IN THE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 11-60464

CRISTOVAL SILVA-TREVINO

Petitioner,

v.

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

Respondent.

Petition for Review of the Board of Immigration Appeals in File A013-014-303

BRIEF OF AMICI CURIAE CATHOLIC CHARITES OF DALLAS, IMMIGRANT DEFENSE PROJECT, KATHRYN O. GREENBERG IMMIGRATION JUSTICE CLINIC OF THE BENJAMIN N. CARDOZO SCHOOL OF LAW, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, AND THE STEWART H. SMITH LAW CLINIC AND CENTER FOR SOCIAL JUSTICE OF LOYOLA UNIVERSITY NEW ORLEANS COLLEGE OF LAW IN SUPPORT OF PETITIONER AND REVERSAL OF THE DECISION OF THE BOARD OF IMMIGRATION APPEALS

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to 5TH CIR. R. 28.2.1, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, Catholic Charities of Dallas, the Immigrant Defense Project, the Kathryn O. Greenberg Immigration Justice Clinic of the Benjamin N. Cardozo School of Law, the National Immigration Project of the National Lawyers Guild, and the Stewart H. Smith Law Clinic and Center for Social Justice of Loyola University New Orleans College of Law submit this brief as amici curiae in support of Petitioner Cristoval Silva-Trevino.

PRELIMINARY STATEMENT

Amici submit this brief to offer this Court a discussion of significant legal and practical concerns arising from former Attorney General ("A.G.") Mukasey's erroneous decision in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008), regarding the method used to determine whether someone has been "convicted" of a crime involving moral turpitude ("CIMT"). Amici urge this Court to join the Third, Eighth, and Eleventh Circuits[1] in rejecting the radical framework in *Silva-Trevino* and to grant Petitioner's petition for review. Additionally, amici ask this Court to hold that *Silva-Trevino* and its unprecedented, fact-intensive methodology for CIMT determinations

[1] *See Sanchez Fajardo v. U.S. Att'y Gen.*, --- F.3d ----, 2011 WL 4808171 (11th Cir. 2011); *Guardado-Garcia v. Holder*, 615 F.3d 900 (8th Cir. 2010); *Jean-Louis v. Att'y Gen. of U.S.*, 582 F.3d 462 (3d Cir. 2009), *petition for reh'g denied* (Apr. 5, 2010).

represent a patent misreading of the Immigration and Nationality Act ("INA").[2]

Even supposing *arguendo* that this Court would ordinarily defer to the agency regarding the analysis of a criminal conviction for immigration purposes—which it would not—*Silva-Trevino* misinterprets clear statutory language. *Silva-Trevino* creates an analytic framework that disrupts the orderly administration of criminal justice systems and raises serious constitutional questions of uniformity, practicability and due process 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 categorical analysis since *Silva-Trevino* confirms its fundamental inconsistency with the statute's plain language.

INTEREST OF AMICI

Amici are nonprofit 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 immigrant defendants and criminal defense

[2] In addition, amici support Petitioner's arguments that this Court should reject *Silva-Trevino* or, at minimum, refuse to apply it retroactively (Brief for Petitioner, Section VI.E, at 36).

attorneys, and training others for such representation and counseling.[3] The United States Supreme Court and Courts of Appeals, including this Court, have accepted and relied on briefs prepared by amici in numerous immigration-related cases.[4]

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 due process in immigration proceedings. 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 courts have relied, for nearly a century.

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[3] Additional information about individual amici is set forth in the Motion for Leave to File Amici Curiae Brief in Support Of Petitioner.

[4] *See*, *e.g.*, Brief for Nat'l Ass'n of Criminal Defense Lawyers, et al. as Amici Curiae Supporting Respondent, Padilla v. Kentucky, 130 S.Ct.1473 (2010) (No. 08-651) (submitted by, *inter alia*, IDP and NLG-NIP); Brief for Immigrant Defense Project, N.Y. State Defenders Ass'n as Amicus Curiae Supporting Petitioner, Carachuri-Rosendo v. Holder, 570 F.3d 263 (5th Cir. 2008) (No. 07-61006).

ARGUMENT

I. *SILVA-TREVINO* IS INCONSISTENT WITH THE UNAMBIGUOUS LANGUAGE OF THE INA AND A CENTURY OF PRECEDENT PREMISING REMOVABILITY UPON BEING "CONVICTED" AND THUS PROHIBITING INQUIRY OUTSIDE OF THE RECORD OF CONVICTION

A. For Nearly a Century, the Fifth Circuit, the Supreme Court, and Nearly Every Court to Consider the Matter Have Correctly Interpreted the Plain Language of the INA to Prohibit Inquiry Beyond the Record of Conviction

Amici support the Petitioner's arguments regarding the unambiguous language of the INA prohibiting inquiry beyond the record of conviction, and write in this section to furnish additional relevant considerations regarding the proper interpretation of the statute.

Silva-Trevino rejects the traditional application of the categorical and modified categorical approaches, instead setting forth a radical three-step framework for determining whether a conviction constitutes a CIMT. The first step of the A.G.'s scheme seeks to determine whether there is a "realistic probability" that the criminal statute "pursuant to which [a noncitizen] was convicted would be applied to reach conduct that does not involve moral turpitude." *Silva-Trevino*, 24 I&N Dec. at 690. In order to demonstrate that this realistic probability exists, the noncitizen bears the

burden of finding and producing an actual case where the same statute was applied to conduct that does not constitute a CIMT. *Id.* at 697, 709 n.4. In every case where the individual is able to meet this burden, the A.G. then calls for an examination of the record of conviction to see whether it evinces a crime that "in fact" involves moral turpitude. *Id.* at 698–99. Where this inquiry fails to reveal any underlying facts in which moral turpitude inheres, *Silva-Trevino* permits an adjudicator to proceed to the most extreme and troubling third step of its new methodology: an inquiry into underlying facts. *Id.* at 699. This drastic departure from the traditional approach allows adjudicators to examine "any additional evidence" outside the record of conviction, where immigration judges deem it "necessary and appropriate…." *Id.* at 704.

Where, as here, the government has alleged an individual is inadmissible because he has been "convicted of ... a crime involving moral turpitude," s*ee* 8 U.S.C. § 1182(a)(2)(A)(i)(I), it would offend the plain language of the statute to allow inquiry into conduct not set forth in the record of conviction. Congress unambiguously chose to premise inadmissibility here upon what the person was "convicted" of doing, and evidence outside the record of conviction is simply irrelevant to determining

what a criminal court "convicted" the individual of doing.[5] *Sanchez Fajardo v. U.S. Att'y Gen.*, --- F.3d ----, 2011 WL 4808171, *3–4 (11th Cir. 2011); *Jean-Louis v. Att'y Gen. of U.S.*, 582 F.3d 462, 473–74 n.13 (3d Cir. 2009), *reh'g denied* (Apr. 5, 2010).

This bedrock principle of immigration law has been recognized by nearly every court to consider the matter, *see* discussion *infra*, and has been the settled law of this Circuit for decades. As this Court has explained, when removability is premised on the conviction of a CIMT, the analysis must focus on "the inherent nature of the crime as defined in the statute concerned, rather than the circumstances surrounding the particular transgression." *Okabe v. INS*, 671 F.2d 863, 865 (5th Cir. 1982). As early as 1933, this Court explained that "[d]eportation is not rested on the mere commission of crime; but there must be conviction in this country" and the Court reached this conclusion, in part, because "Congress has . . . used the expressions crime [and] conviction." *Wallis v. Tecchio*, 65 F.2d 250, 252

[5] Respondent alleges that Petitioner is inadmissible based solely on the allegation that Petitioner was "convicted" of a CIMT. *Silva-Trevino*, 24 I&N Dec. at 691. Accordingly, this case does not present the separate and distinct question of what method is appropriate to determine whether an admission, as opposed to a conviction, is sufficient to trigger inadmissibility. Moreover, even where immigration consequences attach to admissions, the underlying inquiry must first establish that the admitted act is "considered a crime in the jurisdiction of occurrence." *Hamdan v. INS*, 98 F.3d 183, 186 (5th Cir. 1996). The court's analysis is thus always grounded in the language and elements of a particular criminal statute. *See, e.g.*, *Matter of K-*, 7 I&N Dec. 594 (BIA 1957); *Matter of E-N-*, 7 I&N Dec. 153 (BIA 1956).

(5th Cir. 1933). Since then, this Court has consistently reaffirmed that, in determining whether a crime involves moral turpitude, it "look[s] to the statutory text as interpreted by the state's courts, without regard to the particular circumstances surrounding the specific offender's violation." *Garcia-Maldonado v. Gonzales*, 491 F.3d 284, 288, 290 (5th Cir. 2007). When "a criminal statute encompasses both acts that do and do not involve moral turpitude, then the BIA cannot sustain a finding of deportability" unless "the law [is] divided into discrete subsections that track the distinction between moral turpitude and less severe conduct." *Omagah v. Ashcroft*, 288 F.3d 254, 260 (5th Cir. 2002). In such cases, the statute is "divisible" and the court may look to the noncitizen's "record of conviction to determine whether he has been convicted of a subsection that qualifies as a [CIMT]." *Amouzadeh v. Winfrey*, 467 F.3d 451, 455 (5th Cir. 2006). This Court has consistently recognized, however, that under the language of the INA courts are "precluded from hypothesizing beyond [the] record of conviction." *Garcia-Maldonado*, 491 F.3d at 290; *Larin-Ulloa v. Gonzales*, 462 F.3d 456, 464 (5th Cir. 2006) (holding that documents outside the record of conviction "including police reports and complaint applications, may not be considered" (internal quotation marks omitted)).

Despite the A.G.'s assertions to the contrary, *Silva-Trevino*, 24 I&N Dec. at 694, nearly all courts have uniformly applied the categorical and modified categorical approach to CIMT inquiry beginning almost a century ago. *See, e.g.*, *United States ex rel. Mylius v. Uhl*, 210 F. 860, 862–63 (2d Cir. 1914); *see also Kellerman v. Holder*, 592 F.3d 700 (6th Cir. 2010) (applying the categorical and modified categorical approach to determine whether person was convicted of a CIMT); *Wala v. Mukasey*, 511 F.3d 102, 107–08 (2d Cir. 2007) (same); *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); *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1017–20 (9th Cir. 2005) (same); *Partyka v. Att'y Gen. of 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) (same); *Castle v. INS*, 541 F.2d 1064, 1066 (4th Cir. 1976); *cf. Nijhawan v. Holder*, 129 S.Ct. 2294, 2300–01 (2009) (explaining general applicability of approach to criminal removal grounds); *Batrez Gradiz v. Gonzales*, 490 F.3d 1206, 1211 (10th Cir. 2007) (adopting the modified categorical approach in aggravated felony context).

In *Silva-Trevino*, the A.G. asserts that the underlying analyses in these decisions adopting the categorical and modified categorical approaches 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 begin with an analysis of the statute of conviction, and if the statute criminalizes different sets of offenses, some of which are CIMTs 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.

The A.G. attempts to rationalize *Silva-Trevino*'s radical departure from binding circuit precedent by reliance upon *National Cable & Telecommunications Ass'n v. Brand X Internet Services,* 545 U.S. 967 (2005) (permitting agencies to depart from prior circuit precedent insofar as they are interpreting ambiguous statutory terms within their expertise) and by purporting to interpret an ambiguous statute. However, as the overwhelming weight of prior precedent indicates, and as the Third Circuit has explained, "[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; *see also Fajardo*, 2011 WL 4808171, at *5. ("Congress unambiguously intended adjudicators to use the categorical and modified categorical approach to determine whether a person was convicted of a crime involving moral turpitude.").

The A.G.'s contrived claim of a "patchwork of different approaches across the nation" is, in reality, rooted in a single aberrant decision from one circuit.[6] *Silva-Trevino*, 24 I&N Dec. at 688. The only court to reject the categorical approach in the moral turpitude context is the Seventh Circuit in its decision in *Ali v. Mukasey*, 521 F.3d 737 (7th Cir. 2008). The *Ali* court rejected the categorical approach because it found the rationales of *Taylor v. United States*, 495 U.S. 575 (1990), and *Shepard v. United States*, 544 U.S. 13 (2005), which established the categorical approach in the criminal sentencing context, inapplicable in the immigration context. What the *Ali* court failed to apprehend is that the categorical approach in the immigration context long pre-dated *Taylor* and *Shepard* and unlike those cases, is based

[6] The A.G.'s claim of a lack of uniformity is also grounded in a misinterpretation of Fifth Circuit law. Contrary to the AG's assertion, 24 I&N Dec. at 694, this Court's decision in *Rodriguez-Castro v. Gonzalez,* 427 F.3d 316 (5th Cir. 2005), does not demonstrate a general unwillingness to use the modified categorical approach. The *Rodriguez-Castro* Court did not resort to a modified analysis only because it had no need to do so—the subsection under which the petitioner had pleaded guilty was not in dispute, thus foreclosing the need for the court to look to the record of conviction. *Rodriguez-Castro*, 427 F.3d at 318.

not on judicial policy determinations and Sixth Amendment concerns, but rather in the statutory language and on the policy considerations that motivated Congress. *See* Alina Das*, The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. Rev. --- (forthcoming Dec. 2011)*, available at* http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1692891_code419245.pdf?abstractid=1692891&mirid=1 (noting that the "earliest cases observed that Congress predicated deportation on convictions rather than conduct to ensure immigration officials would act in an administrative rather than judicial capacity in determining the immigration penalties for convictions").

Moreover, the A.G.'s attempt to justify his finding of ambiguity in the statute by dissecting the term of art "crime involving moral turpitude" and attributing independent significance to the word "involving" is unavailing. *Silva-Trevino*, 24 I&N Dec. at 693. From the unitary phrase CIMT, A.G. Mukasey extracts the word "involving," ascribing to it the proposition that "inquiry into the particularized facts of the crime" is necessary for moral turpitude determinations by immigration judges. *Id.* at 699. However, to dissect this phrase and attempt to ascribe meaning to one of its constituent words is to render the term of art meaningless. *Jean-Louis*, 582 F.3d at 477; *see also Fajardo*, 2011 WL 4808171, at *5; Pet'r's Br. at 25–26. As the

Petitioner points out, Pet'r's Br. at 29, the A.G.'s interpretation of the word "involving" is also foreclosed by an intervening decision of the Supreme Court. *Nijhawan v. Holder*, 129 S.Ct. 2294, 2298 (2009) (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 phrase "involves conduct" refers to a generically defined crime and not to the particular circumstances of its commission (citing *James v. United States*, 550 U.S. 192, 202 (2007)).

Finally, as the A.G. would have been aware had he given Petitioner an opportunity to brief the issue being litigated, *see* discussion *infra* at Section III.A, the clear meaning of the statutory text is confirmed by decades of congressional acquiescence to the judicial consensus regarding the necessity of the categorical approach. *Fajardo*, 2011 WL 4808171, at *4; Pet'r's Br. at 25–26. In fact, Congress considered *and rejected* an attempt to dispense with the categorical approach in 1952, when it debated what would become the modern-day INA. The Senate version of the bill initially proposed to authorize deportation for anyone convicted of a crime "if the Attorney General in his discretion concludes that the alien is an undesirable resident of the United States." *See* S. 2550, 82d Cong. § 241(a)(4). Senators

objected to this language, asserting that it would permit the immigration agency to deport a person based on a discretionary view of the desirability of the immigrant rather than the conviction at issue. 98 Cong. Rec. 5420, 5421 (1952). As Senator Douglas explained:

> The phase is "in his discretion" – that is, in the discretion of the Attorney General. In other words, frequently the test is not the fact, but whether the Attorney General might with some reason conclude that deportation was proper. The Senator (Mr. Welker) has quite properly pointed out that this leaves only a very narrow question for the courts to decide on review, and the alien has almost no protection. A lawsuit is no protection if the matter to be received is as vague and variable and arbitrary as the Attorney General's conclusion about a person's undesirability.

Id. Thereafter, amendments to the Senate bill eliminated this problematic portion of the bill and left only the conviction-based ground of deportability for CIMTs, demonstrating Congress's desire to limit the immigration agency's review of underlying facts where removability is predicated on "convictions." *See* Immigration and Nationality Act of 1952, Pub. L. No. 82–414, § 241(a)(4), 66 Stat. 163, 204.

B. After the Attorney General's Decision in *Silva-Trevino*, Courts Have Reaffirmed the Categorical Approach

Silva-Trevino's misinterpretation of the statute is evidenced by subsequent court decisions overruling, criticizing or ignoring its misguided

framework. Most recently, the Eleventh Circuit found that "Congress unambiguously intended adjudicators to use the categorical and modified categorical approach to determine whether a person was convicted of a [CIMT]." *Fajardo*, 2011 WL 4808171, at *14. Previously, the Third Circuit also rejected *Silva-Trevino*, describing it 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). The Eighth Circuit also affirmed the categorical approach for CIMTs by concluding that it is still "bound by . . . circuit precedent, and to the extent *Silva-Trevino* is inconsistent, we adhere to circuit law." *Guardado-Garcia v. Holder*, 615 F.3d 900, 902 (8th Cir. 2010).

The Supreme Court's decision in *Nijhawan* also reaffirms the necessity of the categorical approach. 129 S.Ct. 2294. In *Nijhawan*, the Court found that consideration of evidence outside the record of conviction is impermissible under the INA to determine if an individual has been convicted of a generic crime. *Id*. at 2299. The Court permitted a circumstance-specific approach, considering evidence outside the record of conviction, only in the limited instances where a relevant removal ground qualifies a generic offense category by reference to the "particular

circumstances in which an offender committed the crime on a particular occasion"—circumstances that cannot generally be determined by consulting the statutory elements and record of conviction. *Id*. at 2300–01. Applying this distinction, the Court required a categorical approach to determine whether the individual had been convicted of a "fraud" crime but permitted inquiry beyond the record of conviction to determine whether the $10,000 threshold was satisfied. *Id.* at 2302.

The Supreme Court decision in *Nijhawan* does not diminish the validity of the categorical approach in the immigration context. *Fajardo*, 2011 WL 4808171, at *5 n.7 (stating that *Nijhawan* circumstance-specific approach is "inapplicable" to CIMT inquiry); *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 Nijhawan*, 129 S.Ct. 2009)). To the contrary, *Nijhawan* dictates that evaluating whether a conviction falls within a "well-established, generic term of art" such as "crime involving moral turpitude" requires a categorical approach. *Fajardo*, 2011 WL 4808171, at *5 n.7; *see also Jean-Louis*, 582 F.3d at 480 (explaining that the "practical impediments to application of the categorical approach identified in *Nijhawan* . . . are not present in the CIMT context").

Moreover, since *Silva-Trevino's* issuance, this Court also has continued to apply the traditional categorical and modified categorical approach in both CIMT and other generic grounds: *"*[T]he categorical and modified categorical approaches remain the analysis in the areas of their traditional application, including a court's application of those approaches to identifying the elements of offenses for which aliens may be removed under Section 1227(a)(2) [which includes deportability for CIMT convictions]." *Bianco v. Holder*, 624 F.3d 265, 268 (5th Cir. 2010) (applying *Nijhawan* and holding that a categorical approach is required to determine whether a petitioner was convicted of a "crime of violence" but permitting circumstance-specific inquiry into whether a domestic relationship existed)*; see also Jimenez-Zuniga v. Mukasey*, 305 F. App'x 208, 209–10 (5th Cir. Dec. 15, 2008) ("When reviewing whether an alien has committed a CIMT, this court utilizes a two-part test and categorical approach, as set forth in *Amouzadeh v. Winfrey*, 467 F.3d 451, 455 (5th Cir. 2006).").

Other circuits have also simply continued to apply the traditional categorical approach notwithstanding *Silva-Trevino*. *See*, *e.g.*, *Tijani v. Holder*, 628 F.3d 1071, 1075 (9th Cir. 2010); *Ahmed v. Holder*, 324 F. App'x 82, 84 (2d Cir. 2009). Even when courts have cited *Silva-Trevino*, they have declined to implement its unprecedented three-step analysis. *See,*

e.g., *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1101–12 (9th Cir. 2011); *Nunez v. Holder*, 594 F.3d 1124, 1129 (9th Cir. 2010); *Garcia-Carbajal v. Holder*, 625 F.3d 1233, 1240 (10th Cir. 2010); *Serrato-Soto v. Holder*, 570 F.3d 686, 689 (6th Cir. 2009); *see also Matter of Guevara-Alfaro*, 25 I&N Dec. 417, 422–23 (BIA 2011) (discussing Ninth Circuit decisions that fail to acknowledge *Silva-Trevino*'s third step). The only circuit to cite positively to *Silva-Trevino* is the Seventh—which simply adhered to its own flawed precedent. *See Mata-Guerrero*, 627 F.3d at 256 (reaffirming, in deference to the A.G., its pre-*Silva-Trevino* decision in *Ali*, 521 F.3d 737); *see also* discussion *supra* at Section 1.A.

II. EVEN IF THE STATUTE WERE AMBIGUOUS, THE COURT SHOULD ADHERE TO CIRCUIT PRECEDENT BECAUSE *SILVA-TREVINO* IS OWED NO DEFERENCE UNDER *CHEVRON* SINCE THE AGENCY HAS NO EXPERTISE IN CONSTRUING CRIMINAL LAW CONCEPTS

This Court does not owe deference to the unworkable and unprecedented framework crafted by the A.G. in *Silva-Trevino* because it does not implicate an issue entrusted to the agency's expertise. The Supreme Court has explained that, before analyzing an agency's statutory interpretation under steps one and two of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), courts must determine whether the agency acted within the scope of its delegated

authority. *United States v. Mead Corp*., 533 U.S. 218, 226 (2001). "[H]istorical familiarity and policymaking expertise account in the first instance for the presumption that Congress delegates interpretive lawmaking power to the agency rather than to the reviewing court . . . ." *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 152 (1991). Accordingly, the court will decline to defer to the agency's interpretation where "the authority claimed by the Attorney General is both beyond his expertise and incongruous with the statutory purposes and design." *Gonzalez v. Oregon*, 546 U.S. 243, 266 (2006).

Applying this doctrine, this Court has explained, that it "review[s] de novo whether the elements of a state or federal crime fit the BIA's definition of a CIMT." *Smalley*, 354 F.3d at 336. This Court has explained that "we accord substantial deference to the BIA's definition of the term 'moral turpitude'" but "review[s] de novo whether the elements of the offense fit the BIA's definition of a crime involving moral turpitude." *Fuentes-Cruz v. Gonzales*, 489 F.3d 724, 725 (5th Cir. 2007); *see also Smalley*, 354 F.3d at 335–36 ("Whether a conviction constitutes a crime involving moral turpitude is a question of law that [the court] review[s] de novo."); *Rodriguez-Heredia v. Holder*, 639 F.3d 1264, 1267 (10th Cir. 2011); *Omagah*, 288 F.3d at 258 ("Determining a particular federal or state crime's

elements lies beyond the scope of the BIA's delegated power or accumulated expertise.").

Two recent Supreme Court decisions confirm that the proper method of analyzing criminal convictions for immigration purposes is not a matter delegated by Congress within the agency's expertise. In *Nijhawan*, although the BIA had addressed the same issue regarding applicability of the categorical approach in *Matter of Babaisakov*, 24 I&N Dec. 306 (BIA 2007), and, although the government invoked *Chevron* deference, *see* Br. of Resp. at 48–49, *Nijhawan*, 129 S.Ct. at 2294 (2009) (No. 08-495), 2009 WL 815242, the Court analyzed the issue without any reference to *Chevron*, and mentioned *Babaisakov* only once. *Nijhawan*, 129 S.Ct. at 2303.

Similarly, in *Carachuri-Rosendo*, the Supreme Court considered whether, in determining whether a state conviction was a "drug trafficking crime" aggravated felony, 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." 130 S.Ct. 2577, 2588 (2010). The Court again upheld the agency's approach, but neither mentioned *Chevron* nor indicated that the proper mode of analysis was a question that commanded judicial deference. The conspicuous absence 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.

Moreover, while the term "convicted" appears within the INA, this Court owes no deference to the agency's novel interpretation of the statute's ordinary use of the word. It is established that federal courts may set forth, without deference to an agency interpretation, the meaning and method of inquiry concerning a general term found in the INA, such as "convicted," over which the agency has no special expertise. *See, e.g.*, *Kungys v. United States*, 485 U.S. 759 (1988); *Monter v. Gonzalez,* 430 F.3d 546 (5th Cir. 2005).

In *Kungys,* the Supreme Court was interpreting the term "material" in the context of a denaturalization provision of the INA and explained that "[w]here Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." 485 U.S. at 770 (quoting *NLRB v. Amax Coal Co.,* 453 U.S. 322, 329 (1981)) (internal citation omitted). In *Monter*, this Court was similarly grappling with the meaning of "material" in a different provision of the INA. 430 F.3d at 546 (interpreting inadmissibility bar for

material misrepresentations used to procure an immigration benefit). Applying *Kungys*, this Court rejected the government's claim to *Chevron* deference and instead adopted the judicial construction of materiality. *Id.* at 555. Here, the Court should similarly conclude that no deference is due to the agency's interpretation of the term "convicted" since it has "accumulated settled meaning" and thus "that Congress mean[t] to incorporate the established meaning." *Kungys,* 485 U.S. at 770.[7]

III. IN ANY EVENT, THE COURT OWES NO DEFERENCE TO THE DECISION UNDER *CHEVRON* STEP TWO BECAUSE THE ATTORNEY GENERAL'S PROCESS WAS DEVOID OF EVEN THE MOST BASIC PROCEDURAL PROTECTIONS OF AN ADJUDICATIVE SYSTEM RESULTING IN AN ARBITRARY AND CAPRICIOUS DECISION

Due to a lack of any meaningful adversarial process in the certification and adjudication of *Silva-Trevino*, the A.G. failed to consider critical legislative history and issued a decision based on a misreading of agency and circuit precedent. The A.G.'s failings resulted in an arbitrary and capricious interpretation of the INA and thus, even if the statute were

[7] The INA defines "conviction" as either a "formal judgment of guilt," or a judicially mandated penalty coupled with a finding of guilt, a plea to guilt, or an admission to "sufficient facts warranting a finding of guilt." 8 U.S.C. § 1101(a)(48)(A). This formulation was adopted by Congress, however, to address the distinct issue of whether a deferred adjudication constitutes a conviction for immigration purposes. *Uritsky v. Gonzalez*, 399 F.3d 728, 733 (6th Cir. 2005). Moreover, the language of the definition clearly supports Petitioner and Amici's arguments insofar as it is wholly tied to what a judge or jury in federal or state criminal courts found or ordered.

ambiguous, which it is not, this Court should not defer to the agency's interpretation.

A. The Attorney General Issued *Silva-Trevino* Without Even the Most Basic Adjudicative Procedural Protections or Meaningful Participation by Mr. Silva-Trevino or Other Interested Parties

As set forth in detail in Petitioner's brief, *see* Pet'r's Br. at 5, the procedures employed by the A.G. in Mr. Silva-Trevino's case deprived him of the most basic opportunity to participate in the proceedings and resulted in an ill-considered and arbitrary decision. As a result of the cryptic *sua sponte* certification order, which was not publicized, neither Mr. Silva-Trevino nor other key stakeholders had any meaningful opportunity to participate in the proceedings. *Id.* at 5–6. Likewise, the A.G. ignored Mr. Silva-Trevino's requests to 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; *see also* Pet'r's Br. at 7–8. In addition, there are some indications that the A.G. engaged in *ex parte* communications with DHS—an allegation the Respondent has failed to deny. Pet'r's Br. at 10–12, 44–48. In short, the procedures employed by the A.G. did not resemble, in the least, the established mechanism utilized to ensure a fair and reliable adjudicative process.

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 an adversarial system relies on parties to frame issues); *Chike v. INS*, 948 F.2d 961, 962 (5th Cir. 1991) (failing to give notice of briefing schedule denied Petitioner opportunity to be heard).

Derailing the adversarial process led to an uninformed and ill-considered decision, *see* discussion *supra* at Section 1.A, on an issue affecting countless immigrants. In *Jean-Louis*, the Third Circuit concluded that this "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." 582 F.3d at 470 n.11.

B. The 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 through adjudication, the need to fully understand the issues—along with basic principles of fairness and transparency—should compel the A.G. to seek out interested parties' arguments. In the past, this is precisely

what A.G.s have done when considering major decisions under the rarely used certification mechanism. A.G. Mukasey deviated sharply from his predecessors' practices of requesting and considering briefs (including amicus briefs) for certified cases. *See*, *e.g.*, *Matter of R-A-*, 24 I&N Dec. 629, 630 n.1 (AG 2008) (describing how A.G. Ashcroft provided an opportunity for additional briefing following certification); *Matter of E-L-H-*, 23 I&N Dec. 700, 704 (AG 2004) (including A.G. Reno's order for briefing following certification); *Matter of Soriano*, 21 I&N Dec. 516, 540 (AG 1997) (addressing the points raised in amicus briefs solicited by A.G. Reno prior to issuing her decision); *Matter of Hernandez-Casillas*, 20 I&N Dec. 262, 286, 289 & 291 (AG 1990) (discussing amicus brief submitted upon referral for certification).

However, adjudication is not the only method the A.G. has at his disposal. In cases where the A.G. intends to reformulate well-settled and established methodology, rule-making may be a more appropriate exercise of the A.G.'s power. In contrast to adjudication, rule-making provides significant procedural protections, which were evidently lacking in the *Silva-Trevino* certification process. *See* Pet'r's Br. at 6. In 2009, A.G. Holder's impetus to vacate former A.G. Mukasey's decision in *Matter of Compean*, 24 I&N Dec. 710 (AG 2009), was based on similar process concerns. A.G.

Holder indicated that "the process used in *Compean* [did not] result[…] in a thorough consideration of the issues involved, particularly for a decision that implemented a new, complex framework in place of a well-established and longstanding practice." Laura S. 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, 1775 n.51 (2010) (citing *Compean*, 25 I&N Dec. at 2). As in *Silva-Trevino*, there was insufficient transparency and publicity to interested parties about the opportunity to brief issues in *Compean*. *Id.* Similar to *Compean*, vacating the A.G.'s opinion in *Silva-Trevino* would remedy the deficient procedure leading to the decision.

C. Without Any Process to Aid in Interpretation, the Attorney General's Decision Ignored Critical Legislative History and Misinterpreted Controlling Principles of Law

Under *Chevron*, deference is not owed to agency interpretations that are arbitrary or capricious. *Chevron*, 467 U.S. at 844. When evaluating 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." *Chevron*, 467 U.S. 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"). An agency decision is arbitrary and capricious if, for instance, it "entirely failed to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43.

The lack of briefing and other procedural defects set forth *supra*, prevented the A.G. from considering many "important aspect[s] of the problem." *State Farm*, 463 U.S. at 43. Specifically, the A.G. failed to consider legislative history that makes clear Congress's intention to prevent immigration judges from re-adjudicating the facts underlying convictions. *See supra* Section I.A (discussing relevant legislative history). The A.G. 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*

Jean-Louis, 582 F.3d at 477. In addition, he also failed to perceive the remarkable uniformity among circuit courts applying the categorical and modified categorical approaches, instead relying on one ill-reasoned case, *Ali*, 521 F.3d at 743, *see* discussion *supra* at Section 1.A, which was in 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). These omissions and errors demonstrate that the A.G. failed to develop relevant information about, and articulate a satisfactory explanation for, his novel approach to CIMT determinations. The A.G.'s interpretation is therefore arbitrary and capricious, and cannot be afforded deference by this Court.

IV. *SILVA-TREVINO*'S UNWORKABLE STANDARD SEVERELY DISRUPTS THE ORDERLY DISPOSITION OF CASES WITHIN THE CRIMINAL JUSTICE SYSTEMS

Silva-Trevino creates confusion within the criminal justice system and renders judges, defendants, defense attorneys and prosecutors unable to predict what immigration consequences will attach to a contemplated criminal disposition. The A.G. permits consideration of any kind of evidence whenever an immigration judge, in his or her own individual judgment, makes the subjective determination that "doing so is necessary and appropriate to ensure proper application of the Act's moral turpitude

provisions." *Silva-Trevino*, 24 I&N Dec. at 699, 704. Although the A.G. acknowledges the need for noncitizen defendants to have "notice of which criminal convictions will trigger immigration consequences," *id.* at 688, the position that he advocates accomplishes precisely the opposite result.

Under *Silva-Trevino*, two individuals convicted under the same criminal statute may face widely diverging immigration consequences if their respective immigration judges arrive at different conclusions as to the need to resort to information outside the record of conviction, or when such inquiry yields evidence outside the record that is substantially different in quantity or quality in each case. The decision at no point defines or circumscribes its "necessary and appropriate" evidentiary standard.

In contrast, under the categorical and modified categorical approach, two individuals convicted of the same crime may reliably predict whether the disposition of their criminal cases will result in removal, by looking to whether the courts have determined that the statute of conviction or similar statutes categorically involves moral turpitude. An inability to reasonably predict the immigration consequences of a guilty plea will lead defendants to eschew pleas in favor of going to trial, thereby compromising the orderly disposition of cases within the criminal justice system.

This concern is not hypothetical. In *Padilla v. Kentucky*, 130 S.Ct. 1473, 1483 (2010), the Supreme Court recognized that noncitizen criminal defendants' paramount concern is often to avoid conviction of deportable offenses and preserve their eligibility for discretionary relief. Accordingly, the prevailing professional norms require defense counsel to advise their clients of such consequences. *Id.* The purpose of enforcing a duty to advise is not only to ensure that defendants are aware of the consequences of their convictions, but also to benefit the criminal justice system as a whole. As the Supreme Court explained, 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 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.

V. FORCING RESPONDENTS, MANY OF WHOM ARE DETAINED AND UNREPRESENTED, TO RELITIGATE THE FACTS OF CONVICTIONS, WHICH MAY BE DECADES OLD, CONTRAVENES NOTIONS OF PRACTICABILITY, UNIFORMITY AND DUE PROCESS

While Mr. Silva-Trevino himself is represented and now out of detention, the *Silva-Trevino* framework applies broadly and often requires ill-equipped immigrants to relitigate the facts underlying convictions in fora that lack adequate procedural safeguards, violating fundamental constitutional principles of practicability, uniformity and due process.[8]

The categorical analysis has long operated as a fair and predictable process for making CIMT determinations. *See* discussion *supra* at Section 1.A. 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) (internal quotation marks and

[8] This Court has held that due process protections do not apply to requests for discretionary relief in immigration court, such as Petitioner's application for adjustment of status. *See United States v. Lopez-Ortiz*¸ 313 F.3d 225, 231 (5th Cir. 2002). However, the *Silva-Trevino* standard, if upheld, is also applicable to determine deportability under 8 U.S.C. § 1227(a)(2)(A)(i) & (ii). *Guevara-Alfaro*, 25 I&N Dec. 417. In such circumstances, Respondents are entitled to the protections afforded by the Due Process Clause of the Fifth Amendment. *Id.*; *see Animashaun v. INS*, 990 F.2d 234, 238 (5th Cir. 1993) ("It is clearly established that the Fifth Amendment of the United States Constitution entitles aliens to due process of law in deportation proceedings."). Amici are aware of just such a case pending before this Court—raising the issue of the applicability of *Silva-Trevino* in the deportability context. Petition for Review, Miller v. Holder, No. 11-60682 (5th Cir. Oct. 5, 2011).

citation omitted) and as a "harsh" and "drastic measure," *Padilla*, 130 S.Ct. at 1478 (internal quotation and citation omitted)—without the 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 that often occurred years or even decades in the past.

The categorical approach, in contrast, 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.

In fiscal year 2010, fifty-seven percent of respondents in immigration court appeared pro se. EXEC. OFFICE FOR IMMIGRATION REV., FY 2010 STATISTICAL YEAR BOOK, at G1 fig.9 (2011). Forty-four percent of all respondents were in detention in 2010, *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., IMPROVING EFFICIENCY AND PROMOTING JUSTICE IN THE IMMIGRATION SYSTEM 1 (May 2008), *available at* http://www.vera.org/download?file=1780/LOP%2B

Evaluation_May2008_final.pdf.

Moreover, detained pro se respondents are routinely transferred far from the locus of their crime and place of residence to detention facilities in remote locations,[9] severely restricting their ability to investigate and produce the 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."). By requiring many respondents to establish facts underlying old convictions long after memories have faded and witnesses and other evidence are no longer available, *Silva-Trevino* offends basic notions of fair play and due process.

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

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Review and reverse the A.G. opinion in this case that overturned a century of federal court and BIA precedent after a severely flawed and inadequate agency process.

Respectfully submitted,

_____/s/_____

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I hereby certify that on November 21, 2011, I electronically filed the foregoing BRIEF OF *AMICI CURIAE* CATHOLIC CHARITES OF DALLAS, IMMIGRANT DEFENSE PROJECT, IMMIGRATION JUSTICE CLINIC OF THE BENJAMIN N. CARDOZO SCHOOL OF LAW, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, AND THE STEWART H. SMITH LAW CLINIC AND CENTER FOR SOCIAL JUSTICE OF LOYOLA UNIVERSITY NEW ORLEANS COLLEGE OF LAW IN SUPPORT OF PETITIONER AND REVERSAL OF THE DECISION OF THE BOARD OF IMMIGRATION APPEALS with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

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