UNITED STATES DEPARTMENT OF JUSTICE
ATTORNEY GENERAL OF THE UNITED STATES

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

In re:	)	
	)	
Cristoval Silva-Trevino	)	No. A013 014 303
	)	
In Removal Proceedings	)	

Memorandum of Law of *Amici Curiae* American Immigration Lawyers Association, Florence Immigrant and Refugee Rights Project, Immigrant Defense Project of the New York State Defenders Association, Immigrant Legal Resource Center, National Immigration Project of the National Lawyers Guild, National Immigrant Justice Center, Refugio del Rio Grande, Inc. and Washington Defenders Association Immigration Project in Support of Reconsideration

Alina Das, Esq.
Nancy Morawetz, Esq.
Immigrant Rights Clinic
Washington Square Legal Services, Inc.
245 Sullivan Street, 5th Floor
New York, NY 10012
(212) 998-6430

Peter Markowitz, Esq.
Immigration Justice Clinic
Cardozo School of Law
55 Fifth Avenue
New York, New York 10003
(212)-790-0340

Lory Diana Rosenberg, Esq.
IDEAS Consultation
200A Monroe Street, Suite 305
Rockville, MD 20850
301-990-9257

Attorneys for *Amici*

December 5, 2008

TABLE OF CONTENTS

PRELIMINARY STATEMENT

On November 19, 2008, with no advance notice of the issues under consideration, the Attorney General published *Matter of Silva-Trevino*, 24 I & N Dec. 687 (AG 2008). Ostensibly rendered under the authority of the power to adjudicate cases through certification, the opinion displays the predictable consequences of a secret process. Ignoring both statutory language and one-hundred years of jurisprudence, the opinion seeks to free immigration judges from the legal restraints imposed by Congress in deporting individuals from the United States. The opinion in *Matter of Silva-Trevino* is a powerful and erroneous rewrite of the law that has governed immigration adjudications since at least 1914. It will cause havoc in immigration proceedings and federal and state courts across the country. In this memorandum, *amici* explain some of the reasons why the decision in *Matter of Silva-Trevino* should be withdrawn. It is procedurally flawed, it is legally incorrect, and it undermines the rule of law governing immigration adjudications.

Amici have drafted this memorandum under extremely tight time constraints. The opinion states that the Attorney General issued his decision on November 7, 2008. The opinion was not published and made available to the public, however, until November 19, 2008. In the interest of submitting any motions within the thirty days ordinarily applicable for motions to reconsider, *amici* have focused this memorandum on how the opinion seeks to overturn a century of precedent governing removal proceedings and does so in a way that imposes retroactive consequences on immigrants and havoc on the courts. Proper briefing of all of the relevant issues would require significant additional time.[1]

[1] In addition to the issues discussed in this brief, the opinion builds on a completely distorted reading of the Supreme Court's decision in *National Telecoms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005); misreads *Gonzales v.*

Amici respectfully urge that the Attorney General withdraw the opinion in this case so that the Board of Immigration Appeals and immigration judges may continue to apply settled precedent without the confusion generated by this opinion. In the alternative, *amici* request that the Attorney General withdraw the opinion in this case pending reconsideration of these issues and provide respondent and interested parties a meaningful opportunity to submit briefs. In light of the drastic proposals contemplated by this opinion, *amici* suggest that a minimum of sixty days should be provided to interested parties to comment on the proposed new standards, similar to that provided in the rulemaking process. *Amici* note that there are many additional interested groups that could participate if there were further briefing, including administrative law experts, bar associations, former immigration judges who are familiar with practical issues in immigration adjudication, and criminal justice experts. But in order for such participation to happen, there must first be an open process that invites participation.

INTERESTS OF *AMICI*

Amici American Immigration Lawyers Association, Florence Immigrant and Refugee Rights Project, Immigrant Defense Project of the New York State Defenders Association, Immigrant Legal Resource Center, National Immigration Project of the National Lawyers Guild, National Immigrant Justice Center, Refugio del Rio Grande, Inc., Washington Defenders Association Immigration Project, are non-profit organizations concerned with the proper treatment of immigrants facing removal. *Amici* have extensive experience in issues concerning the inter-relationship of criminal law and immigration law. *Amici* include organizations involved in counseling and representing immigrants in removal proceedings, counseling immigrants and

---

Duenas-Alvarez, 549 U.S. 183 (2007); seeks to alter the established burden of proof in removal proceedings; and seeks to overturn established precedent on the proper standard for evaluating what constitutes a crime involving moral turpitude. As a result of time constraints, this brief does not fully address these very important issues.

their attorneys in the criminal justice system, and training others for such representation and counseling. Amici also include groups that have trained judges and prosecutors on the interplay of criminal law and immigration law.

The Board of Immigration Appeals (Board) has long recognized the value of submissions from groups with *amici's* experience. *See, e.g., Matter of Velazquez-Herrera,* 24 I & N Dec. 503 (BIA 2008) (acknowledging the amicus briefs of the Washington Defender Association); *Matter of Carachuri-Rosendo,* 24 I &N Dec. 382, 388-94 (BIA 2007) (acknowledging the amicus brief of the Immigrant Defense Project of the New York State Defenders Association); *Matter of Devison-Charles,* 22 I & N Dec. 1362 (BIA 2000, 2001) (acknowledging the amicus brief of the Immigrant Defense Project of the New York State Defenders Association); *Matter of N-J-B-,* 22 I & N Dec. 1057 n. 2 (AG 1999) (acknowledging with appreciation the arguments made by amicus in his brief); *Matter of Noble,* 21 I & N Dec. 672 (BIA 1997) (acknowledging amicus brief filed on behalf of the American Immigration Lawyers' Association). Likewise, the Attorney General has both invited and accepted the submission of additional briefs in opinions issued pursuant to his certification authority, as acknowledged in his recent decision in *Matter of R-A-*, 24 I & N Dec. 629, 630, n.1 (AG 2008) ("In 2003, Attorney General Ashcroft certified the Board's decision in *Matter of R-A-* for review and provided an opportunity for additional briefing" *citing Matter of R-A-*, 23 I & N Dec. 694 (AG 2005)), and in numerous other decisions discussed below.

The opinion in this case is of enormous interest to *amici* and contains prejudicial errors of fact and law warranting withdrawal or reconsideration. As is explained below, the rules that are followed in the course of classifying a conviction in immigration court are not mere technicalities. Instead, they are an essential part of the due process foundation of the removal

system. *Amici*, as organizations that regularly train both immigration and criminal defense lawyers about the interplay of criminal and immigration laws and who represent immigrants in immigration proceedings, have a strong interest in assuring that the rules that govern classification of criminal convictions are fair, predictable, and in accord with longstanding precedent on which immigrants, their counsel and the courts have relied.

BACKGROUND

On October 6, 2004, respondent, Mr. Silva Trevino, pled no contest to a charge under section 2.11(a)(1) of the Texas Penal Code. The court deferred adjudication and granted five years probation. The respondent was placed in removal proceedings on November 25, 2005. In the proceedings before an Immigration Judge, he sought to adjust his status. On February 9, 2006, the Immigration Judge pretermitted the application and ordered respondent removed. The Immigration Judge found that under the Board's categorical analysis, respondent's conviction should be classified as a crime involving moral turpitude. Oral decision of the Immigration Judge, *In the Matter of Silva Trevino*, No. A 13 014 303 (Feb. 98, 2006) (Los Fresnos, Tex.).[2] Respondent, through prior counsel, appealed to the Board. In the appeal the sole issue was whether a plea under 2.11(a)(1) of the Texas Penal Code constitutes a crime involving moral turpitude. Respondent's attorney argued that under established categorical analysis the Immigration Judge had misclassified the conviction. The government submitted a three paragraph brief seeking affirmance on the basis of the decision of the Immigration Judge. No party raised any question about the applicability of established precedent on the categorical

[2] The facts set out in this brief are gathered from the official file in this case and copies of letters submitted by respondent's attorney. Counsel for *Amici* would be happy to provide copies of these documents.

approach, the burden of proof, or the standard for determining when a conviction is a crime involving moral turpitude.

On June 6, 2006, the Board sustained the appeal, reversed the decision of the Immigration Judge, and remanded for a new hearing. .On August 8, 2006, the Board *sua sponte* reheard the case and issued a new decision that also sustained the appeal, and reversed and remanded the decision of the Immigration Judge. The Board found that the conviction did not meet the criteria for a crime involving moral turpitude and therefore did not bar eligibility for adjustment. The Board observed that the underlying facts of the case may be relevant to the determination whether to grant discretionary relief. (Op. dated Aug. 8, 2006, n. 6). Nothing in the Board decision questioned established precedent on the categorical approach, the burden of proof, or the standard for determining when a conviction is a crime involving moral turpitude.

Following the Board's order, the case was remanded to the Immigration Judge. In accordance with the Board's decision, respondent's counsel repeatedly sought adjudication of the I-130 petition so that respondent could proceed with his adjustment application.[3] Meanwhile the Immigration Court continued the proceedings while awaiting the adjudication of the I-130 petition.[4] Then on August 8, 2007, a year after the remand from the Board, respondent's counsel was informed by the Board that the Attorney General had certified the case to himself.[5] The notice simply stated that the Board's "decision" was referred. The notice did not state what

[3] *See, e.g.*, Letter dated October 6, 2006 from Jaime Diez, Esq. to Sherry Jones, Department of Homeland Security, Harlingen, Texas; Letter dated January 8, 2007 from Jaime Diez, Esq. to Sherry Jones, Department of Homeland Security; Letter dated March 9, 2007 from Jaime Diez, Esq. to Sherry Jones, Department of Homeland Security.
[4] The file indicates that the proceedings were adjourned on September 7, 2006, October 10, 2006, November 8, 2006, December 11, 2006, January 8, 2007, February 7, 2007, March 7, 2007, April 19, 2007 and May 24, 2007.
[5] The notice states that that the Attorney General referred the case to himself on July 7, 2007 and includes order to that effect. *See* Letter dated August 8, 2007 from Veronica Rubi, Senior Legal Advisor, Executive Office of Immigration Review, to Jaime Diez, Esq. The file indicates, however, that the Attorney General referred the case as early as April. On April 27, 2007, there were communications from the Executive Office of Immigration Review to the Immigration Court in Harlingen stating that the case had already been certified. *See* e-mail dated April 27, 2007 from Terry Smith, Executive Office of Immigration Review to Celeste Garza, Executive Office of Immigration Review stating that "Attorney General Alberto Gonzales has certified this same case to himself for review, therefore the Board's decision is no longer final."

issues would be considered, what briefing schedule should be followed in making submissions, or otherwise indicate the process that would be followed.

After not receiving any further information regarding a briefing schedule, Respondent's counsel followed up on the certification by requesting information about the reason for the referral and the status of the order. He sent this inquiry to all of the addresses included in the letter informing him of the certification.[6] He did not receive any response.

Neither the original decision in this case, nor the certification order, was published in any form that notified the public of its issuance, or was meaningfully available to the public. Neither the decision nor the certification order appears on Lexis or Westlaw. The certification order was not sent to interested organizations and there was no request for any briefing of the issues that the Attorney General would consider. A search of the Department of Justice website offers no listing of cases or issues that have been certified or how interested parties can participate in these proceedings.

The Attorney General issued his decision reversing the Board on November 7, 2008. A copy was faxed on November 10, 2008 to respondent's counsel and to the General Counsel of the Department of Homeland Security, who had not appeared on any prior papers.[7] The decision was made public on November 19, 2008.

[6] Letter dated January 16, 2008 from Jaime Diez to David Landau, Chief Appellate Counsel, Department of Homeland Security, with copies to Veronica Rubi, Senior Legal Advisor, Executive Office of Immigration Review, Office of District Counsel, Harlingen, Texas, and Mr. Cristoval Silva-Trevino.

[7] See Letter dated November 10, 2008 to Jaime Diez, Esq. and Gus Coldabella, General Counsel, Department of Homeland Security, transmitting the Attorney General's November 7, 2008 decision.

ARGUMENT

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

The procedures used in this case violated basic principles of due process, fair play and transparency in government. The source of the request to certify in this case is unknown, but it appears to have been an *ex parte* communication. No notice was sent to Mr. Silva-Trevino's counsel explaining the basis of the proposed referral so that he could rebut the claims supporting the referral. Furthermore, there was no notice that the Attorney General was considering a wholesale abandonment of a century of precedent and therefore no opportunity for either Mr. Silva-Trevino or other interested parties to submit briefs to aid the Attorney General's deliberations. To restore a modicum of fairness and transparency in the agency's process of determining the precedent that will be applied by immigration judges, *amici* urge that the opinion in this case be withdrawn, or that, at a minimum, the Attorney General withdraw his opinion pending reconsideration and set a briefing schedule allowing interested parties a minimum of sixty days to present arguments regarding the legality and wisdom of the opinion in this case.

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). "Process which is a mere gesture is not due process." *Id.* at 315. To meet due process requirements, the respondent in this case had a right to be notified of the kinds of "claims of the opposing party and [provided with] a reasonable opportunity to meet them." *Morgan v. United States*, 304 U.S.

1, 18 (1938). In this case, nothing in the Board's cursory notice about the Attorney General's certification provided any indication of the issues that the Attorney General would consider or any briefing schedule for the respondent or other interested parties to make any submission. This, in itself, is a violation of due process. *Cf. Chike v. INS*, 948 F. 2d 961 (5th Cir. 1991) (due process requires notice of the Board's briefing schedule); 5 U.S.C. §557 (c) (providing for a reasonable opportunity to submit proposed findings and exceptions to proposed findings). Furthermore, respondent's counsel had no reason to anticipate that the Attorney General would treat this case as an opportunity to conduct a comprehensive re-evaluation of the use of the well-established categorical approach for assessing the consequences of a conviction, or to revisit the burdens of proof or the long-standing generic definition of a crime involving moral turpitude. Absent such a notice, a party would be left to guess at any number of *sua sponte* issues that might be raised on an appeal, which is untenable in any system of adjudication. *Cf. Burns v. United States*, 501 U.S. 129, 138 (1991) (requiring notice of possibility of departure from guidelines so that a defendant is not left to "negate every conceivable ground on which the [adjudicator] might choose to depart on [his] own initiative."); *Shell Oil Co. v. E.P.A.*, 950 F.2d 741, 342 (D.C. Cir. 1991) (rejecting rule where agency had failed to provide adequate notice of its later course of action).

Furthermore, when entertaining broad arguments that would displace decades of settled precedent, basic principles of fairness, transparency and the need to fully understand the issues should lead the Attorney General to seek out the arguments of interested parties. In the past, this is exactly what Attorneys General have done with respect to major decisions considered under the certification process. For example, prior to issuing her decision in *Matter of Soriano*, 21 I & N Dec. 516 (AG 1997), Attorney General Reno invited briefing from interested parties on the

retroactivity of changes to relief under former INA § 212(c). The decision in that case addresses the points raised in those amicus briefs. Similarly, prior to issuing his decision in *Matter of Hernandez-Casillas*, 20 I & N 262 (AG 1990), Attorney General Thornburgh considered briefs submitted during the certification process. *See* op. n. 11 (discussing briefs submitted on referral for certification). *See also Matter of E-L-H-*, 23 I & N Dec. 700 (AG 2004) (including order of Attorney General Reno for briefing following certification); *Matter of R-A-*, 24 I & N Dec. 629, 630 n.1 (AG 2008) (describing how Attorney General Ashcroft had provided an opportunity for additional briefing following certification).

The need for briefing by the respondent and *amici* to aid the Attorney General's deliberation is even greater in this case. As shown below, the opinion in this case ignores, misunderstands, and casts doubt on a century of precedent on many separate issues. Many of these issues were not briefed or addressed in any way because neither respondent, nor the Board, had any reason to think that this precedent might be drawn into question. In contrast, the core issues decided in *Matter of Soriano* had been briefed before the Board by both the parties and *amici*. Nonetheless, Attorney General Reno recognized that if she was to reconsider questions that had been decided by the Board, and review the Board's opinion in that case, it was appropriate to invite interested parties to submit further briefing. *See also Matter of S-K-*, 24 I & N Dec. 289 (AG 2007) (listing *amici*); *Matter of J-S-*, 24 I & N Dec. 520 (AG 2008) (referencing arguments presented by a*mici*).

In addition, it appears highly likely that the certification process in this case began with some *ex parte* communication with the Attorney General. Although the opinion states that the Attorney General certified the question to himself, there is no indication of what prompted the Attorney General to order the certification of this case from among some 30,000 cases decided

by the Board each year. The identification of this case for certification is especially unusual since the decision raised none of the issues later decided by the Attorney General and the case had been remanded well before the Attorney General certified the case. Furthermore, because the underlying Board decision in this case was not published by the Board, and even as an unpublished opinion, is not available on Westlaw or Lexis, it is highly unlikely that the Attorney General or the Office of Legal Counsel in the Department of Justice on their own identified this as a case that warranted certification.

Finally, there is the troubling possibility that the certification process in this case may have been used by the Office of Immigration Litigation to shore up its litigation positions in court. Because the Office of Immigration Litigation and the Office of the Solicitor General are part of the Department of Justice, and are charged with defending the agency in court, the Attorney General bears a special responsibility to maintain both the appearance and actuality of impartiality in the adjudication of removal charges and to protect the certification process from efforts to make it a backdoor mechanism for one-sided *ex parte* communication by the office's litigators. A process in which the agency's litigators can present their views and the party is not provided with such an opportunity falls far short of the process that is due. *See Morgan v. United States*, 304 U.S. at 19.

At a minimum, basic principles of due process and fair play require that a certification be conducted in a transparent way that provides fair notice of the issues that are under consideration and an opportunity to be heard. *Id.* When a case is certified by the Board, that notice comes in the form of a statement in the Board opinion. *Cf. Matter of Ponce de Leon Ruiz*, 21 I & N Dec. 154 (BIA 1996) (ordering certification to the Attorney General at the close of the Board's published opinion); *Matter of K-W-S-*, 9 I & N Dec. 306 (BIA 1958) (same). When sought by

DHS, it properly comes through service of the request for referral, which explains the basis for the request. In *Matter of Soriano*, for example, then-General Counsel of the Immigration and Naturalization Service David Martin informed his adversary when he requested certification and urged the Attorney General to invite amicus submissions that could address the published Board decision in that case. Here, however, there is reason to believe that there was some *ex parte* communication relating to the referral which was not shared with Mr. Silva-Trevino's counsel, and certainly was not disclosed to the many interested organizations that have provided amicus briefs to the Board and the Attorney General on so many occasions in the past. As a result, both respondent and *amici* were denied even the minimal process of notice of the issues that the Attorney General would consider. On that ground alone, the Attorney General should withdraw the opinion in this case.

II. THE DECISION IS CONTRARY TO A CENTURY OF JURISPRUDENCE ADDRESSING THE STATUTORY BASIS, LEGISLATIVE HISTORY AND FUNDAMENTAL PURPOSES FOR APPLYING THE CATEGORICAL AND MODIFIED CATEGORICAL APPROACH TO DETERMINE WHETHER A PERSON HAS BEEN CONVICTED OF A CRIME INVOLVING MORAL TURPITUDE.

Contrary to the assertions made by the Attorney General in *Silva-Trevino*, courts have uniformly applied the categorical and modified categorical approach for determining whether a person has been convicted of a crime involving moral turpitude for nearly a century. Following this approach, courts determine the statutory elements of the offense of conviction and then determine whether those particular elements fall within the generic definition of a "crime involving moral turpitude."[8] This approach—and its cornerstone principle that courts may not

[8] A "crime involving moral turpitude" has long been defined "as being inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general" and requires an analysis of the level of scienter under the statute. *Matter of Solon*, 24 I & N Dec. 239, 240 (BIA 2007) (internal quotation marks and citations omitted); *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*

look beyond the statute and record of conviction to consider the actual conduct underlying the conviction—have been ingrained in the statutory language, legislative history, and federal court and agency interpretation of the applicable terms since Congress first imposed immigration consequences on a person's conviction for a crime involving moral turpitude in 1891. The Seventh Circuit's decision in *Ali v. Mukasey* in 2008, with which *amici* take issue, marks the only significant departure from the principles of the categorical and modified categorical approach during its nearly 100-year-old history. Rather than correct that outlier, the Attorney General's decision single-handedly guts the categorical and modified categorical approach and instead creates an unworkable and fundamentally unfair method of analysis in its wake.

This result, likely due to the failure by the Attorney General to provide an opportunity for briefing on these issues, appears to be based on three broad, interrelated, and incorrect assertions. First, the opinion claims that a new approach is needed to address the "patchwork" of federal courts' interpretations of the categorical and modified categorical approach that have created disuniformity in the ways that courts have viewed the facts underlying a conviction. *See* Op. at 688, 693-694. Second, the opinion draws on the statutory text to contend that it is both "silent on the precise method that immigration judges and courts should use to determine if a prior conviction is for a crime involving moral turpitude" and at the same time calls for an "individualized moral turpitude inquiry" contrary to the categorical and modified categorical approach. *See* Op. at 693, 699-700. Third, the opinion rejects as inapplicable what it deems the only broader justifications for categorical and modified categorical approach—the concerns of

---

Baker, 15 I & N Dec. 50, 51 (BIA 1974); *Matter of S-*, 2 I & N Dec. 353, 357 (BIA, AG 1945). It is unclear whether the opinion of the Attorney General is attempting to refashion a new definition of "crime involving moral turpitude" with its references to "reprehensible" conduct and "some form of scienter." *See* Op. at 706 & n.5, 707. Due to the lack of clarity in the Attorney General's opinion and the lack of notice and opportunity for briefing this issue, *amici* are unable to address the issue fully. However, insofar as the opinion purports to change the longstanding definition of "crime involving moral turpitude" and weaken Board and federal court standards on scienter, such changes would also provide good reason for the withdrawal of the opinion or withdrawal pending additional briefing on these important issues.

the criminal sentencing context (as discussed in *Taylor v. United States*, 495 U.S. 575 (1990) and *Shepard v. United States,* 544 U.S. 13 (2005)) and the oppressive administrative burden that a retrial of facts in the immigration court would entail. *See* Op. at 701-03. As explained below, each of these broad assertions on the state of case law, the statutory text and interpretation, and the justifications for the categorical and modified categorical approach is incorrect and demonstrates a lack of understanding of the century of jurisprudence on these issues.

A. The decision ignores the previously uniform approach of the Supreme Court, federal courts and Board of Immigration Appeals on the application of the categorical and modified categorical approach in this context.

The Attorney General's analysis in *Silva-Trevino* begins by asserting that there is a "patchwork" of approaches among the various circuits to determining whether a person has been convicted of a crime involving moral turpitude, calling for a new "uniform" approach to be articulated by the agency. Op. at 688. This assertion is misleading at best. Under the proper categorical and modified categorical approach for determining whether a person has been convicted of a crime involving moral turpitude, a review of any underlying facts concerning the person's conduct in committing the crime, beyond that indicated by the record of conviction, is prohibited. The decisions of federal courts are uniform but for the outlier of the Seventh Circuit in *Ali*, which is the only cited decision that invites courts to look outside the record of conviction to determine if a person has been convicted of a crime involving moral turpitude. By adopting this outlier as the basis of its "uniform" approach, the Attorney General essentially guts the analysis adopted by the other federal circuits and creates the disuniformity it purportedly seeks to avoid.

The Supreme Court, every federal circuit, and the Board of Immigration Appeals all apply the categorical and modified categorical approach in the immigration context. *See, e.g.,*

Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007); *Dulal-Whiteway v. DHS*, 501 F.3d 116 (2d Cir. 2007); *Sandoval-Lua v. Gonzales*, 499 F.3d 1121 (9th Cir. 2007); *Gradiz v. Gonzales*, 490 F.3d 1206, 1211 (10th Cir. 2007); *Jeune v. AG*, 476 F.3d 199, 204 (3d Cir. 2007); *Recio-Prado v. Gonzales*, 456 F.3d 819, 821 (8th Cir. 2006); *Berhe v. Gonzales*, 464 F.3d 74, 85 (1st Cir. 2006); *Soliman v. Gonzales*, 419 F.3d 276 (4th Cir. 2005); *Omari v. Gonzales*, 419 F.3d 303 (5th Cir. 2005); *Patel v. Ashcroft*, 401 F.3d 400 (6th Cir. 2005); *Jaggernauth v. United States AG*, 432 F.3d 1346, 1353 (11th Cir. 2005); *Bazan-Reyes v. INS*, 256 F.3d 600, 606 (7th Cir. 2001); *Matter of Velazquez-Herrrera*, 24 I & N Dec. 503 (BIA 2008). Under the categorical and modified categorical approach, "it is the nature of the crime, as defined by statute and interpreted by the courts and as limited and described by the record of conviction which determines whether an alien falls within the reach of that law." *Matter of Pichardo-Sufren*, 21 I & N Dec. 330, 334 (BIA 1996).[9] Under this approach, immigration courts may not consider extrinsic evidence beyond the record of conviction. *Id.*; *see also Matter of Torres-Varela*, 23 I & N Dec. at 84-85 ("The crime must be one that necessarily involves moral turpitude without consideration of the circumstances under which the crime was, in fact, committed. It is therefore necessary to engage in an objective analysis of whether the elements necessary to obtain a conviction under the particular statute render the offense a crime involving moral turpitude." (citation omitted)).

Courts have applied this categorical and modified categorical approach to the provisions of the immigration statute that predicate immigration consequences on offenses for which a person was "convicted." *See Velazquez-Herrera*, 24 I & N Dec. at 513. This includes determinations of whether a person has been "convicted" of a crime involving moral turpitude

[9] 'Modified categorical approach' is somewhat of a misnomer—it refers to the part of the categorical approach that permits a limited review of the record of conviction to determine whether a person's conviction falls under the portion of a divisible statute that corresponds to a removable offense. *See, e.g.*, *Duenas-Alvarez*, 127 S.Ct. at 819 (explaining lower courts' use of the term 'modified categorical approach').

for inadmissibility and deportability purposes. *See, e.g.*, *Wala v. Mukasey*, 511 F.3d 102, 107-108 (2d Cir. 2007) (applying the categorical and modified categorical approach to determine whether person was convicted of a crime involving moral turpitude); *Vuksanovic v. United States AG*, 439 F.3d 1308, 1311 (11th Cir. 2006) (same); *Recio-Prado v. Gonzales*, 456 F.3d 819, 821 (8th Cir. 2006) (same); *Jaadan v. Gonzales*, 211 Fed. Appx. 422, 427 (6th Cir. 2006) (same); *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1017-1020 (9th Cir. 2005) (same); *Partyka v. AG of the United States*, 417 F.3d 408, 411-412 (3d Cir. 2005) (same); *Padilla v. Gonzales*, 397 F.3d 1016, 1019 (7th Cir. 2005) (same); *Smalley v. Ashcroft*, 354 F.3d 332, 336 (5th Cir. 2003) (same); *Maghsoudi v. INS*, 181 F.3d 8, 14 (1st Cir. 1999) (same); *but see Ali v. Mukasey*, 521 F.3d 737, 743 (7th Cir. 2008).

The Attorney General asserts that the underlying analyses in these decisions adopting the categorical and modified categorical approach vary to significant degrees. *See* Op. at 693-694. However, while the cases sometimes uses different terms to describe the approach, the essential analysis is uniform—courts each begin with an analysis of the statute of conviction, and if the statute criminalizes different sets of offenses, some of which are crimes involving moral turpitude 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 crime involving moral turpitude.[10] In other words, while

[10] The Attorney General's labels notwithstanding (*see* Op. at 696, attempting to divide circuits' case law into "minimal conduct," "common case," or "realistic probability" approaches), a comparison of the actual language of each circuit describing the categorical approach in this context demonstrates that their case law is essentially the same—each determining what the statute covers and whether a person has been "convicted" of a crime involving moral turpitude under some provision. *See, e.g.*, *Wala v. Mukasey*, 511 F.3d 102, 107-108 (2d Cir. 2007) ("Under the categorical approach, a reviewing court 'look[s] to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime.' This approach requires a court to 'focus on the intrinsic nature of the offense, rather than on the singular circumstances of an individual petitioner's crimes, and only the minimum criminal conduct necessary to sustain a conviction under a given statute is relevant.' In describing the categorical approach, we have held that 'every set of facts violating a statute must satisfy the criteria for removability in order for a crime to amount to a removable offense; the BIA may not justify removal based on the particular set of facts underlying an alien's criminal conviction.' Under the modified categorical approach, however, a limited review of a petitioner's circumstances may be warranted where a statute

courts' terminology may differ, the essential purpose and requirements of the approach—to examine the conviction and not the conduct to determine if a person has been convicted of a

---

of conviction is 'divisible.' A statute is divisible if it 'encompasses multiple categories of offense conduct, some, but not all, of which would categorically constitute' a removable offense. In reviewing a conviction under a divisible statute, we may refer to the 'record of conviction' to ascertain whether a petitioner's conviction was under the branch of the statute that proscribes removable offenses. The record of conviction includes, inter alia, 'the charging document, a plea agreement, a verdict or judgment of conviction, a record of the sentence, or a plea colloquy transcript.'" (citations omitted)); *Vuksanovic v. United States AG*, 439 F.3d 1308, 1311 (11th Cir. 2006) ("'Whether a crime involves the depravity or fraud necessary to be one of moral turpitude depends upon the inherent nature of the offense, as defined in the relevant statute, rather than the circumstances surrounding a defendant's particular conduct.' That is, the determination that a crime involves moral turpitude is made categorically based on the statutory definition or nature of the crime, not the specific conduct predicating a particular conviction." (citations omitted)); *Recio-Prado v. Gonzales*, 456 F.3d 819, 821 (8th Cir. 2006) ("Our initial inquiry is whether the alien's statute of conviction 'defines a crime in which moral turpitude necessarily inheres.' If that is the case, 'then the conviction is for a crime involving moral turpitude for immigration purposes, and our analysis ends.' If the statute criminalizes conduct that involves moral turpitude as well as conduct that does not, we look to the record of conviction to determine what precise provision of the statute applied to the alien." (citations omitted); *Jaadan v. Gonzales*, 211 Fed. Appx. 422, 427 (6th Cir. 2006) ("To determine whether a crime falls within a particular category of grounds for deportation (in this case, whether the crimes involve moral turpitude), the Court should first employ the 'categorical' approach. Under the categorical approach, the Court considers not whether the actual conduct constitutes a crime involving moral turpitude, but 'whether the full range of conduct encompassed by the statute constitutes a crime of moral turpitude.' If so, the conviction is necessarily for a crime involving moral turpitude. If, however, the statute of conviction criminalizes some conduct that does not involve moral turpitude, the Court should apply the modified categorical approach. Under this approach, the Court conducts a limited examination of documents in the record to determine whether the particular offense at issue constitutes a crime involving moral turpitude. This inquiry does not involve looking to the particular facts underlying the conviction; rather, it is limited to judicial documents that are part of the record of conviction, such as the judgment of conviction, charging documents, written plea agreement, and transcript of the plea colloquy."); *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1017-1020 (9th Cir. 2005) ("The categorical approach requires us to 'make a categorical comparison of the elements of the statute of conviction to the generic definition, and decide whether the conduct proscribed [by the statute] is broader than, and so does not categorically fall within, this generic definition.' We look 'only to the fact of conviction and the statutory definition of the prior offense,' and not to the particular facts underlying the conviction. The issue is not whether the actual conduct constitutes a crime involving moral turpitude, but rather, whether the full range of conduct encompassed by the statute constitutes a crime of moral turpitude. . . . Because the statute of conviction is broader than the generic definition of the crime, we proceed to the modified categorical approach, which allows us to 'look beyond the language of the statute to a narrow, specified set of documents that are part of the record of conviction, including the indictment, the judgment of conviction, jury instructions, a signed guilty plea, or the transcript from the plea proceedings.' We do not, however, 'look beyond the record of conviction itself to the particular facts underlying the conviction.'" (citations omitted)); *Partyka v. AG of the United States*, 417 F.3d 408, 411-412 (3d Cir. 2005) ("Whether an alien's crime involves moral turpitude is determined by the criminal statute and the record of conviction, not the alien's conduct. Under this categorical approach, we read the applicable statute to ascertain the least culpable conduct necessary to sustain a conviction under the statute. As a general rule, a criminal statute defines a crime involving 'moral turpitude only if all of the conduct it prohibits is turpitudinous.' Where a statute covers both turpitudinous and non-turpitudinous acts, however, it is "divisible," and we then look to the record of conviction to determine whether the alien was convicted under that part of the statute defining a crime involving moral turpitude." (citations omitted)); *Smalley v. Ashcroft*, 354 F.3d 332, 336 (5th Cir. 2003) ("We categorically apply this definition of moral turpitude to an alien's crime: 'whether a crime involves moral turpitude depends on the inherent nature of the crime, as defined in the statute concerned, rather than the circumstances surrounding the particular transgression.' A crime involves moral turpitude only if all of the conduct it prohibits is turpitudinous. 'An exception to this general rule is made if the statute is divisible into discrete subsections of acts that are and those that are not CIMTs.' In this situation, we look at the alien's record of conviction to determine whether he 'has been convicted of a subsection' that qualifies as a CIMT."); *Maghsoudi v. INS*, 181 F.3d 8, 14 (1st Cir. 1999) ("The inherent nature of the crime of conviction, as defined in the criminal statute, is relevant in this determination; the particular circumstances of [the immigrant's] acts and convictions are not. We may, however, refer to the record of conviction, meaning the charge (indictment), plea, verdict, and sentence, in ascertaining exactly the criminal conduct to which [the immigrant] pled guilty.").

crime involving moral turpitude—is uniform throughout. *See supra* n.10.

Yet the Attorney General's new three-step test essentially collapses this sound approach into one that permits the very inquiry that the categorical and modified categorical approach prohibits—an inquiry into extrinsic facts. The opinion first purports to maintain the categorical and modified categorical approach as step one and two of the new test. *See* Op. at 689-690. However, the Attorney General's characterization of step one as a "reasonable probability" test, borrowing language from *Duenas-Gonzales*, is the first fundamental flaw of his new analysis. It is difficult to reconcile the Attorney General's incorporation of the "realistic probability" test as a mandatory component of step one with his endorsement in the opinion of the time-tested elements analysis under the categorical approach. Assuming he intended such a stark shift, this determination is highly problematic and without basis in law.[11] An elements analysis is the

[11] The opinion's apparent misreading of the Supreme Court's discussion of "reasonable probability" in *Duenas-Alvares* is an important issue. However, as *amici* have previously noted, *amici* are only able to address this issue briefly here, but will provide additional arguments if given time and an opportunity to provide further briefing.

First, to be clear, the Supreme Court's reference to the "realistic probability" limitation in *Duenas-Alvarez* is inapposite to the circumstances addressed by the opinion in this case and the vast majority of cases in which the categorical approach is used to determine whether a conviction is for a crime involving moral turpitude. The issue before the Court in *Duenas-Alvarez* was whether one who is convicted of "aid[ing] and abet[ting] a theft falls, like a principal, within the scope of th[e] generic definition" of a theft offense, i.e., "taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." *Duenas-Alvarez*, 127 S. Ct. at 819 (internal quotation marks and citations omitted). In addressing this question, the Supreme Court first acknowledged the central and uniform role of the categorical approach in evaluating how a conviction should be classified for immigration purposes, *see id.* at 818, and in applying that test to the question at hand, observed that the generic definition of theft does include aiding and abetting. *Id*. at 818. However, the petitioner then raised a narrow question of whether "California's statute, through the California courts' application of a 'natural and probable consequences' doctrine [punishing aiders and abettors for any crime that 'naturally and probably' results from the intended crime], creates a subspecies of the Vehicle Code section crime that falls outside the generic definition of 'theft.'" *Id*. at 822. It was in this context—the question of how courts' interpretation of a statute may color a determination of whether that statue falls within the generic definition of a theft offense—that the Court explained that there must be more than "legal imagination . . . [i]t requires a realistic probability, not a theoretical possibility," i.e., the person relying on case law interpretations must "at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues." *Id.* at 193.

The Attorney General's opinion appears to take what is essentially one, rarely needed tool for examining a statute under the categorical approach and uses it to redefine the entire approach. Except in the most extreme of statutory interpretation cases, such as in *Duenas-Alvarez* where the issue turned on the construction and application of a 'natural and probable consequences' component of accomplice liability doctrine, the "reasonable probability" case law analysis is neither necessary nor desirable as a means for assessing the statute. Rather, the test is as it has been articulated for nearly a century, to examine the elements of the statute and determine whether they fit within

approach reflected in the case law, *see supra* n.10 (describing analysis in case law), which the Attorney General presumably recognizes.

After purporting to adopt the categorical and modified categorical approach as steps one and two, the opinion then states that if the categorical and modified categorical approach is "inconclusive" as to whether the person has been convicted of a crime involving moral turpitude, then "judges may, to the extent they deem it necessary and appropriate, consider evidence beyond the formal record of conviction." Op. at 690; *see also* Op. at 708 (stating that "if the record of conviction does not resolve the inquiry, [the adjudicator may] consider any additional evidence of factfinding the adjudicator determines is necessary or appropriate to resolve accurately the moral turpitude question"). Not only does this new "third step" eviscerate the purpose of the categorical and modified categorical approach, it provides no workable standard for adjudicators to determine when it is "necessary or appropriate" to review the facts. *See infra* Part II.C.2.

---

the generic definition of a crime involving moral turpitude, *see infra* Part II.B.2 (citing language from a century of cases). As the Ninth Circuit recently explained, "[w]here...a state statute explicitly defines a crime more broadly than the generic definition, no 'legal imagination,' *Duenas-Alvarez*, 127 S.Ct. at 822, is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime. The state statute's greater breadth is evident from its text." *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. Or. 2007), *cert. denied*, 128 S. Ct. 425 (2007).

The Attorney General's apparent elevation of one narrow tool of statutory analysis into the entirety of 'step one' of his approach is particularly troubling because it suggests that immigrants find specific legal opinions in order to argue that they have not been convicted of a crime involving turpitude—regardless of whether the immigrant lacks legal representation, is detained, or convicted under a new statute where there are few or no published cases available on courts' interpretation. What is more, as the Attorney General himself acknowledges without resolving, the framework he posits calls into question the statutory burden of proof and will be "more complicated" in removal cases, Op. at 703, n.4 ("[I]t is the alien who must 'point to his own case or other cases' in which a person was convicted without proof of the statutory element that evidences moral turpitude."); *cf. Latu v. Mukasey*, -- F.3d --, 2008 U.S. App. LEXIS 23291, at *14-16, n. 5 (9th Cir. Nov. 3, 2008) ("We emphasize, however, that it is the government that bears the burden of proving removability by clear and convincing evidence. 8 U.S.C. § 1229a(c)(3)(A)."). *See also infra* n.17 (discussing other problematic aspects of Attorney General's burden discussion). The implications of such an approach are staggering. Although *amici* was not presented with an opportunity to explore this issue in depth, it is clear that any such adoption of "reasonable probability" as "step one" of the new test adds to the unfairness of the overall approach, and provides further support for the withdrawal of the opinion.

Only the Seventh Circuit, in a recent panel decision 'reversing' its own prior precedent without going en banc, purports to permit this type of review of the facts outside the record of a conviction to determine if the person is inadmissible for a crime involving moral turpitude—apparently based on a theory that the agency was switching positions on this issue (despite the fact that *Ali* pre-dates *Silva-Trevino*).[12] *Compare Ali*, 521 F.3d at 743 ("[W]e now conclude that when deciding how to classify convictions under criteria that go beyond the criminal charge--such as the amount of the victim's loss, or whether the crime is one of 'moral turpitude', the agency has the discretion to consider evidence beyond the charging papers and judgment of conviction.") *with Padilla v. Gonzales*, 397 F.3d 1016, 1019 (7th Cir. 2005) ("In determining whether a crime involves moral turpitude, we employ a 'categorical' approach; that is, we

[12] The validity of the *Ali* decision is questionable given the conflicting prior panel decisions. The *Ali* decision discusses three prior decisions that touch upon the approach to determining whether a person has been convicted of a crime involving moral turpitude—*all* of which, contrary to the assertions in the opinion, apply a categorical analysis of the nature and elements of the statute at issue and not the underlying facts. *See Hashish v. Gonzales*, 442 F.3d 572, 576 (7th Cir. 2006) (analyzing whether convictions under former Ill. Crim. Code 38-16-1 and 720 ILCS 5/16-1(a) are crimes involving moral turpitude); *Padilla v. Gonzales*, 397 F.3d 1016, 1019 (7th Cir. 2005) (analyzing whether a conviction under 720 Ill. Comp. Stat. 5/31-4(a) is a crime involving moral turpitude); *Mei v. Ashcroft*, 393 F.3d 737, 741 (7th Cir. 2004) (analyzing whether a conviction under 625 ILCS 5/11-204(a) is a crime involving moral turpitude). Indeed, the categorical approach has long been applied in the crime involving moral turpitude context within the Seventh Circuit. *See, e.g., United States ex rel. Giglio v. Neelly*, 208 F.2d 337, 342 (7th Cir. 1953). Because *Ali* was not an en banc decision, it does not override these prior panel decisions. *See Wade v. Hewlett-Packard Development Co. LP Short Term Disability Plan*, 493 F.3d 533, 542 (5th Cir. 2007) ("[I]f two panel decisions conflict, the earlier one controls."). Considering *Ali* in this light, the Attorney General's opinion in *Silva-Trevino* has *no* support among any controlling federal court decisions.

Moreover, even if *Ali* were valid federal precedent, its reasoning is flawed. Not only does the decision fail to recognize that the categorical approach is compelled by statute, *see infra* Part II.B, the *Ali* decision was largely based on its 'deference' to the Board's analysis in *Matter of Babaisakov*, 24 I & N Dec. 608 (2008), a case that does not apply to the crime involving moral turpitude context. *See Ali*, 521 F.3d at 742. *Babaisakov* focuses on the "loss" provision in the fraud aggravated felony category, *see* 8 U.S.C. § 1101(a)(43)(M)(i) (labeling as an aggravated felony any "offense that . . . involves fraud or deceit in which the loss to the victim or victims exceeds $10,000"). While *amici* submit that the reasoning in *Babaisakov* is incorrect *see, e.g., Dulal-Whiteway v. DHS*, 501 F.3d 116 (2d Cir. 2007) (reaching the correct conclusion in the fraud-loss context) and discussion *infra* Part II.B, it is also clear that the Board never intended to extend this reasoning to the context of crimes involving moral turpitude. First, while the Board incorrectly held that "loss to the victim" was a "qualifier" that permitted an inquiry into extrinsic evidence, the Board *correctly* held that courts must apply the categorical approach to determine if the offense "*involves* fraud or deceit." *See Babaisakov*, 24 I & N Dec. at 312, 322 (emphasis added). Second, the only reference the Board makes to the "crime involving moral turpitude" context implicitly acknowledges that the categorical approach applied to the determinations of whether there is "a *conviction* for a crime involving moral turpitude." *See id*. at 317 (emphasis in original). In any event, *Ali* mistakenly extends the reasoning of *Babaisakov* to the crime involving moral turpitude context and its flawed reasoning is now shared by the opinion in *Silva-Trevino*.

determine whether a given crime necessarily involves moral turpitude by examining only the elements of the statute under which the alien was convicted and the record of conviction, not the 'circumstances surrounding the particular transgression'. . . . Generally, a statute that encompasses both acts that do and do not involve moral turpitude cannot be the basis of a removability determination under the categorical approach. However, if the statute is 'divisible' . . . then an alien convicted under a subsection that includes only crimes involving moral turpitude may be found removable."). Notably, the Attorney General's opinion points to no other federal or Board decision adopting the view that a court may look beyond the record of conviction to determine if a person's conviction constitutes a crime involving moral turpitude.

Thus, the Attorney General's assessment of the current state of federal and agency case law on the categorical and modified categorical approach is misleading. The opinion takes the outlier approach and purports to make it the rule. Given the fact that many of the circuits have currently concluded that the categorical and modified categorical approach stems from the plain language of the statute, *Silva-Trevino* creates significant disuniformity since circuits will not defer to this new agency rule. *See, e.g.*, *Gertsenshteyn v. Mukasey*, 544 F.3d 137, 145 (2d Cir. 2008) (holding that the categorical and modified categorical approach is compelled by the statutory term "convicted"); *Velazquez-Herrera*, 24 I & N Dec. at 513 (discussing federal cases that draw the categorical and modified categorical approach from the statutory term "convicted"); *see also infra* Part II.B.

B. Contrary to the assertions in *Silva-Trevino*, the categorical and modified categorical approach for determining whether a person has been convicted of a crime involving moral turpitude is compelled by the plain language of the statute and a century of jurisprudence.

By purporting to create a new rule imposing the way in which courts are to determine whether a person has been convicted of a crime involving moral turpitude, the Attorney General distorts the plain language of the statute and ignores a century of statutory interpretation, case law, and legislative history on this precise issue. In line with the statutory language and Congressional intent, federal courts and the agency have consistently interpreted the statute as requiring a categorical and modified categorical approach to determining whether a person's conviction is for a crime involving moral turpitude.

1. The plain language of the statute compels the use of the categorical and modified categorical approach.

The statute 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) or attempt or conspiracy to commit such a crime" is inadmissible. *See* INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I). Taking each part in the disjunctive, the statute provides three ways for a person to be deemed inadmissible for a crime involving moral turpitude—applying to any person (a) "convicted of . . . a crime involving moral turpitude," or (b) "who admits having committed . . . a crime involving moral turpitude," or (c) who admits committing acts which constitute the essential elements of . . . a crime involving moral turpitude." *See id.*

Thus, the plain meaning of the statutory language distinguishes between convictions and admissions. Where Congress uses the term "convicted," it "premises removability not on what

an alien has done, or may have done, or is likely to do in the future . . . but on what he or she has been formally convicted of in a court of law." *Gertsenshteyn v. Mukasey*, 544 F.3d 137, 145 (2d Cir. 2008); *see also Velazquez-Herrera*, 24 I & N Dec. at 513 ("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*." (emphasis in original)). Thus, by its terms, the statute prohibits courts from considering the underlying facts or conduct when assessing whether a conviction constitutes a crime involving moral turpitude.

Ignoring this plain language, the Attorney General makes three attempts to use statutory language to suggest that "the text actually cuts in different directions." Op. at 693. First, the decision points to language in the parts of the statute that deal with admissions. *See* Op. at 693 (asserting that the language of "aliens who admit 'committing; certain 'acts' seem to call for, or at least allow, inquiry into the particularized facts of the crime"). Yet the language relating to "admissions," "commissions," and "acts" only reinforces the long-held principle that where Congress does predicate immigration consequences on "convictions," it seeks to confine courts' review to the individual's conviction, not his or her conduct or separate admissions. *See, e.g.*, *Velazquez-Herrera*, 24 I & N Dec. at 513. 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) (holding that "where a plea of guilty results in something less than a conviction, . . . the pleas, without more, is not tantamount to an admission of commission of the crime for immigration purposes"); *Matter of Winter*, 12 I & N Dec. 638, 642 (BIA 1967, 1968) ("Where, as here, an alien has been the

subject of court proceedings on criminal charges and the ultimate disposition of those charges by the court falls short of a conviction . . . the 'admission' provisions cannot be called into play to give the intermediate step of pleading a stronger effect than the ultimate disposition could have under the immigration laws."). Determinations of inadmissibility based on admissions entail an entirely separate set of requirements for agency officials to follow prior to relying on statements by an immigrant. *See, e.g.*, *Matter of K*, 9 I & N Dec. 715 (BIA 1962) (holding that an individual must be provided with the definition of the crime before making the alleged admission); *Matter of E.N.*, 7 I & N Dec. 153 (BIA 1956) (holding that an individual must admit all factual elements of the crime); *Matter of G*, 1 I & N D Dec. 225 (BIA 1942) (holding that admission must have been voluntarily given); Foreign Affairs Manual Note 5.11 to 22 C.F.R. § 40.21(a) (stating that officer must ensure the admission is developed to the point where "there is no reasonable doubt that the alien committed the crime in question"); *see also infra* Part II.B.2 (discussing legislative history and interpretation of convictions and admissions as distinct bases for inadmissibility with distinct requirements limiting the power of the agency). Thus, the language relating to "admissions," "commissions" and "acts" does not alter the requirements surrounding "convictions."

Second, the Attorney General attempts to support his opinion by pointing to statutory language within the term "crime involving moral turpitude," explaining that "use of the word 'involving'" and the term 'moral turpitude' indicate 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." *Op.* at 699. This dissection and elements-analysis of "crime involving moral turpitude" is a red herring and

contrary to the history of jurisprudence on the term. "Crime involving moral turpitude" is a legal term of art with "deep roots" in a century-old history. *See Jordan v. De George*, 341 U.S. 223, 227 (1951). It is no different than the myriad of other categories of crime-based grounds of inadmissibility and deportability that are predicated on convictions, whether generic or more complex, such as "aggravated felony" or its subsets, "theft offense," "crime of violence," "illicit trafficking," and other terms under the Immigration and Nationality Act. The requirement of the categorical and modified categorical approach does not stem from the term or label, but from the statutory requirement that a person be "convicted" of an offense that fits within that term or label. *See, e.g.*, *Velazquez-Herrera*, 24 I & N Dec. at 513.

Third, the decision points to language in the deportability provisions that limit the conviction-based deportability consequences relating to crimes involving moral turpitude to the immigrant's "date of admission." Op. at 700. Again, this type of factor is not unique to crimes involving moral turpitude or other grounds of removability (and the decision is careful to state that its analysis does not apply to other categories of removability). All grounds of deportability, for example, require that the person be "admitted," *see* 8 U.S.C. § 1227(a), and 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 "admission" issue is not unique to convictions for crimes involving moral turpitude. Nor is the existence of similar limiting provisions in the statute unique. Many aggravated felony provisions, for example, have other types of limiting provisions, such as the "theft" and "crime of violence" aggravated felony categories that require a one-year sentence to have been imposed. *See* 8 U.S.C. § 1101(a)(43). 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" or "crime of violence" aggravated felony. *See, e.g., Duenas-Alvarez*, 549 U.S. at 820.

Thus, the Attorney General's plain language arguments actually support the rule that the decision eviscerates—that when it comes to convictions, "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*." *Velazquez-Herrera*, 24 I & N Dec. at 513 (emphasis in original). No further inquiry into extrinsic evidence—whether testimonial or otherwise—is permissible in determining whether a person has been "convicted" of a crime involving moral turpitude. *See Pichardo-Sufren*, 21 I & N Dec. at 334.

2. A century of jurisprudence and legislative history demonstrate that Congressional intent compels the use of the categorical and modified categorical approach.

The reasoning of the Attorney General in *Silva-Trevino* is further undermined by a century of jurisprudence and legislative history that demonstrate Congressional intent for how immigration courts must determine whether a person has been convicted of a crime involving moral turpitude. As this history demonstrates, all of the Attorney General's purported reasons for why the statute calls for an "individualized inquiry" into moral turpitude stand in stark contrast to Congressional intent on this precise issue over the last century.

When the term "moral turpitude" first appeared in federal immigration law in 1891, the statute "directed the exclusion of 'persons who have been *convicted* of a felony or other infamous crime or misdemeanor involving moral turpitude.'" *Jordan*, 341 U.S. at 230 n.14 (emphasis added, quoting the Act of March 3, 1891, 26 Stat. 1084). Congress reenacted this provision in 1903, *see* Act of March 3, 1903, 32 Stat. 1213; in 1907, *see* Act of Feb. 20, 1907, 34 Stat. 898' and in 1917, *see* Act of February 5, 1917, 39 Stat. 889, expanding the language to

include any person "*convicted*" of *or* who "*admits*" the commission of a crime or misdemeanor involving moral turpitude.

In examining this language under these early immigration statutes, federal courts concluded that Congress used the terms "convicted" and "admits" as two distinct means of limiting the power of immigration officers to find individual removable on criminal grounds. Early federal court decisions considering the "admits" language concluded that Congress intended its application where there was no conviction to prevent immigration officials from trying facts and underlying conduct. *See Howes v. Tozer*, 3 F.2d 849, 852 (1st Cir.1925) ("Congress, by the enactment of this provision, has required the alien's own admission of guilt as proof of the commission of this class of crimes, and has deprived the immigration authorities of the right to try the question of guilt; that the statute contemplates a voluntary admission; and that evidence of facts stated by the alien from which an inference of his guilt might be inferred is not competent."); *United States ex rel. Castro v. Williams*, 203 F. 155, 156-57 (D.NY 1913) ("Congress has required in respect to this particular class of aliens proof of a specified kind and no other, viz., either a conviction in the country where the crime was committed or an admission by the alien. There is no pretense of any conviction, and . . . ordinary proof is not sufficient. . . . This provision must have been intended as a limitation upon the power of the immigration authorities. It deprives them of the right to try the question of guilt at all. So it is a privilege to aliens because it insures them against any such trial. . . . It is not enough as the government contends that there should be some evidence to support the findings of the board. In this particular class of aliens there must be some evidence of the specific kind prescribed by the act.").

Similarly, federal courts held that Congress sought to limit immigration officers' power to determine whether persons were "convicted" of crimes involving moral turpitude. In a 1914 case involving an individual who had been convicted of libel in England, the Second Circuit Court of Appeals issued a landmark decision interpreting the statute and explicated what has become to be known as the categorical approach to assessing an individual's conviction under the Act:

> [T]he immigration officers act in an administrative capacity. They do not act as judges of the facts to determine from the testimony in each case whether the crime of which the immigrant is convited [sic] does or does not involve moral turpitude. . . . [T]his question must be determined from the judgment of conviction. . . . [T]he law must be uniformly administered. It would be manifestly unjust so to construe the statute as to exclude one person and admit another where both were convicted of criminal libel, because, in the opinion of the immigration officials, the testimony in the former case showed a more aggravated offence than in the latter.

United States ex rel. Mylius v. Uhl, 210 F. 860, 863 (2d Cir. 1914). This reasoning was further refined under the jurisprudence of Judge Learned Hand in a series of decisions in the 1930s. *See, e.g.*, *United States ex rel. Guarino v. Uhl*, 107 F.2d 399, 400 (2d Cir. 1939) (L. Hand, J.) (explaining, in the context of a person convicted of possession of a jimmy (burglar's tool) that "unless the possession of the jimmy with intent to use it for any crime at all, was 'necessarily', or 'inherently', immoral, the conviction did not answer the demands of § 19 of the act of 1917. . . . deporting officials may not consider the particular conduct for which the alien has been convicted; and indeed this is a necessary corollary of the doctrine itself" (citations omitted)); *United States ex rel. Robinson v. Day*, 51 F.2d 1022, 1023 (2d Cir. 1931) (L. Hand, J.) ("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)). If further review is necessary, it must be limited to the record of conviction. *See United States ex rel. Zaffarano v. Corsi*, 63 F.2d 757, 757-758 (2d Cir. 1933) ("[N]either the immigration officials nor the court reviewing their decision may go outside the record of conviction to determine whether in the particular instance the alien's conduct was immoral. And by the record of conviction we mean the charge (indictment), plea, verdict, and sentence. The evidence upon which the verdict was rendered may not be considered . . . ."). Other courts agreed with this interpretation of Congressional intent over the next several decades. *See, e.g., Okabe v. Immigration & Naturalization Service*, 671 F.2d 863, 865 (5th Cir. 1982); *Aguilera-Enriquez v. INS*, 516 F.2d 565, 570 (6th Cir. 1975); *Wadman v. Immigration & Naturalization Service*, 329 F.2d 812, 814 (9th Cir. 1964); *Rassano v. Immigration & Naturalization Service*, 377 F.2d 971, 974 (7th Cir. 1966); *United States ex rel. Giglio v. Neelly*, 208 F.2d 337, 342 (7th Cir. 1953); *United States ex rel. McKenzie v. Savoretti*, 200 F.2d 546, 548 (5th Cir. 1952); *Tillinghast v. Edmead*, 31 F.2d 81, 84 (1st Cir. Mass. 1929).

The federal courts' view of the Congress's intent behind the statute was also adopted by the Attorney General in one of his first decisions on immigration law. *See Op. of Hon. Cummings*, 37 Op. Atty Gen. 293 (AG 1933) ("If the alien has been convicted of a crime such as indicated and the conviction is established, it is not the duty of the administrative officer to go behind the judgment in order to determine purpose, motive, and knowledge, as indicative of moral character."). Subsequent decisions of the Attorney General during the 1930s repeatedly affirmed this view and prohibited the immigration agency from looking beyond the record of conviction. *See Op. of Hon. Cummings*, 39 Op. Atty Gen. 215 (AG 1938) ("[N]either courts nor immigration officers may go outside such record to determine facts or whether in the particular instance the alien's conduct was immoral. . . . It has been held that when, by its definition, the

crime does not necessarily involve moral turpitude, the alien cannot be deported because in the particular instance his conduct was immoral; and, conversely, that when it does, no evidence is competent that he was in fact blameless." (citations omitted)); *Op. of Hon. Cummings*, 39 Op. Atty Gen. 95 (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.").

The Board of Immigration Appeals similarly held that the categorical and modified categorical approach was required, explaining the rule in a major decision again affirmed by the Attorney General. *See Matter of S-*, 2 I & N Dec. 353, 357 (BIA, AG 1945) ("Under settled judicial principles, the presence or absence of moral turpitude, which has been said to be 'an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man or society,' must be determined in the first instance from a consideration of the crime as defined by the statute. If, as defined, it does not inherently or in its essence involve moral turpitude, then no matter how immoral the alien may be, or how iniquitous his conduct may have been in the particular instance, he cannot be deemed to have been guilty of base, vile, or depraved conduct. It is only where the statute includes within its scope offenses which do and some which do not involve moral turpitude, and is so drawn that the offenses which do embody moral obloquy are defined in divisible portions of the statute and those which do not in other such portions, that the record of conviction, i.e., the indictment (complaint or information), plea, verdict and sentence is examined to ascertain therefrom under which divisible portion of the statute the conviction was had and determine therefrom whether moral turpitude is involved." (citations omitted)).[13]

[13] Other early cases demonstrate the Board's careful and continued adoption of the categorical and modified categorical approach. *See, e.g., Matter of R-*, 4 I & N Dec. 176, 179 (BIA 1950) ("We find no merit to counsel's argument that the conduct in question does not constitute a crime since it is well settled that where a record of conviction is introduced in the proceedings, the nature of the crime is conclusively established by that record. It is not permissible to go behind the record of conviction to determine the purpose, motive, or knowledge as indicative of moral character. This rule precludes inquiry

In 1952, Congress debated what would become the modern-day Immigration and Nationality Act. The Senate version of the bill initially proposed a significant change to the

---

outside the record of conviction as to facts favorable and unfavorable to the alien."); *Matter of T-*, 3 I & N Dec. 641, 642-643 (BIA 1949) ("In reaching a conclusion that this crime involves moral turpitude it is well settled that where a record of conviction is introduced in the immigration proceedings 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. It is true that in some cases this rule results in the deportation of an alien who has committed a petty offense which does not necessarily indicate moral obliquity and in a finding of nondeportability in some very few cases where the offense is indicative of bad character. 'But such results always follow the use of fixed standards and such standards are . . . necessary for the efficient administration of the immigration laws.'" (citations omitted)); *Matter of D-S-*, 3 I & N Dec. 502, 504 (BIA 1949) ("It is well settled in immigration proceedings that the nature of the crime is conclusively established by the record of conviction consisting of the charge or indictment, the plea, the verdict and sentence. We are not permitted to go behind this record to determine purpose, motive, or facts, either favorable or unfavorable to the alien." (citations omitted)); *Matter of P-*, 3 I & N Dec. 290, 296-297 (BIA 1948) ("It is well established that when we must decide whether a violation of such a statute as this is a crime involving moral turpitude and the statute is divisible or separable and so drawn as to include within its definition crimes which do and some which do not involve moral turpitude, the record of conviction, i.e., the information (complaint or indictment), plea, verdict and sentence, may be examined to ascertain therefrom whether the requisite moral obloquy is present. It is equally clear that the law must be uniformly administered." (citations omitted)); *Matter of P-*, 1 I & N Dec. 48 (BIA 1947) ("[A] crime must by its very nature and at its minimum, as defined by statute, involve an evil intent before a finding of moral turpitude would be justified."); *Matter of R-*, 2 I & N Dec. 819 (BIA 1947) ("'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.' The Courts have considered the record of conviction, which includes the indictment, plea, verdict and sentence, only where the statute is divisible, for the purpose of determining under which section or clause of the statute the conviction occurred." (citations omitted)); *Matter of M-*, 2 I & N Dec. 721, 724 (BIA 1946); *Matter of M-*, 2 I & N Dec. 525, 526 (BIA 1946) ("Whether in this case the particular violations of section 404 involve moral turpitude must . . . be determined from an examination of the records of convictions. The hearing testimony and matters outside the records of conviction cannot be considered in making this determination." (citations omitted)); *Matter of E-*, 2 I & N Dec 328, 335 (BIA 1945) ("[T]he presence or absence of moral turpitude in any crime is to be judged solely from the definition of the offense (statutory or common law, as the case may be) plus, if necessary, the record of conviction. The particular conduct of the alien, no matter how base or depraved it might have been, is immaterial and irrelevant and under no circumstances . . . can it be considered in making a determination."); *Matter of P-*, 2 I & N Dec. 117 (BIA 1944) ("In determining whether a crime involves moral turpitude, we are limited in the first instance to an examination of the statute wherein the crime is defined. If the crime as defined does not necessarily of its essence comprehend moral turpitude, then the alien cannot be said to have committed a crime involving moral turpitude. Where, however, the statute is divisible or separable and so drawn as to include within its definition crimes which do and some which do not involve moral turpitude, the record of conviction, i.e., the information (complaint or indictment), plea, verdict and sentence, may be examined to ascertain therefrom whether the requisite moral obloquy is present."); *Matter of T -*, 2 I & N Dec. 22 (BIA 1944) ("[I]t is not permissible to consider circumstances under which the crime was committed. The inquiry is limited to the inherent nature of the crime as defined by the statute and established by the record of conviction. If the crime as defined does not necessarily involve moral turpitude, the alien cannot be excluded because in the particular instance his conduct was immoral. Conversely, if the crime as defined necessarily involves moral turpitude, no evidence is competent to show that moral turpitude was not involved. If one statute defines several crimes, some of which involve moral turpitude and some of which do not, and the statute is divisible, it is permissible to ascertain by examination of the record of conviction whether the particular offense involved moral turpitude. The record of conviction means the charge (indictment), plea, verdict, and sentence. . . . As application of the rule must be uniform, the statute must be taken at its minimum unless its provisions are divisible, and if divisible—one or more of its provisions describing offenses involving moral turpitude, and others describing offenses not involving that element—the charge as shown by the record of conviction is controlling as to which provision of the statute is involved. If the particular provision describes an act involving moral turpitude, other evidence may not be received to show that turpitude was not involved; and, on the contrary, if the charge relates to a provision which describes an act not involving moral turpitude, extraneous evidence may not be received to show that moral turpitude was in fact involved." (citations omitted)); In the Matter of W--, 1 I & N Dec. 485 (BIA 1943) ("It is well settled that the record of a foreign court showing conviction is to be taken as conclusive evidence of conviction of the crime disclosed by it.").

criminal grounds of deportability for convictions. In addition to the longstanding grounds for deporting an immigrant who was "convicted" of a crime involving moral turpitude, section 241(a)(4) of the Senate Bill proposed removal of an immigrant who "at any time after entry is convicted in the United States of any criminal offense not comprehended within any of the foregoing (crimes involving moral turpitude), if the Attorney General in his discretion concludes that the alien is an undesirable resident of the United States." *See* Section 241(a)(4), Senate Bill 2550, 82d Cong., 2d sess. 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.

98 Cong. Rec. 5421 (1952). Thereafter, amendments to the Senate bill eliminated this problematic portion of the bill and left only the conviction-based ground of deportability for crimes involving moral turpitude, demonstrating Congress's desire to limit the immigration agency's review of underlying facts where removability is predicated on "convictions."

Since that time, federal courts and the Board of Immigration Appeals have continued to apply the categorical and modified categorical approach to determinations of whether criminal convictions constitute crimes involving moral turpitude for inadmissibility and deportability

purposes.[14] Congress is presumed to be aware of this case law, *see Lorillard Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575, 580 (1978), and has not changed the "convicted" portion of

[14] Since 1952, the Board has had occasion to reaffirm the application of the categorical and modified approach many times. *See, e.g.*, *Pichardo-Sufren*, 21 I & N Dec. at 334; *Matter of Short*, 20 I & N Dec. 136, 137-138 (BIA 1989) ("In determining whether a crime involves moral turpitude, it is the nature of the offense itself which determines moral turpitude. It is the inherent nature of the crime as defined by statute and interpreted by the courts and as limited and described by the record of conviction which determines whether the offense is one involving moral turpitude. The statute under which the conviction occurred controls. If it defines a crime in which turpitude necessarily inheres, then the conviction is for a crime involving moral turpitude for the purposes of the deportation statute. Only where the statute under which the respondent was convicted includes some offenses which involve moral turpitude and some which do not do we look to the record of conviction, meaning the indictment, plea, verdict, and sentence, to determine the offense for which the respondent was convicted." (citations omitted)); *Matter of Baker*, 15 I & N Dec. 50, 51 (BIA 1974) ("It is the inherent nature of the crime as defined by the statute or interpreted by the courts and as limited and described by the record of conviction which determines whether the offense is one involving moral turpitude."); *Matter of Lopez*, 13 I & N Dec. 725, 726 (BIA 1971) ("The presence or absence of moral turpitude must be determined in the first instance from a consideration of the crime as defined by the statute. It is only when the statute includes within its scope offenses which do and some which do not involve moral turpitude that we turn to a consideration of the indictment, plea, verdict and sentence. It is well settled that the definition of a crime must be taken at its minimum . . . ." (citations omitted)); *Matter of V-D-B-*, 8 I & N Dec. 608, 610 (BIA 1960) ("We are not permitted to go behind the record of the judgment of conviction to determine the applicant's guilt or innocence of the offenses charged against him."); *Matter of F-*, 8 I & N Dec. 469, 472 (BIA 1959) ("The immigration laws must be uniformly administered and immigration officers acting in an administrative capacity are in no position to go behind the record to inquire into the legal status of the tribunal whose judgment of conviction is before us."); *Matter of H-*, 7 I & N Dec. 616, 618 (BIA 1957) ("It is the inherent nature of the crime as defined by the statute or interpreted by the courts and as limited and described by the record of conviction which determines whether the offense is one involving moral turpitude"); *Matter of R-*, 6 I & N Dec. 444, 447-448 (BIA 1954) ("The test requires us to first determine what law or specific portion thereof has been violated and then, without regard to the act committed by the alien, to decide whether that law inherently involves moral turpitude; that is, whether violation of the law 'under any and all circumstances,' would involve moral turpitude. If we find that violation of the law under any and all circumstances involves moral turpitude, then we must conclude that all convictions under that law involved moral turpitude although the 'particular acts evidence no immorality.' If, on the other hand, we find that the law punishes acts which do not involve moral turpitude as well as those which do involve moral turpitude, then we must rule that no conviction under that law involves moral turpitude, although in the particular instance conduct was immoral." (citations omitted)); *Matter of B-*, 6 I & N Dec. 98, 108 (BIA 1954) ("It is well settled that the presence or absence of moral turpitude must be determined, in the first instance, from a consideration of the crime as defined by the statute; that we cannot go behind the judgment of conviction to determine the precise circumstances surrounding the commission of the crime; and that, if the offense, as defined in the statute, does not inherently or in its essence involve moral turpitude, then no matter how immoral the alien may be, or how iniquitous his conduct may have been in the particular instance, he cannot be deemed to have been guilty of base, vile or depraved conduct. It is only where the statute includes within its scope offenses which do and some which do not involve moral turpitude, and is so drawn that the offenses which do embody moral obloquy are defined in divisible portions of the statute and those which do not in other such portions, that the record of conviction, that is, the indictment, plea, verdict and sentence may be examined to ascertain therefrom under which divisible portion of the statute the conviction was had and determine from that portion of the statute whether moral turpitude is involved."); *Matter of P-*, 5 I & N Dec. 582, 584-585 (BIA 1953) ("In determining whether a particular offense involves moral turpitude, the scope of inquiry is limited to the statute, the regulations issued thereunder, and the record of conviction including the complaint information or indictment, the plea, verdict and sentence. The question as to whether or not a certain crime involves moral turpitude must be determined from the judgment of conviction, and if a crime does not in its essence involve moral turpitude, resort cannot be had to evidence outside the record to show that the offense involved moral turpitude."); *Matter of S-*, 5 I & N Dec. 576, 577 (BIA 1953) ("[W]e are precluded from going outside the record of conviction to consider [] testimony."); *Matter of B-*, 5 I & N Dec. 538, 540 (BIA 1953) ("It is well settled that where a statute is sufficiently broad to include offenses which do and do not

the inadmissibility grounds despite having amended the inadmissibility statute over forty times since 1952. *See* 8 U.S.C. § 1182 (historical notes).

The Attorney General's reasoning is in direct conflict with this history of consistent statutory interpretation and reenactment of the statutory provision, evincing Congressional intent. The Attorney General cannot justify his position by ignoring this wealth of legal history and claiming that the statute is "silent" on the issue and invites agency interpretation. A century of jurisprudence on Congressional intent stands behind the "convicted" requirement and demonstrates the gross error in the Attorney General's reasoning.

C. The decision in *Silva-Trevino* is contrary to the interests of fairness, uniformity, comity, and recognition of the limitations of the agency as articulated in *Taylor, Shepard,* and federal and agency immigration decisions.

As part of the Attorney General's rationale for permitting an inquiry into extrinsic facts beyond the record of conviction, the opinion rejects what it deems are the only two justifications for the traditional categorical and modified categorical approach—(i) that the approach is "carried over" from the criminal sentencing context in *Taylor* and *Shepard*, and (ii) that the approach guards against oppressive administrative burden. *See* Op. at 700-703. This assessment—both in its assumptions and conclusions—betrays a fundamental lack of understanding of the importance of the categorical and modified categorical approach to constitutional limitations on agency power and the fair and efficient administration of

---

involve moral turpitude and the record of conviction fails to show with sufficient particularity what offense was actually committed, it may not be concluded that the offense for which the person was convicted involves moral turpitude."); *Matter of of C-*, 5 I & N Dec. 65, 71 (BIA 1953) ("[I]n these broad divisible statutes which involve acts which do and acts which do not involve moral turpitude, while it is improper to go to testimony or evidence as to the nature of the particular act, it is entirely correct and eminently fitting to base a determination of moral turpitude upon the record of conviction, i.e., the complaint information or indictment, plea, verdict, and sentence. Indeed, we are precluded from going outside the record of conviction."); *Matter of R-*, 4 I & N Dec. 644, 647 (BIA 1952) ("It is well established that, for immigration purposes, in determining whether an offense involved moral turpitude, it is not permissible to consider the circumstances under which the crime was committed. The inquiry is limited to the inherent nature of the crime as defined by the statute and established by the record of conviction; i.e., the charge (indictment or complaint), plea, verdict, and sentence.").

immigration laws. First, the three principles articulated in *Taylor* and *Shepard*—statutory language, administrative burden, and Constitutional concerns of fairness—apply with equal or greater force in the immigration context. In addition, at least three other overlapping principles support the application of categorical and modified categorical approach as articulated by the many immigration decisions referenced above—uniformity, comity, and the recognition of the limitations of the agency.

1. The principles articulated by the Supreme Court in *Taylor* and *Shepard*—statutory language, administrative burden, and Constitutional concerns of fairness—apply with equal or greater force in the immigration context.

As the aforementioned history of the categorical and modified categorical approach demonstrates, this approach was not "carried over" from *Taylor* and *Shepard* into the immigration context. *See supra* Part II.B.2 (describing the first federal court opinion explaining the categorical approach in 1914, followed by scores of federal and agency decisions on the issue pre-dating *Taylor* in 1990 and *Shepard* in 2005). Thus, the Attorney General's assertions that the categorical and modified categorical approach should never have been carried over from the criminal sentencing context misses the point. Nevertheless, the principles articulated in *Taylor* and *Shepard* do apply—with equal or greater force—in the immigration context.

As the Second Circuit's recent decision in *Dulal-Whiteway* explains, the Supreme Court provided three principle reasons for the categorical and modified categorical approach in *Taylor* and *Shepard*: (i) statutory language focusing the consequences of "convictions"; (ii) the daunting practical realities of permitting relitigation of underlying facts; and (iii) Constitutional concerns of fairness, which in the sentencing context relate to Sixth Amendment jury trial rights. *See Dulal-Whiteway*, 501 F.3d at 131-133 (analyzing the Supreme Court's jurisprudence on the

categorical and modified categorical approach in the sentencing context). The court correctly concluded that these principles each apply here.

First, the statutory language focusing on whether a person has been "convicted" of the relevant offense, is certainly applicable here. *See id.* at 131-132; *see also supra* Part II.B (discussing how the statutory language "convicted" compels the categorical and modified categorical approach in the inadmissibility statute). As discussed above, the Attorney General's decisions fails to adequately address this aspect of the statutory language or the century of jurisprudence interpreting it.

Second, as the Second Circuit explains, "the *Taylor* and *Shepard* Courts' concern about the 'daunting' practical difficulties associated with scrutinizing the facts underlying a conviction is equally applicable in the removal context. We have emphasized that the BIA and reviewing courts are ill-suited to readjudicate the basis of prior criminal convictions." *Dulal-Whiteway*, 501 F.3d at 132. This concern has been expressed by the agency is numerous decisions since the Board first began publishing decisions. *See, e.g.*, *Pichardo-Sufren*, 21 I & N Dec. at 335-336 ("[T]he principle of not looking behind a record of conviction provides this Board with the only workable approach in cases where deportability is premised on the existence of a conviction. If we were to allow evidence that is not part of the record of conviction . . . , we essentially would be inviting the parties to present any and all evidence bearing on an alien's conduct leading to the conviction, including possibly the arresting officer's testimony or even the testimony of eyewitnesses who may have been at the scene of the crime. Such an endeavor is inconsistent both with the streamlined adjudication that a deportation hearing is intended to provide and with the settled proposition that an Immigration Judge cannot adjudicate guilt or innocence. . . . We believe that the harm to the system induced by the consideration of such extrinsic evidence far

outweighs the beneficial effect of allowing it to form the evidentiary basis of a finding of deportability." (citations omitted)); *see also Matter of R-*, 6 I & N Dec. 444, 447-448 (BIA 1954), *Matter of P-*, 3 I & N Dec. 290, 296-297 (BIA 1948).

In addressing the issue, the Attorney General states that "[i]mmigration judges are well versed in case management" and that sometimes the factual inquiry may be simple. *Op.* at 702-703.[15] This view of the potential burden on the agency is overly simplistic, particularly in light of the increasing caseloads of the officials actually tasked with the duty of applying the law at the agency level. *See, e.g.*, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW: CASELOAD PERFORMANCE REPORTING NEEDS IMPROVEMENT, GAO-06-771 (August 11, 2006) *available at* www.gao.gov/products/GAO-06-771 ("From fiscal years 2000 to 2005, despite an increase in the number of immigration judges, the number of new cases filed in immigration courts outpaced cases completed. During this period, while the number of on-board judges increased about 3 percent, the courts' caseload climbed about 39 percent from about 381,000 cases to about 531,000 cases."). In fact, during fiscal years 1996 to 2006, immigration courts handled 136,896 cases involving charges of crimes involving moral turpitude. *See* Transactional Records Access Clearinghouse, Individuals Charged with Moral Turpitude in Immigration Court, *at* http://trac.syr.edu/immigration/reports/moral_turp.html. Permitting an "individualized moral turpitude inquiry," Op. at 700, into the facts beyond the record of conviction for alleged crimes involving moral turpitude will be devastating for the immigration courts managing these high caseloads.

[15] The Attorney General acknowledges that the BIA is in disagreement with his assessment, but provides only a conclusory statement in response. *See* Op. at 702 ("I do not believe, as the Board has suggested, that limiting inquiry to the record of conviction is the 'only' administratively workable solution to deciding moral turpitude cases that cannot be decided at the categorical stage, or that permitting inquiry beyond the record in such cases would provide 'no clear stopping point' to complete relitigation of past crimes.").

Third, as the Second Circuit correctly concludes, Constitutional principles of fairness—expressed in Sixth Amendment terms in sentencing cases—also apply in the immigration context. *See Dulal-Whiteway*, 501 F.3d at 132. The Attorney General's response to this point is to note that the Sixth Amendment does not apply to immigration proceedings. *Op.* at 701. However, as the Second Circuit recognized, "the concept of a 'conviction' does carry with it the assurance that the convicted individual was accorded constitutional protections before a judgment was imposed against him," and moreover,

> even were we to read the INA's requirement of a "conviction" as having no relation whatsoever to the constitutional right to a jury trial, *Taylor* was motivated not only by the Sixth Amendment but by general conceptions of fairness. *See Taylor*, 495 U.S. at 601 (noting the "potential unfairness of a factual approach"). "[I]f a guilty plea to a lesser, [non-removable] offense was the result of a plea bargain, it would seem unfair to [order removal] as if the defendant had pleaded guilty to [a removable offense]." Id. at 601-02. By permitting the BIA to remove only those aliens who have actually or necessarily pleaded to the elements of a removable offense, our holding promotes the fair exercise of the removal power.

Id., 501 F.3d at 132&n.14, 133. Thus, the principles of *Taylor* and *Shepard* apply to the immigration context.

To counter this view, the Attorney General points to the fact that moral turpitude is not an "element" of a crime and that an evidentiary inquiry into underlying facts will permit a more inclusive look into the offense of conviction without permitting an immigrant to "relitigate the conviction itself." Op. at 701, 703. An offense is, however, defined by the elements in the statute of conviction, as limited by the record of conviction, and it is these factors that must correspond to those in the generic definition of a crime involving moral turpitude. These are therefore some of the very factors that demonstrate why the underlying fairness principles of *Taylor* and *Shepard* would apply with even greater force in the immigration context.

As previously explained, "crime involving moral turpitude" is a legal term of art, and immigration courts have been determining whether a conviction fits that category for a century. *See supra* n.8 & Part II.B. Looking to the statutory offense and record of conviction to determine whether a person has been convicted of a "crime involving moral turpitude" preserves the inquiry as a question of law, to be determined by an immigration judge, without engaging in a factual inquiry into issues that were not litigated—perhaps as a result of plea deals or prosecutorial discretion—during the criminal proceedings. Thus, the application of the categorical and modified categorical approach is even more important in immigration proceedings where, unlike in criminal sentencing cases, there is no statutory right to government-appointed counsel, no right to collaterally attack convictions, and the rules of evidence and discovery are lax. Under these circumstances, opening the "convicted" inquiry up for factual inquiries where the immigrant does not have an equal opportunity to find and challenge the evidence and/or the basis for the conviction raises due process concerns in terms of notice and an opportunity to be heard on the facts and evidence that will be used to show that he or she has been "convicted" of a removable offense. [16] *See generally Burger v. Gonzales*, 498 F.3d 131 (2d Cir. 2007) (reversing removal order because respondents due process rights were violated when she was deprived of opportunity to present evidence); *Tun v. Gonzales*, 485 F.3d 1014 (8th Cir. 2007) (same); *Zolotukhin v. Gonzales*, 417 F.3d 1073 (9th 2005) (same); *Kerciku v. INA*, 314 F.3d 913 (7th Cir. 2003) (same).

[16] As the Attorney General's opinion acknowledges, his new test will allow an immigration judge to consider (and the government to produce) "any additional evidence . . . necessary or appropriate to resolve accurately the moral turpitude question," while simultaneously dictating that "[a]liens may not challenge—at any stage of the moral turpitude inquiry—determinations or facts that were necessary to their prior convictions." Op. at 704.

2. In addition, principles concerning the Constitutional requirements for workable standards and rules, separation of powers and comity, uniformity all support the application of the categorical and modified categorical approach.

In addition to the concerns articulated above, there are several other principles described in the case law that the Attorney General's decisions fails to address, including principles of separation of powers and comity (relating to the immigration court's role in construing convictions from state, federal, and foreign criminal courts), limitations on the types of standards used by the immigration court as an administrative agency, and the important issue of uniformity. All of these concerns support application of the categorical and modified categorical approach and lead to the fair administration of immigration law.

First is the important concern of separation of powers and comity—immigration courts are not in a position as administrative bodies to question or look beyond the adjudications of criminal courts of state, federal or foreign governments. This concept is well developed in the case law. *See, e.g.*, *United States ex rel. Mylius v. Uhl*, 210 F. 860, 863 (2d Cir. 1914) ("[T]he immigration officers act in an administrative capacity. They do not act as judges of the facts to determine from the testimony in each case whether the crime of which the immigrant is convited [sic] does or does not involve moral turpitude."); *Op. of Hon. Cummings*, 37 Op. Atty Gen. 293 (AG 1933) ("[W]hen it has been shown that an immigrant has been convicted of a crime, the only duty of the administrative officials is to determine whether that crime should be classified as one involving moral turpitude, according to its nature and not according to the particular facts and circumstances accompanying a commission of it." (internal quotation marks and citations omitted)); *Matter of F-*, 8 I & N Dec. 469, 472 (BIA 1959) ("[I]mmigration officers acting in an administrative capacity are in no position to go behind the record to inquire into the legal status

of the tribunal whose judgment of conviction is before us."); *Matter of R-*, 6 I & N Dec. 444, 447-448 (BIA 1954) ("The rule set forth . . . eliminates the situation where a nonjudicial agency retries a judicial matter."); *Matter of R-*, 2 I & N Dec. 819, 826-827 (B.I.A. 1947) ("To find that the offense in the particular circumstances involved moral turpitude would in effect enlarge the crime by adding the element of materiality which the statute was drawn to eliminate. As Judge Noyes declared in *Mylius v. Uhl*, the crime must be judged 'according to its nature, and not according to the particular facts and circumstances accompanying a commission of it.'"). Permitting an agency to review the facts beyond the record of conviction in determining how to categorize that conviction places the agency in the role of judicial body at worst and fails to consider important factors of comity at best.

Second is the closely related issue regarding limitations on the agency, drawn from Constitutional nondelegation doctrine, which dictate that agencies must apply workable standards and rules. Nondelegation doctrine was articulated early in the immigration context in *Mahler v. Eby*, 264 U.S. 32, 44 (1924), in which the Supreme Court reversed the deportation orders of Secretary of Labor on the grounds that they lacked express findings, holding that "[i]n creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function." This doctrine worked its way into courts' reasoning on the importance of the categorical and modified categorical approach for assessing a person's conviction. *See, e.g., Op. of Hon. Cummings*, 37 Op. Atty Gen. 293 (AG 1933) ("In determining whether aliens are entitled to admission, the immigration authorities act in an administrative and not a judicial capacity. They must follow definite standards and apply general rules." (internal quotation marks and citation omitted)); *Matter of R-*, 6 I & N Dec. 444, 447-448&n.2 (BIA

1954) ("The rule set forth exists because a standard must be supplied to administrative agencies."); *Matter of P-*, 3 I & N Dec. 290, 296-297 (BIA 1948) ("In determining whether aliens are entitled to admission, the immigration authorities act in an administrative and not a judicial capacity. They must follow definite standards and apply general rules." (internal quotation marks and citation omitted)). Permitting the agency to review the facts beyond the record of the conviction as part of an "individualized moral turpitude inquiry," Op. at 700, or whenever an immigration judge deems it "necessary and appropriate," Op. at 690, eviscerates the workable standard provided by Congress to the agency and therefore would violate nondelegation principles.

Third and importantly is the issue of uniformity. It has been long held that immigration laws must be applied uniformly, as the Attorney General acknowledges in his decision. *See* Op. at 694 ("[B]ecause our immigration laws 'often affect individuals in the most fundamental ways,' those laws 'to the greatest extent possible . . . should be applied in a uniform manner nationwide.'" (quoting *Matter of Cerna*, 20 I & N Dec. 399, 408 (BIA 1991)). This necessity of uniformity—along with the fundamental principles of fairness and equal protection it ensures—is a core reason for the application of the categorical and modified categorical approach in determining the effects of a person's conviction. *See, e.g.*, *United States ex rel. Mylius v. Uhl*, 210 F. 860, 863 (2d Cir. 1914) ("[T]he rule which confines the proof of the nature of the offense to the judgment is clearly in the interest of a uniform and efficient administration of the law and in the interest of the immigration officials as well, for if they may examine the testimony on the trial to determine the character of the offense, so may the immigrant."); *Op. of Hon. Cummings*, 37 Op. Atty Gen. 293 (AG 1933) ("I do not think the immigration law intends that where two aliens are shown to have been convicted of the same kind of crime, the authorities should inquire

into the evidence upon which they were convicted and admit the one and exclude the other. It is true that if they do not take such course some aliens who have been convicted of high crimes may be excluded although their particular acts evidence no immorality and that some who have been convicted of slight offenses may be admitted although the facts surrounding their commission may be such as to indicate moral obliquity. But such results always follow the use of fixed standards and such standards are, in my opinion, necessary for the efficient administration of the immigration laws." (internal quotation marks and citations omitted)); *Matter of F-*, 8 I & N Dec. 469, 472 (BIA 1959) ("The immigration laws must be uniformly administered."); *Matter of R-*, 6 I & N Dec. 444, 447-448 (BIA 1954) ("The rule set forth . . . prevents the situation occurring where two people convicted under the same specific law are given different treatment because one indictment may contain a fuller or different description of the same act than the other indictment; and makes for uniform administration of law."); *Matter of T-*, 3 I & N Dec. 641, 642-643 (BIA 1949) ("This rule precludes inquiry outside the record of conviction as to facts favorable and unfavorable to the alien. It is true that in some cases this rule results in the deportation of an alien who has committed a petty offense which does not necessarily indicate moral obliquity and in a finding of nondeportability in some very few cases where the offense is indicative of bad character. 'But such results always follow the use of fixed standards and such standards are . . . necessary for the efficient administration of the immigration laws.'" (citations omitted)); *Matter of T-*, 2 I & N Dec. 22 (BIA 1944) ("[A]pplication of the rule must be uniform."). By permitting a "individualized moral turpitude inquiry," Op. at 700, the Attorney General's decision undermines uniformity and its attendant fairness and equal protection principles by creating a rule that permits immigration judges to reach different conclusions and apply different standards, reviewing facts where the adjudicator deems it "necessary and

appropriate," Op. at 690, to individuals with the same convictions.[17]

The Attorney General's decision undermines all of the core principles that have long been cited as justifications for the categorical and modified categorical approach. The result is an unworkable system for immigration courts. Immigration courts have traditionally been able to determine the legal question of whether a person has been convicted of a removable offense at the initial stages of proceedings, and then schedule and hold later evidentiary hearings for individuals who are removable but eligible for relief (such as cancellation of removal and asylum). Under the new standard, in thousands of cases, individual hearings (and the adjournments that will be necessary to collect this factual evidence) will have to be held to determine the threshold issue of removability. This means that individual hearings will be required in many cases currently resolved without such hearings. Some cases will now require multiple hearings if the respondent prevails at the individual hearing on removability and is eligible for relief. The impact of this new approach on the fair and efficient administration of justice in the already overburdened immigration court system will be severe. *See, e.g.*, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW: CASELOAD PERFORMANCE REPORTING NEEDS IMPROVEMENT, GAO-06-771 (August 11, 2006) *available at* www.gao.gov/products/GAO-06-

[17] The Attorney General's decision is also troubling insofar as it suggests, in a footnote, the application of a new burden-shifting scheme in light of its "individualized moral turpitude inquiry." Op. at 700, 703 n.4. Under this scheme and open factual inquiry, an adjudicator may reach a different result on removability for the same individual depending on whether he or she is charged as having been convicted of a crime involving moral turpitude under the inadmissibility or deportability provision of the statute. *See* Op. at 703 n.4. This contravenes the principle, recognized by the Supreme Court, that adjudicators may not reach different results when applying the same statutory language to identical convictions simply because they arise in different contexts. *See, e.g.*, *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (finding that, whatever the context, "we must interpret the statute consistently"); *see also Clark v. Martinez*, 543 U.S. 371, 385-86 (2005) (concluding that interpretation must apply in both inadmissibility and deportability contexts). The language in the footnote is also problematic because it could be read to suggest, perhaps inadvertently, the reversal of longstanding federal court and BIA precedent placing the burden of proof of establishing removability on the government where lawful permanent residents face inadmissibility. *Compare* Op. at 703 n.4 *with Hana v. Gonzales*, 400 F.3d 472 (6th Cir. 2005); *Singh v. Reno*, 113 F.3d 1512 (9th Cir. 1997); *Matter of Huang*, 19 I & N Dec. 749, 754 (BIA 1988). The opinion's discussion of this complex burden issue in a footnote without addressing longstanding precedent on point is further indication of the need to withdraw the opinion outright or withdraw the opinion pending additional briefing on these important legal issues.

771 (measuring a 39 percent rise in caseload for immigration judges from fiscal year 2000 through 2005); *supra* Part II.C.1 (discussing staggering administrative burden on immigration courts). In light of the aforementioned issues, both in terms of the century of jurisprudence on the categorical and modified categorical approach as well as the real world impact that this opinion will have on the immigration court system, withdrawal of the opinion or, at a minimum, withdrawal pending additional briefing is necessary to address these significant concerns.

III. THE OPINION CREATES AN UNWORKABLE STANDARD THAT WILL SUBSTANTIALLY DISRUPT 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 new fact-based moral turpitude analysis announced in the opinion in this case will also make 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 a contemplated guilty plea or other conviction disposition. Under the new fact-based analysis, no one will be able to assure defendants that a contemplated disposition will leave them eligible for relief from removal or will carry no immigration consequences. As a result, many more minor cases will be forced to trial, imposing a tremendous burden on state and federal criminal justice systems.

In *St. Cyr*, the Supreme Court explained the critical importance of immigration advisals during plea negotiations and the obligations of various criminal justice actors to make such advisals. 533 U.S. at 322-23. The traditional categorical analysis allows criminal court judges and criminal defense attorneys to satisfy their ethical and statutory obligations to ensure that noncitizen defendants understand the immigration consequences of a contemplated disposition.

See generally St. Cyr, 533 U.S. at 323 n.48; Dan Kesselbrenner and Lory D. Rosenberg, IMMIGRATION LAW AND CRIME § 4:19 (citing twenty five state statutes that require immigration advisals before accepting criminal pleas) (2008). The traditional approach affords courts and attorneys and, more importantly, immigrant defendants some level of certainty as to the immigration consequences that are likely to flow from a contemplated disposition. For example, there is settled case law, that a conviction for intentionally causing physical injury under N.Y. P. L. § 120.00(1), is a crime involving moral turpitude, *Matter of Solon*, 24 I & N Dec. 239 (BIA 2007), but that a conviction for recklessly causing physical injury under N. Y. P. L. § 120.00(2), is not a crime involving moral turpitude, *Matter of Fualaau*, 21 I & N Dec. 475, 478 (BIA 1996). Accordingly, under traditional categorical analysis, a court or defense attorney could advise a defendant facing a New York assault charge, with a great degree of certainty, about what immigration consequences would flow if the client pled guilty under subdivision one or two of N. Y. P. L. § 120.00.

Under the fact-based analysis announced in this decision there is be no way to reliably assess the immigration consequences of many contemplated dispositions. Even when a client is offered a disposition that would traditionally have not been considered a crime involving moral turpitude, such as reckless assault under N.Y. P. L. § 120.00(2), there will be several significant impediments to assessing immigration consequences.[18] Because DHS may attempt to characterize such conviction as a crime involving moral turpitude, the criminal courts will have to conduct an inquisition into the factual circumstances underlying an arrest even when such facts are irrelevant to the offered disposition. Without an assurance that DHS will not inquire into the facts underlying a certain conviction, attorneys will be required to conduct full-scale

[18] Indeed, *amici* are already aware of a case in the Immigration Court in York, PA, where DHS has taken the position—based on their reading of the Attorney General's opinion—that a conviction for reckless assault, under N.Y. P.L. § 120.00(2), is a crime involving moral turpitude based on the facts underlying the conviction.

factual investigations for even minor offenses that are traditionally resolved shortly after arrest at arraignments. In this process, attorneys will have to guess at what type of documentary or testimonial evidence DHS or the respondent will be able to produce at an individual hearing in removal proceedings, which could occur at any time in the future and in which the defendant may not have an attorney and may be detained and without access to witnesses and documents. In short, courts and defense attorneys will have to expend extraordinary investigatory resources to make even educated guesses as to the immigration consequences that would flow from many dispositions. Even under the best of circumstances, such guesswork will never be able to account for the various ways different immigration judges will weigh and credit evidence.

The problem becomes even more tangled when one begins to understand how attorneys actually obtain and deliver immigration advice. The way that federal immigration law maps onto the various criminal codes of the fifty states is an extraordinarily complex and specialized area of law. *Drax v. Reno*, 338 F.3d 98, 99 (2d Cir. 2003) (describing the "labyrinthine character of modern immigration law—a maze of hyper-technical statutes and regulations that engender waste, delay, and confusion for the Government and petitioners alike."). As a result, criminal defense attorneys, and even some general practice immigration attorneys, are generally ill-equipped to assess the immigration consequences of contemplated dispositions on their own.

Accordingly, criminal justice systems, courts, public defender offices, and defender organizations have in, recent years, expended significant resources creating and updating practice materials and forming programs and organizations all to assist defense attorneys and courts to meet their obligations to deliver immigration advisals.[19] Practice aids, such as charts

[19] *See, e.g., The National Center for State Courts*, Impact of Immigration on Courts, Technical Assistance Program, *available at* http://www.ncsconline.org/WC/CourTopics/ResourceGuide.asp?topic=ImmLaw; *Defending Immigrant Partnership*, *available at* http://defendingimmigrants.org/; *Immigration Advocates Network*, Immigration and Crime Resources, *available at* http://www.immigrationadvocates.org/library/folder.172046-Immigration_and_Crimes;

that map out the immigration consequences of various statutes, simply cannot take account 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. *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 consequences of various dispositions based on traditional categorical approach), *available at* http://defendingimmigrants.org/library/. Nonprofit criminal-immigration experts, who each provide crucial consultations on thousands of cases a year, could no longer offer brief advice and counseling to evaluate contemplated dispositions without, in many cases, undertaking a full factual investigation of a case—a practical impossibility. Simply put, this decision undermines years of work creating an infrastructure to assist criminal justice systems in delivering accurate immigration advisals and leaves such systems with no realistic way to meet their obligations. *See, e.g.*, New York State Collateral Consequences of Criminal Charges website (covering immigration consequences) which will be hosted by the New York Judicial Institute, http://www2.law.columbia.edu/fourcs/index.html.

In addition, the opinion in this case will upset reliance by prosecutors on the consequences of a conviction being limited to the terms of the conviction, further leading to disruption of the orderly process of state and criminal justice systems. In attempting to reach just resolutions of criminal cases involving noncitizen defendants through plea negotiations and

---

National Immigration Project of the National Lawyers Guild, Criminal & Deportation Defense, *available at* http://www.nationalimmigrationproject.org/CrimPage/CrimPage.html; *New York State Defenders Association, Immigrant Defense Project*, *available at* http://www.nysda.org/idp/; *Immigration Legal Resource Center*, Criminal and Immigration Law, *available at* http://www.ilrc.org/criminal.php.

cooperation agreements, for example, prosecutors must also rely on the parties being able to have a clear understanding of immigration consequences of the negotiated conviction disposition. As explained by Robert Johnson, a former President of the National District Attorneys Association: "As prosecutors, we see the effects of these collateral consequences . . . Defendants will go to trial more often if the result of a conviction is out of the control of the prosecutor and judge . . . As a prosecutor, you must comprehend this full range of consequences that flow from a crucial conviction. If not, we will suffer the disrespect and lose the confidence of the very society we seek to protect." Message from the President Robert M.A. Johnson, Nat. Dist. Attys. Ass'n, The Prosecutor, May/June 2001, http://www.ndaa.org/ndaa/about/president_message_may_june_2001.html ("Message from the President, NDAA").

As a result of the new *Silva-Trevino* analysis, 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 automatic removal. Many noncitizen defendants will therefore be unwilling to plead guilty, and many more cases, particularly minor cases, will proceed to trial. *St. Cyr*, 533 U.S. at 323 (explaining that many noncitizen defendant only plead guilty in reliance upon reassurances that the plea will mitigate immigration consequences). Criminal justice systems are, of course, reliant on plea bargaining, *id*. at 324 n.51 (noting that 90% of convictions are obtained via guilty plea), U.S. Sentencing Comm'n, 2007 Sourcebook of Federal Sentencing Statistics, at Fig. C & tbl.10 (noting that in 2007, 95.8% of federal criminal cases were resolved by guilty plea and, in some district, as high as 99% percent of cases were resolved by guilty pleas), and as the Supreme Court has explained "'[i]f every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities,'" *id.* at 323 n.47 (*quoting*

Santobello v. New York, 404 U.S. 257, 260 (1971)). Accordingly, state and federal court criminal justice systems would not only be unable to deliver required advisals, but as a result, would bear the significant costs associated with trying many more cases involving noncitizen defendants.

IV. THE DECISION IMPERMISSIBLY APPLIES A DRAMATIC AND ENTIRELY NEW RULE RETROACTIVELY TO NONCITIZENS, WHO PLED GUILTY PRIOR TO ITS ISSUANCE, IN REASONABLE RELIANCE UPON LONG SETTLED PRECEDENT.

Even assuming *arguendo* that the opinion is correct, which it is not, the decision must nevertheless be withdrawn because retroactive application of the new rule it announces is an abuse of discretion and a violation of due process. As a general matter, while rulemaking is the preferred method of announcing new agency interpretations, *Community Tel. of S. Calif. v. Gottfried*, 459 U.S. 498, 511 (1983) (explaining that "rulemaking is generally a better, fairer, and more effective method" of announcing a new rule), agencies are nonetheless free to announce new rules through adjudication, *NLRB v. Bell Aerospace Co*., 416 U.S. 267, 294 (1974); *S.E.C. v. Chenery Corp*., 332 U.S. 194, 202 (1947); *but see supra* Part I (discussing necessity for fair process in adjudication). However, there are limits on an agency's power to apply such new rules retroactively. *Bell Aerospace,* 416 U.S. at 295, *Chenery Corp*., 332 U.S. at 202; *cf. INS v. St. Cyr*, 533 U.S. 289, 315-16 (2001) (discussing generally presumption against retroactivity).

Here, the Attorney General has purported to change the consequences of plea agreements entered into long before his decision. There is no question that such a decision has a retroactive effect since it "attache[s] new legal consequences to events completed before its enactment." *St. Cyr*, 533 US at 325 (holding that altering immigration consequences of a criminal plea

agreement has retroactive effect). The only issue is whether or not such retroactive effect is permissible.

In order to determine whether a new rule announced in an agency adjudication can be applied retroactively, the "elementary consideration of fairness," *St. Cyr*, 533 U.S. at 516, militating against "retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles." *S.E.C. v. Chenery Corp*., 332 U.S. 194, 202 (1947). As the Supreme Court has explained more recently, retroactivity analysis turns on "familiar considerations of fair notice, reasonable reliance, and settled expectations." *St. Cyr*, 533 U.S. at 321. Therefore, when a "substantial" "adverse consequence" results from reliance on a prior decision or "some new liability . . . [is] imposed on an individual for past actions which were taken in good-faith reliance on" such prior decision, it offends due process and is an abuse of discretion to retroactively apply a new rule announced through an agency adjudication. *Bell Aerospace*, 416 U.S. at 295; s*ee also Heckler v. Cmty. Health Servs. of Crawford County, Inc*., 467 U.S. 51, 60 n. 12 (1984) (recognizing the principle that "an administrative agency may not apply a new rule retroactively when to do so would unduly intrude upon reasonable reliance interests").

The circuit courts have further sharpened retroactivity analysis for new rules announced through agency rule adjudications. *See, e.g., Microcomputer Tech. Inst. v. Riley*, 139 F.3d 1044, 1050 (5th Cir. 1998); *Retail, Wholesale and Department Store Union, AFL-CIO v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972). As the Fifth Circuit has explained:

> When an agency changes its policy prospectively, a reviewing court need only determine the reasonableness of the new interpretation in terms of *Chevron*. But where an agency makes a change with retroactive effect, the reviewing court must also determine whether application of the new policy to a party who relied on the old is so unfair as to be arbitrary and capricious.
>
> * * *

> Accordingly, we must weigh the disadvantages of retroactivity-frustration of parties' expectations-against the detrimental effect of prospectivity-partial frustration of what we have now determined is the proper statutory interpretation.

Microcomputer, 139 F.3d at 1050-51; *see also Negrete-Rodriguez v. Mukasey*, 518 F.3d 497, 503-504 (7th Cir. 2008) ("An administrative agency may not apply a new rule retroactively when to do so would unduly intrude upon reasonable reliance interests." (internal quotation marks omitted)); *Retail, Wholesale*, 466 F.2d at 390 (establishing a often cited five-factor test for evaluating retroactive agency adjudications, followed by the majority of circuits other than the Fifth). Moreover, the Fifth Circuit has made clear that no deference is afforded to an agency on the retroactivity issue. *Microcomputer*, 139 F.3d at 1050-51.

The three factors that have been most guided courts in determining whether an new agency adjudicative rule may be applied retroactively are: (1) the extent to which the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law; (2) the gravity of the adverse consequences that will befall the litigant if the rule is applied retroactively; and (3) the extent to which the litigant may have relied on the former rule. *See infra* Part IV.A-C.

A. It is improper to retroactively apply the new rule announced in the decision because it is an abrupt departure from an extremely well-settled prior rule of law.

When an agency adjudication announces a new rule which is an abrupt departure from well settled law, courts are loathe to allow the rule to be applied retroactively. *See, e.g.*, *McDonald v. Watt*, 653 F.2d 1035 (5th Cir. 1981); *cf. St. Cyr*, 533 U.S. 238 (refusing to retroactively apply a new statutory rule that dramatically changed settled law). As the D.C. Circuit has explained, retroactive application is inappropriate "where the [agency] ha[s] confronted the problem before, ha[s] established an explicit standard of conduct, and now

attempts to punish conformity to that standard under a new standard subsequently adopted." *Retail, Wholesale*, 466 F.2d at 391; *cf. Bell Aerospace*, 416 U.S. at 274-75 (explaining the great weight to be afforded to "the long-standing interpretation placed on a statute by an agency charged with its administration."). As the court in *Pfaff v. United States Department of Housing and Urban Development*, 88 F.3d 739, 748 n.4 (9th Cir. 1996) explained:

> The disadvantage to adjudicative procedures is the lack of notice they provide to those subject to the agency's authority. While some measure of retroactivity is inherent in any case-by-case development of the law, and is not inequitable per se, this problem grows more acute the further the new rule deviates from the one before it. Adjudication is best suited to incremental developments to the law, rather than great leaps forward.

In *McDonald*, the Fifth Circuit reviewed an adjudicatory decision of the Department of the Interior that retroactively applied a new interpretation of a regulation to past actions. 653 F.2d 1035. The new rule required applications for mineral leases of government land to bear an original signature. *Id*. at 1037. However, at the time the litigant submitted his application, the "well established agency practice" was to accept facsimile signatures. *Id*. at 1036. Accordingly, the court held that the agency abused its discretion is applying the new rule retroactively to the litigant because, *inter alia*, "it was unquestionably an abrupt departure from [a] well established practice of the agency." *Id*. at 1045.

The decision in this case is an even more dramatic and abrupt change of agency interpretation. Far from the mere "established practice" in *McDonald*, the former rule in this case, which required the use of traditional categorical analysis, has been a fundamental tenet of immigration law for over a century. *See supra* Part II.B.2. This decision was a wholly unforeseeable about-face for an agency that has reaffirmed this basic principle of law innumerable times. *See id*. This factor cuts sharply in favor of prohibiting retroactive application of the new moral turpitude analysis announced in this decision.

B. It is improper to retroactively apply the new rule announced in the decision because of the gravity of the consequence to immigrants in removal proceedings.

The gravity of the consequence to a litigant flowing from retroactive application is a critical factor in determining whether to give a new rule retrospective or merely prospective application. *See, e.g., Bell Aerospace Co.*, 416 U.S. at 295; *Retail, Wholesale*, 466 F.2d at 219. Since removal is a monumental deprivation of liberty, *see Bridges v. Wixon*, 326 U.S. 135, 147 (1945) (comparing deportation to the "loss of all that makes life worth living" (internal quotation marks omitted)), there is little doubt that this factor likewise cuts sharply against retroactive application. Therefore, circuit courts have been quick to overturn agency decisions retroactively applying new adjudicative rules in the removal context. *See, e.g., Miguel-Miguel v. Gonzales*, 500 F.3d 941, 952 (9th 2007) (holding that new rule changing the consequences of criminal convictions on eligibility for relief from removal could not be retroactively applied); *Kankamalage v. INS*, 335 F.3d 858, 862-64 (9th Cir. 2003) (same); *Ka Fung Chan v. INS*, 634 F.2d 248, 257 (5th Cir. 1981) (recognizing that retroactive application of decisional rule would be improper in the deportation context if there were a prior "decision of the BIA upon which [the litigant] could have relied to his detriment"); *Ruangswang v. INS*, 591 F.2d 39, 46 (9th Cir. 1978) (prohibiting retroactive application of new rule making litigant ineligible for adjustment of status); *see also St. Cyr*, 533 U.S. 289 (holding that new statutory rule changing the consequences of criminal convictions on eligibility for relief from removal could not be retroactively applied by agency because of, *inter alia*, the gravity of immigration consequence); *Jideonwo v. INS*, 224 F.3d 692, 698 (7th Cir. 2000) (same). As the Seventh Circuit has explains, it is improper to engage in "'mouse-trapping' aliens into conceding deportability in reliance on

being eligible for a discretionary waiver and then removing this type of relief after the concession had been made." *Jideonwo*, 224 F.3d at 698. Just as in *St. Cyr*, *Miguel-Miguel*, *Kankamalage*, *Jideonwo*, and *Ruangswang*, it would be error to retroactively apply the new rule in this case, which also increases the immigration consequences of many convictions, to noncitizens who pled guilty prior to the new rule's issuance.

C. It is improper to retroactively apply the new rule because there were countless contrary prior Supreme Court, circuit court, and BIA decisions upon which noncitizens could have reasonably relied in accepting their plea agreements and waiving their Constitutional rights.

The potential for reasonable reliance on prior law is often at the heart of judicial unease with retroactive application of new rules. *See, e.g.*, *St. Cyr*, 533 U.S. at 321; *Heckler*, 467 U.S. 51, 60 n. 12; *Bell Aerospace Co.*, 416 U.S. at 295. When a litigant could have reasonably relied upon the prior rule, courts generally are unwilling to allow agencies to retroactively apply a change in the rule. *See, e.g., St. Cyr*, 533 U.S. 289; *McDonald*, 653 F.2d 1035. Moreover, where, as here, a litigant has waived constitutional rights by entering into a *quid pro quo* criminal plea agreement in return for settled expectations as to immigration consequences, the reliance interest is especially strong. *St. Cyr*, 533 U.S. at 321-24. In the present context, there is no need to grapple with this sometimes difficult issue because the Supreme Court has squarely decided the issue in *INS v. St. Cyr*.

In *St. Cyr*, the Court undertook a detailed and thorough analysis before concluding "[t]here can be little doubt that, as a general matter, alien defendants considering whether to enter into plea agreements are acutely aware of the immigration consequences of their convictions." 533 U.S. at 322; *see also Ka Fung Chan v. INS*, 634 F.2d 248, 257 (5th Cir. 1981) (recognizing reliance when there is a prior "decision of the BIA upon which [the litigant] *could* have relied to his detriment." (emphasis added)). The Court reviewed criminal defense

organizations' practice manuals and amicus briefs, state statutes requiring immigration advisals, as well as ABA Standards for Criminal Justice requiring defense attorneys to advise clients regarding immigration consequences of potential plea agreements. *Id*. at 321-25. In the end, the Court authoritatively held that, in deciding to plead guilty, the "respondent, and others like him, almost certainly relied upon" the well-established current state of the law regarding the immigration consequences of the plea agreement and thus concluded that no individualized inquiry into the reliance is required. *Id*. at 325. The present case requires precisely the same analysis and the same result. *See also Miguel-Miguel*, 500 F.3d 941, 952(9th Cir. 2007) (finding agency abused discretion by disrupting settled expectations regarding immigration consequences of criminal plea agreement); *Kankamalage*, 335 F.3d 858 (same).

D. Retroactive application of this new rule to noncitizens who pled guilty before its issuance will cause a deluge of post-conviction motions that will unduly burden state and federal criminal justice systems.

If the new rule announced in this decision were applied retroactively it would spark a tidal wave of state criminal post-conviction motions seeking to withdraw guilty pleas entered into in reliance upon the well established prior categorical analysis.

It is now well established that (1) criminal defense attorneys have an ethical obligation to advise clients of the immigration consequences of contemplated plea agreements, *St. Cyr*, 533 U.S. at 323 n.48 (citing ABA Standards for Criminal Justice and explaining that "if a defendant will face deportation as the result of a conviction defense counsel should fully advise the defendant of these consequences" (internal quotation marks omitted)), *Michel v. United States*, 507 F.2d 461, 465 (2d Cir. 1974) ("Where his client is an alien, counsel . . . has the obligation of advising him of his particular position as a consequence of his plea."), and (2) that plea agreements entered into in reliance upon incorrect immigration advice may be vacated, *see, e.g.*,

United States v. Kwan, 407 F.3d 1005 (9th Cir. 2005); *United States v. Couto*, 311 F.3d 179, 190 (2d Cir. 2002); *Downs-Morgan v. United States*, 765 F.2d 1534, 1538-41 (11th Cir. 1985); *United States v. Russell*, 686 F.2d 35, 41–42 (D.C. Cir. 1982); *Strader v. Garrison*, 611 F.2d 61, 63 (4th Cir. 1979); *People v. Wilbur*, 890 P.2d 113 (Colo. 1995); *State v. Sallato*, 519 So.2d 605 (Fla. 1988); *Rollins v. State*, 591 S.E.2d 796 (Ga. 2004); *People v. Correa*, 485 N.E.2d 307 (Ill. 1985); *People v. McDonald*, 802 N.E.2d 131 (N.Y. 2003); *Rosa v. State*, 2005 WL 2038175 (Tex. App. Dallas 2005); *State v. Rojas-Martinez*, 73 P.3d 967 (Utah Ct. App. 2003).

Moreover, a growing number of jurisdictions permit a guilty plea to be withdrawn and a conviction vacated, even in the absence of affirmative misadvice, where defense counsel or the court has simply failed to warn the defendant of unwelcome immigration consequences. Some states adopt this rule as a matter of constitutional law, *see, e.g*., *People v. Soriano*, 194 Cal. App. 3d 1470 (1987); *People v. Pozo*, 275 P. 907 (Co. 1987); *Williams v State*, 641 N.E.2d 44 (Ind. App. 1994); *State v. Paredez*, 101 P.3d 799 (N.M. 2004); *Lyons v. Pearce*, 694 P.2d 969 (Or. 1985), *cf. Couto*, 311 F.3d at 179 (calling into question whether courts have a constitutional obligation to warn defendants who plead guilty to crimes that will trigger mandatory deportation), and others do so because the lack of such warnings runs afoul of a state advisal statute, *see St. Cyr*, 533 U.S. at 323 n.48 (citing nineteen state statutes requiring immigration advisals); Kesselbrenner and Rosenberg, IMMIGRATION LAW AND CRIME § 4:19 (citing twenty five state statutes that require immigration advisals before accepting criminal pleas).

If the new rule announced in this decision is applied retroactively to convictions obtained via plea agreements, it would undoubtedly increase the immigration consequences for many defendants who pled guilty before its issuance. We can expect that such defendants were advised of the immigration consequences either by their defense attorneys in compliance with

defense counsel's ethical, constitutional, and/or statutory obligations or by courts in compliance with their relevant statutory and/or constitutional obligations. Since the new rule would render such advice incorrect in many situations, retroactively applying it would open the flood gates to a waive of post-conviction motions in state and federal courts.

The burden on courts and prosecutors adjudicating and litigating post-conviction motions would be considerable. Moreover, in a substantial number of cases, where guilty pleas were vacated, prosecutors and police agencies would be saddled with attempting to reinvestigate and reprosecute stale cases, in some instances decades after the commission of a crime, long after memories had faded and contact with witnesses had been lost.

Convictions vacated on legal grounds, such as ineffective assistance of counsel or constitutionally or statutorily defective pleas are, of course, not convictions for immigration purposes. *See* INA § 101(a)(48)(A); *Matter of Adamiak*, 23 I & N Dec. 878 (BIA 2006); *Matter of Marroquin-Garcia*, 23 I & N Dec. 705, 2005 WL 731412 (AG 2005); *Matter of Pickering*, 23 I & N Dec. 621 (BIA 2003); *Matter of Rodriguez-Ruiz*, 22 I & N Dec. 1378 (BIA 2000). Accordingly, not only will retroactive application burden state and federal criminal systems but the Department of Homeland Security and the Executive Office of Immigration Review will likewise be burdened by expending scarce resources initiating proceedings, which will later be abandoned when convictions are vacated, or litigating and adjudicating motions to reopen, which are routinely granted after a conviction the government relied upon to establish removability has been vacated. *See Cruz v. United States Attorney General*, 452 F.3d 240 (3d Cir. 2006) (identifying 10 unpublished BIA decisions in which BIA granted untimely motions where noncitizens vacated conviction on which removal order was based); *see generally* Kesselbrenner and Rosenberg, IMMIGRATION LAW AND CRIME § 4:1.

Accordingly retroactive application of this new rule will not only impermissibly disturb defendants' settled expectations, but will also place a substantial and needless burden upon state and federal criminal justice systems. Because noncitizens who pled guilty before the issuance of this decision waived their constitutional rights in reliance upon a century of settled Supreme Court, circuit court, and BIA precedent; and because the instant decision is a shockingly abrupt 180 degree change in agency interpretation; and because retroactive application of the new rule will cause many noncitizens to suffer the gravest of deprivations—banishment, the law of the Supreme Court, the Fifth Circuit, and indeed every circuit, dictates that it would be an abuse of discretion and a violation of due process to retroactively apply this dramatic new rule to litigants who pled guilty before its pronouncement.

Since the Respondent himself pled guilty before the pronouncement of this new rule, it cannot even be applied in this case. The decision is therefore merely advisory. On this basis alone, the decision should be withdrawn as improvidently issued and beyond the regulatory power of the attorney general reviewing decisions of the Board of Immigration Appeals pursuant to 8 C.F.R. § 1003.1(h).

CONCLUSION

For the foregoing reasons, *amici* request that the Attorney General and the Board take immediate action to withdraw the opinion in this case or, at the very least, withdraw it pending a proper process to consider a century of precedent that rejects the approach taken in the Attorney General's opinion. As a result of being issued without any meaningful process, this opinion is riddled with errors that will confuse immigration judges and actors in the criminal justice system and deny due process to the tens of thousands of immigrants who are currently in removal proceedings including tens of thousands who are enduring detention in hopes of a fair day in court.

Dated: December 5, 2008

Respectfully submitted,

Alina Das, Esq.
Nancy Morawetz, Esq.
Immigrant Rights Clinic
Washington Square Legal Services, Inc.
245 Sullivan Street, 5th Floor
New York, NY 10012
(212) 998-6430

Peter Markowitz, Esq.
Immigration Justice Clinic
Cardozo School of Law
55 Fifth Avenue
New York, New York 10003
(212)-790-0340

Lory Diana Rosenberg, Esq.
IDEAS Consultation
200A Monroe Street, Suite 305
Rockville, MD 20850
301-990-9257

Attorneys for *Amici*