

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

In the matter of:

Amicus Invitation No. 17-06-12

**Brief of Amici Curiae the American Immigration Lawyers Association, Immigrant Defense Project, and the National Immigration Project of the National Lawyers Guild**

## I. Introduction.

For over one hundred years, the Board and the federal courts have held that the determination of whether an individual’s criminal conviction carries immigration consequences is governed by the categorical approach and its modified variant. The Board’s prior attempt to depart from the categorical approach with regard to crimes involving moral turpitude (“CIMTs”) in *Matter of Silva-Trevino* was ultimately withdrawn after years of wasteful litigation at the circuit courts of appeal. *See Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (AG 2008), *withdrawn* 26 I. & N. Dec. 550 (AG 2015). Eventually the Board accepted and formally took the position in *Silva-Trevino III* that the categorical approach and its modified variant govern the determination as to whether a conviction is a deportable CIMT. 26 I. & N. Dec. 826 (BIA 2016). In this case, the Board should adhere to its position announced in *Silva-Trevino III* and continue to apply the categorical approach to all aspects of CIMT determinations. The “reprehensibility” element of the CIMT generic definition is no exception.

The Supreme Court’s jurisprudence on the application of the categorical approach is clear that it applies uniformly across the grounds of removability that are premised on the statutory term “conviction.” “[C]onviction’ is ‘the relevant statutory hook.’” *Moncrieffe v. Holder*, 569 U.S. 184, 133 S.Ct. 1678, 1685 (2013) (quoting *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 580 (2010)). Under the categorical approach, the first step of the analysis is to determine the generic federal crime. *See, e.g., Esquivel-Quintana, v. Sessions*, 137 S.Ct. 1562, 1570 (relying on “[t]he structure of the INA, a related federal statute, and evidence from state criminal codes” to determine generic elements); *Lopez v. Gonzales*, 549 U.S. 47, 53 (2006).

The adjudicator then compares the elements of the crime of conviction with the elements of the generic definition of the removability ground in the Immigration and Nationality Act (“INA”).

The Court has repeatedly held that this analysis requires that “we presume that the state conviction ‘rested upon . . . the least of th[e] acts’ criminalized by the statute, and then we determine whether that conduct would fall within the federal definition of the crime.” *Esquivel-Quintana*, 137 S.Ct. at 1568 (2017) (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)) (alterations in original); *Mellouli v. Lynch*, 135 S.Ct. 1980, 1986 (2016). If the elements of conviction are broader, reaching conduct beyond the generic offense, the conviction cannot serve as a predicate for removal. *Esquivel-Quintana*, 137 S.Ct. at 1568.

In some circumstances, the adjudicator may apply a modified categorical approach and consult a “limited set of documents” from the noncitizen’s underlying criminal case “to determine what crime, with what elements, [the] defendant was convicted of.” *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016). The modified categorical approach may be applied only when the statute of conviction treats generic and non-generic conduct as “alternative” crimes (or elements) rather than alternative means of committing one crime (or element). *Id.* An “element” is “what the jury must find beyond a reasonable doubt to convict the defendant [or] what the defendant necessarily admits when he pleads guilty.” *Id.* at 2248. If the statute is constructed of alternative elements rather than alternative means of committing an offense, the adjudicator may consult the record of conviction to see if it reveals the offense of conviction. *Id.*

This is the only circumstance in which an immigration adjudicator or court may apply the modified categorical approach: where the statute of conviction is divisible as outlined in the



Supreme Court’s decisions in *Descamps* and *Mathis*. Nothing about the “reprehensibility” element of the Board’s generic definition of a CIMT constitutes an exception to the ordinary functioning of the categorical approach. A contrary position—that a modified categorical approach may be applied to an indivisible statute—finds no justification in the text of the INA or the spate of Supreme Court and federal Court of Appeals decision that strictly govern the way in which the categorical approach is applied in immigration adjudications. Accordingly, the Board should adhere to its current position that the categorical approach applies to CIMT adjudications just as it does to all other “conviction”-based grounds of removability, including the “reprehensibility” element of the CIMT generic definition.

## II. Legal Argument.

- A. The Board is precluded from applying the modified categorical approach to an indivisible statute.
  1. The categorical approach applies to CIMT determinations, with no exception for the “reprehensibility” element of the generic definition.

The Supreme Court has made it abundantly clear that the analysis of the immigration consequences of criminal convictions must start with the text of the Immigration and Nationality Act (“INA”). *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1685 (2013) (categorical approach applies to immigration cases because “the INA asks what offense the noncitizen was ‘convicted’ of, not what acts he committed.”) (citation omitted). For noncitizens, like the respondent in this case, who have been admitted to the United States but are alleged to be removable for having been convicted of committing a CIMT, the statute provides:

Any alien who

- (I) is convicted of a crime involving moral turpitude committed within five years . . . 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.

INA § 237(a)(2)(A)(i) (emphasis added).

The Supreme Court has consistently held that the analysis of removability must be focused on the words of the statute, which in this case repeatedly uses the term “convicted of” to impose immigration consequences. INA § 237(a)(2)(A)(i). Where the statute, as here, directs the adjudicator to examine whether a noncitizen has been “convicted of” an offense, the analysis starts by determining the elements of the generic offense. *See Lopez v. Gonzales*, 549 U.S. 47, 53 (2006). The adjudicator then compares the elements of the statute of conviction to those of the generic offense, relying on the statutory text and decisions interpreting the text. *See Descamps v. United States*, 133 S.Ct. 2276, 2285-2286 (2013). Where the minimum conduct criminalized by the state offense does not include every element of the generic offense, the categorical analysis is complete and the noncitizen does not stand “convicted of” the generic offense. *See, e.g., Mathis v. United States*, 136 S.Ct. 2243, 2251 (2016) (where elements of state conviction “cover a greater swath of conduct than [the generic offense]” this “resolves the case”); *Mellouli v. Lynch*, 135 S.Ct. 1980, 1986 (2015) (“Because Congress predicated deportation ‘on convictions, not conduct,’ the approach looks to the statutory definition of the offense of conviction, not to the particulars of an alien’s behavior.”); *Moncrieffe v. Holder*, 133 S.Ct. 1678, 1684-1685 (2013) (because an adjudicator “examines what the state conviction necessarily involved and not the facts underlying the case, it presumes that the conviction ‘rested upon [nothing] more than the least of th[e] acts’ criminalized”) (alternations in original).



It is only in the limited circumstances where the statute of conviction lists different alternative elements, effectively creating multiple possible crimes, that the adjudicator may continue to consult the conviction records to determine which alternative element was in play in the underlying case. *See Mathis v. United States*, 136 S.Ct. 2243, 2249 (2016).

Five Courts of Appeals rejected the BIA’s prior attempt to depart from applying the strict categorical approach to CIMTs. *Silva-Trevino v. Holder*, 742 F.3d 197, 200-06 (5th Cir. 2014) (rejecting Attorney General’s Attorney General Mukasey’s opinion in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), as contrary to the plain language of the statute); *Olivas-Motta v. Holder*, 746 F.3d 907, 911-16 (9th Cir. 2013) (same); *Prudencio v. Holder*, 669 F.3d 472, 480–84 (4th Cir. 2012); *Fajardo v. U.S. Att’y Gen.*, 659 F.3d 1303, 1307-11 (11th Cir. 2011); *Jean-Louis v. Att’y Gen. of U.S.*, 582 F.3d 462, 472-82 (3d Cir. 2009). Indeed, the Board itself concluded in *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (2016), that “the categorical and modified categorical approaches apply” to the determination of whether a CIMT renders a noncitizen removable. *Accord Matter of Diaz-Lizarraga*, 26 I. & N. Dec. 847 (BIA 2016) (“To determine whether an offense is a crime involving moral turpitude, we employ the categorical approach, which requires us to focus on the elements of the crime, rather than the conduct of the respondent.”). There is nothing special about the “reprehensibility” element of CIMTs that would permit the Board to depart from this longstanding jurisprudence. *See Arg. § A.2, infra* at 8-9.

Bound by the Supreme Court’s affirmance of the categorical approach, the courts have uniformly held that the categorical and modified categorical approaches apply to determining whether a specified state offense qualifies as a CIMT. Both pre- and post-*Mathis*, the Courts of

Appeal have consistently applied the categorical approach and its modified variant to the determination of whether an offense constitutes a CIMT. *Coelho v. Sessions*, \_\_\_ F.3d \_\_\_, 2017 WL 3124434, at \*3 (1st Cir. July 24, 2017); *Ramirez-Contreras v. Sessions*, 858 F.3d 1298, 1205-06 (9th Cir. 2017); *Chavez-Alvarez v. Attorney General*, 850 F.3d 583, 587-88 (3d Cir. 2017); *Flores-Molina v. Sessions*, 850 F.3d 1150, 1158-59 (10th Cir. 2017); *Lovano v. Lynch*, 846 F.3d 815, 817-18 (6th Cir. 2017); *Sotnikau v. Lynch*, 846 F.3d 731, 735 (4th Cir. 2017); *Gomez-Perez v. Lynch*, 829 F.3d 323, 326-27 (5th Cir. 2016); *Alonzo v. Lynch*, 821 F.3d 951, 960-61 (8th Cir. 2016); *Gelin v. Attorney General*, 837 F.3d 1236, 1241-42 (11th Cir. 2016); *Efstathiadis v. Holder*, 752 F.3d 591, 595 (2d Cir. 2014). And this Circuit law is “controlling” in removal proceedings with respect to the contours of the categorical and modified categorical approaches. See *Matter of Chairez*, 26 I. & N. Dec. 819, 822 n.5 (BIA 2016).

When a statute lists multiple, alternative elements that effectively create two or more discrete crimes, adjudicators are permitted “to examine a limited class of documents to determine which of a statute’s alternative elements formed the basis of the defendant’s prior conviction.” *Descamps v. United States*, 133 S. Ct. 2276, 2284 (2013). Yet, where the statute does not list alternative elements, but merely alternative means for committing a crime, there is no role to be played by a modified categorical analysis. See *Mathis v. United States*, 136 S. Ct. 2243, 2256 (2016) (“the court may ask only whether the *elements* of the state crime and generic offense make the requisite match.”) (emphasis in original). Accordingly, where the underlying statute is indivisible, the Board may not depart from the categorical analysis in reviewing whether a conviction qualifies as a CIMT.

2. The Board may not examine the record of conviction where the state statute is indivisible.

There is no basis under the law for the Board to depart from decades of jurisprudence to create an exception to the categorical approach in cases involving crimes involving moral turpitude. The statutory language of the INA, using the phrase “convicted of,” is identical, and there is no principled distinction that can be drawn to treat CIMTs differently than other criminal removal grounds under the statute. Accordingly, where the statute is indivisible, the adjudicator may not “look behind [the individual’s] conviction in search of record evidence that he actually committed the generic offense.” *Descamps*, 133 S. Ct. at 2293. Thus, where the minimum conduct criminalized by the statute of conviction includes non-reprehensible conduct, the Respondent does not stand “convicted of” a crime involving moral turpitude.

The Board specifically requested briefing on whether the categorical approach should apply where “the requirement in question is whether the involved conduct is reprehensible, which is a subjective determination that is not an element of the state offense.” Amici contend that the question answers itself. The categorical analysis requires the adjudicator to “focus on the elements, rather than the facts, of a crime.” *Descamps*, 133 S. Ct. at 2285. Thus, the Board’s proposed question turns the categorical analysis upside-down: if the elements of the state offense reach broader than the generic crime, and the statute is indivisible, the inquiry must stop. There is no basis to apply the modified categorical approach where the statute is indivisible. To do so would invite the same error resoundingly rejected by the Court in

*Descamps*:

Courts can go much further in reconceiving indivisible statutes as impliedly divisible ones. In fact, every element of every statute can be imaginatively transformed as the Ninth Circuit suggests—so that every crime is seen as



containing an infinite number of sub-crimes corresponding to “all the possible ways an individual can commit” it. . . . And that is what we have expressly and repeatedly forbidden.

*Descamps*, 133 S. Ct. at 2290-2291 (citation omitted).

Put another way, the proper way to frame the analysis is to examine the least reprehensible conduct criminalized by the elements of the state statute and determine if these elements rise to the level of being morally turpitudinous. If so, the crime constitutes a CIMT. If not, resort may only be had to the modified categorical approach where the statute is divisible. Otherwise, the analysis stops and the crime does not constitute a CIMT.

- B. The Board need not address the remaining questions posed in the amicus invitation because reviewing the record of conviction is not permitted for indivisible statutes.

The Board requested amici to opine on other issues in its amicus invitation, but amici respectfully submit that the answer to the first inquiry resolves the case entirely, making an analysis of the remaining issues superfluous. The present case is controlled by longstanding jurisprudence and there is no basis to treat CIMTs differently than other criminal grounds of removal.

### **III. Conclusion.**

Where a noncitizen stands convicted of a state crime and the statute of conviction sweeps broader than the generic definition, the analysis of the immigration consequences flowing from the conviction remains the same whether the offense is a CIMT, an aggravated felony, a controlled substance offense, or any other criminal ground of removal. In each case, the Supreme Court has made it abundantly clear that if the statute is indivisible, adjudicators may not proceed to the modified categorical approach. Accordingly, amici urge the Board to



reaffirm the application of the categorical approach to the analysis of whether a particularly state crime constitutes a CIMT.

Respectfully submitted this 2<sup>nd</sup> day of August, 2017.

SUNBIRD LAW, PLLC



Devin T. Theriot-Orr, WSBA #33995

1001 4<sup>th</sup> Avenue, Suite 3200

Seattle, WA 98154

Ph. (206) 962-5052

Fax (206) 681-9663

Em [devin@sunbird.law](mailto:devin@sunbird.law)

Attorney for Amici American Immigration Lawyers Association, Immigrant Defense Project and the National Immigration Project of the National Lawyers Guild.