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February 9, 2009

Hon. Eric H. Holder Jr.
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

RE: *Matter of Silva-Trevino*, A013 014 303 (A.G. opinion dated Nov. 7, 2008; motion for reconsideration denied by A.G. Order 3034-2009 dated Jan. 15, 2009)

Dear Attorney General Holder:

We write as *amici curiae* in this case to urge you to withdraw, vacate—or at least to stay pending a proper process—the above-referenced opinion issued and reaffirmed by the former Attorney General during the last days of his tenure.

In *Matter of Silva-Trevino*, Attorney General Mukasey effectively overruled a hundred years of agency precedent on application of categorical analysis in determining whether a past conviction should be classified as a "crime involving moral turpitude." *See Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008). The decision was issued without any advance notice of the important issues that the former Attorney General would address and without any opportunity for the interested public to provide input. Even after *amici curiae* learned of the opinion and immediately offered initial legal briefing in support of reconsideration, former Attorney General Mukasey refused to consider any briefs. In a stunning, one-paragraph order dated January 15, 2009 (two business days before the past administration left office) and not faxed to counsel until January 22, 2009, former Attorney General Mukasey denied the motion, explaining only that "... this matter was properly certified and decided in accordance with settled Department of Justice procedures, and *there is no entitlement to briefing* when a matter is certified for Attorney General review." Office of the Attorney General, Order No. 3034-2009, *Matter of Silva-Trevino*, A013 014 303 (emphasis added). In short, there was no opportunity for consideration of legal and factual arguments either before or after the opinion was issued.

This blatant disregard for open and transparent government stands in stark contrast to the position of the new administration and your own views in favor of more transparent and fair government processes. As you stated during your confirmation hearings, in response to a question from Senator Feingold that addressed problems of "secret law" under the past administration:

> I firmly believe that transparency is a key to good government. Openness allows the public to have faith that its government obeys the law. Public scrutiny also provides an important check against unpersuasive legal reasoning—reasoning that is biased toward a particular conclusion.

http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/upload/FeingoldToHolder.pdf (Question and Answer 2). In this case, former Attorney General Mukasey did not provide any notice of the issues to allow for a check on "unpersuasive legal reasoning." The predictable result is an opinion riddled with factual and legal errors that overlooks relevant precedent and will have drastic consequences both for individuals whose status depends on determinations made in civil removal proceedings and hundreds of thousands of persons seeking adjudication of their status in other even less formal adjudicative processes ranging from applications for lawful admission to the United States to applications for naturalization.

In light of the former Attorney General's wholesale denial of even the minimum standards of due process and fair adjudication, the undersigned *amici curiae* respectfully request that you withdraw, vacate—or stay pending a proper process—the *Silva-Trevino* opinion.

BACKGROUND

The background and procedural history of this case is detailed in the Memorandum of Law in Support of *Amici Curiae* in Support of Reconsideration filed on December 5, 2008, which *amici curiae* attach and incorporate herein (hereinafter "*Amici Curiae* Dec. 5th Memorandum") and a further reply memorandum, dated January 6, 2009, also attached and incorporated herein. Although the specific issue involved in the *Silva-Trevino* case relates to whether the respondent's conviction of the crime of indecency with a minor fit the legal standards to be deemed a "crime involving moral turpitude," the former Attorney General's far-reaching pronouncements change the method to be applied in analyzing *all* convictions charged as crimes involving moral turpitude and reaches questions that were not in issue in the underlying proceeding before the Board of Immigration Appeals. Notably, in the underlying proceedings in *Silva-Trevino*, no party challenged application of the longstanding categorical approach that looks to the record of conviction in classifying convictions for immigration purposes and does not permit consideration of evidence outside of the record of conviction. Once the case was certified, former Attorney General Mukasey did not invite any briefing on any issues—and in particular gave no hint that he was considering abandoning the categorical approach. Indeed, he did not even provide any public notice of the very fact of the certification. But in his opinion, which became public on November 19, 2008, the former Attorney General used this case to engage in an eleventh hour rewrite of immigration law rules for classifying all types of past convictions, instead of a ruling on how to classify the particular conviction at issue in the case.

Amici curiae, concerned by the complete lack of transparency in issuing this opinion and its indefensible drastic revision of immigration law, submitted legal briefing

on December 5, 2008 in support of the respondent's motion for reconsideration and requesting that the former Attorney General withdraw the opinion or, alternatively, withdraw it pending a full and fair opportunity for briefing. The brief of *amici curiae* detailed some of the many procedural and substantive errors in the decision. Because of the short time for briefing, *amici curiae* also requested an opportunity to brief additional issues in the case.

Subsequent to seeking reconsideration, counsel for *amici* received a letter from the BIA dated January 22, 2009, which contained a copy of a one-paragraph Order signed by former Attorney General Mukasey and dated January 15, 2009, summarily denying reconsideration. *See* Attorney General Order No. 3034-2009.

ARGUMENT

I. THE ATTORNEY GENERAL HAS THE AUTHORITY TO WITHDRAW *SILVA-TREVINO.*

The Attorney General has the authority both to direct that the BIA refer cases to him for decision and to vacate and reconsider any previous Attorney General decision. *See* 8 C.F.R. § 1003.1(h)(1)(i); *Matter of R-A-*, 24 I. & N. Dec. 629 (AG 2008) (vacating stay order issued by previous Attorney General). *See also* 8 U.S.C. § 103(g) (Attorney General shall review administrative determinations in immigration proceedings as necessary for carrying out his duties). Indeed, in issuing *Matter of Silva-Trevino*, former Attorney General Mukasey essentially overruled—without addressing—several longstanding former Attorney General decisions that had been considered well-settled law. *See, e.g., Matter of S-,* 2 I & N Dec. 353, 357 (BIA, AG 1945); *Op. of Hon. Cummings*, 39 Op. Atty Gen. 215 (AG 1938); *Op. of Hon. Cummings*, 39 Op. Atty Gen. 95 (AG 1937); *Op. of Hon. Cummings,* 37 Op. Atty Gen. 293 (AG 1933). For the same reasons, the Attorney General has the authority to vacate a past Attorney General's decision—particularly here where the Attorney General refused to entertain briefing. For the reasons set forth below, the Attorney General should exercise his authority to vacate *Silva-Trevino* and permit this important issue to receive proper consideration.

II. THE *SILVA-TREVINO* DECISION SHOULD BE WITHDRAWN BECAUSE IT WAS ISSUED WITHOUT MINIMAL PROCEDURES TO ALLOW FOR MEANINGFUL PARTICIPATION BY MR. SILVA-TREVINO'S ATTORNEY AND OTHER INTERESTED PARTIES.

The BIA opinion in this case was one of tens of thousands of unpublished orders issued by the Board each year. Former Attorney General Mukasey certified the decision as early as August 2007, and issued his opinion on November 7, 2008. In the intervening time—at least fifteen months—there was no notice provided to counsel or the public of the broad issues the former Attorney General intended to consider and no opportunity for briefing offered to the respondent's counsel or any interested parties. Indeed there was no public awareness of even the mere fact of certification. Moreover, there was no indication in the BIA's decision in this case or in the briefing before the BIA that the

adjudication would reach the broad issues addressed in the opinion. *See* United States Department of Homeland Security Bureau of Immigration and Customs Enforcement Memorandum of Law in Support of the Decision of the Immigration Judge, dated April 26, 2006.

Once the former Attorney General's opinion was published on November 19, 2008 revealing the broad reach of the opinion, *amici curiae* immediately filed briefing in support of the respondent's motion for reconsideration, detailing some of the procedural and legal errors in the Attorney General's opinion. Nonetheless, the Attorney General issued a one-paragraph order on January 15, 2009 (two business days before the current administration came into office) curtly stating, without any discussion or explanation: "I find no basis for reconsideration of the decision." *See* Attorney General Order No. 3034-2009. In an apparent effort to excuse the failure to consider the legitimate issues and concerns raised by the respondent and *amici curiae*, the January 15 order states only: "[T]here is no entitlement to briefing when a matter is certified for Attorney General review." *Id.*

This blatant disregard for open and transparent government decision-making and due process of law stands in stark contrast to the position of the new administration. In fact, the new administration has already taken admirable steps towards ensuring that other "midnight" rules issued in the waning days of the past administration not take effect until there is an appropriate opportunity to review them. For example, on the first day of the new administration, the White House issued a memorandum instructing all heads of executive departments and agencies to withdraw or suspend new or pending regulations so that they can first be reviewed and approved by the new department or agency heads in the new administration. *See* Memorandum for the Heads of Executive Departments and Agencies from Rahm Emmanuel, Assistant to the President and Chief of Staff, dated January 20, 2009. In a subsequent memorandum, the White House further instructed that heads of executive departments should consider reopening such new rules based on the following considerations:

> (1) whether the rulemaking process was procedurally adequate; (2) whether the rule reflected proper consideration of all relevant facts; (3) whether the rule reflected due consideration of the agency's statutory or other legal obligations; (4) whether the rule is based on a reasonable judgment about the legally relevant policy considerations; (5) whether the rulemaking process was open and transparent; (6) whether objections to the rule were adequately considered, including whether interested parties had fair opportunities to present contrary facts and arguments; (7) whether interested parties had the benefit of access to the facts, data, or other analyses on which the agency relied; and (8) whether the final rule found adequate support in the rulemaking record.

Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, entitled "Implementation of Memorandum Concerning Regulatory Review," from Peter R. Orszag, Director, Office of Management and Budget, dated January 21, 2009.

The former Attorney General's opinion in *Matter of Silva-Trevino* fails miserably to satisfy these White House requirements for open and transparent decision-making. Although the White House directives deal specifically with rulemaking by regulation, these important considerations are equally applicable to interpretations of law by the Attorney General in the process of adopting a broad rule through adjudication of an individual case. Indeed, given the notice and opportunity for comment afforded in the process of promulgating regulations, the case is even stronger for withdrawal of the "midnight" rule issued here where the adjudication process did not even apprise the party, let alone potential *amici*, of the issues under consideration.[1]

Moreover, the former Attorney General's opinion was issued without due consideration of the relevant agency's statutory or other legal obligations raised by the respondent and *amici curiae* after learning of the opinion and its extremely broad reach, without any expressed reasonable judgment about the legally relevant policy considerations also raised, and without a fair opportunity to present contrary facts and arguments nor *any* consideration of objections raised after the already-issued opinion was made public. *See* Point I in attached *Amici Curie* Dec. 5th Memorandum; and Points 1-3 in attached Reply Memorandum of Law of *Amici Curiae* in Response to the Memorandum of the U.S. Department of Homeland Security in Opposition to the Request for Amicus Curiae Recognition, filed on January 6, 2009.

As you stated during your confirmation hearings, when you indicated that you wisely planned to reexamine another opinion—*Matter of Compean*, 24 I & N Dec. 710 (A.G. 2009)—issued by the former Attorney General at the end of his tenure:

> The Constitution guarantees due process of law to those who are the subjects of deportation proceeding. I understand Attorney General Mukasey's desire to expedite immigration court proceedings, but the Constitution requires that those proceedings be fundamentally fair. For this reason, I intend to reexamine the decision should I become Attorney General.

http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/upload/FeingoldToHolder.pdf (Question and Answer 12).

The same concerns regarding due process of law and fundamental fairness for those who are subjects of deportation proceedings or other administrative immigration processes administered by the Department of Justice are applicable here. Moreover, in this case, there was not even any public knowledge that the former Attorney General had

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[1] Notably, the Attorney General's lack of adherence to the hallmarks of due process and fair adjudication also flies in the face of the process of *past* Attorneys General who have issued such notice and sought briefing in cases on certification. *See, e.g.*, *Matter of R-A-*, 24 I & N Dec. 629, 630 n.1 (A.G. 2008) (describing how Attorney General Ashcroft had provided an opportunity for additional briefing following certification); *Matter of E-L-H-*, 23 I & N Dec. 700 (A.G. 2004) (including order of Attorney General Reno for briefing following certification); *Matter of Soriano*, 21 I & N Dec. 516 (A.G. 1997) (issued following invitation by Attorney General Reno for briefing); *Matter of Hernandez-Casillas*, 20 I & N Dec. 262 & n.11 (A.G. 1990) (describing Attorney General Thornburgh's consideration of briefs submitted during the certification process).

certified the case and no notice whatsoever of the broad issues under consideration by the former Attorney General.

In sum, the former Attorney General's November 2008 *Silva-Trevino* opinion issued without notice and briefing of the issues addressed, along with his January 2009 one-paragraph order denying reconsideration and refusing to consider legal briefing offered on these issues, were issued without a modicum of transparency and due process. For this reason alone, the undersigned urge you to withdraw—or at least withdraw pending reconsideration—this uninformed and ill-advised opinion.

III. THE OPINION SHOULD BE WITHDRAWN BECAUSE IT CONTAINS SIGNIFICANT ERRORS OF LAW AND CREATES UNFAIRNESS AND DISUNIFORMITY.

As explained in greater depth in the *Amici Curie* Dec. 5th Memorandum, former Attorney General's reasoning in *Silva-Trevino* is fundamentally flawed and contrary to a century of jurisprudence on this issue. *Amici* briefly summarize their arguments here, but respectfully refer the Attorney General to their attached initial memorandum for further explication of these important issues. *See* Points II-IV in *Amici Curie* Dec. 5th Memorandum.

In summary, for almost a century prior to the Attorney General's ruling in *Silva-Trevino*, the categorical approach has governed the adjudication of immigration cases where charges of removability are based on prior criminal convictions. *See* Point II in *Amici Curie* Dec. 5th Memorandum (describing the long history of cases at the federal and agency level applying the categorical approach in immigration law since 1914). This approach has been applied by the Supreme Court and every federal court of appeals. *See, e.g,, Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007); *Dulal-Whiteway v. DHS*, 501 F.3d 116 (2d Cir. 2007); *Sandoval-Lua v. Gonzales*, 499 F.3d 1121 (9th Cir. 2007); *Gradiz v. Gonzales*, 490 F.3d 1206, 1211 (10th Cir. 2007); *Jeune v. AG*, 476 F.3d 199, 204 (3d Cir. 2007); *Recio-Prado v. Gonzales*, 456 F.3d 819, 821 (8th Cir. 2006); *Berhe v. Gonzales*, 464 F.3d 74, 85 (1st Cir. 2006); *Soliman v. Gonzales*, 419 F.3d 276 (4th Cir. 2005); *Omari v. Gonzales*, 419 F.3d 303 (5th Cir. 2005); *Patel v. Ashcroft*, 401 F.3d 400 (6th Cir. 2005); *Jaggernauth v. United States AG*, 432 F.3d 1346, 1353 (11th Cir. 2005); *Bazan-Reyes v. INS*, 256 F.3d 600, 606 (7th Cir. 2001); *Matter of Velazquez-Herrrera*, 24 I & N Dec. 503 (BIA 2008). Under the categorical and modified categorical approach, "it is the nature of the crime, as defined by statute and interpreted by the courts and as limited and described by the record of conviction which determines whether an alien falls within the reach of that law." *Matter of Pichardo-Sufren*, 21 I & N Dec. 330, 334 (BIA 1996). Under this approach, immigration courts may not consider extrinsic evidence beyond the record of conviction. *Id.*; *see also Matter of Torres-Varela,* 23 I & N Dec. at 84-85 ("The crime must be one that necessarily involves moral turpitude without consideration of the circumstances under which the crime was, in fact, committed. It is therefore necessary to engage in an objective analysis of whether the elements necessary to obtain a conviction under the particular statute render the offense a crime involving moral turpitude." (citation omitted)).

As many courts and the BIA itself have recognized in various contexts, the Immigration and Nationality Act compels the categorical approach for removal categories predicated on convictions. *See, e.g.*, *Gertsenshteyn v. Mukasey*, 544 F.3d 137 (2d Cir. 2008); *Velazquez-Herrera*, 24 I & N Dec. at 513. This includes determinations of whether a person has been "convicted" of a crime involving moral turpitude for inadmissibility and deportability purposes. *See, e.g.*, *Wala v. Mukasey*, 511 F.3d 102, 107-108 (2d Cir. 2007) (applying the categorical and modified categorical approach to determine whether person was convicted of a crime involving moral turpitude); *Vuksanovic v. United States AG*, 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 Fed. Appx. 422, 427 (6th Cir. 2006) (same); *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1017-1020 (9th Cir. 2005) (same); *Partyka v. AG of the United States*, 417 F.3d 408, 411-412 (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) (same); *but see Ali v. Mukasey*, 521 F.3d 737, 743 (7th Cir. 2008).

The former Attorney General's opinion in *Silva-Trevino* abandons the categorical approach for crimes involving moral turpitude and instead institutes an unworkable and fundamentally unfair method for determining the immigration consequences of crimes. *See* Points II-III in *Amici Curie* Dec. 5th Memorandum. The opinion permits the very inquiry that the categorical approach prohibits—examination into the extrinsic facts underlying a non-citizen's offense, even though a criminal court has already rendered a judgment in the non-citizen's case.

The former Attorney General's opinion will have drastic consequences not only for individuals whose status depends on determinations made in civil removal proceedings, such as in this case, but also for hundreds of thousands of persons seeking adjudication of their status in less formal immigration adjudicative processes ranging from applications for lawful admission to the United States to applications for naturalization. With respect to civil removal proceedings before Immigration Judges, we emphasize that immigration courts are ill-equipped to conduct the sort of factual inquiry contemplated by *Silva-Trevino*—essentially entailing a re-adjudication of guilt or innocence as to a non-citizen's prior conduct resulting in a criminal conviction. First, Immigration Judges are not trained in criminal law and procedure, and face voluminous dockets with little leeway to accommodate the additional time required by cases that demand such a re-adjudication. Second, non-citizens, including longtime lawful permanent residents, asylees, and others are not afforded appointed counsel in immigration proceedings, have no right to a jury trial or the normal discovery processes available in criminal trials, and their basic Fourth and Fifth Amendment protections do not apply with full force. Third, removal proceedings are not governed by formal rules of evidence, and poorly authenticated documentary evidence and hearsay evidence are routinely admitted in these hearings. Worse yet, immigration judges frequently must assess very old convictions, including misdemeanors and other low-level offenses for which no records may exist. Overall, civil immigration proceedings lack the essential

constitutional and procedural protections afforded in the criminal justice system, and were not meant as a setting within which to adjudicate criminal charges.

Nevertheless, under *Silva-Trevino*, which invites consideration of factors beyond those relevant to determining the categorical definition of an offense of conviction in relation to the removal charges, immigration judges and other immigration adjudicators in even less formal adjudicatve processes will be required to conduct mini-trials to determine the details of criminal culpability where respondents are unrepresented by counsel, where conviction records are silent or have been destroyed, and where witnesses are unavailable or have only faded memories of the underlying events. The impact of this added responsibility will be staggering. *See, e.g.*, Transactional Records Access Clearinghouse, Individuals Charged with Moral Turpitude in Immigration Court, *at* http://trac.syr.edu/immigration/reports/moral_turp.html (listing the thousands of cases involving charges of crimes involving moral turpitude, including 13,210 cases in 2006 alone). Moreover, immigrants facing criminal charges in criminal prosecutions will be unable to assess the future consequences of their pleas and convictions. *See* Points III-IV in *Amici Curie* Dec. 5th Memorandum.

Application of the categorical approach avoids many of the complications created by Attorney General Mukasey's elaborate and unprecedented scheme. Under the previously-existing categorical approach, immigration judges and other immigration adjudicators can rely on objective, officially created records reflecting the interpretation of the criminal statute and the determinations made in prior criminal proceedings where defendants had access to appointed counsel and other appropriate protections, and where judgments are issued contemporaneously with the presentation of testimony and other evidence.

CONCLUSION

For the foregoing reasons, the undersigned *amici curiae* respectfully request that you take immediate action to withdraw the opinion in this case or, at the very least, withdraw it pending a proper process.

Respectfully submitted,

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Florence Immigrant and Refugee Rights Project
Immigrant Defense Project
Immigrant Legal Resource Center
National Immigrant Justice Center
National Immigration Project of the National Lawyer's Guild
Washington Defenders Association Immigration Project

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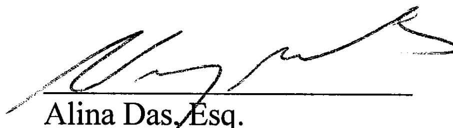

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