Elizabeth A. Hohenstein
Christopher J. Hajec
Immigration Reform Law Institute
25 Massachusetts Ave. NW, Suite 335
Washington, D.C. 20001
(202) 232-5590
Attorneys for Amicus Curiae Federation for American Immigration Reform

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

Amicus Invitation No. 17-06-12 In Removal Proceedings	Case No.: Redacted

REQUEST TO APPEAR AS AMICUS CURIAE AND SUPPLEMENTAL BRIEF OF THE FEDERATION FOR AMERICAN IMMIGRATION REFORM

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I. INTEREST OF AMICUS CURIAE

On behalf of the Federation for American Immigration Reform (FAIR), the Immigration Reform Law Institute (IRLI) respectfully responds to the request by the Board of Immigration Appeals (Board) on July 12, 2017, for supplemental briefing in this matter. FAIR is a nonprofit, public-interest, membership organization of concerned citizens and legal residents who share a common belief that our nation's immigration policies must be reformed to serve the national interest. Specifically, FAIR seeks to improve border security, stop illegal immigration, and promote immigration levels that are consistent with the national interest. The Board has solicited *amicus curiae* briefs from FAIR for more than twenty years. *See, e.g.*, *In-re-Q- --M-T-*, 21 I. & N. Dec. 639 (B.I.A. 1996) (citing Timothy J. Cooney, Esquire, Washington, D.C., counsel for *amicus curiae* FAIR, and noting, "The Board acknowledges with appreciation the brief submitted by *amicus curiae*.").

II. ISSUES PRESENTED

The *amicus* has provided supplemental briefing on the following issues for the Board's consideration in the instant case:

- Is the Board precluded from applying a modified categorical analysis for an indivisible or means-based statute within the context of crime involving moral turpitude (CIMT) determinations, when the requirement in question is whether the involved conduct is reprehensible, which is a subjective determination that is not an element of the state offense?
- Do the "three basic reasons for adhering to an elements-only inquiry," *Mathis v. United States*, 136 S. Ct. 243, 2252-53 (2016), have force in the CIMT context?

- Do the answers to the first two questions require modification of the Board's decision in *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016), and if so, how?

III. SUMMARY OF THE FACTS

Respondent is a lawful permanent resident of the United States. In a social setting, respondent was dancing with a man and removed money from the man's person. The man became aware of the theft while it was taking place. Based on this incident, respondent was convicted of robbery by sudden snatching under Fla. Stat. § 812.131.

IV. SUMMARY OF THE ARGUMENT

The Board is not precluded from applying the modified categorical approach to crimes involving moral turpitude where the conviction or admission involves an indivisible statute. Permitting the modified categorical approach to apply to indivisible CIMT determinations will require the Board to amend its prior precedent in *Matter of Silva-Trevino*, which the Board can freely do. The Board is not required to adopt the contrary categorical and modified categorical approaches set forth in *Mathis v. United States*, 136 U.S. 243 (2016), because the justifications listed in that case do not have force in the CIMT context.

Therefore, the Board should amend its decision in *Matter of Silva-Trevino*. If the Board is faced with an indivisible statute where the reprehensible conduct determination cannot be made using the categorical approach, the Board should analyze the statute using the modified categorical approach.

V. ARGUMENT

The Immigration and Nationality Act (INA) makes an alien removable when the alien commits a crime involving moral turpitude (CIMT). 8 U.S.C. § 1182(a)(2)(A)(i)(I)

(inadmissibility);[1] 8 U.S.C. § 1227(a)(2)(A)(i) (deportability after admission).[2] The term "crime involving moral turpitude" is not statutorily defined, but the Board has defined a CIMT as conduct which is "inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owned between persons or society in general . . . ." *Matter of Franklin*, 20 I. & N. Dec. 867, 868 (B.I.A. 1994). There are two basic elements of a CIMT: "reprehensible conduct and some form of scienter." *Matter of Silva-Trevino*, 26 I. & N. Dec. 826, 830 (B.I.A. 2016) (citation omitted) [hereinafter Board's *Silva-Trevino*].

Currently, the Board uses a particular version of the categorical and modified categorical approaches to determine if a conviction or admission of a crime constitutes a CIMT. First, under the categorical approach, the Board compares the elements of the statutory crime to the elements of the offense as generally understood ("the generic crime"). Board's *Silva-Trevino, supra*, at 831; *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013). Currently, only if the statute is divisible—that is, contains several different crimes that can result in a conviction under the statute—will the Board employ the modified categorical approach. It will do so by examining additional documents to discover which of the several crimes in the statute the defendant was convicted of, and then determine if the elements of that conviction match the elements of the generic crime. Board's *Silva-Trevino, supra*, at 832; *Descamps*, 133 U.S. at 2284-86.

For a variety of reasons, the Board should alter how it employs these approaches.

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[1] In general.— Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitution the essential elements of—

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

8 U.S.C. § 1182(a)(2)(A)(i)(I)

[2] Crimes of moral turpitude.— Any alien who—

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 245(j)) after the date of admission, . . . is deportable.

8 U.S.C. § 1227(a)(2)(A)(i)(I)

A. The BIA Has Discretion To Amend Its Own Precedent And Make A Modified Categorical Approach Available In All CIMT Determinations.

As relevant here, in 2015, the Attorney General (AG) ordered the Board to address two issues: (1) "How adjudicators are to determine whether a particular criminal offense is a crime involving moral turpitude under the Act"; and (2) "When, and to what extent, adjudicators may use the modified categorical approach and record of conviction . . . ." *Matter of Silva-Trevino*, 26 I. & N. Dec. 550, 553-54 (A.G. 2015) [hereinafter AG *Silva-Trevino*]. The Board is not precluded by this order from applying a modified categorical analysis to an indivisible or means-based statute; the AG specifically left the questions of how to make CIMT determinations and when to use the modified categorical approach up to the agency. Therefore, the Board is free to amend the manner of analysis it set forth in the Board's *Silva-Trevino*. *See Matter of Marcal Neto*, 25 I. & N. Dec. 169 (B.I.A. 2010), *rev'g Matter of Perez Vargas*, 23 I. & N. 829 (B.I.A. 2005) (reversing the Board's prior decision pertaining to 8 U.S.C. § 1154(j) determinations).

Although the Board cited Supreme Court precedent as justification for its current method of applying the categorical and modified categorical approaches to CIMTs, Board's *Silva-Trevino*, *supra*, at 831-32, Supreme Court jurisprudence does not demand those approaches in cases before either the Board or circuit courts. The Supreme Court has found the categorical approach applicable to cases under the Armed Career Criminals Act (ACCA). *See, e.g.*, *Taylor v. United States*, 495 U.S. 575 (1990); *Mathis v. United States*, 136 S. Ct. 2243 (2016) (clarifying the difference between elements and facts in the context of the ACCA); *Descamps v. United States*, 133 S. Ct. 2276 (2013) (applying the categorical and modified categorical approach to ACCA determinations). Following the ACCA example, the Supreme Court also has applied the categorical and modified categorical approaches in immigration law to determine if aggravated felonies or drug convictions warranted removal from the United States. *See Moncrieffe v.*

Holder, 133 S. Ct. 1678 (2013) (using the approaches for aggravated felonies); *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015) (applying the approaches to cases under 8 U.S.C. § 1227(a)(2)(B)(i)); *but see Nijhawan v. United States*, 557 U.S. 29 (2009) (using a circumstance-specific approach to an aggravated felony that did not include elements of a generic crime).

The Supreme Court has never explicitly applied the categorical or modified categorical approaches in a CIMT case, however. At most, the Court has acknowledged these approaches in passing. *See Mathis*, 136 S. Ct. at 2253 n.3 (discussing the use of the categorical and modified categorical approaches in CIMT cases). Therefore, there is no binding precedent to prevent the BIA from amending *Matter of Silva-Trevino* and adopting a different, nuanced approach to analyzing CIMTs.

B. The "Three Basic Reasons" In *Mathis v. United States* Do Not Apply In The Analysis Of A CIMT.

In *Mathis v. United States*, the Supreme Court reaffirmed three justifications for using the categorical and modified categorical approaches in assessing convictions under the ACCA. 136 S. Ct. at 2252; *see also Descamps v. United States*, 133 S. Ct. 2276 (2013). The Court stated that the categorical and modified categorical approaches were appropriate to analyze convictions under the ACCA because they: (1) comport with the text and history of the statute; (2) protect a defendant's Sixth Amendment right to have a jury determine facts; and (3) avoid any unfairness from factual error. *Mathis*, 136 S. Ct. at 2252-53. But these three reasons do not justify the strict application of the categorical and modified categorical approach to immigration cases involving CIMTs.

First, the CIMT statutes do not indicate that immigration judges should use the categorical and modified categorical approaches to determine whether an alien has committed a CIMT. The Supreme Court uses the categorical and modified categorical approached for ACCA

cases because the text of that statute focuses solely on previous convictions, not criminal action or conduct. *Id.* The text of the CIMT statute is significantly broader. Under § 1182(a)(2)(A)(i)(I), CIMT determinations can be based on either a conviction or an alien's admission "to committing acts which constitute the essential elements of" a CIMT.[3] Admissions to crimes considered CIMTs can result in removability. *Matter of K*, 7 I. & N. Dec. 594, 598 (B.I.A. 1957) (adopting a three-part test for the acceptance of an admission: (1) the conduct involves essential elements of the crime; (2) the alien was provided with a definition of the essential elements of the crime; (3) the admission was voluntary).

Indeed, the statutory inclusion of admissions makes the current method of determining CIMTs unworkable. For example, if an alien admitted to burglarizing a home in a state where the burglary statute is divisible, but had not been convicted under that statute, under the current method, the immigration judge (IJ) would have to analyze the admission using the modified categorical approach. Yet, because no conviction would exist, there would be no documents for the IJ to analyze to make the CIMT determination.

Thus, if the Board were to continue its current method of analysis, a section of § 1182 would become obsolete and unusable by the government as grounds for removal. Whatever approach is adopted by the Board and courts, it cannot render a section of the statute useless. Therefore, the first justification in *Mathis* for using the categorical and modified categorical approaches is inapplicable when analyzing CIMTs.

The second justification in *Mathis* was based on important Sixth Amendment concerns. 136 S. Ct. at 2252. *See also Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (holding that it was unconstitutional to remove from the jury the assessment of facts for determining increased

[3] Other CIMT statutes only include convictions. However, IRLI would advocate for analyzing all CIMTs uniformly to reflect the INA's broadest use of CIMT.

penalties); *Descamps*, 133 S. Ct. at 2288 (using the categorical approach for ACCA determinations because of Sixth Amendment concerns; "the only facts the court can be sure the jury found are those constituting the elements of the offense"). But these Sixth Amendment concerns have no bearing on removal proceedings, which are civil, not criminal, in nature. There are no juries in such proceedings; rather, IJs are authorized to "receive evidence, and interrogate, examine and cross-examine the alien and any witnesses," 8 U.S.C. § 1229a(b)(1), and also to evaluate the evidence to determine if the alien is removable and on what grounds, § 1229a(c)(1)(A). The *Mathis* Court's Sixth Amendment concerns thus do not translate to immigration proceedings.

The final reason the Supreme Court gave for using the categorical approach was that it eliminated inaccuracies that might occur from using court documents outside of a narrow list. *Mathis*, 136 S. Ct. at 2253. Yet Congress, exercising its plenary power over immigration, has provided a broad list of documents that can be used as proof of a criminal conviction. 8 U.S.C. § 240(c)(3)(B).[4] Clearly, Congress did not regard the risk of inaccuracies as outweighing the importance of providing a broad range of sources to guide an IJ in deciding whether an underlying conviction is a CIMT. *Cf. Ocampo-Duran v. Ashcroft*, 254 F.3d 1133, 1135 (9th Cir.

[4] In any proceeding under this Act, any of the following documents or records (or certified copy of such an official document or record) shall constitute proof of a criminal conviction:

(i) Any official record of judgment and conviction.
(ii) Any official record of plea, verdict, and sentence.
(iii) A docket entry from court of records that indicates the existence of the conviction.
(iv) Official minutes of a court proceeding or a transcript of a court hearing in which the court takes notice of the existence of the conviction.
(v) An abstract of a record of conviction prepared by the court in which the conviction was entered, or by a State official associated with the State's repository of criminal justice records, that indicate the charge or section of law violated, disposition of the case, the existence and date of conviction, and the sentence.
(vi) Any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction.
(vii) Any document or record attesting to the conviction that is maintained by an official of a State of Federal penal institution, which is the basis for that institution's authority to assume custody of the individual named in the record.

2001) (using two unnamed court documents to find the alien removable for committing an aggravated felony).

C. *Matter of Silva-Trevino* Must Be Modified To Account For The Shortcomings Of The Board's Current Method Of Applying The Categorical And Modified Categorical Approaches.

Whether a crime involves moral turpitude is not directly reflected in its elements. *Matter of Silva-Trevino*, 24 I. & N. Dec. at 699 ("But moral turpitude is not an element of an offense."). In light of this, the Board should amend its decision in *Matter of Silva-Trevino* to allow IJs and the Board the freedom to use the modified categorical approach in cases where the statute is not divisible but the reprehensible nature of the conviction cannot be ascertained under the categorical approach. Sometimes, the particular facts underlying a conviction or admission, ascertainable from various court documents, will establish the CIMT elements (reprehensible conduct and scienter) even though the generic offense will not always involve these elements. There is no reason for the Board to go on using a method of determining CIMTs that is underinclusive. Rather, it should adjust its practice to better effectuate Congress's purpose of removing aliens who have demonstrated moral turpitude.

Therefore, adjudicators should begin the CIMT analysis with the categorical approach—comparing the statute's elements to the generic offense to determine if the conviction involved reprehensible conduct and a culpable mental state. If using the categorical approach does not render a determination, an adjudicator should then employ the modified categorical approach, regardless of divisibility, and examine the record of conviction or other court-produced documents to determine if the alien was convicted of a CIMT. The record of conviction or other document may reveal some circumstance that is not implied by the statute's language, but nonetheless shows that the conviction or admission involved moral turpitude.

This approach should be used here to determine that respondent's conviction constitutes a CIMT. Under Fla. Stat. § 812.131, the elements of robbery by sudden snatching are: (1) defendant took money or property from a person; (2) the property taken was of some value; (3) the taking was with the intent to permanently or temporarily deprive the victim of the property; and (4) in the course of the taking, the victim was or became aware of the taking. In re Standard Jury Instructions in Criminal Cases Report No. 2008-08, No. SC08-2431, 2009 Fla. LEXIS 2449, at *31-32 (Feb. 26, 2009).

The categorical approach does not yield an answer here, for it seems possible to meet the elements of this offense without displaying moral turpitude. The statute lists two types of intent: intent to permanently deprive and intent to temporarily deprive. Fla. Stat. § 812.131. Intent to permanently deprive, it would seem, does involve moral turpitude, while intent to temporarily deprive does not.

But under the suggested approach, an adjudicator could examine the record of conviction or other court-produced documents to determine whether respondent intended to permanently deprive or temporarily deprive the victim of his property. The record would likely reveal that respondent removed cash from the victim's person. It is reasonable to assume that when a defendant takes cash from a victim, the defendant intends to permanently take it. *Matter of Grazley*, 14 I. & N. Dec. 330 (B.I.A. 1973). Thus, the respondent's conviction under Fla. Stat. § 812.131 constitutes a CIMT under the suggested approach.

VI. CONCLUSION

For the foregoing reasons, the Board should expand use of the modified categorical approach in two ways: first, by applying it to indivisible offenses, and second, by allowing

adjudicators to examine not only the record of conviction, but other court-produced documents, as well, to determine if a conviction involves reprehensible conduct.

Respectfully submitted,

Elizabeth A. Hohenstein
Christopher J. Hajec
Immigration Reform Law Institute, Inc.
25 Massachusetts Ave, NW, Suite 335
Washington, DC 20001
Phone: 202-232-5590
Fax: 202-464-3590
Email: litigation@irli.org