IN THE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10-2382

RICARDO A. PRUDENCIO,
A 096 447 990,
Petitioner,
v.
ERIC H. HOLDER, JR., Attorney General,
Respondent.

Petition for Review of the Board of Immigration Appeals in file A 096 447 990

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

Peter L. Markowitz
KATHRYN O. GREENBERG
IMMIGRATION JUSTICE CLINIC
BENJAMIN N. CARDOZO SCHOOL OF LAW
55 Fifth Avenue
New York, NY 10003
(212) 790-0340
Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Local Rule 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 operation 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% of more of its stock.

Kathryn O. Greenberg 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.

This case does not arise out of a bankruptcy proceeding. *Amici* are unaware if any corporation or other publicly held entity has a direct financial interest in the outcome of the litigation.

STATUTORY ADDENDUM

Pursuant to Rule 28(f) of the Federal Rules of Appellate Procedure, an addendum containing relevant statutes and regulations is appended to this brief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

INTEREST OF *AMICI*

Amici are among the nation's leading non-profit organizations with specialized expertise in the interrelationship of criminal and immigration law. *Amici* assist thousands of immigrants and attorneys each year by 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, including cases implicating *Silva-Trevino* and other crime-related issues.[1]

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 criminal

[1] *See, e.g.*, Br. of NYSDA Immigrant Defense Project as *Amicus Curiae*, Lopiccolo v. Gonzales, No. 07-1245 (4th Cir. Motion for Leave to Appear as Amicus granted July 12, 2007); *see also, e.g.*, Br. 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, ILRC and NLG-NIP); Br. for Immigrant Defense Project, et al. as *Amici Curiae* Supporting Petitioner, Zamudio-Ramirez v. Holder, No. 09-71083 (9th Cir. remanded Apr. 13, 2010) (brief regarding *Silva-Trevino* submitted by current *amici*); Br. for Immigrant Defense Project, et al. as *Amici Curiae* Supporting Petitioner, Castruita-Gomez v. Holder, No. 06-74582, (9th Cir. 2010) (same).

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

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, and the Kathryn O. Greenberg Immigration Justice Clinic of the Benjamin N. Cardozo School of Law submit this brief as *amici curiae* in support of Petitioner Ricardo A. Prudencio. *Amici* authored and funded this brief independent of party's counsel or any other party or person.

PRELIMINARY STATEMENT

Amici offer this brief to supplement the arguments set forth by Petitioner with a discussion of significant legal and practical concerns arising from former Attorney General Mukasey's erroneous decision in *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (AG 2008), regarding the method used to determine whether a given criminal conviction is a "crime involving moral turpitude" ("CIMT"). *Amici* support Petitioner's arguments that the Board of Immigration Appeals ("BIA") erred in applying Steps One and Two of the *Silva-Trevino* analysis—which largely mirror the pre-*Silva*-

Trevino framework. Because Petitioner's conviction is categorically not a CIMT under Steps One and Two, this Court need not address the validity of *Silva-Trevino's* controversial Step Three, which permits relitigation of the facts underlying a state or federal criminal conviction. However, to the extent this Court finds it necessary to rule on the validity of *Silva-Trevino*, *amici* urge this Court to reject the framework entirely and reaffirm the importance of the categorical approach.

Silva-Trevino is irreconcilable with decades of agency and federal court precedent grounded in the unambiguous commands of the immigration laws and creates an analytic framework that raises serious constitutional questions of due process, fairness, and uniformity by requiring immigration officials to make *de novo* findings of fact regarding the circumstances underlying often decades-old criminal convictions. Furthermore, *Silva-Trevino* purports to dictate to the federal courts how to analyze federal and state criminal statutes, a matter beyond the agency's expertise. *Amici* therefore urge this Court to terminate Mr. Prudencio's removal proceedings and ask that, should the Court reach the issue of whether it is permissible to go beyond a categorical inquiry in determining whether Mr. Prudencio's conviction is a CIMT, it join numerous other courts in reaffirming the importance of the categorical approach for moral turpitude determinations.

ARGUMENT

The former Attorney General's eleventh hour decision in *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (AG 2008), which was issued without the benefit of briefing on the issue ultimately decided,[2] upended a century of precedent from the agency and federal courts regarding one of the bedrock principles of immigration law: the categorical approach used to assess the immigration consequences of criminal convictions. *See* discussion *infra* at

[2] As the Third Circuit noted in *Jean-Louis*, the Attorney General's refusal to notify Mr. Silva-Trevino's counsel or any other stakeholders of the issues under review pursuant to his certification, and his concomitant failure to invite or allow any briefing, also serve to reduce the deference due the decision. *Jean-Louis v. Att'y Gen. of U.S.*, 582 F.3d 462, 470 n.11 (3d Cir. 2009), *petition for reh'g denied* (Apr. 5, 2010); *see also* Laura Trice, *Adjudication By Fiat: The Need For Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions*, 85 N.Y.U. L. Rev. 1766, 1776-80 (2010). *Amici*, with other organizations, protested the unusually secretive process in a brief submitted in support of Mr. Silva-Trevino's motion for reconsideration. *Jean-Louis*, 582 F.3d at 470 n.11 (citing Br. of *Amici Curiae* American Immigration Lawyers Ass'n, Florence Immigrant and Refugee Rights Project, Immigrant Defense Project, Immigrant Legal Resource Ctr., Nat'l Immigration Project of the Nat'l Lawyers Guild, Nat'l Immigrant Justice Ctr., Refugio del Rio Grande, Inc., and Washington Defenders Ass'n Immigration Project in Support of Reconsideration, filed Dec. 5, 2008, *available at* http:// www.immigrantdefenseproject.org/docs/08 SilvaTrevinoAmicusBrief.pdf). The motion to reconsider was summarily denied in a five-sentence decision issued two days before the Attorney General left office. *Matter of Silva-Trevino*, Order No. 3034-2009 (A.G. 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.*

Part I. The categorical approach requires the reviewing court to look to the elements and the nature of an offense to determine whether the offense is a crime involving moral turpitude ("CIMT") and prohibits the Court from relitigating the facts underlying a criminal conviction. *Castle v. Immigration and Naturalization Serv.*, 541 F.2d 1064, 1066 (4th Cir. 1976) (finding that Congress clearly intended that the agency focus on the "inherent nature of the offense rather than the circumstances surrounding the transgression."); *cf. Garcia v. Gonzales*, 455 F.3d 465, 468 (4th Cir. 2006) (applying categorical analysis to determine whether a conviction is an aggravated felony); *Bejarano-Urrutia v. Gonzales*, 413 F.3d 444, 446 (4th Cir. 2005) (same).

In an entirely unforeseen break with precedent, *Silva-Trevino* prescribed exactly the opposite approach; it purported to interpret the Immigration and Nationality Act (INA) to permit immigration judges to go beyond the evidence actually passed on in the criminal proceeding to come to their own assessment about the conduct underlying a conviction they believe may be a CIMT. *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (AG 2008). As the Third Circuit held in *Jean-Louis v. Att'y Gen. of U.S.*, 582 F.3d 462, 473 (3d Cir. 2009), *petition for reh'g denied* (Apr. 5, 2010), the Attorney General's decision "is bottomed on an impermissible reading of the

statute, which . . . speaks with the requisite clarity." Among other flaws, *Silva-Trevino* fundamentally misinterprets the statute by failing to accord proper significance to the Immigration and Nationality Act's ("INA") requirement that a respondent be "convicted" of a CIMT, 8 U.S.C. § 1227(a)(2)(A), an interpretive error evidenced by the century of jurisprudence prohibiting the sort of conduct-based inquiry that the *Silva-Trevino* decision promotes. Although *Silva-Trevino*'s analytical framework seeks protection in doctrines of deference to the agency, the subject at issue—the method employed to determine the nature of a state or federal criminal conviction—does not implicate the agency's expertise, and the Attorney General's contradiction of plain statutory language would not be entitled to deference even if it did. *Silva-Trevino* also raises serious constitutional questions regarding the due process rights of immigrants in agency proceedings and the Sixth Amendment rights of immigrants in criminal proceedings.

I. SILVA-*TREVINO* CONTROVERTS THE UNAMBIGUOUS LANGUAGE OF THE INA.

Silva-Trevino runs contrary to the plain language of the INA by ignoring statutory language that unambiguously compels a categorical approach to determine whether a criminal conviction for a CIMT may be grounds for deportability. The novel interpretation it sets forth diverges from

the statutory language by misconstruing the text in two key ways. First, it simply ignores the statutory requirement of a "conviction." Second, *Silva-Trevino* incorrectly focuses on the word "involving" within the unitary term of art "crime involving moral turpitude" (CIMT), attaching improper significance to that word. As evidenced by the overwhelming weight of federal court authority—both prior and subsequent to *Silva-Trevino*—the decision contravenes the statute's unambiguous requirement that CIMTs be analyzed categorically.

A. *Silva-Trevino* Ignores the Unambiguous Statutory Requirement of a "Conviction" of a Removable Offense

The INA provides that a lawful permanent resident like Petitioner "who . . . is *convicted* of a crime involving moral turpitude committed within five years . . . after the date of admission . . . is deportable," and further provides that a noncitizen "who at any time after admission is *convicted* of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct . . . is deportable." 8 U.S.C. § 1227(a)(2)(A)(i)-(ii) (emphasis added).

Silva-Trevino's most fundamental flaw is ignoring Congress' clear mandate to determine removability under this ground by analyzing the nature of a noncitizen's "conviction" rather than his or her conduct. As the agency itself has explained:

> For nearly a century, the Federal circuit courts of appeals have held that where a ground of deportability is premised on the existence of a 'conviction' for a particular type of crime, the focus of the immigration authorities must be on the crime of which the alien was *convicted*, to the exclusion of any other criminal or morally reprehensible acts he may have *committed.*

Matter of Velazquez-Herrera, 24 I. & N. Dec. 503, 513 (BIA 2008). This long history confirms that the term "convicted" prohibits courts from considering the underlying facts or conduct when assessing whether a conviction constitutes a CIMT. *See Jean-Louis*, 582 F.3d at 473 n.13. For nearly one hundred years, this view has prevailed in virtually every federal circuit court and the Board of Immigration Appeals ("BIA"). *See United States ex rel. Mylius v. Uhl*, 210 F. 860, 862-63 (2d Cir. 1914) (confining the CIMT inquiry to the record of conviction and not permitting an investigation into the conduct behind the conviction); *see also*, *Mendoza v. Holder*, 623 F.3d 1299, 1302 (9th Cir. 2010) (same); *Serrato-Soto v. Holder*, 570 F.3d 686, 689 (6th Cir. 2009) (same); *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 n.4 (8th Cir. 2006) (same); *Padilla v. Gonzales*, 397 F.3d 1016, 1019 (7th Cir. 2005) (same); *Partyka v. Att'y Gen. of the U.S.*, 417 F.3d 408, 411–12 (3d Cir. 2005); *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.*

Immigration and Naturalization Serv., 541 F.2d 1064, 1066 (4th Cir. 1976) (same); *Matter of T-***,** 2 I. & N. Dec. 22, 25 (BIA 1944) (same).

Like virtually all other circuit courts, this Court limits the CIMT inquiry to "[t]he inherent nature of the offense rather than the circumstances surrounding the transgression." *Castle v. Immigration and Naturalization Serv.*, 541 F.2d 1064, 1066 (4th Cir. 1976); *see also Yousefi v. U.S. I.N.S.*, 260 F.3d 318, 324 (4th Cir. 2001) (explaining that the court must look "to the elements of the crime rather than the facts surrounding each crime."). This Court has explicitly rejected the argument that the INA supports "look[ing] beyond the record of conviction to the facts surrounding the actual commission of the offense to determine whether moral turpitude was involved," explaining that "the focus of the statute is on the type of crime committed rather than on the factual context surrounding the actual commission of the offense." *Castle*, 541 F.2d at 1066 n.5. For well over fifty years prior to *Silva-Trevino*, the BIA similarly looked to the elements of the criminal statute—and not the underlying facts—where it predicated immigration penalties on convictions. *See Matter of T-*, 3 I. & N. Dec. 641, 642-43 (BIA 1949) ("In reaching a conclusion that this crime involves moral turpitude . . . the nature of the crime is conclusively established by the record of conviction. This rule precludes inquiry outside the record of conviction as

to facts favorable and unfavorable to the alien."); *accord Matter of Torres-Varela*, 23 I. & N. Dec. 78, 89 (BIA 2001); *Matter of Pichardo-Sufren*, 21 I. & N. Dec. 330, 334-35 (BIA 1996).

The basic structure of the immigration statute predicating certain immigration consequences on the nature of convictions—and not on a relitigation of the facts underlying such convictions—has remained unchanged since the categorical analysis was first articulated by courts in the early twentieth century. *See, e.g., United States ex rel. Guarino v. Uhl*, 107 F.2d 399, 400 (2d Cir. 1939) (explaining that officials may not consider the particular conduct for which the alien has been convicted); *United States ex rel. Robinson v. Day*, 51 F.2d 1022, 1023 (2d Cir. 1931) ("Neither the immigration officials, nor we, may consider the circumstances under which the crime was in fact committed. When by its definition it does not necessarily involve moral turpitude, *the alien cannot be deported because in the particular instance his conduct was immoral*." (citations omitted) (emphasis added)). The federal courts' view of the Congress' intent behind the statute was also adopted long ago by the Attorney General in one of his first decisions on immigration law. *See Op. of Hon. Cummings*, 39 Op. Atty Gen. 95, 96-97 (AG 1937) ("It is not permissible to go behind the record of that court to determine purpose, motive, or knowledge as indicative of moral

character.").[3]

Breaking with almost a century of agreement about what the INA requires, *Silva-Trevino* instead asserts that the statute may be understood to authorize individualized inquiry to determine whether unproven facts underlying a conviction involve moral turpitude. *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (AG 2008). The Attorney General justifies his decision by asserting the need to create uniformity since he claims the underlying analyses in the circuits' decisions implementing the categorical and modified categorical approach vary significantly. *Id*. at 693–95. However, while the cases sometimes use different terms to describe the approach, the pertinent analysis is essentially uniform.[4] If the statute criminalizes one set of elements, the courts simply look to the minimum conduct necessary to offend the statute and determine whether that conduct satisfies the definition of CIMT—if it does, the crime is categorically a CIMT and if it does not, the

[3] Notably, in enacting the modern INA in 1952, Congress reaffirmed the importance of categorical determinations of deportability when it considered and rejected a proposal to allow individualized determinations of immigrants' deportability based on criminal conduct. *See* Senate Bill 2250 § 241(a)(4) 82d Cong. (2d Sess. 1952); *see also* 98 Cong. Rec. S5420, 5421 (1952) (statement of Sen. Douglas) (expressing concern that federal court review "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 undersirability.").

[4] *See* Section I(C) for a more in-depth discussion of this issue, including analysis of the outlier Seventh Circuit decision, *Mata-Guerrero v. Holder*, 627 F.3d 256 (7th Cir. 2010).

crime is categorically not a CIMT ("traditional categorical approach"). If the statute criminalizes different sets of elements, some of which are CIMTs and some of which are not (a "divisible statute"), courts may inquire into the limited set of documents which constitute the record of conviction for the sole purpose of determining which set of elements the person was convicted of violating ("modified categorical approach"). A review of the language by which the circuit courts articulate the categorical approach reveals the former Attorney General's erroneous finding of disuniformity.[5]

Further evidence of the impropriety of *Silva-Trevino*'s inattention to the statute's "conviction" requirement is the fact that, in similar provisions, the same statute clearly distinguishes between contexts in which "admissions" rather than "convictions" can be the basis for immigration penalties. Elsewhere, the INA provides that "any alien convicted of, or who *admits* having committed, or who *admits committing acts* which constitute the essential elements of . . . a crime involving moral turpitude (other than a purely political offense) or attempt or conspiracy to commit such a crime" is

[5] *See, e.g.*, *Wala v. Mukasey*, 511 F.3d 102, 107-108 (2d Cir. 2007); *Vuksanovic v. United States AG*, 439 F.3d 1308, 1311 (11th Cir. 2006); *Recio-Prado v. Gonzales*, 456 F.3d 819, 821 (8th Cir. 2006); *Jaadan v. Gonzales*, 211 Fed. Appx. 422, 427 (6th Cir. 2006); *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1017-1020 (9th Cir. 2005); *Partyka v. AG of the United States*, 417 F.3d 408, 411-412 (3d Cir. 2005); *Smalley v. Ashcroft*, 354 F.3d 332, 336 (5th Cir. 2003); *Maghsoudi v. INS*, 181 F.3d 8, 14 (1st Cir. 1999).

inadmissible. *See* 8 U.S.C. §1182(a)(2)(A)(i)(I) (emphasis added). This language, which is not applicable in the case at bar, distinguishes between, and disjunctively lists, convictions and admissions of acts as bases for removal. Pointing to these provisions, the Attorney General ignores the logical import of the different terms and instead suggests "the text actually cuts in different directions." 24 I. & N. Dec. at 693. In contrast to the "conviction" language, the decision asserts that the reference to "aliens who admit 'committing' certain 'acts' seem[s] to call for, or at least allow, inquiry into the particularized facts of the crime." *Id*. But the language relating to "admissions," "commissions," and "acts" only reinforces the distinction; the canon of *expresio unius* counsels that where Congress chooses to predicate immigration consequences on "convictions," as in the provision at 8 U.S.C. § 1227(a)(2)(A)(i)-(ii), and *not* on the range of related acts described in 8 U.S.C. § 1182(a)(2)(A)(i)(I), it must mean to limit courts' review to the individual's actual conviction. *Cf. Velazquez-Herrera,* 24 I. & N. Dec. 503, 513 (BIA 2008). Indeed, where a person has been convicted, courts may not use admissions to find the individual removable based on an offense for which he was not convicted. *See*, *e.g*., *Matter of Seda*, 17 I. & N. Dec. 550, 554 (BIA 1980); *Matter of Winter*, 12 I. & N. Dec. 638, 642 (BIA 1968).

Moreover, even with regard to determinations of inadmissibility based on admissions, the inquiry must remain focused on the nature of the criminal statute a respondent admits to violating. The BIA's longstanding interpretation of the admission requirements confirms this reading of the statute. *See, e.g.*, *Matter of K-*, 7 I. & N. Dec. 594, 597-98 (BIA 1957); *Matter of E-N-*, 7 I. & N. Dec. 153, 155 (BIA 1956). These requirements make clear that even in the inadmissibility context, the inquiry remains focused on the intrinsic nature of the particular criminal statute the respondent admits offending rather than on a noncitizen's particular conduct. Thus, the language relating to "admissions," "commissions" and "acts" does not alter the requirements surrounding "convictions." *See Jean-Louis*, 582 F.3d at 476–77.

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

The former Attorney General also attempts to support his opinion by pointing to statutory language within the term "crime involving moral turpitude," explaining that "use of the word 'involving'" indicates that courts must look into the facts of the actual conduct, since "moral turpitude is not an element of an offense" and "[t]o limit the information available to immigration judges in such cases means that they will be unable to

determine whether an alien's crime actually 'involv[ed]' moral turpitude." 24 I. & N. Dec. at 693, 699 (second alteration in original). This attempt to justify abandonment of a century of precedent interpreting the phrase "crime involving moral turpitude" is simply untenable because for just as long, the phrase has been understood as a unitary term of art. Moreover, as the Supreme Court has recently reaffirmed, the use of the word "involving" to modify "crime" in the INA does *not* invite, let alone require, inquiry into underlying facts. *See James v. United States*, 550 U.S. 192, 202–04 (2007).

First, as the Attorney General was well aware, the term "CIMT" is a unitary term of art with "deep roots" and decades of federal and agency history. *See Jordan v. De George*, 341 U.S. 223, 227 (1951); *Jean-Louis*, 582 F.3d at 477. Federal courts and the BIA have consistently adhered to a generic definition of this unitary term for decades, defining it, time and again, as inherent in convictions proscribing "baseness or depravity contrary to accepted moral standards." *Castle*, 541 F.2d at 1066 (citing *Guerrero de Nodahl v. INS*, 407 F.2d 1405, 1406 (9th Cir. 1969)); *see also, e.g.*, *Uppal v. Holder*, 605 F.3d 712, 719 (9th Cir. 2010); *Matter of Solon*, 24 I. & N. Dec. 239, 240 (BIA 2007); *see also Matter of Torres-Varela*, 23 I. & N. Dec. 78, 83 (BIA 2001); *Matter of Fulaau*, 21 I. & N. Dec. 475, 477 (BIA 1996); *Matter of Danesh*, 19 I. & N. Dec. 669, 670 (BIA 1988); *Matter of Baker*, 15

I. & N. Dec. 50, 51 (BIA 1974). As the long-standing and uniform use of the term "CIMT" makes clear, this phrase refers to a class of criminal offenses and not to individual circumstances in which those statutes are violated.[6]

In addition, the Attorney General's interpretation was inconsistent with Supreme Court authority holding that the phrase "involves conduct that presents a serious potential risk of physical injury to another" in the Armed Career Criminal Act's (ACCA) definition of the generic term of art "violent felony," 18 U.S.C. § 924(e)(2)(B), called for a purely categorical examination. *James v. United States*, 550 U.S. 192, 202–04 (2007). Few, if any, criminal statutes specify as an element of the offense that the *actus reus*

[6] *Silva-Trevino* also points to the language in the deportability provisions that make the conviction-based deportability consequences relating to crimes involving moral turpitude hinge on the immigrant's "date of admission," 24 I. & N. Dec. at 700, a fact not ordinarily reflected in the record of conviction. But this is a spurious reason to depart from the categorical approach in the CIMT context. Most conviction-related grounds require the conviction to have occurred "after admission," *see* 8 U.S.C. § 1227(a)(2)(A)(iii), (B), (C), (E), so this issue of the fact of an earlier admission is not unique to convictions for crimes involving moral turpitude; nonetheless the decision is careful to state that its analysis does not apply to other categories of removability. Many aggravated felony provisions, moreover, contain analogous limiting provisions, such as the "theft" aggravated felony category that requires a one-year sentence to have been imposed. *See* 8 U.S.C. § 1101(a)(43)(G). This does not change the fact that courts must apply a categorical and modified categorical approach to the determination of whether the person was convicted of a "theft" aggravated felony. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 187–89 (2007).

"involve a serious potential risk of . . . injury"—just as few, if any, statutes list "turpitude" as an element of an offense. Nonetheless the Court instructed that in determining whether a given offense is a violent felony under ACCA, "we consider whether the *elements of the offense* are of the type that would justify its inclusion within the ['involves a serious risk'] provision, without inquiring into the specific conduct of this particular offender." *Id*. at 202.

To the extent *James* might have left any room for doubt about the propriety of the Attorney General's reliance on the word "involving," the Supreme Court removed it in *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009). In *Nijhawan*, the Court affirmed, in the context of interpreting the criminal removal grounds of the INA itself, that neither the use of the word "involving" in the generic definition of an offense, nor the fact that a generic descriptor is not itself an element of a state or federal criminal offense, justifies departing from the categorical approach. 129 S. Ct. at 2302 (finding that the phrase "involves fraud or deceit" at 8 U.S.C. § 1101(a)(43)(M)(i) referred generically to "fraud or deceit crimes"). [7]

[7] While *Nijhawan* held that the portion of the aggravated felony definition requiring that a fraud or deceit crime involve a loss to the victim of over $10,000 called for a "circumstance specific" inquiry not limited to the elements of the statute of conviction, it did so because the phrase "offense that . . . involves fraud or deceit" went on to specify "*in which* the loss to the

C. Federal Circuit Court Authority Since *Silva-Trevino* Demonstrates its Critical Misinterpretation of the INA.

Silva-Trevino's misapprehension of the statute is evidenced by the subsequent federal court decisions ignoring and criticizing its misguided framework. Two circuits have already explicitly rejected *Silva-Trevino's* new framework for moral turpitude determinations. The Third Circuit 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). Similarly, in 2010, the Eighth Circuit concluded that it is still "bound by . . . circuit precedent, and to the extent *Silva-Trevino* is inconsistent, we adhere to circuit law."[8] *Guardado-Garcia v. Holder*, 615 F.3d 900, 902 (8th Cir. 2010). These circuit court opinions, among other decisions discussed *infra*, demonstrate

---

victim or victims." 129 S.Ct at 2301. ("The words 'in which' (which modify "offense") can refer to the conduct involved "*in"* the commission of the offense of conviction, rather than to the elements *of* the offense."). The CIMT grounds for removability contain no such language. *See Jean-Louis*, 582 F.3d at 480 ("*Nijhawan* . . . [does] not support abandoning our established methodology [for CIMTs]." *Jean-Louis*, 582 F.3d at 480 (citing *Nijhawan v. Atty'Gen. of U.S.*, 523 F.3d 387, 391-92 (3d Cir. 2008), *aff'd sub nom. Nijhawan v. Holder*, 129 S. Ct. 2009)).

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

Silva-Trevino's flawed reasoning and divergence from the plain language and established meaning of the INA.

Other circuits have 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); *Keungne v. U.S. Atty. Gen.*, 561 F.3d 1281, 1284 (11th Cir. 2009); *Ahmed v. Holder*, 324 Fed.Appx. 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., 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) (addressing Ninth Circuit Court of Appeals decisions that fail to acknowledge *Silva-Trevino's* third step). These intervening decisions make increasingly obvious *Silva-Trevino's* incompatibility with the INA and further demonstrate why this Court should reaffirm its commitment to the categorical approach. Moreover, the BIA's recent instructions to immigration courts to continue to apply the *Silva-Trevino* framework in the absence of controlling authority rejecting it, make it all the more urgent that this Court act now to reaffirm the categorical approach. *See Guevara-Alfaro*, 25 I. & N. Dec. 417.

More than two years after *Silva-Trevino*, the only circuit to cite positively to the decision is the Seventh—which was simply adhering to its own misguided precedent. *See Mata-Guerrero v. Holder*, 627 F.3d 256 (7th Cir. 2010) (reaffirming its pre-*Silva-Trevino* decision in *Ali v. Mukasey* 521 F.3d 737 (7th Cir. 2008)). For the reasons set forth *supra* at Sections I(A) & (B), the Seventh Circuit's outlier position is unjustifiable.

II NO DEFERENCE IS DUE TO THE INTERPRETIVE FRAMEWORK SET FORTH IN *SILVA-TREVINO*

This Court owes no deference to *Silva-Trevino's* untenable framework for determining the whether a state or federal criminal conviction is a crime involving moral turpitude. Under the *Chevron* doctrine of administrative deference, federal courts generally afford deference to agency interpretations of their own governing statutes. *Afeta v. Gonzales*, 467 F.3d 402, 404 (4th Cir. 2006) (explaining *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984)). At the threshold, sometimes referred to as "*Chevron* Step Zero," deference is only warranted "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law." *Gonzales v. Or.*, 546 U.S. 243, 255 (2006). If the relevant statute does delegate interpretive authority to the agency, "*Chevron* Step One" proceeds to ask whether Congress spoke to the precise question and whether the statute that the agency interpreted is clear and unambiguous. *Chevron*, 467

U.S. 837, 842-43 (1984).[9] If the language of the statute is clear and unambiguous, a contrary agency interpretation receives no deference. *Id*.

Silva-Trevino's radical new methodology for analyzing criminal statutes is owed no deference under *Chevron* because Congress did not delegate to the agency any special authority to interpret criminal statutes. In any event, Congress spoke with the requisite clarity in conditioning deportability on a conviction—not conduct—that constitutes a CIMT and thus required the categorical approach. *See* discussion *supra* at Section I. As a result, this Court should not defer to *Silva-Trevino*.

In regard to Step Zero, as a matter of law and logic, federal courts do not owe deference to the BIA's interpretation of state and federal criminal statutes. *See Garcia v. Gonzales*, 455 F.3d 465, 467 (4th Cir. 2006) (holding that where the Board of Immigration Appeals "construes statutes over which

[9] At "*Chevron* Step Two," if the language of the particular statute at issue is silent or ambiguous and the interpretation of the relevant statute is delegated to the agency, the reviewing court limits its review of the agency interpretation to whether its construction of the statute or language at issue is a permissible one. *Chevron*, 467 U.S. at 843. Even assuming *arguendo* that *Chevron* Step Two applies—which it does not—the interpretation is unreasonable for the reasons discussed in Point I, *supra*. Furthermore, the nonadversarial and irregular process by which Attorney General Mukasey promulgated the *Silva-Trevino* decision greatly diminishes whatever deference would otherwise be due, as discussed in footnote 2 see comment, *supra*.

it ha[s] no particular expertise, including federal and state criminal law, the BIA's interpretation is not entitled to deference."). Discussing the respective authority of the agency and federal courts when construing the INA and criminal statutes, the Ninth Circuit recently explained that "[t]he BIA has no special expertise by virtue of its statutory responsibilities in construing state or federal criminal statutes, and thus, has no special administrative competence to interpret the . . . statute of conviction." *Marmolejo-Campos v. Holder*, 558 F.3d 903, 907 (9th Cir. 2009). Given the recognized limits of administrative deference, *Silva-Trevino*'s dictates about the interpretation of criminal statutes deserve no deference from federal courts. *Silva-Trevino's* mandate fails to pass *Chevron*'s threshold Step Zero and therefore should in no way affect this Court's *de novo* interpretation of state and federal criminal statutes.

Two recent Supreme Court decisions confirm that the proper method to interpret the nature of criminal convictions for immigration purposes is not a matter delegated by Congress to the agency's expertise. In *Nijhawan*, the Court was called upon to determine whether evidence outside the record of conviction could establish that a conviction for fraud was an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i), considering precisely the same issue that the BIA had addressed in *Matter of Babaisakov*, 24 I. & N. Dec.

306 (BIA 2007).[10] Despite the fact that the government explicitly invoked *Chevron* deference in its defense of the BIA's view, *see* Br. of Resp. at 48-49, *Nijhawan v. Holder*, 129 S.Ct. 2294 (2009) (No. 08-495), 2009 WL 815242 (arguing that, "agency interpretations . . . are entitled to deference."), the Court analyzed *de novo* whether the categorical approach was warranted. While the Court ultimately arrived at the same conclusion as the BIA, it did so without any reference to *Chevron*, and mentioned *Babaisakov* only once. *Nijhawan*, 129 S.Ct. at 2303.

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

[10] For a more detailed discussion of *Nijhawan*, *see* discussion *supra* at note 7.

disagreement between the agency and the court of appeals in favor of the BIA's view, but as in *Nijhawan*, nowhere did the Court so much as mention *Chevron* or indicate that the proper mode of analysis was a question on which the agency's view commanded judicial deference.

The conspicuous absence of any discussion of *Chevron* in the Supreme Court's recent consideration of the extent and nature of categorical analysis under the INA reflects the Court's understanding that the BIA may not set the terms by which federal courts interpret criminal convictions. Since this is precisely what *Silva-Trevino* attempts to do, it fails at Chevron Step Zero and should be accorded no deference.[11] Again, even if this were an issue upon which deference would ordinarily be due, which it is not, for the reasons discussed *supra* at Section I there is no ambiguity in the statute to resolve.

[11] The BIA's recent decision in *Matter of Guevara-Alfaro*, 25 I. & N. Dec. 417 (BIA 2011), supports this conclusion. There, the BIA addressed two issues: (1) whether a statutory rape offense is a CIMT and (2) the validity of *Silva-Trevino*'s new procedural framework. In regard to the former, the BIA declined to follow contrary Ninth Circuit case law, invoking *Brand X*. *National Cable & Telecomm. Ass'n. v. Brand X Internet Servs.*, 545 U.S. 967 (2005). However, conspicuously absent from the BIA discussion of the second issue is any assertion that *Brand X* empowers the agency to deviate from contrary circuit court authority. *Id*. at 422-23.

III. *SILVA-TREVINO* CREATES AN UNWORKABLE STANDARD THAT SUBSTANTIALLY DISRUPTS THE ORDERLY FUNCTION OF STATE AND FEDERAL CRIMINAL JUSTICE SYSTEMS.

In addition to significantly disrupting the fair administration of law within the immigration court system, the analysis announced in *Silva-Trevino* makes it impossible for actors in state and federal criminal justice systems—including judges, defense attorneys, and prosecutors—to comply with their ethical and statutory obligations to advise defendants regarding the immigration consequences of contemplated plea. As a result, many more minor cases will be forced to trial, imposing a tremendous burden on state and federal criminal justice systems.

In *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), the Supreme Court recognized that non-citizen criminal defendants' paramount concern is often to avoid conviction of deportable offenses and preserve their eligibility for discretionary relief and thus that prevailing professional norms require defense counsel to advise their clients of such consequences. *Id*. at 1483. The 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. The just and efficient disposition of cases can be advanced when noncitizen defendants, prosecutors, and defense attorneys all understand the immigration

consequences that will flow from a contemplated disposition. *Id*. As a result of *Silva-Trevino* however, all actors will be unable to reliably predict the immigration consequences of a plea because no one will know, *ex ante*, what kinds of evidence regarding the underlying conduct an immigration judge might later find "necessary and appropriate" to determining the immigration effect of the conviction. *Silva-Trevino*, 24 I. & N. Dec. at 690.[12]

Practice aids, such as charts that map out the immigration consequences of various criminal statutes, currently allow for the simple evaluation of the immigration consequences of criminal convictions. *See*, *e.g.*, Manuel D. Vargas, *Representing Immigrant Defendants in New York*, Appendix A (Quick Reference Chart for Determining Immigration Consequences of Common New York Offenses) (4th ed., NYSDA 2006); *Defending Immigrant Partnership*, State Specific Resources and Charts (including charts from fifteen jurisdictions explaining immigration

[12] Notably, the DOJ Office of Immigration Litigation recently released an educational packet. *See* Office of Immigration Litigation, *Immigration Consequences of Criminal Convictions* (2011), http://www.justice.gov/civil /oil/REVISED%20Padilla%20v.%20Kentucky%20Reference%20Guide_11-8-10.pdf. This resource explains how criminal defense attorneys can meet their obligations under *Padilla* to effectively advise their clients. However, the guide does not make a single mention of the *Silva-Trevino* decision. The lack of reference to *Silva-Trevino's* new framework implies that the Department of Justice itself recognizes that it is an unworkable standard that will disrupt the orderly function of immigration adjudications.

consequences of various dispositions based on traditional categorical approach), *available at* http://defendingimmigrants.org. However, these resources simply cannot take account of the individual facts of a case and therefore would, in many cases, no longer be reliable tools to evaluate the immigration consequences of a conviction. Simply put, this decision undermines years of work by *amici* and others to create an infrastructure to assist criminal justice systems in delivering accurate immigration advisals and leaves such systems with no realistic way to meet their obligations. As a result of *Silva-Trevino*, judges, defense attorneys and prosecutors simply will no longer be able to reassure defendants with any level of certainty that a contemplated disposition will not result in removal.

Many noncitizen defendants will therefore be unwilling to plead guilty, and many more cases, particularly minor cases, will proceed to trial. *INS v. St. Cyr*, 533 U.S. 289, 323 (2001). Accordingly, state and federal court criminal justice systems will not only be unable to deliver required advisals, but as a result, will bear the significant costs associated with trying many more cases involving noncitizen defendants.

IV. FORCING RESPONDENTS IN IMMIGRATION COURT REMOVAL PROCEEDINGS—WHO ARE OFTEN DETAINED AND *PRO-SE*— AND IMMIGRANTS IN NON-ADVERSARIAL AGENCY ADJUDICATIONS 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 CIMT determinations. *See* discussion *supra* at Section I. In contrast, *Silva-Trevino* imposes an unworkable system in which respondents face deportation—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) and as a "harsh" and "drastic measure," *Padilla v. Kentucky*, 130 S. Ct. 1473, 1476 (2010)—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 which often occurred years or even decades in the past.

The categorical inquiry is a straightforward legal determination that immigration judges routinely make on behalf of *pro se* respondents. 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, have no meaningful opportunity to develop the record regarding the previously

uninvestigated facts of old convictions. Over fifty seven percent of respondents in immigration court appear *pro se*. EXEC. OFFICE FOR IMMIGR. REV., FY 2010 STATISTICAL YEARBOOK, at G1 fig.9 (2010), *available at* http://www.justice.gov/eoir/statspub/fy10syb.pdf. 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 EFFICIENCTY AND PROMOTING JUSTICE IN THE IMMIGRATION SYSTEM 1 (May 2008), *available at* http://www.vera.org/download?file=1780/LOP% 2BEvaluation_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,[13] 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.").

Moreover, *Silva-Trevino* significantly diminishes the quality of adjudication in already over-strained immigration courts by requiring them

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

to conduct factual hearings of a type and quantity not previously seen in removal proceedings.

Finally, the due process concerns *Silva-Trevino* raises in removal proceedings are compounded by the additional due process problems it creates in the thousands of non-adversarial immigration adjudications that occur each year which require a CIMT determination. *See* ABA, RESOLUTION 113: PRESERVING THE CATEGORICAL APPROACH IN IMMIGR. ADJUDICATIONS 2 (Aug. 4, 2009), *available at* http://www.abanet.org/leadership/2009/annual/summary_of_recommendations/One_Hundred_Thirteen.doc.

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 10, 2011
New York, NY

/s/

Peter L. Markowitz, Director
Immigration Justice Clinic
Benjamin N. Cardozo School of Law
55 Fifth Avenue, rm 1109
New York, New York 10003

STATUTORY ADDENDUM

TABLE OF CONTENTS

Constitution and Statutes

U.S. CONST., amend. VI

Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

* * *

8 U.S.C. § 1101(a)(43)(B), (G), (M), (i)

§ 1101. Definitions

(a) As used in this Act—

. . .

(43) The term "aggravated felony" means—

. . .

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

. . .

(G**)** a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at [sic] least one year;

. . .

(M) an offense that—

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

* * *

8 U.S.C. § 1182(a)(2)(A)(i)(I)

§ 1182. Inadmissible aliens

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

. . .

(2) Criminal and related grounds.

(A) Conviction of certain crimes.

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

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

. . .

is inadmissible.

* * *

8 U.S.C. § 1227(a)(2)(A)(i), (ii), (iii), (B), (C), (E)

§ 1227. Deportable Aliens

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

. . .

(2) Criminal Offenses

(A) General Crimes

(i) Crimes of moral turpitude

Any alien who--

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

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

is deportable.

(ii) Multiple Criminal Convictions.

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

(iii) Aggravated felony.

Any alien who is convicted of an aggravated felony at any time after admission is deportable.

. . .

(B) Controlled Substances

(i) Conviction.

Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

(ii) Drug abusers and addicts.

Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.

(C) Certain firearm offenses.

Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of Title 18) in violation of any law is deportable.

. . .

(E) Crimes of domestic violence, stalking, or violation of protection order, crimes against children and

(i) Domestic violence, stalking, and child abuse. Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the term "crime of domestic violence" means any crime of violence (as defined in section 16 of Title 18) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

(ii) Violators of protection orders.

> Any alien who at any time after admission is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable. For purposes of this clause, the term "protection order" means any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as a pendente lite order in another proceeding.

* * *

18 U.S.C. § 924(e)(2)(B)

§ 924. Penalties.

> (e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).
>
> (2) As used in this subsection--
>
> . . .
>
> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--

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

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

* * *

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10-2382 **Caption:** Prudencio v. Holder

CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e) or 32(a)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

   ☑ this brief contains 6976 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   ☑ this brief has been prepared in a proportionally spaced typeface using MS Word 2008 Times New Roman size 14 font.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

Date: March 10, 2011
New York, NY

/s/
Peter L. Markowitz, Director
Immigration Justice Clinic
Benjamin N. Cardozo School of Law
55 Fifth Avenue, rm 1109
New York, New York 10003

CERTIFICATE OF SERVICE

When All Case Participants are Registered for the Appellate CM/ECF System

U.S. Court of Appeals Docket Number 10-2382

I, Peter L. Markowitz, hereby certify that I electronically filed the foregoing documents with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on March 10, 2011.

I certify that all participants in the case *that require service* are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Date: March 10, 2011
New York, NY

/s/
Peter L. Markowitz, Director
Immigration Justice Clinic
Benjamin N. Cardozo School of Law
55 Fifth Avenue, rm 1109
New York, New York 10003