IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 09-71083

RAMIRO ZAMUDIO-RAMIREZ,

Petitioner,

v.

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

Respondent.

On Petition for Review from the determination of the Board of Immigration Appeals

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BRIEF OF *AMICI CURIAE* IMMIGRANT DEFENSE PROJECT, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, IMMIGRANT LEGAL RESOURCE CENTER, FLORENCE IMMIGRATION AND REFUGEE RIGHTS PROJECT, U.C. DAVIS IMMIGRATION LAW CLINIC, AND IMMIGRATION JSTICE 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.

Florence Immigrant and Refugee Rights Project 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, Florence Immigrant and Refugee Rights Project, 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 Ramiro Zamudio-Ramirez.

PRELIMINARY STATEMENT

Amici offer this brief to supplement the arguments set forth by Petitioner with a discussion of significant practical and constitutional concerns arising from former Attorney General Mukasey's erroneous decision in *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (AG 2008), which was applied by the Board of Immigration Appeals ("the Board") below in contravention of the clear language of the Immigration and Nationality Act ("INA"). *Amici* urge this Court to reject *Silva-Trevino* and its unprecedented, fact-intensive framework for moral turpitude determinations.[1]

[1] In addition to the arguments offered herein for the rejection of *Silva-Trevino* by this Court, *amici* support the arguments submitted by Petitioner in his Opening Brief.

Silva-Trevino was issued without the benefit of any briefing on the issues ultimately decided. Without any meaningful adversarial process, the Attorney General remained ignorant of critical legislative history and misapplied controlling principles of law, resulting in an arbitrary and capricious decision that does not warrant deference from this Court.

On the merits, *Silva-Trevino* creates an analytic framework that misinterprets clear statutory language and 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 criminal convictions. Forcing immigrants to relitigate the facts of sometimes decades-old convictions is both unrealistic and fundamentally unfair. *Silva-Trevino* also interferes with the orderly functioning of criminal justice systems by making it impossible to predict the immigration consequences of contemplated pleas, leading many more noncitizen defendants to proceed to trial. No federal court has endorsed the approach set forth in *Silva-Trevino*. Rather, the Supreme Court and several Courts of Appeals have, since *Silva-Trevino,* reaffirmed the necessity of the categorical analysis. *Amici* therefore urge this Court to likewise reaffirm the importance of the categorical approach for moral turpitude determinations and reject the application of *Silva-Trevino* in this Circuit.

INTEREST OF *AMICI*

Amici are non-profit organizations concerned with the proper treatment of immigrants facing removal and with extensive experience in the inter-relationship 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.

ARGUMENT

I. EVEN IF THE STATUTE WERE AMBIGUOUS, *SILVA-TREVINO* WOULD NOT WARRANT DEFERENCE BECAUSE IT IS AN ARBITRARY AND CAPRICIOUS AGENCY INTERPRETATION RESULTING FROM A COMPLETE BREAKDOWN OF THE ADVERSARIAL PROCESS

First, and most importantly, *Silva-Trevino*'s novel approach to moral turpitude determinations does not warrant deference because it is based on an impermissible reading of an unambiguous statute. *Jean-Louis v. Att'y Gen. of U.S.*, 582 F.3d 462, 473 (3d Cir. 2009), *pet. for reh'g filed* Nov. 18 2009; Pet'r Br. 14-46. Even if this were a decision to which the court would otherwise defer, which it is not, deference is not owed to agency interpretations that are arbitrary or capricious. *Chevron, U.S.A., Inc., v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). Under the arbitrary and capricious standard, 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." *Id.* at 865 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (stating that one factor relevant to giving weight 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"). Before interpreting a statute, an agency must develop relevant information about alternatives and explain the considerations involved in its choice. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (affirming that an "agency must examine the relevant data and articulate a satisfactory explanation for its action"); *Pac. Coast Fed'n of Fishermen's Ass'n, Inc. v. Nat'l Marine Fisheries Serv.*, 265 F.3d 1028, 1034 (9th Cir. 2001) (adhering to the principle that the agency must consider "the relevant factors"). An agency decision is arbitrary and capricious 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." *State Farm*, 463 U.S. at 43.

Due to a lack of any meaningful adversarial process in the certification and adjudication of *Silva-Trevino*, the Attorney General failed to consider critical legislative history and issued a decision 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.

A. Despite its Far-Reaching Consequences, *Silva Trevino* Was Issued Without Minimal Procedures or Meaningful Participation by Either Mr. Silva-Trevino or Other Interested Parties.

Neither Mr. Silva-Trevino 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. *Jean-Louis v. Att'y Gen. of U.S.*, 582 F.3d 462, 470 n.11 (3d Cir. 2009). Prior to the Attorney General's sudden pronouncement of his new formulation, the validity of the categorical approach was not raised or briefed at any stage in the proceedings. *Id.* Without any indication that the categorical approach itself was under review, Mr. Silva-Trevino's counsel could not anticipate or properly brief the issue. As the Ninth Circuit 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 also Greenlaw v. United States*, 128 S. Ct. 2559, 2564 (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"). This derailing of the adversarial process, which led to an

uninformed and ill-considered decision on an issue affecting countless immigrants, seriously concerned the Third Circuit. In *Jean-Louis*, the court lamented that

> [d]espite requests by Silva-Trevino's counsel, the Attorney General refused to identify the issues to be considered, to define the scope of his review, to provide a briefing schedule, or to apprise counsel of the applicable briefing procedure. . . . [N]either the IJ decision nor the Attorney General's certification order were made publicly available, thus denying stakeholders . . . the opportunity to register their views.

Jean-Louis, 582 F.3d at 470 n.11. 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." *Id*.

The Immigration Judge denied Mr. Silva-Trevino's application for relief in February 2006. *Silva Trevino*, 24 I. & N. Dec. at 691. On appeal to the Board, the sole issue was whether Mr. Silva-Trevino's conviction under a Texas statute constituted a crime involving moral turpitude. Br. of *Amici Curiae* Am. Immigr. Lawyers Ass'n et al. in Supp. of Recons., *Matter of Silva-Trevino*, at 4, (Dec. 5, 2008) [hereinafter "*Silva-Trevino* Br. in Supp. of Recons."], *available at* http://www.immigrantdefenseproject.org/docs/08_SilvaTrevinoAmicusBrief.pdf. Mr. Silva-Trevino's attorney argued in his brief that the Immigration Judge had misclassified the conviction under the

categorical analysis. *Id.* The government submitted a three-paragraph brief seeking affirmance. *Id.* Neither party questioned the applicability of the categorical approach or the standard for determining whether a conviction constitutes a crime involving moral turpitude. *Id.* The Board sustained Mr. Silva-Trevino's appeal, finding that his conviction had not been shown to involve moral turpitude under the categorical approach. *Id.* at 4-5. Again, nothing in the Board's decision called into question established precedent regarding the categorical approach or its utility for moral turpitude determinations. *Id.* at 5. Following the Board's order, the case was remanded to the Immigration Judge. *Id.* In accordance with the Board's decision, Mr. Silva-Trevino's counsel repeatedly sought to proceed with his client's application for relief. *Id.*

On August 8, 2007, a year after the remand, the Board informed Mr. Silva-Trevino's counsel that the Attorney General had *sua sponte* certified the case to himself. Letter from Veronica Rubi, Senior Legal Advisor, Exec. Off. of Immigr. Rev., to Jaime Diez, Esq. (Aug. 8, 2007) (on file with *amici*). The notice simply stated that the Board's "decision" was referred; it provided no notice of the issues to be considered, briefing schedule or any other aspects of the process. *Silva-Trevino* Br. in Supp. of Recons. at 5. Notably, while the certification notice states that the case was certified on

July 7, 2007—an unexplained month before counsel was notified, *id*.—internal Department of Justice records make clear that the case was in fact certified in April 2007 or before. *See* E-mail from Terry Smith, Exec. Off. of Immigr. Rev., to Celeste Garza, Exec. Off. of Immigr. Rev. (Apr. 27, 2007) (stating that "Attorney General Alberto Gonzales has certified this same case to himself for review, therefore the Board's decision is no longer final") (on file with *amici*). The government offered no explanation as to why it failed to notify Mr. Silva-Trevino until approximately four months after the certification, nor made clear whether the Department of Homeland Security ("DHS") was also kept in the dark or, instead, whether it was provided earlier notice.

Most importantly, despite repeated requests by counsel, *see* Letter from Jaime Diez, Esq., Counsel for Mr. Silva-Trevino, to David Landau, Chief Appellate Counsel, DHS and Veronica Rubi, Senior Legal Advisor, Exec. Off. of Immigr. Rev., Off. of District Counsel, Harlingen, TX (Jan. 16, 2008) (on file with *amici*), the Attorney General refused to identify the issues to be considered, define the scope of his review, provide a briefing schedule, or apprise counsel of the applicable briefing procedure. *Jean-Louis*, 582 F.3d at 462 n.11. Absent such a notice, Mr. Silva-Trevino was left to guess at any number of issues that might be raised *sua sponte* on

appeal, which is untenable in any system of adjudication. *Alaska Dep't of Health & Social Servs.*, 424 F.3d at 939; *Greenlaw*, 128 S. Ct. at 2564; *see also Burns v. United States*, 501 U.S. 129, 137 (1991) (requiring notice of possibility of departure from sentencing guidelines so that a defendant is not left to "negate every conceivable ground on which the [adjudicator] might choose to depart on [his] own initiative").

Further, since neither the decisions by the Immigration Judge and the Board nor the Attorney General's certification orders were made publicly available, there was no notice to interested parties that the Attorney General was considering a wholesale abandonment of a century of precedent. Without notice of the issue, stakeholders did not have the opportunity to submit briefs to aid the Attorney General's deliberations. In fact, the first opportunity for interested parties to file comment was after entry of the Attorney General's opinion. *See generally Silva-Trevino* Br. in Supp. of Recons.; *see also Jean-Louis*, 582 F.3d at 462 n.11. Several organizations (including several current *amici*) submitted an *amicus* brief in support of Mr. Silva-Trevino's motion to reconsider, pointing out the serious flaws in the Attorney General's decision. *See generally Silva-Trevino* Br. in Supp. of Recons. The motion to reconsider was summarily denied in a five-sentence decision issued two days before the Attorney General left office. *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 the Attorney General's assertion that "there is no entitlement to briefing when a matter is certified for Attorney General review." *Id*.

B. Attorney General Mukasey's Deficient Process in Certifying and Adjudicating *Silva-Trevino* Stands in Stark Contrast to the Practice of Previous Attorneys General.

When entertaining broad changes that would displace decades of settled precedent, the need to fully understand the issues—along with basic principles of fairness and transparency—should compel the Attorney General to seek out the arguments of interested parties. In the past, this is precisely what Attorneys Generals have done when considering major decisions under the rarely used certification mechanism. Attorney General Mukasey deviated sharply from his predecessors' practices of requesting and considering *amicus* briefs for certified cases. *See, e.g., Matter of R-A-*, 24 I. & N. Dec. 629, 630 n.1 (AG 2008) (describing how Attorney General Ashcroft provided an opportunity for additional briefing following certification*); Matter of E-L-H-*, 23 I. & N. Dec. 700, 704 (AG 2004) (including order of Attorney General Reno for briefing following certification); *Matter of Soriano* 21 I. & N. Dec. 516, 540 (AG 1997)

(addressing the points raised in *amicus* briefs solicited by Attorney General Reno prior to issuing her decision); *Matter of Hernandez-Casillas*, 20 I. & N. Dec. 262, 286, 289 & 291 (A.G. 1990) (discussing *amicus* brief submitted upon referral for certification).

C. The Lack of any Adversarial Process Left the Attorney General Ignorant of Critical Legislative History and Led Him to Misinterpret Controlling Principles of Law.

The lack of briefing on the appropriateness of the categorical approach for moral turpitude determinations prevented the Attorney General from considering essential issues. Specifically, the Attorney General failed to consider legislative history that makes clear Congress' intention to prevent immigration judges from readjudicating the facts underlying convictions. *See* Pet'r Br. at 35-46 (discussing relevant legislative history). In addition, the Attorney General overlooked the fact that "crime involving moral turpitude" is a term of art with a long history predating even the INA, and instead attempted to inappropriately parse the internal grammar of this accepted term of art. *See* Pet'r Br. at 35-46; *Jean-Louis*, 582 F.3d at 477. Finally, the lack of briefing also led the Attorney General to overlook basic principles of law. For example, he erroneously stated that the respondent bore the burden of proof, *Silva-Trevino*, 24 I. & N. Dec. 687, 703 n.4, 709 (AG 2008), because of his apparent 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); s*ee also Hana v. Gonzales*, 400 F.3d 472, 475-76 (6th Cir. 2005); *Singh v. Reno*, 113 F.3d 1512, 1514 (9th Cir. 1997). He also failed to recognize that the one case upon which he relied to claim that there was a division of authority on the applicability of the categorical approach, *Ali v. Mukasey*, 521 F.3d 737, 743 (7th Cir. 2008), was in direct conflict with prior Seventh Circuit precedent, *see, e.g.*, *Padilla v. Gonzales*, 397 F.3d 1016, 1019 (7th Cir. 2005); *Bazan-Reyes v. INS*, 256 F.3d 600, 606 (7th Cir. 2001), and thus was not even the law of that circuit.

These omissions and errors demonstrate that the Attorney General utterly failed to develop relevant information about, and articulate a satisfactory explanation for, his novel approach to moral turpitude determinations. The Attorney General's interpretation is therefore arbitrary and capricious, and should not be accorded deference by this court.

II. IN PRACTICE, *SILVA-TREVINO* IMPOSES AN UNWORKABLE SCHEME RAISING SERIOUS CONSTITUTIONAL CONCERNS FOR MORAL TURPITUDE DETERMINATONS IN IMMIGRATION COURTS AND NON-ADVERSARIAL AGENCY ADJUDICATIONS.

Without swift action by this Court, the *Silva-Trevino* moral turpitude framework will continue to force unequipped immigrants to relitigate the facts underlying convictions in forums without adequate procedural safeguards, thereby violating fundamental constitutional principles of fairness, due process and uniformity. This Court should therefore reject *Silva-Trevino* and reaffirm its own precedent recognizing the categorical and modified categorical inquiries as the proper analysis for moral turpitude determinations.

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

The categorical analysis has long operated as a fair and predictable process for making moral turpitude determinations 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." *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 1007 (9th Cir. 2008) (quoting *Tokatly v. Ashcroft*, 371 F.3d 613, 620 (9th Cir. 2004)). In contrast, *Silva-Trevino* imposes an unworkable system in which respondents face a grave

deprivation of liberty—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 the procedural protections necessary to ensure a fair hearing. *Silva-Trevino* places on respondents—many of who 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.

Because there is no right to government-appointed counsel in removal proceedings, over sixty percent of respondents appear *pro se*. U.S. Dep't of Justice, Exec. Off. for Immigr. Rev., FY 2009 Statistical Yearbook, at G1 fig.9 (2010), *available at* http://www.justice.gov/eoir/statspub/fy09syb.pdf. A staggering 914,000 immigrants faced the prospect of deportation without the assistance of counsel in the five-year period ending in 2009. *Id.* The categorical inquiry is a straightforward legal determination that immigration judges routinely make on behalf of *pro se* respondents. However, under the *Silva-Trevino* framework the court must rely upon the factual record created by the parties. Unrepresented respondents, lacking an adequate understanding of the legal standards at issue in their cases, are unable to

develop an appropriate factual record.[2]

The increasing number of detained respondents compounds the problem of lack of access to counsel. By 2009, half of all respondents were in detention. *Id.* at O1 fig.23. In fiscal year 2007 (the most recent year with publicly available data), eighty-four percent of detained respondents were unrepresented. NINA SIULC ET AL., VERA INST. OF JUSTICE, IMPROVING EFFICIENCY AND PROMOTING JUSTICE IN THE IMMIGRATION SYSTEM, REPORT SUMMARY 1 (May 2008), *available at* http://www.vera.org/download?file=1780/LOP%2BEvaluation_May2008_final.pdf. Furthermore, detained *pro se* respondents are routinely transferred far from the locus of their crime and place of residence to detention facilities in remote locations,[3] severely restricting their ability to investigate and produce the evidence required

[2] For closely related reasons, criminal courts are understandably reluctant to permit defendants to appear *pro se*. *See Faretta v. California*, 422 U.S. 806, 834 n.46, 835 (1975) (requiring knowing and intelligent waiver of the right to counsel and permitting a state to appoint standby counsel even over defendants' objections); *Cook v. Schriro*, 538 F.3d 1000, 1009 (9th Cir. 2008) (noting with approval a trial judge's "lengthy explanation of the perils of self-representation" and "extensive questioning pursuant to *Faretta*").

[3] In 2008, ICE transferred 52.4% of all detainees. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, HUGE INCREASES IN TRANSFERS OF ICE DETAINEES (2009), http://trac.syr.edu/immigration/reports/220/. Furthermore, many detainees are transferred to remote locations, making access to counsel prohibitive. DORA SCHRIRO, ICE, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 23-24 (Oct. 6, 2009), *available at* http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf.

under *Silva-Trevino's* new framework. *See 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."). The combination of lack of representation and inability to investigate evidence while detained will be fundamentally unfair to immigrants if this Court permits moral turpitude adjudications to be transformed into fact-intensive retrials of past criminal convictions.

Silva-Trevino further offends due process by requiring many respondents to establish facts underlying old convictions long after memories have faded and witnesses and other evidence are no longer available. The Framers recognized that long delays between arrest and trial could impair the preparation of a defense and result in unfairness to the accused. *See* U.S. CONST. amend. VI. As the Supreme Court has explained, the speedy trial right is rooted in concerns of fairness. *See Barker v. Wingo*, 407 U.S. 514, 532 (1972) (stating that "the inability of a defendant adequately to prepare his case [as a result of long delays] skews the fairness of the entire system"). Although the Sixth Amendment's speedy trial right does not apply in civil removal proceedings, the underlying fairness concerns also sound in Fifth Amendment due process.

B. Abandoning the Categorical Approach for Moral Turpitude Determinations Made by DHS Officers in Non-Adversarial Immigration Adjudications Outside of Immigration Courts Creates Additional Due Process Violations.

The due process defects that arise from abandoning the categorical approach to moral turpitude determinations are compounded in non-adversarial proceedings outside of the immigration courtroom.[4] According to the American Bar Association ("ABA"), "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 [hereinafter "Resolution 113"] (Aug. 4, 2009), *available at* http://www.abanet.org/leadership/2009/annual/summary_of_recommendations/One_Hundred_Thirteen.doc. Many of the determinations made by immigration officers require a quickly-made judgment of whether an individual has been convicted of a crime involving moral turpitude. *See, e.g.*, 8 U.S.C. § 1226(c)(1) (requiring mandatory detention of persons inadmissible or deportable because of conviction for, *inter alia*, crimes involving moral turpitude); 8 C.F.R. § 1003.19(h)(2)(i) (depriving immigration judges of jurisdiction to review DHS' bond determinations for certain classes of aliens, *e.g.*, arriving aliens).

[4] Attorney General decisions such as *Silva-Trevino* constitute binding precedent in all DHS immigration adjudications. 8 C.F.R. § 1003.1(g).

In addition, in considering an immigrant's eligibility to naturalize, officers evaluate whether past convictions qualify as crimes involving moral turpitude as part of a "good moral character" determination and in deciding whether to refer the applicant for removal. 8 U.S.C. §§ 1427(a), 1101(f)(3). Similarly, domestic violence victims seeking relief under the Violence Against Women Act—who often face imminent peril if not granted relief—must receive a finding of good moral character from an immigration officer. 8 U.S.C. § 1154(a)(1); 8 C.F.R. § 204.2(c)(2)(v). The categorical approach has been a central feature of these administrative processes, where moral turpitude determinations are often made quickly and with even less opportunity for the immigrant to contest government reliance on documentation of facts outside of what was established by the criminal conviction. This reality amplifies the unfairness of abandoning the categorical approach in favor of the new framework articulated in *Silva-Trevino*.

C. Allowing Immigration Adjudicators to Look Behind Criminal Judgments Results in the Disuniform Application of Immigration Law.

Silva-Trevino undermines the constitutionally mandated "uniform rule

of naturalization." U.S. CONST. art. I, § 8.[5] At base, *Silva-Trevino* establishes a rule that permits immigration judges to attach different immigration consequences to identical convictions whenever they deem it "necessary and appropriate," 24 I. & N. Dec. at 690, to relitigate a criminal conviction.

By permitting an "individualized moral turpitude inquiry," *id*. at 700, the "step three" analysis abandons long-standing court and agency precedent that has consistently rejected a fact-based inquiry on constitutional grounds of uniformity, and erodes the fundamental principles of fairness and equal protection that uniformity ensures. *See United States ex rel. Mylius v. Uhl*, 210 F. 860, 863 (2d Cir. 1914) (stating that it would be contrary to the uniform administration of immigration law "to exclude one person and admit another where both were convicted of [the same criminal statute], because, in the opinion of the immigration officials, the testimony in the former case showed a more aggravated offence than in the latter"); *Matter of R-*, 6 I. & N. Dec. 444, 448 n.2 (BIA 1954) ("The rule set forth . . . prevents the situation occurring where two people convicted under the same specific law are given different treatment because one indictment may contain a

[5] *See also* Iris Bennett, *The Unconstitutionality of Nonuniform Immigration Consequences of "Aggravated Felony" Convictions*, 74 N.Y.U. L. REV. 1696, 1704-05 (1999) (explaining the problems created by disuniform immigration laws under the Articles of Confederation).

fuller or different description of the same act than the other indictment; and makes for uniform administration of law."). Indeed, *Silva-Trevino* guarantees the disparate, unjust results that the constitutional requirement of uniformity proscribes.

III. *SILVA-TREVINO* ALSO DISRUPTS THE FAIR AND EFFICIENT ADMINISTRATION OF PLEA BARGAINING IN CRIMINAL JUSTICE SYSTEMS

In addition to imposing an unworkable and unfair scheme in immigration adjudications, *Silva-Trevino* interferes with the fair and efficient disposition of cases in criminal justice systems. This is because many noncitizen defendants are unwilling to enter into plea agreements without some degree of certainty about the immigration consequences of their pleas.[6] In *INS v. St Cyr*, the Supreme Court explained the critical importance of immigration consequences to a defendant considering whether to plead guilty and the severe due process concerns raised by unforeseeable

[6] Criminal justice systems rely on plea bargaining. *INS v. St. Cyr*, 533 U.S. 289, 323 n.51 (2001) (noting that ninety percent of convictions are obtained via guilty plea); U.S. SENTENCING COMM'N, 2008 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at fig. C & tbl.10 (noting that in 2008, 96.3% of federal criminal cases were resolved by guilty plea and, in some districts, as many as 99% percent of cases were resolved by guilty pleas). As the Supreme Court has stated, "[i]f every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities." *St. Cyr*, 533 U.S. at 322 n.47 (*quoting Santobello v. New York*, 404 U.S. 257, 260 (1971)).

changes in the nature of those consequences. 533 U.S. 289, 322, 323 (2001).

The categorical analysis permits judges and defense attorneys to satisfy their ethical and statutory obligations to ensure that noncitizen defendants understand the immigration consequences of contemplated dispositions. *See id.* at 322 n.48 (noting that "[m]any States . . . require that trial judges advise defendants that immigration consequences may result from accepting a plea agreement" and that "the American Bar Association's Standards for Criminal Justice provide that, if a defendant will face deportation as a result of a conviction, defense counsel 'should fully advise the defendant of these consequences.'"); *see also* DAN KESSELBRENNER & LORY D. ROSENBERG, IMMIGRATION LAW AND CRIMES § 4:19 (2009) (citing twenty-five state statutes that require immigration advisals before accepting criminal pleas).

Under *Silva-Trevino*, judges, defense attorneys and prosecutors are no longer able to reassure defendants with any level of certainty that a contemplated disposition will not result in removal. Accordingly, many noncitizen defendants are unwilling to plead guilty, and many more cases—particularly those involving minor charges—are proceeding to trial. *St. Cyr*, 533 U.S. at 323 (explaining that many noncitizen defendants only plead guilty in reliance upon reassurances that the plea will mitigate immigration

consequences); *see also* Robert M.A. Johnson, President, Nat'l Dist. Att'ys Ass'n, Message from the President, May/June 2001, http://www.ndaa.org/ndaa/about/president_message_may_june_2001.html ("As prosecutors, we see the effects of these collateral consequences . . . . Defendants will go to trial more often if the result of a conviction is out of the control of the prosecutor and judge.").

At present, a range of programs and resources are available to assist defense attorneys in advising noncitizen clients regarding the immigration consequences of different pleas.[7] *Amici* prepare or distribute reference charts and other materials regarding the immigration consequences of state crimes,[8] and regularly advise defense attorneys weighing the immigration

[7] *See, e.g.*, National Immigration Project of the National Lawyers Guild, Criminal & Deportation Defense, http://www.nationalimmigrationproject.org/CrimPage/CrimPage.html; Immigrant Defense Project, *available at* http://www.nysda.org/idp/; National Center for State Courts, Impact of Immigration on Courts, Technical Assistance Program, http://www.ncsconline.org/WC/CourTopics/ResourceGuide.asp? topic=Imm Law; Defending Immigrant Partnership, http://defendingimmigrants.org/; Immigration Advocates Network, Immigration and Crime Resources, http://www.immigrationadvocates.org/library/folder.172046-Immigration_and_Crimes; Immigrant Legal Resource Center, Criminal and Immigration Law: Defending Immigrants' Rights, http://www.ilrc.org/criminal.php at "Public Defenders."

[8] *See, e.g.*, Law Offices of Norton Tooby, Immigration Consequences of Criminal Convictions, http://www.criminalandimmigrationlaw.com/_imm_cons.php (providing links to reference charts produced by *amici* and other organizations analyzing adverse immigration consequences of criminal

consequences of plea agreements. However, *Silva-Trevino* has significantly undermined the critical contribution these resources and advisal services make to the efficient administration of criminal justice systems. In jurisdictions where *Silva-Trevino* has not yet been rejected, it is impossible for *amici* to give confident advisals that permit noncitizen defendants to make informed decisions on whether to accept plea offers. In the experience of *amici*, this has already translated into more noncitizen defendants proceeding to trial in an effort to avoid potentially removable convictions.

IV. *SILVA-TREVINO* HAS BEEN SIGNIFICANTLY UNDERMINED BY THE SUPREME COURT'S SUBSEQUENT REAFFIRMANCE OF THE IMPORTANCE OF THE CATEGORICAL APPROACH IN *NIJHAWAN V. HOLDER*, 129 S. CT. 2294 (2009).

No federal court has approved of or applied *Silva-Trevino*'s unprecedented moral turpitude framework. To the contrary, both the Supreme Court and Courts of Appeals have continued to apply and reassert the importance of the categorical analysis.

After *Silva-Trevino* was decided, the Supreme Court reiterated the necessity of the categorical analysis and the impracticability of alternatives. *Nijhawan v. Holder*, 129 S. Ct. 2294, 2299-2300 (2009). According to the Court, the categorical approach is not only appropriate but "required" to

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convictions in Arizona, California, Florida, Illinois, New Jersey, New York, Washington, and the District of Columbia).

evaluate a "generic crime." *Id.* at 2299 ("[The categorical approach] avoids the practical difficulty of trying to ascertain in a later proceeding, perhaps from a paper record containing only a citation (say, by number) to a statute and a guilty plea, whether the [offender's] prior crime . . . did or did not involve, say, violence." (citations and quotation marks omitted)). The Supreme Court made clear that consideration of evidence outside the record conviction is permissible only in those limited instances where a statutory provision qualifies a generic crime by reference to the "particular circumstances in which an offender committed the crime on a particular occasion"—circumstances which cannot generally be determined by consulting the statutory elements and record of conviction. *Id.* at 2300-01. The aggravated felony provision at issue in *Nijhawan* involved a generic crime (fraud) qualified by a monetary threshold ($10,000), 8 U.S.C. § 1101(a)(43)(M)(i). *Nijhawan*, 129 S. Ct. at 2300-02. The Court found that applying the categorical approach to the monetary threshold would render the aggravated felony provision largely meaningless and therefore permitted consideration of extrinsic evidence to determine the discrete factual issue of the monetary threshold *but not for the generic crime inquiry*. *Id.*

Unlike the monetary threshold in that aggravated felony provision, the INA provisions referring to crimes involving moral turpitude do not mention

any "particular circumstances in which the offender" must have "committed the crime on a particular occasion" that would permit a circumstance-specific approach. *Id*. at 2301; *see* 8 U.S.C. §§ 1182(a)(2)(A)(i)(I), 1227(a)(2)(A)(i)(I). Thus, an examination of the statutory elements allows adjudicators to determine whether moral turpitude is present in any given offense.[9] Accordingly, "[t]he practical impediments to application of the categorical approach identified in *Nijhawan* . . . are not present in the CIMT context." *Jean-Louis v. Att'y Gen. of U.S.*, 582 F.3d 462, 480 (3d Cir. 2009). As the Third Circuit explained, "[the Board] and courts of appeals have determined whether moral turpitude inheres in the convicted conduct using a categorical approach for over a century. Hence, *Nijhawan* . . . [does] not support abandoning our established methodology." *Jean-Louis*, 582 F.3d at 480 (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)).

Furthermore, one year and a half after the issuance of *Silva-Trevino*—and thousands of petitions for review later—no circuit court has endorsed its

[9] As the Supreme Court made clear subsequent to *Silva-Trevino*, the use of the word "involving" does not invite an inquiry into the specific facts underlying a conviction: the Supreme Court has recognized that a statute containing the ambiguous language "involves conduct," still refers to a generically defined crime. *Nijhawan*, 129 S. Ct. at 2300 (citing *James v. United States*, 550 U.S. 192 at 202 (2007)); *see also Jean-Louis*, 582 F.3d at 447 (explaining that "crime involving moral turpitude" is a term of art).

radical framework. The Third Circuit, the only circuit court to squarely address the *Silva-Trevino* inquiry, emphatically rejected it as both burdensome and manifestly contrary to the statute. *See Jean-Louis*, 582 F.3d at 478-80; *see also* Pet'r Br. at 13-16. Recently, this Court specifically reaffirmed the categorical and modified categorical approach. *Tijani v. Holder*, No. 05-70195 (9th Cir. Mar. 11, 2010) (reiterating that to determine whether a conviction a crime involving moral turpitude "this court applies the [categorical] approach . . . we do not consider the particular facts of the convictions") (citing *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 999 (9th Cir. 2008) (stating that "[t]he issue is not whether the actual conduct constitutes a crime involving moral turpitude")); *Nunez v. Holder*, --- F.3d ---, 2010 WL 446485, *3 (9th Cir. Feb. 10, 2010) (explaining that to "determine if a crime involves moral turpitude, we first apply the categorical approach . . . . If the crime does not qualify under the categorical approach, we apply the modified categorical approach"); *see also Marmolejo-Campos v. Holder*, 558 F.3d 903, 907 & n.6 (9th Cir. 2009) (noting *Silva-Trevino*'s tension with prior circuit precedent and nevertheless requiring immigration adjudicators "to interpret the statute under which the petitioner was

convicted and, in certain cases, to examine the record of conviction" to decide the question of moral turpitude).[10]

[10] Although this Court has not squarely ruled on the validity of *Silva-Trevino*'s step-three factual inquiry, it has already discredited the decision's step-one "realistic probability" requirement, 24 I. & N. Dec. at 697-98. This Court found that requirement to be based on a misinterpretation of *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007). *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007). *Duenas-Alvarez* dealt with an unusual situation where the Court could not determine whether a criminal statute would in fact reach the minimum conduct the respondent hypothesized. *Duenas-Alvarez*, 549 U.S. at 191-92. The Court held that in the context of statutory ambiguity a respondent must demonstrate a "realistic probability" that a "state would apply its statute" in the manner alleged. *Id*. at 193. Contrary to the assertion in *Silva-Trevino*, *Duenas-Alvarez* does not require such a showing unless the reach of the statute is ambiguous. As this Court has explained, "[w]here . . . a state statute explicitly defines a crime more broadly than the generic definition, no 'legal imagination' is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime. [A] state statute's greater breadth [may be] evident from its text." *Grisel*, 488 F.3d at 850; *see also Cerezo v. Mukasey*, 512 F.3d 1163, 1167 (9th Cir. 2008) (stating that where "the state statute plainly and specifically criminalizes conduct outside the contours of the federal definition, we do not engage in judicial prestidigation by concluding that the statute 'creates a crime outside the generic definition.'") (quoting *Duenas-Alvarez*, 549 U.S. at 193). Where a realistic probability can be determined from examining the statutory text alone, no reference to an outside case is necessary. *Grisel*, 488 F.3d at 850.

Moreover, relying upon reported cases as the singular source of evidence of the reach of a statute is an inaccurate measure of a statute's breadth. As this Court recently pointed out, because "the majority of people who are convicted . . . never go to trial at all, but rather plead guilty to the charge . . . a lack of published cases or appellate-level cases does not imply a lack of convictions." *Nunez v. Holder*, --- F.3d ----, 2010 WL 446485, at *8 n.10 (9th Cir. Feb. 10, 2010). With the vast majority of convictions resulting from pleas, *see supra* note 6 and accompanying text, it is both unrealistic and eminently unfair to require an adjudicator to determine whether or not a criminal statute reaches certain conduct based solely on the

Other circuits have also continued to apply the traditional categorical approach notwithstanding *Silva-Trevino*. *See, e.g., Ahmed v. Holder,* 324 Fed. Appx. 82, 84 (2d Cir. 2009) (applying the "modified categorical approach applicable in this Circuit"); *Serrato-Soto v. Holder*, 570 F.3d 686, 689 (6th Cir. 2009) (employing the "'categorical approach,' whereby we consider not whether the actual conduct constitutes a crime involving moral turpitude, but 'whether the full range of conduct encompassed by the statute constitutes a crime involving moral turpitude'").[11] Even when courts have

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existence of a decision from one of the small percentage of cases that go to trial.

Furthermore, *Silva-Trevino*'s requirement that respondents affirmatively come forward with a case demonstrating the non-turpitudinous reach of a statute, 24 I. & N. Dec. at 703 n.4, impermissibly shifts to respondents the burden to disprove deportability. This rule flies in the face of the INA and the Constitution, which require the government to establish removability, including proof related to criminal convictions, by clear and convincing evidence. 8 U.S.C. § 1229a; *see also Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674, 678 (9th Cir.2005) (explaining the constitutional requirement that the government bears the burden to prove removability by "clear, convincing, and unequivocal evidence"); *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 1004-05 (9th Cir. 2008) (disapproving of reading *Duenas-Alvarez* "to suggest that it [is] incumbent on the [noncitizen] to make the ['realistic probability'] showing"), *overruled on other grounds by Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009); c*f. Martinez v. Mukasey*, 551 F.3d 113, 121 (2d Cir. 2008) (noting that "looking into evidence of [the respondent's] actual conduct" is equivalent to "[p]lacing the burden on" the respondent).

[11] Although the Sixth Circuit in *Kellermann v. Holder,* 592 F.3d 700, 704 (6th Cir. 2010), appears to accept *Silva-Trevino* and purports to disagree with the Third Circuit's decision in *Jean-Louis*, 582 F.3d at 462, *Kellermann* merely applies the familiar second-stage modified categorical analysis, and

cited *Silva-Trevino*, they have declined to apply its unprecedented three-step analysis. *See, e.g.*, *Uppal v. Holder*, 576 F.3d 1014, 1017 (9th Cir. 2009); *Serrato-Soto*, 570 F.3d at 689, 690; *Marmolejo-Campos*, 558 F.3d at 907; *Tejwani v. Att'y Gen. of U.S.*, Nos. 07-1828 & 07-4132, 2009 WL 3387961, at *3 (3d Cir. 2009); *Destin v. U.S. Att'y. Gen.*, 345 Fed. Appx. 485, 487 (11th Cir. 2009).[12] These intervening decisions make increasingly obvious *Silva-Trevino*'s incompatibility with the INA and binding precedent. In light

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does not in fact address the validity of the novel step-three inquiry that *Jean-Louis* rejected. *Kellerman*, 592 F.3d at 704.

[12] The ABA has joined the courts in affirming the importance of the categorical approach and rejecting the *Silva-Trevino* framework. In a 2009 report, the ABA lauded the categorical approach as a tool that "promotes uniform treatment of convictions, fairness, and due process, as noncitizens convicted under identical provisions of criminal law will face the same set of immigration consequences and will not be forced to defend themselves against old criminal allegations without the due process protections of a criminal proceeding." ABA, RESOLUTION 113 (citations omitted). The ABA subsequently urged Attorney General Holder to withdraw *Silva-Trevino*, declaring that its "novel fact-based inquiry . . . offends due process, creates inefficiency, and undermines the uniform and predictable administration of justice in the immigration system." Letter from Carolyn B. Lamm, President, ABA, to Eric H. Holder, Jr., U.S. Att'y Gen. (Jan. 22, 2010), *available at* http://www.abanet.org/poladv/letters/immigration/2010jan26_silvatrevino_l.pdf (citations omitted). The ABA reiterated these findings in a recent report, where it recommended "[w]ithdraw[ing] *Silva-Trevino* and reinstat[ing] the categorical approach." ARNOLD & PORTER LLP, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES, 2010 A.B.A. Comm. on Immigr. Rep., ES-23, *available at* http://new.abanet.org/Immigration/Documents/ReformingtheImmigrationSystemExecutiveSummary.pdf.

of this growing body of authority, this Court should once again reaffirm its commitment to the categorical approach.

CONCLUSION

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

Respectfully Submitted,

Date: March 12, 2010
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