IN THE

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 11-1095

ABDUL WAHEED,
A047-699-995,
Petitioner,
v.
ERIC H. HOLDER, JR., Attorney General,
Respondent.

Petition for Review of the Board of Immigration Appeals in file A047-699-995

BRIEF OF *AMICI CURIAE* AMERICAN IMMIGRATION LAWYERS ASSOCIATION, IMMIGRANT DEFENSE PROJECT, IMMIGRANT LEGAL RESOURCE CENTER, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS' GUILD, AND UNIVERSITY OF MARYLAND SCHOOL OF LAW IMMIGRATION CLINIC IN SUPPORT OF PETITIONER AND REVERSAL OF THE DECISION OF THE BOARD OF IMMIGRATION APPEALS

Jeremy L. McKinney
for the AMERICAN IMMIGRATION
LAWYERS ASSOCIATION
1331 G Street, NW, Ste. 300
Washington, DC 20005
(202) 507-7600
Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Local Rule 26.1, *amici curiae* submit the following corporate disclosure statements:

American Immigration Lawyers Association (AILA) states that it does not have a parent corporation. It is a nonprofit corporation operating under § 501(c)(3) of the Internal Revenue Code that does not issue stock. As it has no stock, no publicly held corporation owns 10% of more of its stock.

Immigrant Defense Project states that its parent corporation is the Fund for the City of New York (FCNY), a nonprofit corporation operating under § 501(c)(3) of the Internal Revenue Code that does not issue stock. As it has no stock, no publicly held corporation owns 10% or more of FCNY's stock.

Immigrant Legal Resource Center states that it does not have a parent corporation. It is a nonprofit corporation operating under § 501(c)(3) of the Internal Revenue Code that does not issue stock. As it has no stock, no publicly held corporation owns 10% of more of its stock.

National Immigration Project of the National Lawyers Guild states that it does not have a parent corporation. It is a nonprofit corporation operation under § 501(c)(3) of the Internal Revenue Code that does not issue stock. As it has no stock, no publicly held corporation owns 10% or more of its stock.

University of Maryland School of Law Immigration Clinic states that it does not have a parent corporation. It is part of a not-for-profit educational institution that does not issue stock. As it has no stock, no publicly held corporation owns 10% of more of its stock.

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

TABLE OF CONTENTS

INTERESTS OF *AMICI* 1

PRELIMINARY STATEMENT 3

ARGUMENT 6

I. *SILVA-TREVINO* CONTROVERTS THE UNAMBIGUOUS LANGUAGE OF THE INA. 7

A. Respondent's Analysis of State/Federal Criminal Statutes is Not Entitled to Deference. 7

B. In *Silva-Trevino*, the Attorney General incorrectly applied *Brand X* in declining to follow established Circuit case law. 10

1. *Silva-Trevino's* determination that the CIMT ground of inadmissiblity is ambiguous is owed no deference because the question of a statute's ambiguity is one reserved for the federal courts. 11

2. *Silva-Trevino* runs contrary to the plain language of the INA by ignoring statutory language that unambiguously compels a categorical approach. 13

3. *Silva-Trevino* assigns unjustified significance to the word "involving" and the fact that turpitude is not an element of criminal offenses. 20

C. This Court Should Directly Address *Silva-Trevino*'s Misinterpretation of the INA. 23

II. *SILVA-TREVINO* ALSO IS UNREASONABLE, AS IT CREATES A STANDARD THAT IS IN CONFLICT WITH OTHER SECTIONS OF THE INA, YIELDS INCONSISTENT RESULTS, AND OFFENDS DUE PROCESS. 24

A. *Silva-Trevino* is inconsistent with the overall statutory scheme and the Supreme Court's analysis of criminal convictions in both the immigration and sentencing context. 25

B. *Silva-Trevino*'s individualized searches for moral turpitude promotes disuniformity in the law. 27

C. The unprecedented, open-ended inquiry contemplated by *Silva-Trevino* has especially troubling implications in non-adversarial proceedings outside of the immigration courtroom 29

CONCLUSION 31

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

CERTIFICATE OF SERVICE 33

TABLE OF AUTHORITIES

CASES

Bejarano-Urrutia v. Gonzales, 413 F.3d 444 (4th Cir. 2005)---------- 26

Carachuri-Rosendo v. Holder, 130 S.Ct. 2577 (2010) ---------- 9, 10, 26

Castle v. INS, 541 F.2d 1064 (4th Cir. 1976) ---------- 15, 17, 21

Chanmouny v. Ashcroft, 376 F.3d 810 (8th Cir. 2004) ---------- 23

Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) ----------7, 8, 9, 10, 11, 12, 16, 17, 25

Crespo v. Holder, 631 F.3d 130 (4th Cir. 2011)---------- 12

Cuevas-Gaspar v. Gonzales, 430 F.3d 1013 (9th Cir. 2005) ---------- 20

Franklin v. INS, 72 F.3d 571, 572 (8th Cir. 1995) ---------- 23

Garcia v. Gonzales, 455 F.3d 465 (4th Cir. 2006) ---------- 8

Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581 (2004) ---------- 13

Gertsenshteyn v. Mukasey, 544 F.3d 137 (2d Cir. 2008)---------- 15

Gonzales v. Oregon, 546 U.S. 243 (2006) ---------- 8

Guerrero de Nodahl v. INS, 407 F.2d 1405 (9th Cir. 1969) ---------- 21

Hartford Underwriters Ins. Co., Union Planters Bank, N.A., 530 U.S. 1 (2000)---------- 16

Home Concrete & Supply, LLC v. U.S., __ F.3d. __, 2011 WL 361495 (4th Cir. 2011) ---------- 13

INS v. Cardoza-Fonseca, 480 U.S. 421 (1987)---------- 13, 25

James v. United States, 550 U.S. 192 (2007) ---------- 21, 22

Jean-Louis v. Att'y Gen. of U.S., 582 F.3d 462 (3d Cir. 2009) -18, 19, 21, 23, 27, 28

Johnson v. United States, 130 S.Ct. 1265 (2010)---------- 27

Kofa v. U.S. INS, 60 F. 3d 1084 (4th Cir. 1995)---------- 2

Leocal v. Ashcroft, 543 U.S. 1 (2004) ---------- 26

Lopez v. Gonzales, 549 U.S. 47 (2006)---------- 26

Lorillard Div. of Loew's Theatres, Inc. v. Pons, 434 U.S. 575 (1978) ------ 18

Maghsoudi v. INS, 181 F.3d 8 (1st Cir. 1999) ---------- 20

Marmolejo-Campos v. Holder, 558 F.3d 903 (9th Cir. 2009) ---------- 8

Matter of Ahortalejo-Guzman, 25 I&N Dec. 465 (BIA 2011)----- 5, 6, 20, 24

Matter of Babaisakov, 24 I&N Dec. 306 (BIA 2007) ---------- 9

Matter of E-, 1 I&N Dec. 505 (BIA 1943) ---------- 4

Matter of E-N-, 7 I & N Dec. 153 (BIA 1956)---------- 15

Matter of K-, 9 I & N Dec. 715 (BIA 1962) ---------- 15

Matter of Fualaau, 21 I&N Dec. 475 (BIA 1996) ---------- 4

Matter of Guevara Alfaro, 25 I&N Dec. 417 (BIA 2011)---------- 5, 20, 24

Matter of R-, 6 I. & N. Dec. 444 (BIA 1954) ---------- 29

Matter of Rodriguez-Rodriguez, 22 I&N Dec. 991 (BIA 1999)---------- 26

Matter of Silva-Trevino, 24 I&N Dec. 687 (AG 2008) -ii, 3, 4, 5, 6, 7, 10, 11, 13, 14, 15, 16, 19, 20, 23, 25, 27, 29, 30, 31

Matter of T-, 2 I&N Dec. 22 (BIA 1944)---------- 18

Matter of Torres-Varela, 23 I&N Dec. 78 (BIA 2001)---------- 21

Matter of Velasquez, 25 I&N Dec. 278 (BIA 2010) ---------- 26

Matter of Velazquez-Herrera, 24 I&N Dec. 503 (BIA 2008)-------- 17, 26, 27

Mendoza v. Holder, 623 F.3d 1299 (9th Cir. 2010)---------- 18

National Cable & Telecommunications Ass'n v. Brand X Internet Service, 545 U.S. 967 (2005) ---------- ii, 7, 10, 11, 12, 24

Nijhawan v. Holder, 129 S.Ct. 2294 (2009) ----------9, 10, 22, 23, 26

Padilla v. Gonzales, 397 F.3d 1016 (7th Cir. 2005) ---------- 18

Partyka v. Att'y Gen. of the U.S., 417 F.3d 408 (3d Cir. 2005) ---------- 20

Recio-Prado v. Gonzales, 456 F.3d 819 (8th Cir. 2006) ---------- 20, 23

Serrato-Soto v. Holder, 570 F.3d 686 (6th Cir. 2009) ---------- 18

United States ex rel. Mylius v. Uhl, 210 F. 860 (2d Cir. 1914) ---------- 17, 28

United States ex rel. Robinson v. Day, 51 F.2d 1022, 1023 (2d Cir. 1931) 25

United States v. Mead Corp., 533 U.S. 218 (2001) ---------- 8

Uppal v. Holder, 605 F.3d 712 (9th Cir. 2010) ---------- 21

Velasquez-Gabriel v. Crocetti, 263 F.3d 102 (4th Cir. 2001) ---------- 17

Vuksanovic v. U.S. Att'y Gen., 439 F.3d 1308 (11th Cir. 2006) ---------- 19

Wala v. Mukasey, 511 F.3d 102 (2d Cir. 2007) ---------- 19

STATUTES

18 U.S.C. § 924(e)(2)(B) ---------- 22

8 U.S.C. § §1182(a)(2)(A)(i)(I) ---------- 5

8 U.S.C. § 1101(a)(43) ---------- 9, 23, 26

8 U.S.C. § 1101(a)(43)(M)(i) ---------- 9, 23

8 U.S.C. § 1154(a)(1)(A)(iii)(II)(bb) ---------- 30

8 U.S.C. § 1182 ---------- 18

8 U.S.C. § 1182(a)(2)(A)(i)(I) ---------- 14, 16

8 U.S.C. § 1226(c)(1) ---------- 30

8 U.S.C. § 1227(a)(2)(A) ---------- 5

8 U.S.C. § 1231(b)(3)(B)(iii)---------- 16

8 U.S.C. §§ 1101(f)(3) ---------- 30

OTHER AUTHORITIES

98 Cong. Rec. S5420, 5421 (1952)---------- 18

ABA, Resolution 113: Preserving the Categorical Approach in Immigration Adjudications 2 (Aug. 4, 2009), http://www.abanet.org/leadership/2009/annual/summary_of_---------- 29

Iris Bennett, The Unconstitutionality of Nonuniform Immigration Consequences of "Aggravated Felony" Convictions, 74 N.Y.U. L. Rev. 1696, 1704-05 (1999)---------- 27

Br. of AILA as Amicus Curiae, *I.N.S. v. Jean*, 496 U.S. 154 (1990) (No. 89-601) ---------- 3

Br. of AILA *et al*. as Amicus Curiae, *Carachuri-Rosendo v. Holder*, 130 S.Ct. 2577 (2010) (No. 09-60) ---------- 3

Br. of IDP *et al*. as *Amici Curiae*, *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010) (No. 08-651) ---------- 3

Br. of IDP *et al*. as *Amicus Curiae*, *Prudencio v Holder*, No. 10-2382 (4th Cir. 2011) ---------- 3, 4

Br. of Resp., *Nijhawan v. Holder*, 129 S.Ct. 2294 (2009) (No. 08-495), 2009 WL 815242 ---------- 9

Foreign Affairs Manual Note 5.11 ---------- 15

Op. of Hon. Cummings, 39 Op. Atty Gen. 95 (AG 1937)---------- 26

Senate Bill 2250 § 241(a)(4) 82d Cong. (2d Sess. 1952)---------- 18

Laura Trice, *Adjudication By Fiat: The Need For Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions*, 85 N.Y.U. L. Rev. 1766 (2010)---------- 7

Rules

Fed. R. App. P. 29 ---------- 3

REGULATIONS

8 C.F.R. § 1003.1(g) ---------- 29

8 C.F.R. § 1003.19(h)(2)(i) ---------- 30

8 C.F.R. § 204.2(c)(2)(v) ---------- 30

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 8 ---------- 27

INTERESTS OF *AMICI*

American Immigration Lawyers Association (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'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.

The Immigrant Defense Project (IDP) is one of the nation's leading non-profit organizations with specialized expertise in the interrelationship of criminal and immigration law. IDP trains and advises criminal defense and immigration lawyers, as well as immigrants themselves, on issues involving the immigration consequences of criminal convictions.

The Immigrant Legal Resource Center (ILRC), founded in 1979, is a national back-up center that provides assistance and/or training to low-income immigrants and their advocates. Among its other areas of expertise, the ILRC is known nationally as a leading authority on the intersection between immigration and criminal law. Its publications include *Defending Immigrants in the Ninth Circuit* (formerly California Criminal Law and

Immigration) (ILRC 2008), which has been cited by the Ninth Circuit Court of Appeals and the California Supreme Court.

The National Immigration Project of the National Lawyers Guild (NIPNLG) is a national membership organization working to defend and expand the rights of immigrants in the United States. For nearly a quarter century, the NIPNLG has provided technical assistance to criminal defense practitioners seeking help in assessing the immigration consequences of criminal conduct. The Fourth Circuit has previously permitted the NIPNLG to share argument as amicus in an en banc case. *See Kofa v. U.S. INS*, 60 F. 3d 1084 (4th Cir. 1995) (en banc).

University of Maryland School of Law Immigration Clinic (Clinic) represents clients with criminal convictions in Immigration Court and advises criminal defense attorneys in the Fourth Circuit about the immigration consequences of convictions. Maureen Sweeney, director of the Clinic, is principle author of the *Abbreviated Chart of Immigration Consequences of Maryland Convictions.* The views expressed in this Amicus Brief are those of the Immigration Clinic of the University of Maryland School of Law. They do not expressly or impliedly represent the views of the University of Maryland School of Law, or of the University of Maryland Law School Clinical Law Program in general.

The United States Supreme Court and Courts of Appeals, including this Court, have accepted and relied on briefs prepared by *amici* in numerous significant immigration-related cases, including cases implicating *Silva-Trevino* and other crime-related issues.[1]

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, AILA, IDP, ILRC, NIPNLG, and the Immigration Clinic of UMDLAW submit this brief as *Amici Curiae* in support of Petitioner Abdel Waheed. *Amici* authored and funded this brief independent of party's counsel or any other party or person.

PRELIMINARY STATEMENT

This case challenges the application of the former Attorney General Mukasey's erroneous decision in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008) to deny Mr. Waheed, a Lawful Permanent Resident, admission to the United States following his brief visit abroad.[2] The Board of

[1] *See, e.g.*, Br. of IDP *et al*. as *Amicus Curiae*, *Prudencio v Holder*, No. 10-2382 (4th Cir. Motion for Leave to Appear as Amicus granted Mar. 18, 2011) (challenging *Silva-Trevino* in deportability setting); *see also, e.g.*, Br. of IDP *et al*. as *Amici Curiae, Padilla v. Kentucky*, 130 S.Ct. 1473 (2010) (No. 08-651); Br. of AILA *et al*. as Amicus Curiae, *Carachuri-Rosendo v. Holder*, 130 S.Ct. 2577 (2010) (No. 09-60); Br. of AILA as Amicus Curiae, *I.N.S. v. Jean*, 496 U.S. 154 (1990) (No. 89-601).

[2] Several undersigned *Amici* have already submitted a brief to this Court challenging *Silva-Trevino* in the deportation ground context. Br. of IDP *et al*. as *Amicus Curiae, Prudencio v Holder*, No. 10-2382 (4th Cir. Motion for

Immigration Appeals (BIA) has applied *Silva-Trevino*'s controversial Step Three, to overturn over sixty years of settled precedent that simple assault is not a CIMT.[3] *Matter of E-*, 1 I&N Dec. 505 (BIA 1943).

The entire *Silva-Trevino* framework is flawed. *Silva-Trevino's* Third Step permits presents the most obvious problems by permitting relitigation of the facts underlying a state or federal criminal conviction. The rule is directly contrary to precedent cases, the plain language of the Immigration and Nationality Act ("INA") and years of judicial and agency wisdom that immigration courts are ill-equipped for relitigation of the facts of any criminal case. The *Silva-Trevino* framework itself raises serious constitutional questions of due process, fairness, and uniformity by requiring immigration officials to make *de novo* findings of fact regarding the

---

Leave to Appear as Amicus granted Mar. 18, 2011). Although the inadmissiblity context is presented here, many of the arguments are applicable to *Prudencio*.

[3] Assaults convictions may constitute CIMT where the statute requires a heightened *mens rea* or the deliberate infliction of physical harm. *Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996). However, as Petitioner's brief details, Maryland law expressly differentiates these aggravated assaults from simple assault. Petitioner was convicted of simple assault. The BIA erroneously invoked *Silva-Trevino* to convert a nonturpitudinous crime (assault) into a potentially turpitudinous crime (aggravated assault) solely on a review of a police report untethered to the conviction record. This is clear error. The "conviction itself [is] our starting place, not to what might have or could have been charged. … [The agency] cannot, *ex post*, enhance the state offense of record just because facts known to it would have authorized a greater penalty under either state or federal law." *Carachuri-Rosendo v. Holder*, 130 S.Ct. 2577, 2586 (2010).

circumstances underlying often decades-old criminal convictions. Furthermore, *Silva-Trevino* purports to dictate to the federal courts how to analyze federal and state criminal statutes, a matter beyond the agency's expertise.

Mr. Waheed is among many non-citizens to be harmed in the wake of *Silva-Trevino*. The opinion asks circuit courts nationwide to assess anew whether any given criminal conviction is a "crime involving moral turpitude" ("CIMT"). It has also engendered significant confusion among Immigration Judges ("IJs") as to when and where it is appropriate to resort to the opinion's amorphous Step Three. *Compare Matter of Ahortalejo-Guzman*, 25 I&N Dec. 465 (BIA 2011) (Step Three not appropriate to contradict conviction record); *Matter of Guevara Alfaro*, 25 I&N Dec. 417 (BIA 2011) (IJs instructed to employ Step Three absent otherwise controlling authority). The number of cases potentially impacted by *Silva-Trevino* is significant as a CIMT conviction constitutes both a ground of deportability, and a ground of inadmissibility. 8 U.S.C. § §1182(a)(2)(A)(i)(I); 8 U.S.C. § 1227(a)(2)(A)(i)-(ii).

Although *Amici* concur with Petitioner that his Petitioner's conviction is categorically not a CIMT and that the Board of Immigration Appeals ("BIA") erred in applying Steps One and Two of the *Silva-Trevino* analysis,

Amici urges the Court to reject the *Silva-Trevino* framework entirely and reaffirm the importance of the traditional categorical approach.

Amici urge this Court to terminate Mr. Waheed's removal proceedings and ask that, should the Court reach the issue of whether it is permissible to go beyond a categorical inquiry in determining whether Mr. Waheed's conviction is a CIMT, it join numerous other courts in reaffirming the importance of the categorical approach for moral turpitude determinations.

ARGUMENT

In an entirely unforeseen break from a bedrock principle of immigration law, *Silva-Trevino* flagrantly departs from the categorical approach used to assess how to classify a criminal conviction for immigration purposes. *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008); *Ahortalejo-Guzman*, 25 I&N Dec. at 467 (describing the *Silva-Trevino* methodology as a "departure from the categorical approach that previously governed" CIMT determinations). The former Attorney General upended a century of agency and federal court precedent in the eleventh hour of his tenure, without any briefing issued on the issue ultimately decided.[4] The case adopts an untenable interpretation of the INA: that the

[4] As the Third Circuit noted in *Jean-Louis*, the Attorney General's refusal to notify Mr. Silva-Trevino's counsel or any other stakeholders of the issues

agency may look beyond the record of conviction in a criminal case to decide whether the underlying conduct makes the conviction a crime involving moral turpitude. *Matter of Silva-Trevino*, 24 I&N Dec. at 690.

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

A. Respondent's Analysis of State/Federal Criminal Statutes is Not Entitled to Deference.

This Court owes no deference to *Silva-Trevino's* untenable framework, which the BIA used to construe the Maryland assault statute Mr. Waheed violated. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), and, by extension, *National Cable & Telecommunications Ass'n v. Brand X Internet Service*, 545 U.S. 967 (2005), provide the familiar framework in assessing whether, and when, a court should defer to an administrative agency's interpretation of a statute. At the threshold, sometimes referred to as "*Chevron* Step Zero,"[5] deference is only

---

under review pursuant to his certification, and his concomitant failure to invite or allow any briefing, also serve to reduce the deference due the decision. *Jean-Louis v. Att'y Gen. of U.S.*, 582 F.3d 462, 470 n.11 (3d Cir. 2009), *petition for reh'g denied* (Apr. 5, 2010); *see also* Laura Trice, *Adjudication By Fiat: The Need For Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions*, 85 N.Y.U. L. Rev. 1766, 1776-80 (2010).

[5] *See generally* Cass Sunstein, *Chevron Step Zero*, 92 Va. L.Rev. 187 (2006).

warranted "'when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law.'" *Gonzales v. Oregon*, 546 U.S. 243, 255 (2006) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)). As this Court has recognized, "where the Board construes statutes over which it ha[s] no particular expertise, including federal and state criminal law … the Board's interpretation is not entitled to deference." *Garcia v. Gonzales*, 455 F.3d 465, 467 (4th Cir. 2006) (reversing BIA's determination that reckless assault constituted a "crime of violence"). *See also Marmolejo-Campos v. Holder*, 558 F.3d 903, 907 (9th Cir. 2009) (en banc) (BIA "has no special administrative competence to interpret the … statute of conviction"). *Silva-Trevino*'s radical new methodology for analyzing criminal statutes fails at *Chevron's* Step Zero. Any suggestion that *Silva-Trevino* changes this Court's *de novo* interpretation of state and federal criminal statutes should be rejected and no deference should be afforded its holdings.

Two recent Supreme Court decisions confirm that the proper method to interpret the offense a noncitizen has been convicted of committing is not a matter delegated by Congress to the agency's expertise. In *Nijhawan v. Holder*, 129 S.Ct. 2294 (2009), the Court was called upon to determine whether evidence outside the record of conviction could establish that a

conviction for fraud was an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i). The BIA had concluded that such evidence could be used when presented with precisely the same issue in *Matter of Babaisakov*, 24 I&N Dec. 306 (BIA 2007). Despite the fact that the government explicitly invoked *Chevron* deference to defend the BIA's view, *see* Br. of Resp. at 48-49, *Nijhawan v. Holder*, 129 S.Ct. 2294 (2009) (No. 08-495), 2009 WL 815242 (arguing that, "agency interpretations . . . are entitled to deference"), the Court analyzed *de novo* whether the categorical approach was warranted. 129 S.Ct. at 2298-2303. While the Court ultimately arrived at the same conclusion as the BIA, it made no reference to *Chevron*, and mentioned *Babaisakov* only once. *Nijhawan*, 129 S.Ct. at 2303.

Similarly, in *Carachuri-Rosendo v. Holder*, 130 S.Ct. 2577 (2010), the Supreme Court considered whether "facts known to the immigration court that could have *but did not* serve as the basis for the state conviction and punishment" could be considered to determine whether a state conviction was an aggravated felony "drug trafficking crime," 8 U.S.C. § 1101(a)(43)(B). *Id.* at 2588. As in *Nijhawan*, the Supreme Court considered this question after the BIA held that it would apply a categorical analysis relying only on the record of conviction unless controlling circuit required a different result. *Matter of Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA

2007). The Supreme Court's resolution concurred with the BIA's view, but as in *Nijhawan*, nowhere did the Court so much as mention *Chevron* or indicate that the proper mode of analysis was a question on which the agency's view commanded judicial deference.

Through *Silva-Trevino*, the agency illegitimately encroaches upon the federal court's province of interpreting criminal convictions. The conspicuous absence of any discussion of *Chevron* in *Nijhawan* and *Carachuri-Rosendo* confirm the well-settled principle that courts, not the agency, has the expertise to interpret criminal statutes. The BIA decision the framework it asserts fails at *Chevron* Step Zero and should be accorded no deference.

B. In *Silva-Trevino*, the Attorney General incorrectly applied *Brand X* in declining to follow established Circuit case law.

Even if the agency overcame this Court's initial inquiry into whether the *Chevron* framework applies at all, *Silva-Trevino* improperly lays claim to deference in the face of contrary circuit law explaining the unambiguous requirement of the statute. The Attorney General's novel interpretation in *Silva-Trevino* diverges from the clear statutory language. First, it finds the statute ambiguous when it is not. Second, it simply ignores the statutory requirement of a "conviction." Third, it disregards the analysis applicable to

construing criminal convictions by incorrectly focusing on the word "involving" within the unitary term of art "crime involving moral turpitude" (CIMT), attaching improper significance to that word.

1. *Silva-Trevino's* determination that the CIMT ground of inadmissiblity is ambiguous is owed no deference because the question of a statute's ambiguity is one reserved for the federal courts.

In departing from a century of established court precedent, Attorney General Mukasey asserted that "administrative agencies are not bound by prior judicial interpretations of ambiguous statutory provisions," citing *Brand X*. *Silva-Trevino*, 24 I&N Dec. at 696. Contrary to Mr. Mukasey's broad pronouncement, the Supreme Court gave the agency no authority to unilaterally determine whether a statutory provision is ambiguous. Whether or not a statute is ambiguous, is a question reserved for the federal courts. An agency is bound by the federal court of appeal's determination of whether the plain language of the statute governs under Step One of *Chevron*, or whether the statute is ambiguous, permitting the agency to make a reasonable interpretation under Step Two. *See, e.g, Crespo v. Holder*, 631 F.3d 130, 136 n.4 (4th Cir. 2011) (no deference given to agency's interpretation of "conviction" because INA's definition "is plain").

At *Chevron* Step One, a court determines whether Congress' intent is expressed in the statute's plain language, and if it is, that intent must be given effect. *Chevron*, 467 U.S. at 843-44. However, when Congress has "explicitly left a gap for the agency to fill," either through silence or the use of ambiguous language, a court must proceed to Step Two, where the inquiry is whether the agency's interpretation is based upon a permissible construction of the statute. At this step, the agency's interpretation is given controlling weight unless it is unreasonable. *Id*. In *Brand X*, the Supreme Court reaffirms that an agency construction of a statute only trumps a prior court construction if the statue is ambiguous. *Brand X*, 545 U.S. at 982. If clear, then Congress has left no room for agency construction. *Brand X*, 545 U.S. at 982.

The court's role in interpreting the intent of Congress is explicit under *Chevron*, and remains unchanged under *Brand X*. At *Chevron* Step One, the reviewing court must "give effect to the unambiguously expressed intent of Congress" and the court is the "final authority on issues of statutory construction." *Chevron*, 467 U.S. at 842-43. Courts are to "employ[] traditional tools of statutory construction" in determining the intent of Congress. *Chevron*, 467 U.S. at 843 n.9. Under Step One of *Chevron*, courts rely on a statute's "text, structure, purpose, and history" to resolve

meanings of statutory terms. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004). Only "when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent" may a court turn to Step Two. *Id.*; *see, e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 445-46 (1987) ("[e]mploying traditional tools of statutory construction," court concluded Congress intended different burdens of proof for asylum and withholding of removal). Only where a statute remains ambiguous after applying such tools does the court turn to *Chevron* Step Two, where *Brand X* may come into play. *See, e.g., Home Concrete & Supply, LLC v. U.S.*, __ F.3d. __, 2011 WL 361495, *7 (4th Cir. 2011).

2. *Silva-Trevino* runs contrary to the plain language of the INA by ignoring statutory language that unambiguously compels a categorical approach.

a. *Silva-Trevino* ignores the unambiguous statutory requirement of a "conviction" of a removable offense.

The narrow question of statutory construction presented by this case is whether an immigration agency may premise a non-citizen's removal from the United States upon evidence extraneous to the criminal record purporting to detail the specific circumstances leading to conviction, rather than the nature of the conviction itself. As evidenced by the overwhelming weight of

federal court authority—both prior and subsequent to *Silva-Trevino*[6]—the decision contravenes the statute's unambiguous requirement that convictions for CIMTs be analyzed categorically.

The INA provides that "any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of . . . a crime involving moral turpitude (other than a purely political) or attempt or conspiracy to commit such a crime" is inadmissible. 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 CIMT, or (b) "who admits having committed" a CIMT, or (c) "who admits committing acts which constitute the essential elements of" a CIMT. *See id.* In this case, the BIA concluded Petitioner's "conviction was for a turpitudinous offense, rendering him removable." Op. of BIA at 3. The plain meaning of the statutory language distinguishes between convictions and admissions, and the BIA limited its analysis here to Petitioner's conviction.[7] Where Congress uses the term "convicted," it "premises

[6] *See* note 8 *infra* citing cases.

[7] Contrary to the former AG's assertions that reference to admissions "seem to call for, or at least allow, inquiry into the particularized facts of the crime," *Silva-Trevino*, 24 I&N Dec. at 693, determinations of inadmissibility based on admissions entail an entirely separate set of requirements for

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). As this Court has explained:

> Congress did not intend to saddle the Immigration Service and the courts with the extremely difficult and time-consuming burden of developing the facts surrounding the commission of the crime for which the alien was convicted. An alien is subject to deportation under the statute for his conviction of a crime involving moral turpitude, not for his commission of an act involving moral turpitude. The focus of the statute is on the type of crime committed rather than on the factual context surrounding the actual commission of the offense**.**

Castle v. INS, 541 F.2d 1064, 1066 n. 5 (4th Cir. 1976) (emphasis added). However, this is exactly what the framework announced in *Silva-Trevino* purports to do. The BIA's subsequent attempts to refine *Silva-Trevino*'s holdings do not cure the colossal break with controlling precedent on a fundamental principle of immigration law.

---

agency officials to follow prior to relying on statements by an immigrant, and also maintains a focus on the elements of a criminal offense. *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); 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"). The language relating to "admissions," "commissions" and "acts" does not alter the requirements surrounding "convictions."

The language of 8 U.S.C. § 1182(a)(2)(A)(i)(I) could not be clearer in its reference to a conviction, rather than to conduct. "If the intent of Congress is clear, that is the end of the matter; for the courts, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. Had Congress intended the term "convicted of a crime involving moral turpitude" to refer instead to conduct or acts involving moral turpitude, "it could simply have said so." *Hartford Underwriters Ins. Co., Union Planters Bank, N.A.*, 530 U.S. 1, 7 (2000); *see also* 8 U.S.C. § 1231(b)(3)(B)(iii) (prohibiting withholding of removal if "there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States"). As evidenced by the overwhelming weight of federal court authority—both prior and subsequent to *Silva-Trevino*—the decision contravenes the statute's unambiguous requirement that convictions for CIMTs be analyzed categorically.

b. This Court (along with the Supreme Court and every Circuit Court but one) limits the CIMT inquiry to the "inherent nature of the offense rather than the circumstances surrounding the transgression."

Because the plain language of the INA's CIMT provisions has been construed under Court precedent to be unambiguously limited to the nature of a conviction, rather than the specific circumstances underlying a

conviction, "there is, for *Chevron* purposes, no ambiguity in such a statute for an agency to resolve." *Velasquez-Gabriel v. Crocetti*, 263 F.3d 102, 106 (4th Cir. 2001). This Court has explicitly rejected the argument that the INA supports "look[ing] beyond the record of conviction to the facts surrounding the actual commission of the offense to determine whether moral turpitude was involved," explaining that "the focus of the statute is on the type of crime committed rather than on the factual context surrounding the actual commission of the offense." *Castle*, 541 F.2d at 1066 n.5.

This Court is far from alone in this view. The BIA has noted, "For nearly a century, the Federal circuit courts of appeals have held that where a ground of deportability is premised on the existence of a 'conviction' for a particular type of crime, the focus of the immigration authorities must be on the crime of which the alien was *convicted*, to the exclusion of any other criminal or morally reprehensible acts he may have *committed*." *Matter of Velazquez-Herrera*, 24 I&N Dec. 503, 513 (BIA 2008). This long history[8]

[8] For nearly one hundred years, this view has prevailed in virtually every federal circuit court and the BIA. *See United States ex rel. Mylius v. Uhl*, 210 F. 860, 862-63 (2d Cir. 1914) (confining the CIMT inquiry to the record of conviction and not permitting an investigation into the conduct behind the conviction); *see also, Mendoza v. Holder*, 623 F.3d 1299, 1302 (9th Cir. 2010) (same); *Serrato-Soto v. Holder*, 570 F.3d 686, 689 (6th Cir. 2009) (same); *Wala v. Mukasey*, 511 F.3d 102, 107–08 (2d Cir. 2007) (same); *Vuksanovic v. U.S. Att'y Gen.*, 439 F.3d 1308, 1311 (11th Cir. 2006) (same); *Recio-Prado v. Gonzales*, 456 F.3d 819, 821 n.4 (8th Cir. 2006) (same);

confirms that the term "convicted" unambiguously limits the analysis to whether the conviction itself constitutes a CIMT, rather than the underlying circumstances. *See Jean-Louis*, 582 F.3d at 473 n.13.

Congress is presumed to be aware the legal landscape in which it legislates, including case law, *see Lorillard Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575, 580 (1978). Congress has not changed the "convicted" portion of the inadmissibility grounds despite having amended the inadmissibility statute over forty times since 1952. *See* 8 U.S.C. § 1182 (historical notes). Notably, in enacting the modern INA in 1952, Congress reaffirmed the importance of categorical determinations when it considered and rejected a proposal to allow individualized determinations of immigrants' deportability based on criminal conduct. *See* Senate Bill 2250 § 241(a)(4) 82d Cong. (2d Sess. 1952); *see also* 98 Cong. Rec. S5420, 5421 (1952) (statement of Sen. Douglas) (expressing concern that federal court review "is no protection if the matter to be received is as vague and variable and arbitrary as the Attorney General's conclusion about a person's undersirability.").

Padilla v. Gonzales, 397 F.3d 1016, 1019 (7th Cir. 2005) (same); *Partyka v. Att'y Gen. of the U.S.*, 417 F.3d 408, 411–12 (3d Cir. 2005); *Smalley v. Ashcroft*, 354 F.3d 332, 336 (5th Cir. 2003) (same); *Maghsoudi v. INS*, 181 F.3d 8, 14 (1st Cir. 1999) (same); *Matter of T-*, 2 I&N Dec. 22, 25 (BIA 1944) (same).

Breaking with almost a century of agreement about what the INA requires, *Silva-Trevino* asserts that the statute authorizes the agency to find as a matter of law that that an individual was *in fact convicted* of a CIMT on the basis of submissions never introduced in the underlying criminal case. *Matter of Silva-Trevino*, 24 I&N Dec. 687, 704 (AG 2008). The Attorney General justifies his decision by asserting the need to create uniformity since he claims the underlying analyses in the circuits' decisions implementing the categorical and modified categorical approach vary significantly. *Id*. at 693–95. However, while the cases sometimes use different terms to describe the approach, the pertinent analysis is essentially uniform.[9] *See Jean-Louis*, 582 F.3d at 474; *E.g., Wala v. Mukasey*, 511 F.3d 102, 107-108 (2d Cir. 2007); *Vuksanovic v. United States AG*, 439 F.3d 1308, 1311 (11th Cir. 2006); *Recio-Prado v. Gonzales*, 456 F.3d 819, 821 (8th Cir. 2006); *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1017-1020 (9th Cir. 2005); *Partyka v. AG of the United States*, 417 F.3d 408, 411-412 (3rd Cir. 2005); *Smalley v.*

[9] If the statute criminalizes one set of elements, the courts simply look to the minimum conduct necessary to offend the statute and determine whether that conduct satisfies the definition of CIMT—if it does, the crime is categorically a CIMT and if it does not, the crime is categorically not a CIMT ("traditional categorical approach"). If the statute criminalizes different sets of elements, some of which are CIMTs and some of which are not (a "divisible statute"), courts may inquire into the limited set of documents which constitute the record of conviction for the sole purpose of determining which set of elements the person was convicted of violating ("modified categorical approach").

Ashcroft, 354 F.3d 332, 336 (5th Cir. 2003); *Maghsoudi v. INS*, 181 F.3d 8, 14 (1st Cir. 1999). *Silva-Trevno* Step Three has increased, not decreased, any disuniformity. *See* Section II.A below.

3. *Silva-Trevino* assigns unjustified significance to the word "involving" and the fact that turpitude is not an element of criminal offenses.

Attorney General Mukasey also attempts to circumvent decades of federal and agency history to support his contention that the use phrase "involving" in the statutory phrase "crime involving moral turpitude" indicates that courts must look into the facts of the actual conduct, since "moral turpitude is not an element of an offense." He further asserts that "[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." *Silva-Trevino*, 24 I&N Dec. at 693, 699 (second alteration in original). This rationale should be rejected because the phrase "crime involving moral turpitude" has long been understood to be a unitary term of art. *See Jean-Louis*, 582 F.3d at 477. Moreover, as the Supreme Court has reaffirmed, the use of the word "involving" to modify "offense" does *not* even invite, let alone require, any inquiry into underlying facts. *See James v. United States*, 550 U.S. 192, 202–04 (2007).

For decades, courts and the BIA have employed the phrase CIMT as a term of art encompassing criminal statutes proscribing "baseness or depravity contrary to accepted moral standards." *Castle*, 541 F.2d at 1066 (citing *Guerrero de Nodahl v. INS*, 407 F.2d 1405, 1406 (9th Cir. 1969)); *see also, e.g.*, *Uppal v. Holder*, 605 F.3d 712, 719 (9th Cir. 2010); *see also Matter of Torres-Varela*, 23 I&N Dec. 78, 83 (BIA 2001). As the long-standing and uniform use of the term "CIMT" makes clear, this phrase refers to a class of criminal offenses and not to individual circumstances in which those statutes are violated.

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

under ACCA, "we consider whether the *elements of the offense* are of the type that would justify its inclusion within the ['involves a serious risk'] provision, without inquiring into the specific conduct of this particular offender." *Id*. at 202.

To the extent *James* might have left any room for doubt about the impropriety of the Attorney General's reliance on the word "involving," the Supreme Court removed it in *Nijhawan v. Holder*, 129 S.Ct. 2294 (2009). In *Nijhawan*, the Court affirmed, in the context of interpreting the criminal removal grounds of the INA itself, that neither the use of the word "involving" in the generic definition of an offense, nor the fact that a generic descriptor is not itself an element of a state or federal criminal offense, justifies departing from the categorical approach. 129 S.Ct. at 2302 (finding that the phrase "involves fraud or deceit" at 8 U.S.C. § 1101(a)(43)(M)(i) referred generically to "fraud or deceit crimes"). [10]

[10] While *Nijhawan* held that the portion of the aggravated felony definition requiring that a fraud or deceit crime involve a loss to the victim of over $10,000 called for a "circumstance specific" inquiry not limited to the elements of the statute of conviction, it did so because the phrase "offense that . . . involves fraud or deceit" went on to specify "*in which* the loss to the victim or victims." 129 S.Ct at 2301. ("The words 'in which' (which modify "offense") can refer to the conduct involved "*in*" the commission of the offense of conviction, rather than to the elements *of* the offense."). The CIMT grounds for removability contain no such language. *See Jean-Louis*, 582 F.3d at 480 ("*Nijhawan* . . . [does] not support abandoning our established methodology [for CIMTs]."

C. This Court Should Directly Address *Silva-Trevino*'s Misinterpretation of the INA.

Two circuits have already explicitly rejected *Silva-Trevino's* new framework for moral turpitude determinations. *Jean-Louis*, 582 F.3d at 477; *Guardado-Garcia v. Holder*, 615 F.3d 900, 902 (8th Cir. 2010) ("to the extent *Silva-Trevino* is inconsistent, we adhere to circuit law").[11] Other circuits have simply ignored the *Silva-Trevino* framework. Pet. Opening Brief at 51-52. Only the Seventh Circuit has embraced *Silva-Trevino*, as it is was simply adhering to its own misguided precedent. *See Mata-Guerrero v. Holder*, 627 F.3d 256 (7th Cir. 2010) (reaffirming its pre-*Silva-Trevino* decision in *Ali v. Mukasey* 521 F.3d 737 (7th Cir. 2008)).

At the same time, the BIA is bound to follow an Attorney General's precedent decision in the absence of controlling authority rejecting it. *Matter of E-L-H-*, 23 I&N Dec. 814 (BIA 2005). The BIA's recent struggle to articulate when a court may consider extrinsic evidence make it all the more urgent that this Court act now to reaffirm the categorical approach. *Compare Guevara-Alfaro*, 25 I&N Dec. at 424 (requiring employment of all three steps where the element that makes the particular sex offense moral

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

turpitudinous – knowledge of the victim's age – is not required for conviction); *Ahortalejo-Guzman*, 25 I&N Dec. at 469 (finding employment of Step 3 erroneous where the element that makes an assault turpitudinous– "that the victim was part of the offender's family" – is not required for conviction but nevertheless is addressed in the conviction record)..

II. *SILVA-TREVINO* ALSO IS UNREASONABLE, AS IT CREATES A STANDARD THAT IS IN CONFLICT WITH OTHER SECTIONS OF THE INA, YIELDS INCONSISTENT RESULTS, AND OFFENDS DUE PROCESS.

While an agency may be "free within the limits of reasoned interpretation to change course if it adequately justifies the change," *Brand X*, 545 U.S. at 1000, an "agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 447 n. 30 (1987). [12] Even assuming *arguendo* that *Chevron* Step Two applies—which it does not—permitting the agency to conduct circumstance-based inquiries of "any additional evidence" for moral turpitude is an overreach and manifestly unreasonable.

[12] Furthermore, the nonadversarial and irregular process by which Attorney General Mukasey promulgated the *Silva-Trevino* decision greatly diminishes whatever deference would otherwise be due, as discussed in footnote 4, *supra*.

A. *Silva-Trevino* is inconsistent with the overall statutory scheme and the Supreme Court's analysis of criminal convictions in both the immigration and sentencing context.

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

The courts and the BIA consistently employ categorical analysis to the expanding definition of "aggravated felony" and other criminal grounds contained in the INA. *See* 8 U.S.C. § 1101(a)(43). *See Carachuri-Rosendo*

v. Holder, 130 S.Ct. 2577 (2010) (multiple drug possession); *Nijhawan v. Holder*, 129 S.Ct. 2294 (2009) (offense involving fraud or deceit); *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (crime of violence); *Bejarano-Urrutia v. Gonzales*, 413 F.3d 444 (4th Cir. 2005) (crime of violence); *Matter of Velasquez*, 25 I&N Dec. 278 (BIA 2010) (crime of domestic violence); *Matter of Velazquez-Herrera*, 24 I&N Dec. 503 (BIA 2008) (child abuse); *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991 (BIA 1999) (sexual abuse of a minor). In each case, the employment of categorical analysis was derived from the INA's focus on the consequences of being "convicted."

In *Lopez v. Gonzales*, 549 U.S. 47 (2006), the Supreme Court drew no distinction between sentencing cases and immigration cases, and cited lower court sentencing cases which supported and differed with its opinion. *See Lopez*, 127 S.Ct. at 629 n. 3. The "categorical approach" taken in immigration and sentencing cases is now "essentially identical" and should apply uniformly. *Velazquez-Herrera*, 24 I&N Dec. at 513. *See also Johnson v. United States*, 130 S.Ct. 1265 (2010) (sentencing case citing immigration case); *United States v. Diaz-Ibarra*, 522 F.3d 343 (4th Cir. 2008) (same).

There is no reasonable rationale to treat a "moral turpitude" inquiry differently than any of the INA's other criminal grounds of inadmissibility

or deportability. "Although these opinions address 'convicted' in the context of different removal provisions, Congress has prescribed a single definition of 'convicted,' applicable to all removable offenses." *Jean*, 582 F.3d at 474-475.

B. *Silva-Trevino*'s individualized searches for moral turpitude promotes disuniformity in the law.

Silva-Trevino undermines the constitutionally mandated "uniform rule of naturalization." U.S. Const. art. I, § 8.[1][13] Courts "have developed a substantial body of case law deciding whether various state criminal statutes fall within the scope of the 'crime involving moral turpitude' offense. This jurisprudence has provided predictability, enabling aliens better to understand the immigration consequences of a particular conviction." *Jean-Louis*, 582 F.3d at 482. Under *Silva-Trevino*, however, two people "convicted" of an identical criminal violation could experience different results in Immigration Court, based solely on the fortuity of whether a factfinder determines that "additional evidence or factfinding . . .

[13] *See also* Iris Bennett, The Unconstitutionality of Nonuniform Immigration Consequences of "Aggravated Felony" Convictions, 74 N.Y.U. L. Rev. 1696, 1704-05 (1999) (explaining the problems created by disuniform immigration laws under the Articles of Confederation).

is necessary or appropriate to resolve accurately the moral turpitude question." *Silva-Trevino*, 24 I&N Dec. at 687.

By permitting an "individualized moral turpitude inquiry," *id*. at 700, the Step Three analysis abandons long-standing court and agency precedent that has consistently rejected a fact-based inquiry on constitutional grounds of uniformity, and erodes the fundamental principles of fairness and equal protection that uniformity ensures. *See United States ex rel. Mylius v. Uhl*, 210 F. 860, 863 (2d Cir. 1914) (stating that it would be contrary to the uniform administration of immigration law "to exclude one person and admit another where both were convicted of [the same criminal statute], because, in the opinion of the immigration officials, the testimony in the former case showed a more aggravated offence than in the latter"); *Matter of R-*, 6 I. & N. Dec. 444, 448 n.2 (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."). Indeed, *Silva-Trevino* guarantees the disparate, unjust results that the constitutional requirement of uniformity proscribes.

C. The unprecedented, open-ended inquiry contemplated by *Silva-Trevino* has especially troubling implications in non-adversarial proceedings outside of the immigration courtroom.

Attorney General decisions such as *Silva-Trevino* constitute binding precedent in all DHS immigration adjudications. 8 C.F.R. § 1003.1(g). According to the American Bar Association ("ABA"), "low-level immigration officers . . . make countless assessments of the impact of noncitizens' criminal convictions each year." ABA, Resolution 113: Preserving the Categorical Approach in Immigration Adjudications 2 (Aug. 4, 2009), http://www.abanet.org/leadership/2009/annual/summary_of_recommendations/One_Hundred_Thirteen.doc.

Many of the determinations made by immigration officers require a determination of whether an individual has been convicted of a CIMT. *See*, *e.g.*, 8 U.S.C. § 1226(c)(1) (requiring mandatory detention of persons inadmissible or deportable because of conviction for, *inter alia*, CIMTs); 8 C.F.R. § 1003.19(h)(2)(i) (depriving immigration judges of jurisdiction to review DHS' bond determinations for certain classes of aliens, *e.g.*, arriving aliens). In addition, domestic violence victims seeking relief under the Violence Against Women Act—who often face imminent peril if not granted relief—must establish "good moral character" before an immigration officer, requiring a determination that they have not been convicted of a CIMT. 8

U.S.C. §§ 1101(f)(3), 1154(a)(1)(A)(iii)(II)(bb), (a)(1)(A)(iv); 8 C.F.R. § 204.2(c)(2)(v). The categorical approach is critical to the fair operation of these non-adversarial administrative processes, where CIMT determinations are of necessity made quickly and with even less opportunity than in formal, adversary removal proceedings for the immigrant to contest government reliance on purported facts not established by the criminal conviction itself. Its abandonment in these contexts amplifies the unfairness of the new framework articulated in *Silva-Trevino*.

CONCLUSION

For the foregoing reasons this Court should grant the Petition for Review and reject the radical moral turpitude framework set forth in *Silva-Trevino*.

Respectfully Submitted,
This the 29th day of April, 2011.

_____/s/_____
Jeremy L. McKinney
for the AMERICAN IMMIGRATION
LAWYERS ASSOCIATION
1331 G Street, NW, Ste. 300
Washington, DC 20005
(202) 507-7600

ON BRIEF:

Maria E. Andrade
Russell R. Abrutyn
for the AMERICAN IMMIGRATION
LAWYERS ASSOCIATION
1331 G Street, NW, Ste. 300
Washington, DC 20005
(202) 507-7600

Isaac Wheeler
for the IMMIGRANT
DEFENSE PROJECT
3 W. 29th Street #803
New York, NY 10001
(212) 725-6421

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11-1095 **Caption:** Waheed v. Holder

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

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

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because this brief contains 6,729 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using MS Word 2007 Times New Roman size 14 font.

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

Dated: April 29, 2011

_____/s/_____
Jeremy L. McKinney
for the AMERICAN IMMIGRATION
LAWYERS ASSOCIATION
1331 G Street, NW, Ste. 300
Washington, DC 20005
(202) 507-7600

CERTIFICATE OF SERVICE

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

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

I, Jeremy L. McKinney, hereby certify that I electronically filed the foregoing documents with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on April 29, 2011.

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

Dated: April 29, 2011

_____/s/_____
Jeremy L. McKinney
for the AMERICAN IMMIGRATION
LAWYERS ASSOCIATION
1331 G Street, NW, Ste. 300
Washington, DC 20005
(202) 507-7600