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

In the Matter of:	)	
	)	
Cristoval Silva-Trevino	)	File No. A013 014 303
	)	
In Removal Proceedings.	)	
	)	

AMICUS BRIEF OF THE
AMERICAN IMMIGRATION LAWYERS ASSOCIATION,
IMMIGRANT DEFENSE PROJECT, AND THE NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD

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Introduction and Statement of Amici

Amici are immigration bar associations and nonprofit organizations whose members and staff represent and counsel noncitizens who have been convicted of a crime. *Amici* have a strong interest in ensuring that the interpretation of immigration laws relating to criminal convictions is fair, consistent, and predictable. In vacating the original decision in Mr. Silva-Trevino's case, the U.S. Attorney General directed the Board of Immigration Appeals to "develop a uniform standard for the proper construction and application of INA section 212(a)(2) and similar provisions in light of all relevant precedents and arguments." A.G. Order at 4 (citing to *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 581-82 (2010); *Moncrieffe v. Holder*, 133 S.Ct. 1678, 1690-92 (2013); *Kawashima v. Holder*, 132 S.Ct. 1166, 1172 (2012)). This brief discusses the cases cited by the U.S. Attorney General Eric Holder, and other relevant decisions, to answer the following questions posed by U.S. Attorney General when he vacated the decision in Mr. Silva Trevino's case:

1. How adjudicators are to determine whether a particular criminal offense is a crime involving moral turpitude under the INA; and

2. When, and to what extent, adjudicators may use a modified categorical approach and consider a record of conviction in determining whether an alien has been "convicted of . . . a crime involving moral turpitude" in applying INA §212(a) and similar provisions.[1]

Id.

For the reasons set forth below, *amici* urge the Board to issue a precedent decision stating that the categorical approach and modified categorical approach—as described in

[1] The undersigned *amici* are addressing the first two issues raised in the U.S. Attorney General's Order. Other *amici* are addressing the third question posed by the U.S. Attorney General relating to the application of *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002).

Moncrieffe, *Mellouli v. Lynch*, 135 S.Ct. 1980 (2015), and *Descamps v. United States*, 133 S.Ct. 2276 (2013), and as applied in the crime involving moral turpitude context for over a century—establish the methodology to determine whether a conviction is a crime involving moral turpitude.[2]

The American Immigration Lawyers Association (AILA) is a national association with more than 13,000 members throughout the United States and abroad, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security and before the Executive Office for Immigration Review, as well as before the United States District Courts, United States Courts of Appeal, and United States Supreme Court.

The Immigrant Defense Project (IDP) is a not-for-profit legal resource and training center dedicated to promoting fundamental fairness for immigrants accused or convicted of crimes. IDP provides criminal defense attorneys, immigration attorneys, and immigrants with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. IDP seeks to improve the quality of justice for immigrants accused of crimes and therefore has a keen interest in ensuring that

[2] *Amici* take no position on the disposition of Mr. Silva-Trevino's particular case.

immigration law is correctly interpreted to give noncitizens convicted of criminal offenses the full benefit of their constitutional and statutory rights.

The National Immigration Project of the National Lawyers Guild (NIP-NLG) is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws. For thirty years, the NIP-NLG has provided legal training to the bar and the bench on immigration consequences of criminal conduct and defenses to removal. It is also the author of *Immigration Law and Crimes* (2014 ed.) and three other treatises published by Thomson-West.

I. The Categorical Approach in *Moncrieffe* and *Mellouli* Governs Whether an Offense is a Crime Involving Moral Turpitude.

The categorical approach, as articulated by the U.S. Supreme Court in *Moncrieffe* and *Mellouli*, governs the determination of whether a noncitizen has been convicted of a crime involving moral turpitude (CIMT). Under this approach, adjudicators evaluate whether a conviction triggers removal based solely on the minimum conduct that is necessary to establish the elements of the criminal statute at issue. *Mellouli*, 135 S.Ct. at 1986 ("An alien's actual conduct is irrelevant to the inquiry, as the adjudicator must 'presume that the conviction rested upon nothing more than the least of the acts criminalized' under the state statute") (citing *Moncrieffe*, 133 S.Ct. at 1684-1685). A criminal offense is only a "categorical match" with the ground of removal if the conviction "necessarily involved . . . facts equating to [the] generic [federal offense]." *Moncrieffe,* 133 S.Ct. at 1684 (citing *Shepard v. United States*, 544 U.S. 13, 24 (2005)) (internal quotations omitted). For over a century, the categorical approach has promoted predictability as well as judicial and administrative efficiency by precluding the

relitigation of past convictions in mini-trials conducted long after the fact. *Shepard*, 544 U.S. at 36; *see also Mellouli*, 135 S.Ct. at 1987 ("the categorical approach ordinarily works to promote efficiency, fairness, and predictability in the administration of immigration law") (internal citations omitted).

As explained below, the reasoning of *Moncrieffe* and *Mellouli* compels the conclusion that the categorical approach applies in the CIMT analysis. As noted by the U.S. Attorney General in his order vacating the decision in Mr. Silva-Trevino's case, five U.S. Courts of Appeals, including the Fifth Circuit in this case, agree with this conclusion and have overruled the U.S. Attorney General's original *Silva-Trevino* decision. *See Silva-Trevino v. Holder*, 742 F.3d 197 (5th Cir. 2014); *Olivas-Motta v. Holder*, 716 F.3d 1199 (9th Cir. 2013); *Prudencio v. Holder*, 669 F.3d 472 (4th Cir. 2012); *Fajardo v. U.S. Att'y Gen.,* 659 F.3d 1303 (11th Cir. 2011); *Jean-Louis v. Att'y Gen. of U.S.*, 582 F.3d 462 (3d Cir. 2009).[3] *See also Efstathiadis v. Holder*, 752 F.3d 591 (2d Cir. 2014) (declining to reach the validity of *Silva-Trevino* but stating that the court "appl[ies] a categorical approach that 'look[s] not to the facts of' the particular case, 'but instead to whether [the offense] categorically fits within' the definition of a CIMT.") (citing *Moncrieffe*, 133 S.Ct. at 1684).

[3] The Seventh Circuit upheld the U.S. Attorney General's prior decision in *Silva-Trevino*. *Mata-Guerrero v. Holder*, 627 F.3d 256 (7th Cir. 2010). The Eighth Circuit first rejected the Attorney General's approach in *Silva-Trevino* but then deferred to it. *Compare Guardado–Garcia v. Holder*, 615 F.3d 900, 902 (8th Cir.2010) (finding *Silva-Trevino* "inconsistent" with the court's precedent) *with Bobadilla v. Holder*, 679 F.3d 1052, 1057 (8th Cir.2012) (deferring to *Silva-Trevino* as a reasonable interpretation). Both the Seventh and Eighth Circuits deferred to the Attorney General's decision under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), and did not have the benefit of the U.S. Supreme Court's decisions in *Moncrieffe*, *Mellouli*, and *Descamps*. Presumably, these courts would also defer to the agency's decision to restore its longstanding historical position applying a strict categorical approach in the crime involving moral turpitude context.

For over a century, the Board has applied the methodology of the categorical approach to the CIMT inquiry. The Attorney General's original decision in Mr. Silva-Trevino's case sharply departed from this long line of precedent by holding that an adjudicator could inquire into the conduct underlying a conviction. As the U.S. Attorney General's order vacating the decision in Mr. Silva-Trevino's case points out, the U.S. Supreme Court has now held repeatedly that the "conviction" requirement in the grounds of removal requires a categorical approach. A.G. Order at 4 (citing to *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 581-82 (2010); *Moncrieffe v. Holder*, 133 S.Ct. 1678, 1690-92 (2013); *Kawashima v. Holder*, 132 S.Ct. 1166, 1172 (2012)); *see also Mellouli*, 135 S.Ct. at 1986 ("Congress predicated deportation 'on convictions, not conduct'") (internal citation omitted). "[I]n light of" this "relevant precedent[]," and its longstanding historical approach, the Board must hold that the categorical approach as articulated in *Moncrieffe* provides the methodology for evaluating whether a conviction is a CIMT. A.G. Order at 4. Such a ruling is critically important because front-line immigration officers and immigration judges rely upon the categorical approach every day to decide thousands of claims regarding conviction-based grounds of removability and bars to status or relief from removal.[4]

[4] The determination as to whether a conviction is for a crime involving moral turpitude is often made outside of an adversarial court proceeding. An immigration officer can summarily deny admission to a noncitizen at the border without review by a judge in procedures. *See* INA § 235(b) (expedited removal). In adjudicating applications for visas, consular officers have to determine whether a noncitizen is inadmissible on criminal grounds, including the crime involving moral turpitude provision. These determinations are often insulated from judicial review. *See Bustamante v. Mukasey*, 531 F.3d 1059 (9th Cir. 2008) (explaining the doctrine of consular nonreviewability). U.S. Citizenship and Immigration Services officers also make this determination when adjudicating applications for benefits such as naturalization and adjustment of status.

A. *Moncrieffe v. Holder*

In *Moncrieffe*, the Supreme Court considered whether a Georgia conviction for marijuana possession with intent to distribute was an aggravated felony, even though "social sharing of a small amount of marijuana" constituted the minimum conduct prohibited by the statute. *Moncrieffe*, 133 S.Ct. at 1682. The aggravated felony with which Moncrieffe was charged was "illicit trafficking in a controlled substance," defined in relevant part as an offense punishable as a felony under the Controlled Substances Act. INA § 101(43)(B) ("illicit trafficking" includes a "drug trafficking crime" as defined under 18 U.S.C. § 924(c)(2)); 18 U.S.C. § 924(c)(2) ("drug trafficking crimes" means "any felony punishable under the Controlled Substances Act"). Under the Controlled Substances Act, social distribution of a small amount of marijuana is punished as a misdemeanor. *Moncrieffe*, 133 S.Ct. at 1686.

In holding that the Georgia conviction was not an aggravated felony, the Court found that the categorical approach applied. The Court observed that the "categorical approach has a long pedigree in our Nation's immigration law." *Id*. at 1685 (citing Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 NYUL Rev. 1669, 1688-1702, 1749-52 (2011)). "The reason" for this long pedigree is that the statute hinges removal on a conviction, not conduct. *Id*. The aggravated felony removal provision "asks what offense the noncitizen was '*convicted*' of . . . not what acts he committed." *Id.* (emphasis added).

Under the categorical approach, the adjudicator looks "not to the facts of the particular prior case, but instead to whether the state statute defining the crime of conviction categorically fits within the 'generic' federal definition" referenced in the

removal statute. *Id*. at 1684 (citing *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186 (2007)) (citing *Taylor v. United States*, 495 U.S. 575, 599-600 (1990)) (internal quotations omitted). By "generic" federal definition the Court "mean[s] [that] the offenses must be viewed in the abstract, to see whether the state statute shares the nature of the federal offense that serves as a point of comparison." *Id*. The key inquiry is not "the noncitizen's actual conduct" but whether the "state offense 'necessarily involved . . . facts equating to [the] generic [federal offense]." *Id*. (internal quotations and citations omitted). This inquiry involves the minimum conduct test, which requires that an adjudicator "presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *Id*. (citing *Johnson v. United States*, 559 U.S. 133 (2010)). Under these standards, the Court found that the Georgia conviction was not an aggravated felony because the least of the acts punished was social sharing of marijuana, a crime that is not punishable as a felony under the Controlled Substances Act.

B. *Mellouli v. Lynch*

In *Mellouli v. Lynch*, the Supreme Court affirmed the principles set forth in *Moncrieffe*. The Court considered whether a Kansas misdemeanor conviction for possession of drug paraphernalia triggered deportation under 8 U.S.C. § 1227(a)(2)(B)(i), which authorizes deportation of a noncitizen "convicted of a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21)." The Kansas statute criminalized the "stor[ing]" or "conceal[ing]" of a "controlled substance," as defined by the state's drug

schedule. *Mellouli*, 135 S.Ct. at 1984. When Mellouli was convicted, "Kansas' schedules included at least nine substances not included in the federal lists." *Id*.

The Court ruled that Mellouli's conviction did not fall within the controlled substance removal ground. As in *Moncrieffe*, the Court cited to the statutory "conviction" requirement as well as the "'long pedigree'" of the categorical approach in immigration law. *Id*. at 1986 (internal citations omitted). The Court recognized that the categorical approach is based on "efficiency, fairness, and predictability" concerns and reiterated that the proper inquiry is whether "'the least of the act criminalized'" triggers removal. *Id*. at 1986, 1987. Because Kansas' drug schedule included offenses that did not appear on the federal schedule at 21 U.S.C. § 802, the Court held that Mellouli's conviction did not necessarily "relat[e] to a controlled substance (as defined in section 802 of Title 21)." *Id.*

C. *Moncrieffe* and *Mellouli*'s Categorical Approach Applies With Equal Force to the CIMT Inquiry.

The categorical approach articulated by the Supreme Court in *Moncrieffe* and *Mellouli* governs the CIMT analysis. Although these cases involved the "illicit trafficking" aggravated felony removal ground and the "controlled substance" removal ground, the Court's reasoning applies with equal force to the CIMT ground of inadmissibility at issue in Mr. Silva-Trevino's case. Like the "illicit trafficking" and "controlled substance" provisions, the portion of the CIMT ground of inadmissibility with which Mr. Silva-Trevino was charged requires a conviction. *See* INA § 212(a)(2)(A)(i) (the CIMT ground renders inadmissible "any alien *convicted of* . . . a crime involving moral turpitude"). The categorical approach described in *Moncrieffe* and *Mellouli* thus applies. *See Silva-Trevino*, 742 F.3d at 197 (the statute "directs [adjudicators] to look for a *conviction*, rather than an act committed") (emphasis added);

Jean-Louis, 582 F.3d at 474 ("It could not be clearer from the text of the statute" that the application of the categorical approach is required in the CIMT context); *Olivas-Motta*, 746 F.3d at 1204 (the "conviction" requirement mandates a categorical approach); *see also Moncrieffe*, 133 S.Ct. at 1685 (noting that the term "conviction" is the "relevant statutory hook") (internal quotations omitted) (*quoting Carachuri-Rosendo v. Holder*, 560 U.S. 579 (2010)) (*citing United States ex rel. Mylius v. Uhl*, 210 F.3d 860, 862 (2nd Cir. 1914)).

Congress chose language requiring a conviction to trigger some immigration consequences, including CIMTs, while prescribing a conduct-based standard for others. *Compare* INA § 212(a)(2)(A)(i) *with* Act of Feb. 20, 1907, ch. 1134, § 3, 34 Stat. 898, 900 ("[A]ny alien woman or girl . . . *practicing* prostitution, at any time within three years after she shall have entered the United States, shall be deemed to be unlawfully within the United States and shall be deported") (emphasis added); *see also* INA § 212(a)(2)(D) ("[A]ny alien who . . . is coming . . . solely, principally, or incidentally to *engage* in prostitution, or has *engaged* in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status") (emphasis added). In examining Congress's use of the "convicted" language in early federal immigration cases examining alleged CIMTs, courts have concluded that Congress intended to limit the authority of immigration adjudicators to restrict immigration authorities to determining consequences based on the conviction rather than the underlying conduct. One of the first cases to discuss the requirement is *United States ex rel. Mylius v. Uhl*, in which a noncitizen challenged his detention and exclusion from the United States on the basis of a prior conviction for criminal libel in England. 203 F. 152, 153 (S.D.N.Y. 1913).

Immigration officials had concluded that the petitioner had been "convicted" of a CIMT by reviewing reports of the trial and the underlying facts that gave rise to his conviction. *Id.* The federal court reversed, concluding that the immigration officials had erred by "go[ing] behind judgments of conviction" and not confining their review to the "inherent nature" of the statutory offense of criminal libel. *Id.* at 153.

In over a century of decisions since *Mylius v. Uhl*, federal courts have applied the categorical approach to evaluate whether individuals were convicted of crimes involving moral turpitude. In 1931, the Second Circuit held that "[n]either 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." *United States ex. rel. Robinson v. Day*, 51 F.2d 1022, 1022–23 (2d Cir. 1931) (emphasis added); *see also United States ex. rel. Guarino v. Uhl*, 107 F.2d 399, 400 (2d Cir. 1939) (unless the crime "was 'necessarily', or 'inherently', immoral, the conviction" did not involve moral turpitude) (internal citations omitted); *United States ex rel. Zaffarano v. Corsi*, 63 F.2d 757, 758 (2d Cir. 1933) (offense lacked turpitude because "[u]nder this provision a man may be convicted for putting forth the mildest form of intentional resistance against an officer").

Prior to the original decision in Mr. Silva-Trevino's case, the Board and the Attorney General had also adopted the categorical approach to determine what crimes involve moral turpitude. *See Op. of Hon. Cummings*, 37 Op. Atty Gen. 293, 295 (AG 1933) ("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"); *see also Matter of S--,* 2 I&N Dec. 353, 357 (BIA, AG 1945) ("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"). Both the Attorney General and the Board looked to the minimum conduct necessary under a conviction to determine deportation or exclusion consequences. *See, e.g.*, *Matter of B--*, 4 I&N Dec. 493, 496 (BIA 1951) ("the definition of the crime must be taken at its minimum"); *Matter of P--*, 3 I&N Dec. 56, 59 (BIA 1948) ("[A] crime must by its very nature and at its minimum, as defined by the statute, involve an evil intent before a finding of moral turpitude would be justified."). This focus on the minimum conduct necessary for conviction continued to be the dominant inquiry across various conviction-based immigration consequences. *See* Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting the Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669 (2011) (describing the historical development and recent application of the categorical approach in immigration law and collecting cases); Rebecca Sharpless, *Toward A True Elements Test: Taylor and the Categorical Analysis of Crimes in Immigration Law*, 62 U. Miami L. Rev. 979 (2008) (same).

This long line of precedent demonstrates Congress's commitment to the categorical approach. At no point did Congress remove the "conviction" requirement. As the Supreme Court has recognized, "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran,* 456 U.S. 353, 382 n. 66 (1982) (internal quotations and citations omitted). As the Eleventh Circuit has recognized, "if Congress believed that the courts and the BIA had

misinterpreted its intent, it could easily have amended the statute to allow adjudicators to consider the actual conduct underlying a conviction." *Fajardo v. U.S. Att'y Gen.,* 659 F.3d 1303, 1309 (11th Cir. 2011).

D. The Phrase "Crime Involving Moral Turpitude" Is A Generic Definition.

Like the term "illicit trafficking" in the aggravated felony provision in *Moncrieffe*, the term "crime involving moral turpitude" in INA § 212(a) is a generic federal definition. *See Matter of Ortega-Lopez*, 26 I&N Dec. 99, 100 (BIA 2013) (referring to the "generic definition of moral turpitude") (internal quotations and citation omitted). The Supreme Court in *Moncrieffe* stated that "by 'generic,' [the court] mean[s] the offenses must be viewed in the abstract, to see whether the state statute shares the nature of the federal offense that serves as a point of comparison." *Moncrieffe*, 133 S.Ct. at 1684. To say that "a state offense is a categorical match with a generic federal offense" is to say that "the state offense 'necessarily' involved . . . facts equating to [the] generic [federal offense]." *Id*. (brackets in original) (internal quotations omitted).

In *Moncrieffe*, the generic definition of "illicit trafficking" came from a federal criminal statute cross-referenced in the aggravated felony definition. The generic definition of a CIMT—an offense that involves "reprehensible conduct committed with some degree of scienter"—comes from case law. A.G. Order at 4 n.3. The fact that "crime involving moral turpitude" is defined by precedent rather than statute in no way alters the generic nature of the term. Once the meaning of a statutory term has been interpreted, its meaning becomes fixed. *See Clark v. Martinez*, 543 U.S. 371, 378 (2005) ("To give [the] same words a different meaning for each category would be to invent a

statute rather than interpret one."); *U.S. v. Santos*, 553 U.S. 507, 522 (2008) ("the meaning of words in a statute cannot change with the statute's application").

That "moral turpitude" is typically not an element of a criminal offense in no way distinguishes it from other generically described federal crimes. *See Silva-Trevino*, 742 F.3d at 205 ("The fact that moral turpitude is not an element of any crime need not—and in fact does not—imply that the characteristics of a crime involving moral turpitude are not present. . . ."); *Jean-Louis*, 582 F.3d at 477 (moral turpitude "is rarely an element" but that the question is whether turpitude "inheres in the crime or its elements"). As noted by the Third Circuit, "violence, like moral turpitude, is not an element of the underlying offense," yet courts treat "crime[s] of violence" as generic crimes under the Immigration and Nationality Act. *Jean-Louis*, 582 F.3d at 478.

The Supreme Court's decision in *Mellouli* supports this understanding of what counts as a generic offense. In ruling that the categorical approach applied to the phrase "relating to a controlled substance," the Court stated that this language "refers to crimes *generically* defined." *Mellouli*, 135 S.Ct. at 14 n. 3 (emphasis added). The Supreme Court rejected the dissent's characterization of the controlled substance ground as being descriptive rather than generic. *Id*. at 1994 (J. Thomas dissenting) (arguing for a contrast between the generic "illicit trafficking" removal ground in *Moncrieffe* and the controlled substance removal ground). Like the phrase "relating to a controlled substance," the phrase "involving moral turpitude" defines a generic class of offenses.

To compare a state conviction to the generic definition of a CIMT, an adjudicator "view[s]" the criminal offense "in the abstract," asking whether the offense "'necessarily' involved . . . facts equating to" what case law has determined moral turpitude to be.

Moncrieffe, 133 S.Ct. at 1684. As mentioned above, a CIMT is an offense that involves "reprehensible conduct committed with some degree of scienter." A.G. Order at 4 n.3. To conduct the CIMT inquiry, an adjudicator thus reviews the elements of the offense of conviction to determine whether the minimum conduct criminalized necessarily involves reprehensible conduct and scienter.

As discussed above, courts have routinely applied a categorical approach to assess whether individuals have been convicted of crimes involving moral turpitude. *See Jean-Louis*, 582 F.3d at 479 ("In the intervening one hundred years . . ., adjudicators have applied the categorical approach to the CIMT inquiry without great difficulty."). Numerous offenses have been found to be CIMTs through application of the categorical approach. *See, e.g.*, *Espino-Castillo v. Holder*, 770 F.3d 861, 863 (9th Cir. 2014) (fraud conviction was a categorical CIMT); *Michel v. I.N.S.*, 206 F.3d 253, 265 (2d Cir. 2000) (affirming the Board's decision that the respondent's convictions for criminal possession of stolen property were categorical CIMTs); *Matter of Leal*, 26 I&N Dec. 20, 27 (BIA 2012) (Arizona reckless endangerment conviction was a categorical CIMT). The methodology for determining whether an offense meets the generic definition of moral turpitude as defined by case law is identical to that used to compare offenses to elements provided by federal statutes.

E. The "Atypical" Circumstance-Specific Approach in *Nijhawan v. Holder* Is Irrelevant to the CIMT Inquiry.

In some cases, DHS has argued that the circumstance-specific approach permitted by the Supreme Court in *Nijhawan v. Holder* applies in the CIMT context. 557 U.S. 29 (2009). This is incorrect. As recognized by the Court in *Mellouli*, the circumstance-

specific inquiry is an "atypical" exception to the categorical approach. 135 S.Ct. at 1986 n. 3. *Nijhawan* does not apply to the CIMT inquiry.

Nijhawan involved the fraud aggravated felony ground, which defines a generic offense "involve[ing] fraud or deceit" that is then narrowed by a requirement of a particular monetary loss to the victim set off by the words "in which." *Nijhawan*, 557 U.S. at 38–39 (offense that "involves fraud or deceit *in which* the loss to the victim exceeds $10,000") (emphasis added). The Court held that the "fraud or deceit" inquiry was categorical but the phrase "in which" called for an adjudication of the amount of loss underlying the conviction. *Id*. at 39 ("The monetary threshold is a limitation, written into the INA itself, on the scope of the aggravated felony for fraud. And the monetary threshold is set off by the words "in which," which calls for a circumstance-specific examination of "the conduct involved '*in*' the commission of the offense of conviction."). The Court bolstered its circumstance-specific reading of the $10,000 loss requirement with the pragmatic insight that "no widely applicable federal fraud statute . . . contains a relevant monetary loss threshold." *Id*. The Court thus found that "to apply a categorical approach [to the $10,000 loss requirement] would leave [the removal ground] with little, if any, meaningful application." *Id*. The Court in *Mellouli* also recognized that its holding in *Nijhawan* was driven in part by the concern that "the fraud or deceit provision [] would apply only in an extraordinarily limited and haphazard manner." *Mellouli*, 135 S.Ct. at 1986 n. 3.

The CIMT ground, in contrast, has no language that calls for an inquiry into the facts. Nor would the CIMT grounds of removal cease to have meaning if a categorical approach were applied. As the Fifth Circuit noted in its decision in this case, "the

statutory language [in the CIMT ground is] readily distinguishable from the language at issue in *Nijhawan*." *See Silva-Trevino*, 742 F.3d at 204. In *Nijhawan*, "the language . . . describe[d] a subset of a category of convictions, rather than an entire category." *Id*. As a result, "relevant convictions [could] only be identified by looking to the circumstances that define the subset." *Id*. In contrast, the CIMT ground "defines no such subset: qualifying offense are all crimes involving moral turpitude, as that generic crime has been defined by federal authorities and common law." *Id*.

The CIMT removal ground language "involving moral turpitude" is similar to the phrase "involves fraud or deceit" in the provision deemed categorical in *Nijhawan*. The CIMT language is also analogous to the phrase "relat[ing] to a controlled substance" at issue in *Mellouli*. The Supreme Court in *Mellouli* found that this phrase, unlike the language in *Nijhawan*, "has no circumstance-specific thrust; its language refers to crimes generically defined." *Mellouli*, 135 S.Ct. at 1986 n. 3. The same is true of the phrase "involving moral turpitude." Nothing in the language invites inquiry into the underlying facts. The phrase "involving moral turpitude" has a similar grammatical construction to "relating to a controlled substance." Both phrases start with a gerund of similar meaning and refer to an "entire category" of offense. *Silva-Trevino*, 742 F.3d at 204 (characterizing "involving moral turpitude" as referring to an "entire category").

As discussed above, the relevant portion of the CIMT statute requires that a noncitizen be "convicted of . . . a crime involving moral turpitude" and this language mandates a categorical approach. INA § 212(a)(2)(A)(i). Otherwise, the term "convicted" would be rendered meaningless and removal would hinge on conduct. The phrase "crime involving moral turpitude" modifies "convicted" and is a legal term of art with "deep

roots" in immigration law. *Jordan v. De George*, 341 U.S. 223, 227 (1951). The word "involving" cannot be parsed out from the phrase in which it appears. *See Prudencio*, 669 F.3d at 481 ("The word 'involving' must be considered in its statutory context. . . . [T]he participle 'involving' cannot be divorced from the unitary phrase 'crime involving moral turpitude,' which is a term of art that has been used for over one hundred years and predates the INA.") (citing *Jean-Louis*, 582 F.3d at 477) (citing *Jordan v. DeGeorge*, 341 U.S. 223, 227–231 (1951); *Baxter v. Mohr*, 37 Misc. 833, 76 N.Y.S. 982 (1902)); *Olivas-Motta v. Holder*, 716 F.3d 1199, 1208 (9th Cir. 2013) ("[T]he entire phrase 'crime involving moral turpitude' is a 'term of art' describing a generic crime."); *see also Nijhawan v. Holder*, 129 S. Ct. at 2302 (the phrase "*involves* fraud or deceit" at 8 U.S.C. § 1101(a)(43)(M)(i) refers generically to fraud or deceit crimes) (emphasis added).

The CIMT provision further contrasts with the statute at issue in *Nijawhan* because a categorical approach would not make it impossible, or nearly impossible, to enforce the removal ground. As discussed above, the Court in *Nijahwan* was concerned that a categorical approach to the $10,000 loss requirement would render the fraud deportation ground meaningless because federal statutes generally do not make loss to the victim an element of a fraud offense. The Court did not think Congress would have intended such a result. A categorical approach to the CIMT provision, in contrast, does not present the same concern. As discussed above, applying the categorical approach in the CIMT context requires that the adjudicator compare the elements of the criminal offense at issue to the case law definition of a crime involving moral turpitude. As long as the minimum conduct criminalized by the statute involves moral turpitude, the

removal ground would apply. Courts have routinely found that convictions involve moral turpitude. *See supra* at 14.

Reading the CIMT statute as sanctioning *Nijahwan*-style fact-finding could "undo all the benefits" of the categorical approach. *Descamps*, 133 S.Ct. at 2287. If adjudicators were permitted to adjudicate the underlying facts of a conviction to see if they involved moral turpitude, convictions could qualify as a CIMT regardless of their elements. The adjudicator would be free to review "extra-statutory documents" as "a device employed in every case to evaluate the facts that the judge or jury found." *Id*. This focus on the underlying conduct would be a boundless inquiry and "subvert" the "rationales supporting the categorical approach." *Id*.

II. The Modified Categorical Approach in *Descamps* Applies to the CIMT Inquiry.

The modified categorical approach as described by the Supreme Court in *Descamps* applies to the CIMT analysis. The approach, which involves a limited review of the record of conviction, "acts not as an exception [to the categorical approach], but instead as a tool." *Descamps*, 133 S. Ct. at 2284. The animating principle of the categorical approach—that removal turns on the minimum conduct needed to violate the elements of the offense—also governs the modified categorical approach. The modified approach "retains the categorical approach's central feature: a focus on the elements, rather than the facts, of a crime." *Id*.

The methodology applies when the criminal statute under review is divisible—when it defines more than one set of elements. *Id*.; *Matter of Chairez-Castrejon II*, 26 I&N Dec. 478, 480 (BIA 2015). Under the approach, adjudicators look only to the record of conviction to determine what set of elements make up the conviction. "Elements" are

facts a jury must find "unanimously and beyond a reasonable doubt." *Descamps*, 133 S. Ct. at 2288; *see also Matter of Chairez-Castrejon II*, 26 I&N Dec. at 480 (understanding "the term 'element'" in *Descamps* to mean "those facts about the crime which '[t]he Sixth Amendment contemplates that a jury—not a sentencing court—will find . . . unanimously and beyond a reasonable doubt.") (internal quotations and citations omitted). Once an adjudicator determines the elements of the noncitizen's conviction through the modified categorical approach, the adjudicator compares them to the judicial definition of a CIMT. The adjudicator cannot review the non-element facts in the record of conviction that describe the manner in which the crime was committed. To rely on such extraneous facts would shift the focus from the conviction to the underlying conduct—the very result that the categorical approach is designed to avoid.

A. Modified Categorical Approach of *Descamps v. U.S.*

In *Descamps v. U.S.*, the Supreme Court considered whether a federal defendant's sentence for being a felon in possession of a firearm could be enhanced under the Armed Career Criminal Act (ACCA) because of the defendant's prior California burglary conviction. Under the ACCA, a federal court can lengthen a federal defendant's sentence if he or she has three prior convictions "for a violent felony," including "burglary, arson, or extortion." 18 U.S.C. § 924(e). Federal courts use the categorical approach to determine if the prior conviction qualifies as a violent felony under the ACCA. The issue in *Descamps* was whether the California burglary conviction was a categorical match with the federal generic definition of burglary.

The California burglary statute provides that a person is guilty of burglary if he or she "enters" a location "with intent to commit grand or petit larceny or any felony."

Descamps, 133 S. Ct. at 2282 (internal quotations omitted). Descamps argued that he had not been convicted of federal, generic burglary because federal burglary requires an "unlawful entry" and the California statute does not. *Id*. The district court, however, disagreed with Descamps, invoking the modified categorical approach to find that he had admitted in the plea colloquy to breaking and entering a grocery store. The court relied on the Ninth Circuit's version of the modified categorical approach established in *United States v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011). Under that approach, a sentencing judge was permitted to peruse the record of conviction to see if the conviction rested on facts that satisfied the elements of the federal generic offense.

Finding that its "caselaw explaining the categorical approach and its 'modified' counterpart all but resolve[d] [the] case," the Supreme Court reversed, rejecting the modified categorical approach set out in *Aguila-Montes de Oca*. *Descamps*, 133 S.Ct. at 2282 (citing to the Court's decisions in *Taylor v. United States*, 495 U.S. 575 (1990), and *Shepard v. United States*, 544 U.S. 13 (2005), as dictating the outcome in *Descamps*). The Court held that the modified categorical approach only applies when the statute of the offense "sets out one or more of the elements in the alternative" and at least one set "criminalizes a broader swatch of conduct than the relevant generic offense." *Id*. at 2281. The Court stressed that "the modified approach serves a limited function" to "effectuate the categorical analysis when a divisible statute list[s] potential offense elements in the alternative." *Id*. at 2283. "The key," the Court stated, "is elements, not facts." *Id*.

Looking to *Richardson v. United States*, 526 U.S. 813, 817 (1999), the Court defined "elements" as facts a jury must find "unanimously and beyond a reasonable

doubt." *Id*. at 2288;[5] *see also id.* at 2298 (Alito, J., dissenting) ("The feature that distinguishes elements and means is the need for juror agreement . . . ."); *Schad v. Arizona*, 501 U.S. 624, 631 (1991) (plurality) (rejecting contention that "jurors should be required to agree upon a single means of commission"); *United States v. Williams*, 449 F.3d 635, 647 (5th Cir. 2006) (jury "unanimity is not required as to the particular *means* used by the defendant to commit a particular element of the offense") (emphasis in original). The central characteristic of an "element" is that "the jury *must* find [it] to convict the defendant." *Descamps*, 133 S.Ct. at 2290 (emphasis added); *see also Matter of Chairez-Castrejon*, 26 I&N Dec. 478, 483 n.3 (BIA 2015) (*Chairez II*) (adopting the jury-unanimity approach).

A list of alternative terms does not necessarily render a statute divisible because the terms might denote alternative "means" of committing a single offense. *Descamps*, 133 S.Ct. at 2285 n.2. As the Supreme Court has observed, "legislatures frequently enumerate alternative *means* of committing a crime without intending to define separate elements or separate crimes." *Schad*, 501 U.S. at 636 (plurality) (emphasis added). *Descamps* thus requires courts to engage in a meaningful analysis of a disjunctively phrased statute to determine whether it sets forth alternative *elements* of distinct crimes. Only if they do—and *not* when the statute merely sets forth alternative *means* of committing the same offense—may the modified categorical approach be employed.[6]

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[5] The relevant question is whether the jury was required to find a particular fact beyond a reasonable doubt to convict. Some jurisdictions require that a quorum of jurors find each necessary element to secure a criminal conviction, rather than a unanimous jury. In these jurisdictions, "elements" are those facts about which the jury must agree by the quorum necessary for conviction. *See Matter of Chairez*, 26 I&N Dec. 349, 353 n.2 (BIA 2014).

[6] Whether particular conduct may be treated as a "means" or an "element" of a state offense turns on the intent of the state legislature, as interpreted by state courts, so long as

Under this test, the California burglary statute at issue in *Descamps* contained a single, indivisible set of elements. As a result, "[t]he modified approach . . . [had] no role to play in [the] case." *Descamps*, 133 S.Ct. at 2285. The sentencing court was not permitted to look at the record of conviction. In the words of the Court: "Our decisions authorize review of the plea colloquy or other approved extra-statutory documents only when a statute defines [the offense] not (as here) overbroadly, but instead alternatively, with one statutory phrase corresponding to the generic crime and another not." *Id*. at 2286.

B. *Descamps* Controls the Modified Categorical Inquiry in Immigration Cases.

As several U.S. Courts of Appeals, including the Fifth Circuit, as well as the Board have recognized, the modified categorical approach described in *Descamps* controls in immigration cases. In *Franco-Casasola*, the Fifth Circuit adopted and applied the *Descamps* framework in determining whether a statute is divisible. 773 F.3d at 43. ("*Descamps* controls on the application of the modified categorical approach to determining whether Franco–Casasola had been convicted of an aggravated felony."). In so doing, the Fifth Circuit recognized that "the central tenet of divisibility analysis" requires "examining the statutorily provided *elements* of the offense." *Id*. at 37 (emphasis added); *see also id*. (quoting *Descamps*, 133 S.Ct at 2283) (the modified categorical approach "helps effectuate the categorical analysis when a divisible statute, listing

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that interpretation does not violate due process. *See Schad*, 501 U.S. at 631-37 (plurality). Courts should look to case law, jury instructions, and other sources of law to determine whether the convicting jurisdiction treats the disjunctive alternatives in statutes as true "elements" or "means." *See, e.g.*, *Omargharib v. Holder*, 775 F.3d 192, 199 (4th Cir. 2014); *Rendon v. Holder,* 764 F.3d 1077, 1089 (9th Cir. 2014).

potential offense elements in the alternative, renders opaque which element played a part in the defendant's conviction.").

The Board has also adopted *Descamps*' modified categorical approach, abandoning its prior articulation in *Matter of Lanferman,* 25 I&N Dec. 721 (BIA 2012), as inconsistent with *Descamps*. *See Matter of Chairez–Castrejon,* 26 I&N Dec. 349, 353 (BIA 2014) (rejecting the government's arguments "that the Board is not bound to follow *Descamps* in removal proceedings" and that the Board has "the flexibility to apply *Matter of Lanferman* in this case"). In *Lanferman*, the Board had adopted a version of the modified categorical approach that permitted a finding of divisibility in "all statutes of conviction . . . regardless of their structure, so long as they contain an element or elements that could be satisfied either by removable or non-removable conduct." 25 I&N Dec. at 727 (citing *Lanferman v. Bd. of Immigration Appeals*, 576 F.3d 84, 90 (2009) (internal citation omitted)). *Lanferman*'s version of the modified categorical approach directly conflicts with *Descamps* because it permits fact-finding from the record of conviction. *See Matter of Chairez–Castrejon,* 26 I&N Dec. at 353 (*Lanferman*'s "interpretation [of the modified categorical approach] is not consistent with the approach to statutory divisibility announced by the Supreme Court in *Descamps v. United States*").[7]

[7] *Lanferman* also conflicted with the dominant approach to divisibility taken by the Board before that decision. *See* Rebecca Sharpless, *Toward A True Elements Test: Taylor and the Categorical Analysis of Crimes in Immigration Law*, 62 U. Miami L. Rev. 979, 996-1012 (2008) (describing the historical majority rule regarding divisibility as limited to statutes that criminalize more than one set of elements).

C. *Descamps* Applies to Crimes Involving Moral Turpitude.

The Board must now hold that *Descamps* applies to the CIMT inquiry. As discussed above, both the categorical and modified categorical approaches derive from the conviction requirement. *Moncrieffe*, 133 S.Ct. at 1685 ("the statute hinges removal on a conviction, not conduct"); *Mellouli*, 135 S.Ct. at 1986 (relying on the conviction requirement). If removal depends on a conviction of a certain type, the categorical and modified categorical approaches described in *Moncrieffe*, *Mellouli*, and *Descamps* must apply. Other, less strict methodologies—like the Board's approach in *Lanferman* or the Ninth Circuit's test in *Aguila-Montes de Oca*—conflict with the conviction requirement by permitting fact-finding from the record of conviction. There is no way to distinguish between the conviction requirement in the CIMT removal grounds and the requirement in other provisions like the aggravated felony and controlled substance grounds. As discussed above in Part I.D., the phrase "involving crime involving moral turpitude" requires the comparison of the elements of the crime of conviction to the generic definition of moral turpitude established by case law.

The Board must now hold that there is only one version of the modified categorical approach that applies when a conviction is required—the one described by the Supreme Court in *Descamps*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Rebecca Sharpless, certify that, on June 18, 2015, I served by U.S. Postal Service a full and complete copy of the foregoing Amicus Brief of the American Immigration Lawyers Association, Immigrant Defense Project, and the National Immigration Project of the National Lawyers Guild on:

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