Case No. 05-50170

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

GUILLERMO AGUILA-MONTES DE OCA,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of California
Honorable Robert T. Benitez, District Judge

BRIEF OF AMICUS CURIAE AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLANT ON REHEARING EN BANC

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INTRODUCTION

In *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (en banc) – an immigration case – this circuit restated a rule that has applied in immigration adjudication for nearly 100 years: determination of deportability or inadmissibility that is triggered by "convicted" conduct under a criminal statute is determined categorically by element. It was a rather unremarkable restatement necessitated by jurisprudence in this circuit (and others) that in high-volume application had become tattered and frayed with different panels approaching and applying the categorical analysis in a mostly correct, but distinct manner. There is nothing shocking about the categorical analysis employed in *Navarro-Lopez;* it merely trims the tattered edges of earlier jurisprudence, and snaps the decisional law of this circuit into alignment with the statutory language of the Immigration and Nationality Act and the analogous Supreme Court teachings on categorical analysis.

The government and Judge Bybee frame *Navarro-Lopez* as ill-considered, dangerous and out-of-step with prior Ninth Circuit precedent and that of other circuits. They believe that *Navarro-Lopez* allows non-citizens who have been convicted of certain crimes to escape deserved punishment or

deportation. Because these are all false premises and make for poor foundations for interpreting the Immigration and Nationality Act, amicus, the American Immigration Lawyers Association, proffers this brief in support of Defendant Guillermo Aguila-Montes de Oca to explain that the categorical analysis set forth in *Navarro-Lopez* is mandated by statute, has a long, well-settled historical basis, and has been thoroughly vetted by this circuit (and others).[1] The en banc court was convened improvidently, and should either (1) dissolve and restore the panel decision, or (2) affirm the panel holding in *United States v. Aguila-Montes de Oca*, 553 F.3d 1229 (9th Cir. 2009), and clarify how the second stage categorical analysis is to be utilized in the context of divisible statutes.

STATEMENT OF INTERESTS OF AMICUS CURIAE

AILA is a national association with more than 11,000 members throughout the United States, 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

[1] AILA takes no position on the merits of Mr. Aguila-Montes de Oca's claims nor do we take a position on what result the categorical analysis, as articulated in this brief, would reach.

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 (immigration courts and the Board of Immigration Appeals), as well as before the United States District Courts, Courts of Appeal, and the Supreme Court of the United States.

ARGUMENT

I. The Categorical Analysis Is A Feature Of The Immigration Statute.

Throughout the Immigration & Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.*, Congress has created deportation liability and ineligibility from relief for categories of non-citizens with prior criminal history. For example, non-citizens who have been convicted for committing crimes involving moral turpitude are deportable. 8 U.S.C. § 1227(a)(2)(A)(i)(I) (if conviction within 5 years of entry and sentence one year or more); 8 U.S.C. § 1227(a)(2)(A)(ii) (two or more convictions). Non-citizens convicted of an aggravated felony are deportable, 8 U.S.C. § 1227(a)(2)(A)(iii), as are non-citizens convicted of crimes of domestic violence. 8 U.S.C. § 1227(a)(2)(E). Convictions for crimes involving moral turpitude may also render a non-citizen ineligible for discretionary relief such as cancellation of removal, 8 U.S.C. § 1229b(b)(B)-(C), or inadmissible to the United States. 8 U.S.C. § 1182(a)(2)(A)(i) (non-citizen inadmissible if convicted of or

"admits committing acts which constitute the essential elements of" a crime involving moral turpitude).

Explicit in this legislative scheme is Congress's focus on categories of generically described crimes. In the examples listed above, the statutory text of the INA conditions removal or ineligibility for relief on a "conviction" for a generically described crime.

The statutory directive links ineligibility or removability with categories of generally described crimes. To implement the statutory language, the Ninth Circuit uses a categorical analysis to determine whether a specific conviction falls within a particular category of predicate crime – and thus determining the immigration consequences thereof.

Likewise, Congress has specified in very particular terms when categorical determinations are not to be applied. For example, in 8 U.S.C. § 1227(a)(7), Congress has devised a statutory scheme where certain victims of domestic violence who otherwise would have been subjected to deportation liability under 8 U.S.C. § 1227(a)(2)(E)(i) under a categorical approach can avoid such liability under 8 U.S.C. § 1227(a)(7) because deportability is not "limited by the criminal court record[.]"

II. There Is Nothing New About Using The Categorical Analysis To Determine the Immigration Consequences of Convictions.

Federal courts have never been in the business of reviewing conviction records to determine whether conduct underlying a conviction supports a ground of removal, except when a statute is divisible. As early as 1914, federal courts have admonished immigration officers when examining convictions for moral turpitude, one of the earliest grounds of criminal inadmissibility and deportability, that the question to be resolved is whether the crime at issue "*necessarily* involve[s] moral turpitude." *United States ex rel. Mylius v. Uhl,* 210 F. 860, 862 (2d Cir. 1914) (emphasis added). "[I]mmigration 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." *Id.* at 863. *Accord 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); *Ablett v. Brownell*, 240 F.2d 625, 627 (D.C. Cir. 1957) ("For a conviction to warrant deportation under this section, moral turpitude must be inherent in, or an essential ingredient of, the crime. If a person not guilty of moral turpitude may nevertheless be convicted of the crime, the offense cannot be said to involved moral turpitude for purposes of Section 19 [of the Immigration Act of February 5, 1917], irrespective of whether or not the conduct of the particular alien whose deportation is sought was immoral."). For an early decision of the Ninth Circuit adopting a categorical approach when analyzing the immigration consequences of convictions, *see Wadman v. INS*, 329 F.2d 812, 814 (9th Cir. 1964) ("In our view § 33(1) of the Larceny Act provides a separation between the act of receiving property 'knowing the same to have been stolen,' and the act of receiving property knowing it to have been 'obtained in any way whatsoever under circumstances which amount to felony or misdemeanor.' [1¶] Under these circumstances, at least, the immigration officers and courts, while precluded from considering the evidence, may examine the 'record of conviction' (including the indictment or information, plea, verdict or judgment and sentence) to determine the crime of which the alien actually was convicted.").

This categorical approach, as implemented in the federal courts, has been reemphasized by the Supreme Court in several parallel instances: *Taylor v. United*

States, 495 U.S. 575 (1990); *Shepard v, United States*, 544 U.S. 13 (2005); *Leocal v. Ashcroft*, 543 U.S. 1 (2004); *Johnson v. United States*, 559 U.S. ____, 2010 U.S. LEXIS 2201 (2010). The Supreme Court expressly has endorsed the approach when interpreting the INA. *See Nijhawan v. Holder*, 557 U.S. ____, 129 S. Ct. 2294, 2297 (2009) (characterizing the question to be resolved and stating that if the loss to victim is an element of a fraud or deceit offense, then the immigration judge must look to the statute of conviction to see if it contains the requisite monetary threshold for aggravated-felony removal purposes).

In the administrative context, the decisional law, with few exceptions, is uniform on the categorical rule.[2] *See, e.g., Op. of Hon. Cummings*, 37 Op. Att'y Gen. 293 (Att'y Gen. 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."); *Matter of T-*, 2 I. & N. Dec. 22

[2] There are two lines of administrative cases that represent departures from the categorical analysis. The first is *Matter of Babaisakov*, 24 I. & N. Dec. 306 (BIA 2007). It is worth noting that the Supreme Court has disapproved of the Board's unlimited view of its authority, as described in *Babaisakov*, to consider extra-record evidence. *See Nijhawan v. Holder*, 557 U.S. at ____, 129 S. Ct. at 2303 (relying on evidence outside the record of conviction to determine monetary loss to the victim under a circumstance-specific approach requires the use of fundamentally fair procedures). The other is *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (Atty. Gen. 2008), which has been disapproved by the Third Circuit. *Jean-Louis v. Attorney General*, 582 F.3d 462 (3d Cir. 2009).

(BIA 1944) ("It 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. . . . 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.") (citations omitted); *Matter of R-*, 2 I. & N. Dec. 819 (BIA 1947) ("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 Short*, 20 I. & N. Dec. 136, 137 - 138 (BIA 1989) ("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 Teixeira*, 22 I. & N. Dec. 316, 318 - 319 (BIA 1996) (looking to documents in the record of conviction to determine under which part of a divisible statute respondent

was convicted) (citations omitted).

III. The Categorical Rule In Navarro-Lopez Is Noteworthy Because It Simply Clarifies Prior Circuit Case Law.

Navarro-Lopez was decided properly. "When the crime of conviction is missing an element of the generic crime altogether," a modified categorical approach does not apply because under such circumstances "we can never find that 'a jury was actually required to find all the elements of' the generic crime." *Navarro-Lopez*, 503 F.3d at 1073 (quoting *Li v. Ashcroft*, 389 F.3d 892, 899-901 (9th Cir. 2004) (Kozinski, J., concurring)). Nothing short of a unanimous en banc panel of this Court affirmed this language of *Navarro-Lopez* a year later, in *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1159-69 (9th Cir. 2008) (en banc). In both instances, AILA filed amicus briefs outlining the role, scope, and application of the categorical and modified categorical approach.

Chief Judge Kozinski in *Li* was not the first judge to notice the tattered state of affairs pre-*Navarro-Lopez*. *See, e.g., Cisneros-Perez v. Gonzales*, 465 F.3d 386, 392 (9th Cir. 2006) ("We have, in the past, expressed skepticism about the scope of the modified categorical approach and whether, for certain prior offenses the inquiry should end if there is no categorical match."). The chief aspect of *Navarro-Lopez* is that as an en banc decision it had the power to trim up prior case law and harmonize it. It isn't actually so that *Navarro-Lopez* overruled or

abrogated prior decisions so much as it cleaned up what had become an untidy collection of panel decisions that, on the main were mostly correct, but in application had strayed.

IV. Divisible Statutes Are Amenable To Second Stage Categorical Analysis.

In *Navarro-Lopez*, this Court set out standards for when it is proper to utilize the modified categorical approach to determine the immigration consequences of a prior conviction. While the terminology used by this Court differs slightly from that used by other circuits, the standard for determining when to employ the modified categorical test is consistent with that used by most other circuits.[3] The standard also provides for a reliable and consistent method for determining when it is appropriate to use the modified categorical test and when it is inappropriate.

The BIA also follows this approach to divisibility. In *Matter of S-*, 2 I. & N. Dec. 353 (BIA 1945), *aff'd*, 2 I. & N. Dec. 362 (Att'y Gen. 1945), the BIA held that a divisible statute consists of "offenses" which involve moral turpitude and "offenses" which do not.

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[3] *See, e.g., Jean-Louis*, 582 F.3d at 474 n. 16 ("Although courts employ different labels to describe the categorical and modified categorical approaches, the fundamental methodology is the same. Each court begins with an analysis of the statute of conviction. If the statute of conviction is divisible, defining variations of the same offense, some of which would constitute a CIMT and others of which would not, inquiry into the record of conviction is permissible solely to determine the particular subpart under which the alien was convicted. Otherwise, scrutiny of the alien's particular acts is prohibited.").

> 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 . . . is examined to ascertain therefrom under which divisible portion of the statute the conviction was had[.]

Id. at 357 (emphasis added).[4]

This standard for determining when a statute is divisible makes sense considering the purpose of the modified categorical approach and remembering that it is still primarily a *categorical* test. The purpose of the modified categorical approach is not to use the record of conviction to ascertain the defendant's actual conduct *per se*. Rather, the record of conviction is used determine whether the defendant was charged and convicted of violating a sub-offense which meets the generic definition of the crime.

An interpretation which allows use of the modified categorical approach

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[4] *See also Matter of Ajami*, 22 I. & N. Dec. 949, 950 (BIA 1999) ("if the statute contains some offenses which involve moral turpitude and others which do not, it is to be treated as a 'divisible' statute, and we look to the record of conviction . . . to determine the offense of which the respondent was convicted."); *Matter of Sweetser*, 22 I. & N. Dec. 709, 713 (BIA 1999) (a statute is divisible when it "encompasses offenses that [meet the deportation standard] as well as offenses that do not."); *Matter of Baker*, 15 I. & N. Dec. 50, 56 (BIA 1974) ("If only some of the subdivisions of a divisible statute involve moral turpitude, then under the rule of strict construction the crime does not involve moral turpitude unless it can be established that the offense as charged was geared to one of the subdivisions involving moral turpitude [citation omitted].").

simply when the elements of the statute of conviction are broader than the elements of the generic crime would create a situation where the exception would swallow the rule. In *Taylor*, the Supreme Court clearly ruled that the pure categorical test is the primary methodology for determining the effect of the prior conviction. Significantly, immediately after indicating that the categorical test was to be employed, the Court went on to state: "This categorical approach, however, may permit the sentencing court to go beyond the mere fact of conviction *in a narrow range of cases* where a jury was actually required to find all the elements of generic burglary." *Taylor*, 495 U.S. at 602 (emphasis added). Therefore, the Court also revealed that resort to the modified categorical test would be limited to a narrow range of cases.

CONCLUSION

For the above reasons, Amicus requests the Court either to restore the panel decision in *United States v. Aguila-Montes de Oca*, 553 F.3d 1229 (9th Cir. 2009), or to affirm it with clarification that the second-stage categorical analysis only applies in the context of divisible statutes.

DATED this 10th day of March 2010.

Respectfully submitted,

/s/ Deborah S. Smith

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached Brief of Amicus Curiae American Immigration Lawyers Association in Support of Defendant-Appellant on Rehearing En Banc is:

__X__ Proportionately spaced, has a typeface of 14 points or more and contains 3,497 words (petitions and answers must not exceed 4,200 words).

or

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March 10, 2010
Date

/s/ Deborah S. Smith
Signature of Attorney or Unrepresented Litigant

CERTIFICATE OF SERVICE

I, Deborah S. Smith, certify that on March 10, 2010, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

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