)(3) of the Internal Revenue Code that does not issue stock. As it has no stock, no publicly held corporation owns 10% or more of its stock.

U.C. Davis Immigration Law Clinic states that it does not have a parent corporation. It does not issue stock, and as such, no publicly held corporation owns 10% or more of its stock.

Immigration Justice Clinic of the Benjamin N. Cardozo School of Law states that its parent corporation is Yeshiva University, a nonprofit corporation operating under § 501(c)(3) of the Internal Revenue Code that does not issue stock. As it has no stock, no publicly held corporation owns 10% or more of Yeshiva University's stock.

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Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, the Immigrant Defense Project, National Immigration Project of the National Lawyers Guild, Immigrant Legal Resource Center, U.C. Davis Immigration Law Clinic, and Immigration Justice Clinic of the Benjamin N. Cardozo School of Law submit this brief as *amici curiae* in support of Petitioner Manuel Olivas-Motta.

PRELIMINARY STATEMENT

Amici offer this brief to supplement the arguments set forth by Petitioner with a discussion of significant legal and practical concerns arising from former Attorney General Mukasey's erroneous decision in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008), regarding the method used to determine whether a given criminal conviction is a "crime involving moral turpitude" ("CIMT"). *Amici* urge this Court to grant Petitioner's petition for review and to hold that *Silva-Trevino* and its unprecedented, fact-intensive framework for CIMT determinations represents a patent misreading of the Immigration and Nationality Act ("INA").[1]

Even supposing *arguendo* that this Court would ordinarily defer to the agency on the issue of the nature of the analysis of a criminal conviction for

[1] In addition, *amici* support Petitioner's arguments (Pet'r's Br. at 8–55) that this court should reject *Silva-Trevino* or, at minimum, refuse to apply it retroactively.

immigration purposes—which it would not—*Silva-Trevino* patently misinterprets clear statutory language and creates an analytic framework that raises serious constitutional questions of due process, fairness, and uniformity by requiring immigration officials to make *de novo* findings of fact regarding the circumstances underlying often decades-old criminal convictions. That numerous courts have reaffirmed the necessity of the traditional categorical analysis since *Silva-Trevino* confirms its fundamental inconsistency with the statute's plain terms.

INTEREST OF *AMICI*

Amici are non-profit organizations with extensive experience in the interrelationship of criminal and immigration law. *Amici* include organizations involved in counseling and representing immigrants in removal proceedings, counseling immigrants and their attorneys in the criminal justice system and training others for such representation and counseling. The United States Supreme Court and Courts of Appeals, including this Court, have accepted and relied on briefs prepared by *amici* in numerous significant immigration-related cases.

This case is of critical interest to *amici*. As explained below, the analysis used to assess the immigration consequences of convictions is an essential part of the due process foundation of the immigration and removal

systems. *Amici* have a strong interest in assuring that the rules governing classification of criminal convictions are fair, predictable and in accord with longstanding precedent on which immigrants, their lawyers and the courts have relied for nearly a century.

STATUTORY ADDENDUM

Pursuant to Circuit Rule 28-2.7, an addendum containing relevant statutes and regulations is appended to this brief.

ARGUMENT

I. *SILVA-TREVINO*'S REASONING MISAPPREHENDS THE UNAMBIGUOUS LANGUAGE OF THE INA, AS CONFIRMED IN SUPREME COURT AND CIRCUIT CASES DECIDED AFTER ITS ISSUANCE

The INA provides that a lawful permanent resident like Petitioner "who at any time after admission is *convicted* of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct . . . is deportable" and also provides that a noncitizen "who . . . is *convicted* of a crime involving moral turpitude committed within five years . . . after the date of admission . . . is deportable." 8 U.S.C. § 1227(a)(2)(A)(i)-(ii) (emphasis added). *Amici* agree with Petitioner (Pet'r's Br. at 17–23) that *Silva-Trevino*'s most fundamental flaw is ignoring Congress' clear mandate to determine removability under this ground by analyzing the nature of a noncitizen's *conviction* rather than his or her

conduct. *Amici* offer additional considerations and authority underscoring this error. In particular, *Silva-Trevino* ignores the agency's settled view concerning the significance of the phrase "admits committing acts which constitute the essential elements of" a CIMT, 8 U.S.C. § 1182(a)(2)(A)(i)(I); assigns the term "involving" a significance that that word cannot bear; draws incorrect conclusions from the fact that "turpitude" is seldom an element of criminal offenses, failing to recognize that the term "crime involving moral turpitude" is a unitary term of art with a well-established meaning; and fails to recognize clear indications of congressional intent, reflected in an overwhelming consensus of circuit case-law decided over decades and confirmed in decisions subsequent to *Silva-Trevino*, to prohibit the sort of conduct-based inquiry that the *Silva-Trevino* decision allows.

A. ***Silva-Trevino*** **Ignores the Well-Settled Consensus Regarding the Significance of Admissions of Turpitudinous Conduct Under the INA**

As the Board of Immigration Appeals (BIA) has acknowledged, the federal courts have understood "[f]or nearly a century" that where the INA assigns consequences to one "convicted" of a given category of offense, the inquiry focuses on the nature of the statutory conviction rather than the particular conduct underlying it. *Matter of Velazquez-Herrera*, 24 I&N Dec. 503, 513 (BIA 2008) (deferring to the Ninth Circuit's application of the

categorical approach to the "crime of domestic violence" ground of removability); *see, e.g.*, *United States ex rel. Robinson v. Day*, 51 F.2d 1022, 1023 (2d Cir. 1931) (L. Hand, J.) ("Neither the immigration officials, nor we, may consider the circumstances under which the crime was in fact committed. When by its definition it does not necessarily involve moral turpitude, the alien cannot be deported because in the particular instance his conduct was immoral." (citations omitted)). The federal courts' view of Congress' intent was also adopted long ago by the Attorney General in one of his first decisions on immigration law. *See Op. of Hon. Cummings*, 39 Op. Att'y Gen. 95, 96-97 (AG 1937) ("It is not permissible to go behind the record of that court to determine purpose, motive, or knowledge as indicative of moral character."). This long history confirms that the term "convicted" prohibits courts from considering the underlying facts or conduct when assessing whether a conviction constitutes a CIMT.

The statute elsewhere provides that "any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of . . . a crime involving moral turpitude (other than a purely political offense) or attempt or conspiracy to commit such a crime" is inadmissible. *See* 8 U.S.C. § 1182(a)(2)(A)(i)(I). This language, which is not applicable in the case at bar, distinguishes between, and disjunctively

lists, convictions and admissions as bases for removal. As Petitioner notes (Pet'r's Br. at 22, 27), this only serves to confirm that where Congress does predicate immigration consequences on a conviction, it seeks to confine courts' review to the individual's conviction, not his or her conduct. *Cf. Padilla v. Kentucky*, 130 S.Ct. 1473, 1478 n.2 (2010) (noting that the ground of exclusion for those "convicted of a felony or other infamous crime or misdemeanor involving moral turpitude" was added in 1891 while the ground of excludability for those who "admit" to having committed a CIMT was added separately in 1907).

Silva-Trevino's suggestion that the statute's reference at 8 U.S.C. § 1182(a)(2)(A)(i)(I) to admission of committing acts constituting a CIMT "seems to call for, or at least allow, inquiry into the particular facts of the crime," *Silva-Trevino*, 24 I&N Dec. at 693, ignores the agency's well-settled understanding of the effect of a conviction under this provision. Where a person has been criminally prosecuted, courts may not use admissions to find the individual removable based on an offense for which he was not convicted. *See, e.g., Matter of Seda*, 17 I&N Dec. 550, 554 (BIA 1980) (holding that "where a plea of guilty results in something less than a conviction, . . . the plea, without more, is not tantamount to an admission of commission of the crime for immigration purposes"), *modified on other*

grounds, *Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988); *Matter of Winter*, 12 I&N Dec. 638, 642 (BIA 1968) ("Where, as here, an alien has been the subject of court proceedings on criminal charges and the ultimate disposition of those charges by the court falls short of a conviction . . . the 'admission' provisions cannot be called into play to give the intermediate step of pleading a stronger effect than the ultimate disposition could have under the immigration laws.").

Moreover, even with regard to determinations of inadmissibility based on admissions, the inquiry must remain focused on the nature of the criminal *statute* a respondent admits to violating. *See, e.g.*, *Matter of K-*, 7 I&N Dec. 594 (BIA 1957) (holding that an individual must be provided with the precise definition of the crime in issue before making the alleged admission); *Matter of E-N-*, 7 I&N Dec. 153 (BIA 1956) (holding that an individual must admit all of the constituent elements of the crime in issue). These requirements make clear that even in this context, the inquiry remains focused on the intrinsic nature of an offense proscribed by a particular statute rather than on a noncitizen's particular conduct. Thus, the language relating to "admissions," "commissions" and "acts" does not alter the requirements surrounding "convictions." *See Jean-Louis v. Att'y Gen. of*

U.S., 582 F.3d 462, 476–77 (3d Cir. 2009), *petition for reh'g denied* (Apr. 5, 2010).

B. *Silva-Trevino* Assigns Unjustified Significance to the Word "Involving" and the Fact that Turpitude is not an Element of Criminal Offenses

The former Attorney General also attempts to support his opinion by pointing to statutory language within the term "crime involving moral turpitude," explaining that "use of the word 'involving'" indicates that courts must look into the facts of the actual conduct, since "moral turpitude is not an element of an offense" and "[t]o limit the information available to immigration judges in such cases means that they will be unable to determine whether an alien's crime actually 'involv[ed]' moral turpitude." *Silva-Trevino*, 24 I&N Dec. at 693, 699 (second alteration in original).

This dissection of the phrase "crime involving moral turpitude" inexplicably ignores the patent truth that the phrase is a unitary term of art with "deep roots" in a century-old history. *See Jordan v. De George*, 341 U.S. 223, 227 (1951); *Jean-Louis*, 582 F.3d at 477. As early as 1914, it was clear that the question of whether an offense is a CIMT required an examination of whether the *statutorily proscribed elements* involved moral turpitude. *United States ex rel. Mylius v. Uhl*, 210 F. 860, 862 (2d Cir.

1914); *see also Jean-Louis*, 582 F.3d at 447 (explaining that "crime involving moral turpitude" is a term of art).

Further, subsequent to the issuance of *Silva-Trevino*, the Supreme Court made clear in *Nijhawan v. Holder*, 129 S.Ct. 2294 (2009), that neither the use of the word "involving" in the generic definition, nor the fact that a generic definition is not itself an element of a criminal offense, justifies departing from the categorical approach. First, the Court held that the use of the word "involving" does not invite an inquiry into the specific facts underlying a conviction.[2] *See Nijhawan*, 129 S.Ct. at 2298 (holding that the phrase "involving fraud or deceit" in the aggravated felony definition at 8 U.S.C. § 1101(a)(43)(M)(i) refers to offenses having fraud or deceit as an element); *id.* at 2300 (noting that a statute using the ambiguous phrase "involves conduct" refers to a generically defined crime and not to the

[2] While *Nijhawan* held that the portion of the aggravated felony definition fraud or deceit category requiring a loss to the victim of over $10,000 called for a "circumstance-specific" inquiry not limited to the elements of the statute of conviction, it did so because the statute in issue—in particular, the phrase "*in which* the loss to the victim or victims"—plainly invited such an inquiry. 129 S.Ct. at 2301 ("The words 'in which' (which modify "offense") can refer to the conduct involved *'in'* the commission of the offense of conviction, rather than to the elements *of* the offense."). The CIMT grounds of removability contain no such language. *See Jean-Louis*, 582 F.3d at 480 ("*Nijhawan* . . . [does] not support abandoning our established methodology [for CIMTs]." (citing *Nijhawan v. Att'y Gen. of U.S.*, 523 F.3d 387, 391–92 (3d. Cir. 2008), *aff'd sub nom. Nijhawan v. Holder*, 129 S.Ct. 2294 (2009))).

particular circumstances of its commission (citing *James v. United States*, 550 U.S. 192, 202 (2007)).

Second, *Nijhawan* and other Supreme Court precedent directly conflicts with the Attorney General's assertion that the fact that "'moral turpitude' is not an element of any criminal offense" justifies departure from the categorical approach, *Silva-Trevino*, 24 I&N Dec. at 701. The *Nijhawan* Court reiterated that the categorical approach applies to the inquiry into whether a given state or federal offense is a "violent felony" under the Armed Career Criminal Act ("ACCA"), which is defined in part to include "'crime[s]' that '*involv[e] conduct* that presents a serious potential risk of physical injury to another.'" *Nijhawan*, 129 S.Ct. at 2300 (quoting 18 U.S.C. §§ 924(e)(2)(B)(i)–(ii)) (emphasis in *Nijhawan*). The fact that few if any criminal statutes contain an element of "conduct that presents a serious potential risk of physical injury to another" has posed no obstacle to the application of the categorical approach in the ACCA context, as *Nijhawan* confirmed; the reviewing court simply considers whether the statutory elements inherently give rise to such a risk. *See, e.g.*, *James*, 550 U.S. at 202 (holding that under 18 U.S.C. § 924(e)(2)(B)(ii) "we consider whether the *elements of the offense* are of the type that would justify its inclusion within the residual provision" requiring that the offense involve conduct that

presents a serious potential risk of injury to another "without inquiring into the specific conduct of this particular offender").

Similarly, although criminal statutes do not typically contain an element of "turpitude," courts for decades have considered whether the statute's elements proscribe conduct that is "inherently base, vile, or depraved, and contrary to the private and social duties man owes to his fellow men or to society in general," *Navarro-Lopez v. Gonzales,* 503 F.3d 1063, 1068 (9th Cir. 2007) (en banc), and is accompanied with a scienter of at least recklessness, *see Marmolejo-Campos v. Holder*, 558 F.3d 903, 910 (9th Cir. 2009) (en banc) (citing *Silva-Trevino,* 24 I&N Dec. at 688, 706). The CIMT inquiry thus requires that a court examine "the elements of the offense" of conviction, not the particular circumstances of the offense. *Nijhawan,* 129 S.Ct. at 2301.

C. ***Silva-Trevino*** **Ignores Decades of Federal Court Consensus on Congress's Clear Intent to Require a Categorical Approach and Has Been Rejected or Ignored by Numerous Courts**

The Attorney General's radical abandonment of the categorical approach in the CIMT context is premised on an asserted need to create a "uniform" methodology in the face of what is claimed to be divergent federal circuit case law. 24 I&N Dec. at 688. But as the Third Circuit found, "[t]he ambiguity that the Attorney General perceives in the INA is an

ambiguity of his own making, not grounded in the text of the statute, and certainly not grounded in the BIA's own rulings or the jurisprudence of courts of appeals going back for over a century." *Jean-Louis*, 582 F.3d at 473. In fact, virtually all courts have uniformly applied the categorical and modified categorical approach to the CIMT inquiry for decades.[3] *See, e.g.*, *Uhl*, 210 F. at 862–63; *see also Wala v. Mukasey*, 511 F.3d 102, 107–08 (2d Cir. 2007) (applying the categorical and modified categorical approach to determine whether person was convicted of a CIMT); *Vuksanovic v. U.S. Att'y Gen.*, 439 F.3d 1308, 1311 (11th Cir. 2006) (same); *Recio-Prado v. Gonzales*, 456 F.3d 819, 821 (8th Cir. 2006) (same); *Jaadan v. Gonzales*, 211 F.App'x 422, 427 (6th Cir. 2006) (same); *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1017–20 (9th Cir. 2005) (same); *Partyka v. Att'y Gen. of the U.S.*, 417 F.3d 408, 411–12 (3d Cir. 2005) (same); *Padilla v. Gonzales*, 397 F.3d 1016, 1019 (7th Cir. 2005) (same); *Smalley v. Ashcroft*, 354 F.3d 332, 336 (5th Cir. 2003) (same); *Maghsoudi v. INS*, 181 F.3d 8, 14 (1st Cir. 1999)

[3] Prior to *Silva-Trevino*, the Seventh Circuit's decision in *Ali v. Mukasey*, 521 F.3d 737 (7th Cir. 2008), with which *amici* take issue for the reasons discussed by the Third Circuit, *see Jean-Louis*, 582 F.3d at 478–80, marked the *only* significant departure from the principles of the categorical and modified categorical approach in the CIMT context during its nearly 100-year-old history. The Seventh Circuit later adhered to this misguided precedent in *Mata-Guerrero v. Holder*, 627 F.3d 256, 260 (7th Cir. 2010), which is unpersuasive for the same reasons.

(same). The Attorney General asserts that the underlying analyses in these decisions adopting the categorical and modified categorical approach vary to significant degrees. 24 I&N Dec. at 693–95. However, while the cases sometimes use different terms to describe the approach, the essential analysis is uniform—courts each begin with an analysis of the statute of conviction, and if the statute criminalizes different sets of offenses, some of which are crimes involving moral turpitude and some of which are not, courts may inquire into the record of conviction only to determine the provision of the statute under which the person was convicted and whether that statutory provision would constitute a CIMT.

Two circuits have already explicitly rejected *Silva-Trevino's* new framework for moral turpitude determinations. As noted above, the Third Circuit rejected *Silva-Trevino* as "bottomed on an impermissible reading of the [INA]," because "the INA requires the conviction of a *crime*—not the commission of an act—involving moral turpitude." *Jean-Louis*, 582 F.3d at 473, 477 (emphasis in original). Similarly, in 2010, the Eighth Circuit concluded that it is still "bound by . . . circuit precedent, and to the extent

Silva-Trevino is inconsistent, we adhere to circuit law."[4] *Guardado-Garcia v. Holder*, 615 F.3d 900, 902 (8th Cir. 2010).

Other circuits have also continued to apply the traditional categorical approach notwithstanding *Silva-Trevino*. *See, e.g.*, *Ahmed v. Holder*, 324 F. App'x 82, 84 (2d Cir. 2009); *Serrato-Soto v. Holder*, 570 F.3d 686, 689 (6th Cir. 2009).[5] Even when courts have cited *Silva-Trevino*, they have declined to apply its unprecedented three-step analysis. *See, e.g.*, *Tejwani v. Att'y Gen. of U.S.*, Nos. 07-1828 & 07-4132, 349 F. App'x 419 (3d Cir. 2009); *Destin v. U.S. Att'y. Gen.*, 345 F. App'x 485, 487 (11th Cir. 2009). These intervening decisions make increasingly obvious *Silva-Trevino*'s incompatibility with the INA and further demonstrate why this Court should again reaffirm its commitment to the categorical approach.

[4] Eighth Circuit precedent clearly limits the CIMT inquiry to the categorical and modified categorical approach. *See e.g.*, *Recio-Prado v. Gonzales*, 456 F.3d 819, 821 (8th Cir. 2006); *Chanmouny v. Ashcroft*, 376 F.3d 810, 811-12 (8th Cir. 2004); *Franklin v. INS*, 72 F.3d 571, 572 (8th Cir. 1995).

[5] Although the Sixth Circuit in *Kellermann v. Holder*, 592 F.3d 700, 704 (6th Cir. 2010), ostensibly accepts *Silva-Trevino* and purports to disagree with the Third Circuit's decision in *Jean-Louis*, *Kellermann* merely applies the familiar second-stage modified categorical analysis, and does not in fact address the validity of the novel step-three inquiry that *Jean-Louis* rejected. *Kellerman*, 592 F.3d at 704.

II. THE ATTORNEY GENERAL'S DECISION IN *SILVA TREVINO* DOES NOT MERIT DEFERENCE FROM THIS COURT

This Court owes no deference to *Silva-Trevino's* untenable framework for determining whether a state or federal criminal conviction is a CIMT. For the reasons set forth *supra* in Point I, Congress spoke with the requisite clarity in conditioning deportability on a conviction—not conduct—that constitutes a CIMT and thus unambiguously required the categorical approach. In addition, even supposing that the statute were ambiguous, the Attorney General's rejection of the categorical approach to analyzing criminal convictions would not warrant deference from this Court because, first, as this Court has held, the analysis of criminal statutes does not implicate the agency's expertise; and second, whatever residuum of deference the Attorney General's opinion might otherwise command is undermined by the deeply troubling lack of adversary process or notice to affected parties in the opinion's issuance.

A. The Analysis of Criminal Statutes Does Not Warrant Deference Because It Does Not Implicate the Agency's Expertise

Deference to an agency's interpretation of an ambiguous statute under the *Chevron* doctrine is only warranted "'when it appears that Congress delegated authority to the agency generally to make rules carrying the force

of law.'" *Gonzales v. Oregon*, 546 U.S. 243, 255 (2006) (quoting *United States v. Mead Corp*., 533 U.S. 218, 226-27 (2001)). *See also, e.g.*, *Marmolejo-Campos*, 558 F.3d at 908–09 ("[B]efore we apply *Chevron*, we must conclude that Congress delegated authority to the agency to interpret the statute in question . . . .").

Even supposing that the statutory requirement of a "convict[ion]" were in any way ambiguous, which it is not, for the reasons discussed in Point I, *supra*, *Silva-Trevino's* radical new methodology for analyzing criminal convictions is owed no deference under *Chevron* because Congress did not delegate to the agency any special authority to specify methods to interpret criminal statutes. As this Court has recently explained, the inquiry into whether a given state or federal criminal conviction constitutes a CIMT within the meaning of the INA consists of two distinct inquiries: "First, the BIA must determine what offense the petitioner has been convicted of committing, and, in certain cases, to examine the record of conviction." *Marmolejo-Campos*, 558 F.3d at 907. Second, "once the Board has identified the petitioner's offense, it must determine whether such conduct is a 'crime involving moral turpitude' as defined in the applicable section of the INA." *Id.*

While the agency's answer to the latter question in a precedent decision may command deference under *Chevron*, *id.* at 909, "[i]t is well established that [this Court] gives no deference to the Board on the first question," *id.* at 907. "The BIA has no special expertise by virtue of its statutory responsibilities in construing state or federal criminal statutes, and thus, has no special administrative competence to interpret the . . . statute of conviction." *Id.* In *Marmolejo-Campos*, this Court *en banc* specifically noted that the question of whether *Silva-Trevino*'s framework permitting resort to evidence outside the record of conviction in order to determine the nature of the convicted conduct was subsumed under the first part of this two-part inquiry. *Id.* at 907 n.6. While it had no occasion to resolve the question of the validity of *Silva-Trevino*'s third step, the Court's decision made perfectly clear that the agency's view that categorical analysis is not required does not, even assuming a statutory ambiguity on that score, command deference under *Chevron*.[6] *See id. See also, e.g., Tijani v.*

[6] The Court clarified that the agency *is* entitled to deference when, in a published opinion, it determines "whether a petitioner's offense, *once established*, meets the definition of a CIMT, 558 F.3d at 910 (emphasis added), so long as that decision is not an irrational abandonment of prior such precedent, *id.* at 916. The Court thus deferred to the Attorney General's determination in *Silva-Trevino* that "'[a] finding of moral turpitude . . . requires that a perpetrator have committed [a] reprehensible act with some form of scienter.'" *Id.* at 910 (quoting *Silva-Trevino*, 24 I&N Dec. at 706), 915.

Holder, 628 F.3d 1071, 1079 (9th Cir. 2010) (explaining that "[t]he first inquiry requires the BIA to construe a state criminal statute" and that "[d]eference is not due to the agency in construing state law" (internal quotation and citation omitted)).

Two recent Supreme Court decisions confirm that the proper method to interpret the nature of criminal convictions for immigration purposes is not a matter delegated by Congress to the agency's expertise. In *Nijhawan*, the Court was called upon to determine whether evidence outside the record of conviction could establish that a conviction for fraud was an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i), considering precisely the same issue that the BIA had addressed in *Matter of Babaisakov*, 24 I&N Dec. 306 (BIA 2007). Despite the fact that the government explicitly invoked *Chevron* deference in its defense of the BIA's view, *see* Br. of Resp. at 48–49, *Nijhawan v. Holder*, 129 S.Ct. 2294 (2009) (No. 08-495), 2009 WL 815242 (arguing that "agency interpretations . . . are entitled to deference"), the Court analyzed *de novo* whether the categorical approach was warranted. While the Court ultimately arrived at the same conclusion as the BIA, it did so without any reference to *Chevron*, and mentioned *Babaisakov* only once. *Nijhawan*, 129 S.Ct. at 2303.

Similarly, in *Carachuri-Rosendo v. Holder*, 130 S.Ct. 2577 (2010), the Supreme Court considered whether, in determining whether a state conviction came within the "drug trafficking crime" aggravated felony ground, 8 U.S.C. § 1101(a)(43)(B), the adjudicator could take into account "facts known to the immigration court that could have *but did not* serve as the basis for the state conviction and punishment." *id.* at 2588. The BIA had held, in a precedent decision, that Fifth Circuit precedent required it to allow consideration of such facts in Mr. Carachuri's case but that, where circuits had not ruled to the contrary, the BIA would apply a categorical analysis relying only on the record of conviction. *Matter of Carachuri-Rosendo,* 24 I&N Dec. 382 (BIA 2007). The Supreme Court resolved the disagreement between the agency and the court of appeals in favor of the BIA's view, but as in *Nijhawan*, nowhere did the Court so much as mention *Chevron* or indicate that the proper mode of analysis was a question on which the agency's view commanded judicial deference.

The conspicuous absence of any discussion of *Chevron* in the Supreme Court's recent consideration of the extent and nature of categorical analysis under the INA reflects the Court's understanding that the BIA may not set the terms by which federal courts interpret criminal convictions.

Since this is precisely what *Silva-Trevino* attempts to do, it should be accorded no deference under *Chevron*.

B. Flaws in the Procedure for Issuance of the *Silva-Trevino* Decision Undermine Any Claim to Deference It Might Otherwise Have

In determining whether an agency interpretation merits deference, courts scrutinize the logical and factual bases for the agency interpretation to determine whether the agency considered the matter "in a detailed and reasoned fashion." *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (holding that one factor relevant to the weight to be given to an administrative ruling is "the thoroughness evident in its consideration")); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (calling for a "searching and careful" inquiry into whether a decision "was based on a consideration of the relevant factors and whether there has been clear error of judgment"). An agency decision merits no deference if, for instance, it "entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Deference is similarly unwarranted where the decision in question represents a "[s]udden

and unexplained change, or change that does not take account of legitimate reliance on prior interpretation"; such unexplained departures "may be arbitrary, capricious [or] an abuse of discretion," and therefore unworthy of deference. *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996) (internal quotation marks and citations omitted).

Due to a lack of any meaningful adversarial process in the certification and adjudication of *Silva-Trevino*, the Attorney General failed to consider critical legal authority discussed *supra* and issued a decision rejecting the agency's long-settled rule based on a misreading of agency and circuit precedent. The Attorney General's failings resulted in a lack of reasoned consideration and *Silva-Trevino* therefore merits no deference from this Court.

Neither Mr. Silva-Trevino's counsel nor relevant stakeholders were notified that the Attorney General intended to use Mr. Silva-Trevino's case to reconsider a century of precedent regarding the methodology for moral turpitude determinations, an issue that had been raised by neither party to the case. *See Jean-Louis*, 582 F.3d at 470 n.11. As set forth in detail in a brief submitted to Attorney General Mukasey shortly after *Silva*'s issuance by, *inter alia*, three undersigned *amici*, Mr. Silva-Trevino was never apprised of the reason for the Attorney General's certification despite his counsel's

repeated attempts to obtain notice of the certified issues and a schedule to brief them.[7] Br. of *Amici Curiae* Am. Immigr. Lawyers Ass'n et al. in Supp. of Recons., *Matter of Silva-Trevino,* at 4–6 (Dec. 5, 2008), *available at* http://www.immigrant defenseproject. org/docs/08_ SilvaTrevinoAmicus Brief.pdf. Indeed, counsel only learned of the certification four months or more after EOIR records show that it took place. *Id.* at 5 n.5. Supported by *amici*, Mr. Silva-Trevino promptly moved the Attorney General to reconsider his decision but the motion was summarily denied in a five-sentence decision. *Silva-Trevino,* Order No. 3034-2009, Off. of the Att'y Gen. (Jan. 15, 2009). The decision's only response to the serious procedural due process concerns raised by *amici* was that "there is no entitlement to briefing when a matter is certified for Attorney General review." *Id*.

As this Court has explained, the opportunity for a litigant to "brief its arguments" is one of the "hallmarks of fairness and deliberation" in adversarial agency adjudications. *Alaska Dep't of Health & Social Servs. v. Ctrs. for Medicare & Medicaid Servs*, 424 F.3d 931, 939 (9th Cir. 2005); *see*

[7] In certifying a decision without entertaining the arguments of interested parties, Attorney General Mukasey deviated sharply from his predecessors' practices of requesting and considering briefs, including *amicus* briefs. *See, e.g*., *Matter of R-A-*, 24 I&N Dec. 629, 630 n.1 (AG 2008); *Matter of E-L-H*, 23 I&N Dec. 700, 704 (AG 2004); *Matter of Soriano* 21 I&N Dec. 516, 540 (AG 1997); *Matter of Hernandez-Casillas*, 20 I&N Dec. 262, 286, 289, 291 (AG 1990).

also Greenlaw v. United States, 554 U.S. 237, 243–44 (2008) (stating that "[i]n our adversary system, in both civil and criminal cases . . . we rely on the parties to frame the issues for decision" based on "the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief"). The avoidance of an adversarial process in *Silva-Trevino*, which led to an uninformed and ill-considered decision on an issue affecting countless immigrants, seriously troubled the Third Circuit; the court concluded that "the lack of transparency, coupled with the absence of input by interested stakeholders . . . serves to dissuade us further from deferring to the Attorney General's novel approach." *Jean-Louis*, 582 F.3d at 470 n.11. *See also* Laura Trice, *Adjudication By Fiat: The Need For Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions*, 85 N.Y.U. L. REV. 1766, 1776 (2010) (reviewing the history of *Silva-Trevino*'s issuance and concluding that "*Silva-Trevino* illustrates the extent to which Attorney General review, unconstrained by basic procedural requirements, can interfere with the due process rights of litigants and bypass the participatory, adversarial process we normally demand for decisions of significant import").

In the absence of briefing, the Attorney General failed to consider the decades of relevant authority discussed *supra* Point I and instead attempted to inappropriately parse the internal grammar of the unitary term of art "crime involving moral turpitude." *See Jean-Louis*, 582 F.3d at 477. The lack of briefing also led the Attorney General to commit basic errors of immigration law. For example, he erroneously stated that the respondent bore the burden of proof, *Silva-Trevino*, 24 I&N Dec. at 703 n.4, apparently in ignorance of the well-established constitutional rule that the government bears the burden of demonstrating inadmissibility in removal cases involving returning lawful permanent residents, such as Mr. Silva-Trevino, *Matter of Huang*, 19 I&N Dec. 749, 754 (BIA 1988); *Matter of Becera-Miranda*, 12 I&N Dec. 358, 363 (BIA 1967).

These omissions and errors demonstrate that the Attorney General utterly failed to develop relevant information about, and articulate a satisfactory explanation for, his abrupt abandonment of the firmly entrenched rule governing CIMT determinations. The Attorney General's interpretation is therefore arbitrary and capricious, and should not be accorded deference by this Court.

III. IN PRACTICE, *SILVA-TREVINO* IMPOSES AN UNWORKABLE SCHEME RAISING SERIOUS CONSTITUTIONAL CONCERNS FOR MORAL TURPITUDE DETERMINATONS IN IMMIGRATION COURTS AND NON-ADVERSARIAL AGENCY ADJUDICATIONS, AND DISRUPTS THE ORDERLY FUNCTIONING OF STATE AND FEDERAL CRIMINAL JUSTICE SYSTEMS

The *Silva-Trevino* framework requires often ill-equipped immigrants to relitigate the facts underlying convictions in fora that lack adequate procedural safeguards, violating fundamental constitutional principles of fairness, due process and uniformity. Practical considerations regarding *Silva-Trevino*'s fundamental unfairness arising from *amici*'s experience assisting immigrants convicted of criminal offenses offer several additional reasons why this Court should reject *Silva-Trevino*.

A. Forcing Respondents in Removal Proceedings—Often Detained and Unrepresented—to Relitigate the Facts of Old Convictions is Impracticable and Offends Notions of Fairness and Due Process.

Silva-Trevino imposes an unworkable system in which respondents face a grave deprivation of liberty—one which the Supreme Court has described as the "loss 'of all that makes life worth living,'" *Knauer v. United States*, 328 U.S. 654, 659 (1946) (citation omitted)—without procedural protections necessary to ensure a fair hearing. *Silva-Trevino* places on respondents, many of whom are *pro se* and detained, the unrealistic burden

of litigating complex factual issues related to events which often occurred years or even decades in the past.

The categorical inquiry is a straightforward legal determination that immigration judges routinely make on behalf of *pro se* respondents by inquiring into the elements of a criminal statute, informed when necessary by reference to "a narrow, specified set of documents that are part of the record of conviction," *Tokatly v. Ashcroft*, 371 F.3d 613, 620 (9th Cir. 2004). However, under the *Silva-Trevino* framework the court must rely upon the factual record created by the parties. For the fiscal years 2006 to 2010, well under half of all respondents in removal were represented, with the rate of represented respondents varying from 35% to 43%. Exec. Office for Immigration Review, *FY2010 Statistical Yearbook* G1 (2010). Unrepresented respondents, lacking an adequate understanding of the legal standards at issue in their cases, are unable to develop an appropriate factual record. Detained respondents—representing fully half of all respondents in FY2009, *id.* at O1 fig.23—are routinely transferred far from the locus of their conviction and place of residence to detention facilities in remote locations,[8] severely restricting their ability to investigate and produce the

[8] *See* TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, HUGE INCREASES IN TRANSFERS OF ICE DETAINEES (2009), http://trac.syr.edu/immigration/reports/220/.

evidence required under *Silva-Trevino's* new framework. *Cf. Smith v. Hooey*, 393 U.S. 374, 380 (1969) ("Confined in a prison, perhaps far from the place where the offense . . . allegedly took place, [a prisoner's] ability to confer with potential defense witnesses, or even to keep track of their whereabouts, is obviously impaired."). [9]

B. *Silva-Trevino* Creates An Unworkable Standard That Substantially Disrupts the Orderly Function of State and Federal Criminal Justice Systems

In addition to significantly disrupting the fair administration of law within the immigration system, the analysis announced in *Silva-Trevino* makes it impossible for actors in state and federal criminal justice systems—including judges, defense attorneys, and prosecutors—to comply with their ethical and statutory obligations to advise defendants regarding the immigration consequences of contemplated plea.

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[9] These concerns are compounded in non-adversarial proceedings outside of the immigration courtroom. *See* 8 C.F.R. § 1003.1(g) (providing that Attorney General decisions bind all DHS immigration adjudicators). According to the American Bar Association , "low-level immigration officers . . . make countless assessments of the impact of noncitizens' criminal convictions each year." ABA, RESOLUTION 113: PRESERVING THE CATEGORICAL APPROACH IN IMMIGRATION ADJUDICATIONS 2 (Aug. 4, 2009), *available at* http://www.abanet.org/leadership/2009/annual/summary_of_recommendations/One_Hundred_Thirteen.doc. The categorical approach is critical to the fair operation of these non-adversarial administrative processes, where CIMT determinations are of necessity made quickly and with even less opportunity for the immigrant to contest government reliance on purported facts not established by the criminal conviction itself.

In *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), the Supreme Court recognized that non-citizen criminal defendants' paramount concern is often to avoid conviction of deportable offenses and preserve their eligibility for discretionary relief and thus that prevailing professional norms require defense counsel to advise their clients of such consequences. *Id*. at 1483. The just and efficient disposition of cases can be advanced when noncitizen defendants, prosecutors, and defense attorneys all understand the immigration consequences that will flow from a contemplated disposition. *Id*. As a result of *Silva-Trevino* however, all actors will be unable to reliably predict the immigration consequences of a plea because no one will know, *ex ante*, what kinds of evidence regarding the underlying conduct an immigration judge might later find "necessary and appropriate" to determining the immigration effect of the conviction. *Silva-Trevino*, 24 I&N Dec. at 690. Practice aids, such as charts that map out the immigration consequences of various criminal statutes, have long allowed for the simple evaluation of the immigration consequences of criminal convictions. *See, e.g.*, Katherine Brady et. al., *Defending Immigrants in the Ninth Circuit: Impact of Crimes under California and Other State Laws* (10th ed. 2010) (publication of *amicus* ILRC); Manuel D. Vargas, *Representing Immigrant Defendants in New York* App. A (4th ed. 2006) (authored by *amicus* IDP).

However, these resources cannot take account of the individual facts of a case and therefore would, in many cases, no longer be reliable tools to evaluate the immigration consequences of a conviction. *Silva-Trevino* undermines years of work by *amici* and others to create an infrastructure to assist criminal justice systems in delivering accurate immigration advisals and leaves such systems with no realistic way to meet their obligations.

As a result of *Silva-Trevino*, judges, defense attorneys and prosecutors simply will no longer be able to reassure defendants with any level of certainty that a contemplated disposition will not result in removal. As a result, many more minor cases will be forced to trial, imposing a tremendous burden on state and federal criminal justice systems.

CONCLUSION

For the foregoing reasons this Court should grant the Petition for Review and reject the unprecedented, erroneous, and unfair moral turpitude framework set forth in *Silva-Trevino*.

Respectfully Submitted,

Date: April 18, 2011
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8 U.S.C. § 1101(a)(43)(B), (M)(i)

§ 1101. Definitions

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. . .

(B**)** illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18);

. . .

(M) an offense that—

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $ 10,000;

* * *

8 U.S.C. § 1182(a)(2)(A)(i)(I)

§ 1182. Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission. Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

. . .

(2) Criminal and related grounds.

(A) Conviction of certain crimes.

(i) In general. Except as provided in clause (ii), any alien convicted of, or who admits having committed or who admits committing acts which constitute the essential elements of--

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime

. . .

is inadmissible.

* * *

8 U.S.C. § 1227(a)(2)(A)(i)-(ii)

§ 1227. Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

. . .

(2) Criminal offenses

(A) General crimes

(i) Crimes of moral turpitude

Any alien who--

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed,

is deportable.

(ii) Multiple criminal convictions

Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

* * *

18 U.S.C. § 924(e)(2)(B)(i)–(ii)

§ 924. Penalties.

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection--

. . .

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; . . .

* * *

Regulations

8 C.F.R. § 1003.1(g)

§ 1003.1 Organization, jurisdiction, and powers of the Board of Immigration Appeals.

. . .

(g) Decisions as precedents. Except as Board decisions may be modified or overruled by the Board or the Attorney General, decisions of the Board, and decisions of the Attorney General, shall be binding on all officers and employees of the Department of Homeland Security or immigration judges in the administration of the immigration laws of the United States. By majority vote of the permanent Board members, selected decisions of the Board rendered by a three-member panel or by the Board en banc may be designated to serve as precedents in all proceedings involving the same issue or issues. Selected decisions designated by the Board, decisions of the Attorney General, and decisions of the Secretary of Homeland Security to the extent authorized in paragraph (i) of this section, shall serve as precedents in all proceedings involving the same issue or issues.

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32

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/s/

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Date: April 18, 2011

CERTIFICATE OF SERVICE

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I, Peter L. Markowitz, hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 18, 2011.

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