UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-70759
Agency No. 096-025-359

ROCIO AURORA MARTINEZ-DE RYAN,
Petitioner,
v.

JEFFERSON B. SESSIONS, III, Attorney General of the United States,
Defendant-Appellant.

On Petition for Rehearing *En Banc*

BRIEF OF *AMICI CURIAE* THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION, FLORENCE IMMIGRANT AND REFUGEE RIGHTS PROJECT, IMMIGRANT LEGAL RESOURCE CENTER, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, AND U.C. DAVIS IMMIGRATION CLINIC, IN SUPPORT OF THE PETITION FOR REHEARING.

Jennifer Lee Koh
IMMIGRATION CLINIC
WESTERN STATE COLLEGE OF LAW
1 Banting
Irvine, CA 92618
(714) 459-1136
jkoh@wsulaw.edu

Evangeline G. Abriel
SANTA CLARA UNIVERSITY
SCHOOL OF LAW
500 El Camino Real
Santa Clara, CA 95053
408-554-5368
eabriel@scu.edu

Counsel for Amici

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Decisions of the U.S. Supreme Court

Decisions of the U. S. Circuit Courts of Appeal

Decisions of the Board of Immigration Appeals

United States Statutes

Other authorities

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c)(1), Amici Curiae state that no subsidiary, no corporation, and no publicly held corporation owns 10% or more of its stock.

STATEMENT OF AMICI'S INTEREST

Amici Curiae are non-profit organizations providing direct legal services to noncitizens and advice, training, and technical support to counsel and advocates for noncitizens in California, Arizona and nationally. Amici have an interest in ensuring that the immigration laws, including the term "crime involving moral turpitude," are applied fairly and uniformly. Each Amicus received authorization to file this brief. A list of the amici and their statements of interest appears in the Appendix.

FRAP RULE 29 STATEMENT

Pursuant to FRAP Rule 29(a) and Circuit Rule 29-3, Amici Curiae have sought the consent of the attorneys representing both parties to file this amicus brief. Counsel for both parties consent to the filing of the brief. Pursuant to Circuit Rule 29-3, a motion for leave to file an amicus brief is not required.

No counsel for any party authored this brief in whole or in part, although parts of the brief are based upon amicus briefs written by Attorney Kari Hong, counsel for Petitioner, together with Attorney Jennifer Lee Koh, counsel for amici,

on behalf of immigration law professors and clinicians in the following cases before this Court: *Garcia-Martinez v. Sessions*, No. 16-72940; *Romero v. Sessions*, No. 16-73655, consolidated with 17-70848; *Lopez Reyes v. Sessions*, Nos. 17-72333, 18-70223, 18-70224.

No party, person or entity other than Amici, their members, and their undersigned counsel contributed money that was intended to fund the preparing or submitting of the brief.

ARGUMENT

THE TERM "CRIME INVOLVING MORAL TURPITUDE" IS UNCONSTITUTIONALLY VAGUE.

Under the void for vagueness doctrine, the Government violates the Fifth Amendment's Due Process Clause when it deprives an individual of life, liberty, or property under a law so vague that it "fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, __ U.S. __, 135 S. Ct. 2551, 2556 (2015). Notice and fair enforcement concerns have particular resonance in the immigration context, where a lack of predictability may easily result in the devastating consequence of removal. *See Padilla v. Kentucky*, 559 U.S. 356, 360 (2010) (noting the virtual inevitability of removal resulting from conviction of removable offenses).

The term "crime involving moral turpitude" ("CIMT"), as used in the Immigration and Nationality Act, fails under both requirements. The term lacks an objective meaning. Instead, it relies on judicial abstractions and subjective moral standards that change over time, making it impossible as a practical matter for noncitizens and even their attorneys to predict what convictions might constitute CIMTs.

A. The Term "Crime Involving Moral Turpitude" as Used in the Immigration and Nationality Act is Unpredictable and Arbitrary and thus Impermissibly Vague.

1. The CIMT Term Lacks Inherent Meaning, and Years of Attempts to Clarify It Have Been Unsuccessful.

The difficulty with the term CIMT begins with the phrase itself. The phrase is inherently meaningless and employs amorphous and archaic language. Moreover, the term lacks identifiable elements for comparison with a non-citizen's conviction. *See Nuñez v. Holder*, 594 F.3d 1124, 1130 (9th Cir. 2010) (stating that there are "no coherent criteria for determining which crimes fall within the [moral turpitude] classification and which crimes do not.").

An important indication of vagueness is the failure of "persistent efforts" by courts and administrative agencies to clarify a statutory term. *Johnson,* 135 S. Ct. at 2558. The Board of Immigration Appeals' (the "Board") efforts to define the term CIMT demonstrate a history of persistent efforts and persistent failure. For decades, the Board has used essentially the same definition, even after being tasked

by the Attorney General to develop a standard process for determining whether an offense involves moral turpitude, *Matter of Silva-Trevino*, 26 I. & N. Dec. 550, 553 (A.G. 2015). In response, the Board determine *en banc* that moral turpitude "refers to conduct that is 'inherently base, vile or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general,'" and requires "two essential elements: reprehensible conduct and a culpable mental state." *Matter of Silva-Trevino*, 26 I. & N. Dec. 826, 833-34 (BIA 2016) (citations omitted). However, instead of clarifying the term, the Board's *Silva-Trevino* definition simply restated the Board's historical definition of conduct that is base, vile, or depraved, *Matter of P--*, 6 I. & N. Dec. 795, 798 (BIA 1955); *Matter of McNaughton*, 16 I. & N. Dec. 569 (BIA 1978); *Matter of S--*, 2 I & N Dec. 353 (BIA 1945); *Matter of G--*, 1 I. & N. Dec. 73 (BIA 1941; A.G.1941), coupled with some form of scienter or evil intent, *Matter of Flores*, 17 I. & N. Dec. 225, 227 (BIA 1980); *Matter of P--*, 3 I. & N. Dec. 56 (CO 1947; BIA 1948); *Matter of S--*, 2 I. & N. Dec. 353.

The Board's definition has given rise to pronounced concerns that it fails to provide clarity. *See Marmolejo-Campos v. Holder*, 558 F.3d 903, 919 (9th Cir. 2009) (en banc) (Berzon, J., dissenting) (stating that the agency "continually refuses to state a coherent definition of, or follow a coherent approach to, the vague CIMT statutory term it is charged with applying"); *Arias v. Lynch*, 834 F.3d

823, 830 (7th Cir. 2016) (Posner, J., concurring) (describing the term CIMT as "meaningless"); *Mei v. Ashcroft*, 393 F.3d 737, 739 (7th Cir. 2004) (noting that "the Board hasn't done anything to particularize the meaning of 'crime involving moral turpitude'").

2. The Use of Evolving Societal Standards in Applying the Term CIMT Has Resulted in Unpredictable and Arbitrary Enforcement.

The vagueness of the Board's CIMT definition is compounded by the term's changeability over time based upon "'contemporary moral standards" and "prevailing views in society.'" *Matter of Ortega-Lopez*, 27 I. & N. Dec. 382, 385 (BIA 2018) (citations omitted). *See also Matter of Diaz-Lizarraga*, 26 I. & N. Dec. 847, 851, 852 (BIA 2016) (departing from seventy years of precedent in order to "update" its jurisprudence to conform with "significant evolution" in the criminal law); *Nuñez v. Holder*, 594 F.3d at 1132 (noting the Board's labeling as CIMTS "such offenses as consensual oral sex, consensual anal sodomy, and overt and public homosexual activity"); Mary Holper, *Deportation for a Sin: Why Moral Turpitude is Void for Vagueness*, 90 NEB. L. REV. 647, 678-86 (2012) (arguing that CIMT framework allows judges to exercise their own moral judgments in assessing moral turpitude).

A definition that is susceptible to change based upon "contemporary moral standards" is by nature not predictable and cannot provide "sufficient definiteness

[so] that ordinary people can understand what conduct is prohibited." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Because it can change based upon changing standards, it also "encourage[s] arbitrary and discriminatory enforcement." *Id.*

Subjectivity also plagues the CIMT definition. The determination that an offense constitutes a CIMT may well "be unacceptable to one or another segment of society and could well divide residents of red states from residents of blue, the old from the young, neighbor from neighbor, and even males from females." *Nuñez,* 594 F.3d at 1127. Because "[t]here is simply no overall agreement on many issues of morality in contemporary society," courts are equally at a loss to determine whether a conviction under a particular statute renders a noncitizen removable. *Id.*

The Board's interpretation of the term CIMT is also unpredictable because of the Board's changes in the degree of moral turpitude required for a CIMT. While the Board originally reserved the term CIMTs for "serious" and "dangerous" crimes, *Matter of E-*, 2 I. & N. Dec. 134, 139-40 (BIA 1944; A.G. 1944), its decisions now include offenses regardless of seriousness and danger. "'Neither the seriousness of a criminal offense nor the severity of the sentence imposed therefor is determinative of whether a crime involves moral turpitude.'" *Matter of Tran*, 21 I. & N. Dec. 291, 293 (BIA 1996). This trend towards inclusion of an ever-increasing spectrum of offenses within the CIMT classification is demonstrated in

Matter of Ortega-Lopez, where the Board detached the CIMT term from the normal indicia of severity – some form of mens rea or criminal intent. "[I]n assessing whether an offense that does not involve fraud is a crime involving moral turpitude, the absence of an intent to injure, an injury to persons, or a protected class of victims is not determinative." 27 I. & N. Dec. 382, 387 (BIA 2018).

The use of changing and subjective standards has resulted in a "mess of conflicting authority," *Marmolejo-Campos*, 558 F.3d at 921 (Berzon, J., dissenting), that is "notoriously baffling," *Garcia-Meza v. Mukasey*, 516 F.3d 535, 536 (7th Cir. 2008). For example, driving under the influence is sometimes but not always a CIMT. *Compare Matter of Abreu-Semino*, 12 I. & N. Dec. 775 (BIA 1968) (simple DUI not a CIMT), with *Matter of Lopez-Meza*, 22 I. & N. Dec. 1188 (BIA 1999) (aggravated DUI, including DUI with a suspended driver's license, is a CIMT). Misprision of a felony may or may not be a CIMT. *Compare Matter of Mendez*, 27 I. & N. Dec. 219 (BIA 2018), *and Matter of Robles-Urrea*, 24 I & N Dec. 22, 26 (BIA 2006) (moral turpitude), *with Robles-Urrea v. Holder*, 678 F.3d 702, 705 (9th Cir. 2012) (not moral turpitude). Similar discrepant results exist for involuntary manslaughter. *Compare Matter of Franklin*, 20 I. & N. Dec. 867, 870 (BIA 1994) (moral turpitude), *with Sotnikau v. Lynch*, 846 F.3d 731 (4th Cir. 2017) (not moral turpitude), and falsely using a social security number, *compare Beltran-*

Tirado v. INS, 213 F.3d 1179, 1184 (9th Cir. 2000) (not moral turpitude), *with Hyder v. Keisler*, 506 F.3d 388, 393 (5th Cir. 2007) (moral turpitude).

The seemingly random assignment of crimes as CIMTs thus prevents an average person—and his or her attorney—from deciphering whether a conviction triggers the penalties associated with a CIMT designation.

B. The CIMT Definition Reflects a Level of Indeterminacy Similar To, If Not Greater Than, the Provisions Invalidated in *Johnson* and *Dimaya*.

In *Johnson v. United States*, the Court invalidated the Armed Career Criminal Act ("ACCA")'s residual clause on vagueness grounds. The Court emphasized, first, that the residual clause creates "grave uncertainty about how to estimate the risk posed by a crime" because courts were required to "imagine" the "kind of conduct the 'ordinary case' of a crime involves." 135 S. Ct. at 2557. Second, ACCA's residual clause left unclear what threshold level of risk made any given crime a "violent felony." *Id.* The combination of the imprecise term and the application to an idealized ordinary case made the statute insufficiently predictable to withstand constitutional scrutiny for vagueness. *Id.* at 2561. "By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause" violates due process. *Id*. at 2558.

Johnson specifically addressed the argument that some offenses would clearly be encompassed within the term "violent felony." In response, the Court emphasized that its holdings "squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." *Id.* at 2560-61.

In *Sessions v. Dimaya*, the Supreme Court invalidated the "crime of violence" definition at 18 U.S.C. § 16(b), as incorporated into the Immigration and Nationality Act, on similar grounds. __U.S. __, 138 S. Ct. 1204, 1211–12, 1215 (2018). As with the ACCA's residual clause, federal courts had no clear way to identify the conduct entailed in a crime's "ordinary case." *Id.* at 1211. In addition, section 16(b) reflected a constitutionally impermissible level of uncertainty about the degree of risk that would make a crime "violent." *Id.* at 1215. Thus, like the residual clause, section 16(b) produced "'more unpredictability and arbitrariness than the Due Process Clause tolerates.'" *Id.* at 1213–16 (*quoting Johnson*, 135 S. Ct. at 2558).

Here, the CIMT term also creates intolerable levels of uncertainty. This uncertainty results from the CIMT concept's twin problems – reliance on judicial abstractions and evolving social standards. These features, like those of the residual clause at issue in *Johnson* and the crime of violence definition at issue in *Dimaya*, lead to continuous redefining of the term CIMT because of the lack of a

meaningful anchor for the concept. Rather than being given meaningful elements derived from either the statute or decades of case law, judges are left with little guidance for determining moral turpitude beyond the advice that evolving "contemporary moral standards" determine which crimes are sufficiently vile, base, and reprehensible to be CIMTs. *Lopez-Meza*, 22 I. & N. Dec. at 1192. Thus, although the *Martinez-de Ryan* panel suggested without further explanation that "recognized common law principles" associated with CIMTs distinguish the term from those found invalidated by the Supreme Court, 895 F.3d 1191, 1194 (9th Cir. 2018), the judicial abstractions required to ascertain contemporaneous social and moral standards result in the same sort of indeterminacy, arbitrariness, and unpredictability found impermissibly vague in *Johnson* and *Dimaya*.

C. Counsel's Ability to Accurately Advise Noncitizens of the Immigration Consequences of Guilty Pleas is Undermined by the CIMT Definition's Indeterminacy.

"Vague laws may trap the innocent by not providing fair warning." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). In the immigration context, "[t]he importance of accurate legal advice for noncitizens accused of crimes has never been more important." *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010). But the defects and the wide-ranging impact of a CIMT assessment make it extremely difficult for immigration and criminal defense counsel to determine whether certain convictions are CIMTs.

Notice matters at multiple stages of the legal process for noncitizens, from choosing whether to accept a guilty plea in criminal court to deciding whether to seek immigration benefits. The ability to ascertain whether a conviction constitutes a CIMT is a critical legal assessment and an essential duty for criminal defense counsel. Even for lawful permanent residents, one or more CIMTs can lead to deportation, 8 U.S.C. § 1227(a)(2)(A)(i), (ii), and mandatory detention, 8 U.S.C. § 1226(c)(1). For noncitizens facing removal, a CIMT can disqualify them from certain forms of relief from removal. *See, e.g.*, 1229b(b)(1)(C) (eligibility for cancellation of removal). Outside the removal context, one or more CIMTs can undermine a noncitizen's application for a visa or other immigration benefits. *See, e.g.*, 8 U.S.C. § 1182(a)(2)(A)(i) (CIMT ground of inadmissibility).

D. The CIMT Definition's Notice and Arbitrary Enforcement Problems are Exacerbated by Serious Practical and Structural Difficulties in the Removal Context, Leading to the Unfair Enforcement of the Law.

Requiring statutes to "establish minimal guidelines to govern law enforcement" is "the most meaningful aspect of the vagueness doctrine." *Smith v. Goguen*, 415 U.S. 566, 574 (1974). In the immigration context, structural barriers and the practical realities associated with the removal system make the Supreme Court's imperative for predictable, fair laws all the more necessary.

First, many noncitizens must navigate the entire removal process without counsel, even though noncitizens with lawyers are far more likely to prevail in

their cases than those who are *pro se*. *See* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court,* 164 U. PA. L. REV. 1, 9 (2015). Noncitizens in removal proceedings have no statutory right to government-appointed counsel, although an Immigration and Customs Enforcement ("ICE") attorney appears in every case. *See* 8 U.S.C. § 1229a(b)(4)(A); 1362.

Representation levels vary based on location and time and, critically, whether an individual is detained. Noncitizens charged with removability based upon prior convictions, including all but the least significant CIMTs, can be subject to mandatory detention. *See* 8 U.S.C. § 1226(b). For detained aliens, the chance of obtaining counsel is reduced to about thirty per cent. *See* Syracuse University, Transactional Records Access Clearinghouse, TRAC Immigration, "Who is Represented in Immigration Court?," http://trac.syr.edu/immigration/reports/485/. *See also* Eagly & Shafer, 164 U. PA. L. REV. at 32 (reporting that only 14 per cent of detained noncitizens had attorneys); U.S. Dep't of Justice, Exec. Office of Immigration Review, FY 2016 Statistics Yearbook, F1, fig. 10 (2017) (hereinafter "FY 2016 Statistics Yearbook") (reporting that nearly forty per cent of individuals in removal proceedings overall (detained and nondetained) were unrepresented). Thus, the vast majority of detained immigrants must litigate their removal cases, including complex

determinations regarding whether a conviction is a CIMT and resulting questions over challenges to removal and statutory eligibility for relief, on their own.

Second, language barriers further exacerbate the challenges for detained immigrants. Almost ninety percent of immigrants in removal proceedings are not fluent in English, thus making it even more difficult to navigate whether their convictions are CIMTs or not. *See* FY 2016 Statistics Yearbook, at E1, fig. 9.

Third, various stages of the removal process -- including enforcement activity by frontline ICE officers, discretionary determinations by immigration judges, and prosecutorial choices by ICE attorneys -- are prone to arbitrary enforcement. *See generally* Jennifer Lee Koh, *Crimmigration and the Void for Vagueness Doctrine,* 2016 WIS. L. REV. 1127, 1159-65 (2016) (discussing arbitrary enforcement concerns in removal context). For instance, non-lawyer ICE officers typically decide whether to place individuals in removal proceedings at all, including whether to charge them with removability based on CIMTs. Jason A. Cade, *The Challenge of Seeing Justice Done in Removal Proceedings*, 89 TUL. L. REV. 1, 70 (2014). Wide disparities in decision-making by immigration judges across the country exist in areas such as asylum adjudication and bond decisions. *See* Koh, 2016 WIS. L. REV at 1161; TRAC Immigration, "Judge-by-Judge Asylum Decisions in Immigration Courts FY 2012-2017," http://trac.syr.edu/immigration/reports/490/include/denialrates.html. Few

constitutional or statutory checks exist to provide accountability to the removal system's structural shortcomings, which are heightened where crime-based removal grounds exist. *See* Koh, 2016 WIS. L. REV at 1161.

E. *Jordan v. De George* Does Not Foreclose This Challenge.

The panel acknowledged that "later Supreme Court cases cast some doubt on [the] general reasoning" of *Jordan v. De George*, but nonetheless concluded that it was "obliged to follow" the sixty-year old decision. *Martinez-de Ryan*, 895 F.3d at 1194. Amici respectfully urge that *Jordan* does not control the outcome here.

First, the Supreme Court's holding in *Jordan* was limited to offenses involving fraud. "Whatever else the phrase 'crime involving moral turpitude' may mean in peripheral cases, the decided cases make plain that crimes in which fraud was an ingredient have always been regarded as involving moral turpitude." *Jordan*, 341 U.S. at 232. This Court's 1957 decision in *Tseung Chu v. Cornell*, relying on *Jordan v. DeGeorge*, also involved a fraud claim and thus can also be read as limited to cases involving fraud. 247 F.2d 929 (9th Cir. 1957).

Second, fundamental changes in the intersection of immigration and crimes have taken place since *Jordan*, undermining its continuing authority. At the time of *Jordan*, "only a narrow class of deportable offenses" existed, and "judges wielded broad discretionary authority to prevent deportation." *Padilla*, 559 U.S. at

360. Current immigration law stands in stark contrast to the framework in effect when *Jordan* was decided. *Id.*

The advent of the categorical approach since *Jordan* also reduces the decision's continued applicability. Under that approach, in determining whether an offense carries immigration consequences, courts look not to the individual's actual conduct, but to the elements of the statutory offense. *Mathis v. United States*, __ U.S. __, 136 S. Ct. 2243, 2248 (2016). The court must presume that the conviction "'rested upon [nothing] more than the least of th[e] acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *Moncrieffe v. Holder*, 569 U.S. 184, 190–91 (2013).

The Board purports to apply the categorical approach to CIMTs. *Silva-Trevino*, 26 I. & N. Dec. at 831. Yet the Board's recent decision in *Matter of Ortega-Lopez* shows how difficult the categorical approach is to apply without a clear CIMT definition. Rather than looking to the least of the acts criminalized under 7 U.S.C. § 2156, which included no element of injury to or death of animals, the Board described in lurid terms the most egregious examples of animal fighting. 27 I. & N. Dec. at 387-88. The Board insisted on its ability to assess the character, gravity, and significance of the conduct on a case-by-case basis. *Id.* at 386. Without a clearer definition of the term CIMT, case-by-case analysis will

continue to involve subjective decisions, not the assessment required under the categorical approach.

Third, changes in vagueness doctrine—particularly the Supreme Court's decisions in *Johnson v. United States* and *Sessions v. Dimaya*—call for renewed scrutiny of the CIMT term. *See supra* Part B. Notwithstanding *Martinez-de Ryan*, this Court has recently suggested twice that the vagueness question is ready for reconsideration. In April 2018, a footnote in a published decision noted that the vagueness challenge to the CIMT definition was potentially viable but held it unnecessary to decide based on the facts of that case. *See Garcia-Martinez v. Sessions*, 886 F.3d 1291, 1296 n.11 (9th Cir. 2018). In June 2018, a different panel also acknowledged "a compelling argument for holding that the statutory phrase 'crime involving moral turpitude' is unconstitutionally vague," although its unpublished decision was resolved on a narrower question. *Romero v. Sessions*, __ Fed. Appx. __, No. 16-73655, 2018 WL 2453867, at *7 (9th Cir. June 1, 2018).

Amici note that three other circuits have determined that *Jordan* precluded a finding that the term CIMT is void for vagueness. *See Moreno v. Attorney General*, 887 F.3d 160, 165 (3d Cir. 2018); *Boggala v. Sessions*, 866 F.3d 563, 569-70 (4th Cir. 2017); *Dominguez-Pulido v. Lynch*, 821 F.3d 837, 842 (7th Cir. 2016). None of those cases deal with fraud offenses, and they do not discuss whether *Jordan*'s applicability is limited to fraud. Each of those cases predated the Supreme Court's

decision in *Dimaya v. Sessions*. While the Fourth Circuit reiterated its finding that CIMT was not void for vagueness a month after *Dimaya*, it did so in a footnote, relying upon *Boggala*, and did not address *Dimaya*. *Guevara-Solorzano v. Sessions*, 891 F.3d 125, 135 n. 4 (4th Cir. 2018).

Moreover, an examination of the decisions reveals flawed reasoning. The Third Circuit reasoned that, regardless of what the term CIMT might mean in "peripheral cases," it was "readily apparent" that crimes involving possession of child pornography and sexual abuse of children were morally turpitudinous. *Moreno*, 887 F.3d at 166. This reasoning was rejected, however, by the Supreme Court's statement in *Johnson* that its holdings "squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." *Johnson*, 135 S. Ct. at 2560–61.

The Third and Seventh Circuits also point to the Supreme Court's statement in *Jordan* that no court had held or suggested that the term CIMT was impermissibly vague. *Moreno*, 887 F.3d at 166; *Dominguez-Pulido*, 821 F.3d at 842 (both citing *Jordan*, 341 U.S. at 230). But multiple judges have voiced their concern over the vagueness of the term. Justice Jackson wrote a powerful dissent in *Jordan*. 341 U.S. at 223-232. Later judges and commentators have contended that the term CIMT is unworkably vague. *See, e.g., Arias v. Lynch*, 834 F.3d 823, 830 (7th Cir. 2016) (Posner, J., concurring) (describing the term CIMT as

"meaningless"); *Nuñez v. Holder*, 594 F.3d 1124, 1130 (9th Cir. 2010) (stating that there exist no "coherent criteria" for determining which crimes are CIMTs); *Marmolejo-Campos*, 558 F.3d at 919 (Berzon, J., dissenting) (describing the term "CIMT" as "vague"). *See also Padilla*, 559 U.S. at 377-80 (Alito, J., concurring) (stating that it is often quite complex to determine whether a conviction for a particular offense will make an individual removeable and that determining whether an offense is a CIMT "is no easier.").

The Fourth Circuit also believed that the petitioner there had not demonstrated unworkability comparable to what the Supreme Court noted in *Johnson*. *Boggala*, 866 F.3d at 570. Yet the Board's application of the term CIMT demonstrates critical unworkability. An example arises in the area of theft. For decades, the Board held that a theft offense was a CIMT only if it involved a permanent deprivation of property. *Diaz-Lizarraga*, 26 I & N Dec. at 849. In 2016, however, the Board "update[d]" its jurisprudence, pointing to "new economic and social realities." *Id.* at 851-2. Under the Board's "updated" rule, a theft offense is a CIMT if it involves an intent to deprive the owner of his property "either permanently or under circumstances where the property rights are substantially eroded." *Id*. at 852-53. The Board's definition resulted in diametrically contradictory decisions on the same criminal statute, Arizona Revised Statute 13-1801. The Board found Mr. Diaz-Lizarraga's conviction to be

a CIMT, but found the convictions of three other individuals under the same statute to not be CIMTs. *In re: Ramos-Sanchez,* 2010 WL 5174004 (BIA 2010), *In re Carlos-Solis*, 2016 WL 4035805 (BIA 2016); *In re Lopez-Bustos*, 2010 WL 4213214 (BIA 2010).

"Time has only confirmed Justice Jackson's powerful dissent in [*Jordan*], in which he called 'moral turpitude' an 'undefined and undefinable standard.'" *Galeana-Mendoza v. Gonzales*, 465 F.3d 1054, 1055 (9th Cir. 2006) (citations and quotations omitted).

CONCLUSION

For the foregoing reasons, amici support the Petitioner's request for a panel rehearing or rehearing en banc.

Dated: September 7, 2018 Respectfully submitted,

s/ Jennifer Lee Koh
JENNIFER LEE KOH
WESTERN STATE COLLEGE OF LAW

s/ Evangeline G. Abriel
EVANGELINE ABRIEL
SANTA CLARA UNIVERSITY SCHOOL OF LAW

Counsel for Amici

Amicus Signatories:

American Immigration Lawyers Association
Florence Immigrant and Refugee Rights Project
Immigrant Legal Resource Center
National Immigration Project of the National Lawyers Guild
U.C. Davis Immigration Law Clinic

CERTIFICATE OF COMPLIANCE

I certify that: Pursuant to FED. R. APP. P., Rule 32(a)(7)(B) and (C), Rule (a)(5) and (6), and Ninth Circuit Rules 32-1 and 32-4, the attached brief is proportionally spaced, has a typeface of 14 points or more, and contains approximately 4,197 words, exclusive of the table of contents, table of authorities, and certificates of counsel, which is does not exceed the 4,200 word-limit for an amicus brief.

/s Evangeline Abriel
EVANGELINE ABRIEL

/s Jennifer Lee Koh
JENNIFER LEE KOH

Counsel for Amici

CERTIFICATE OF SERVICE – ALL CASE PARTICIPANTS ARE CM/ECF PARTICIPANTS

I hereby certify that on September 7, 2018, I electronically filed this Motion for Leave to File Brief Amici Curiae with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all those participants who must be served with this document are registered CM/ECF users and understand that service will be accomplished by the appellate CM/ECF system.

/s/ *Evangeline G. Abriel*
Evangeline G. Abriel

APPENDIX

STATEMENTS OF INTEREST OF AMICI CURIAE

American Immigration Lawyers Association

The American Immigration Lawyers Association (AILA) is a national non-profit association with more than 15,000 members throughout the United States and abroad, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. As part of its mission, AILA provides trainings, information, and practice advisories to practitioner providing direct services to noncitizens before the U.S. Citizenship and Immigration Services, the Department of Homeland Security, the Immigration Courts and Board of Immigration Appeals, the federal district and circuit courts, the U.S. Supreme Court, and U.S. consulates abroad, and, increasingly, to counsel representing noncitizens accused of criminal offenses in federal and state courts.

Authorization to file this brief as amicus curiae was given by AILA's Executive Committee.

Immigrant Legal Resource Center

The Immigrant Legal Resource Center (ILRC) is a national nonprofit resource center whose mission is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that respects immigrant rights.[1] The ILRC publishes over twenty manuals and provides numerous trainings each year to educate noncitizens and their counsel and advocates about family immigration law, immigration relief for victims of persecution, crime, and other harm, removal defense, and citizenship naturalization.[2]

The ILRC also has deep expertise in the intersection of criminal and immigration law.[3] Public defender offices throughout California contract with ILRC to strategize about alternative immigration-safe dispositions in individual cases for noncitizen clients. ILRC has a number of publications specifically for criminal defense attorneys. *See, e.g.*, Katherine Brady, *et al.*, *Defending Immigrants in the Ninth Circuit: Impact of Crimes under California and Other State Laws* (10th ed. 2008, updated 2013); *California Criminal Defense* –

---

[1] *See* the ILRC website, at https://www.ilrc.org/mission.

[2] *See* the ILRC's publications page, at https://www.ilrc.org/publications?gclid=EAIaIQobChMIl83rgp6d3QIVG57ACh3fQQgIEAAYASADEgLx5vD_BwE.

[3] *See, e.g.*, https://www.ilrc.org/sites/default/files/resources/immigration_criminal_law_resources.pdf.

Procedure and Practice (CEB 2017) (including chapter on defending noncitizens). ILRC also has a free online "quick reference" chart that analyzes the immigration consequences of more than 200 convictions in California, and helped create similar charts and materials analyzing offenses in Arizona, Nevada, and Washington.[4] It also operates an "Attorney of the Day" service that offers consultations on immigration law and the immigration consequences of convictions to attorneys, employees of non-profit organizations, public defenders, and others assisting immigrants.

Authorization to file this brief was given by Katherine Brady, Senior Staff Attorney at ILRC.

National Immigration Project of the National Lawyers Guild

The National Immigration Project of the National Lawyers Guild ("NIPNLG") is a non-profit membership organization of attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and secure the fair administration of the immigration and nationality laws.[5] For 30 years, the NIPNLG has provided legal training to the bar and the bench on the immigration consequences of criminal conduct, litigated on behalf of noncitizens as *amici curiae* in the federal courts, and authored *Immigration Law and Crimes* and four

[4] *See, e.g.*, ILRC, Quick Reference Chart, www.ilrc.org/chart.
[5] *See* https://www.nationalimmigrationproject.org/about.html.

other treatises published by Thompson-Reuters.[6] NIPNLG has participated in litigation around the country on vagueness issues[7] and

has a direct interest in ensuring that the rules governing classification of criminal convictions for immigration purposes give noncitizens fair notice and comport with due process.

Authorization to file this amicus brief was given by Sejal Zota, Legal Director at NIPNLG.

Florence Immigrant and Refugee Rights Project

The Florence Immigrant and Refugee Rights Project (Florence Project) is a 501(c)(3) nonprofit legal service organization providing free legal services to men, women, and unaccompanied children in immigration custody in Arizona and technical assistance to counsel and advocates nationwide. The government does not provide attorneys for people in immigration removal proceedings, and an estimated 86 percent of the detained people go unrepresented due to poverty. The Florence Project strives to address this inequity both locally and nationally through direct service, partnerships with the community, and advocacy and outreach efforts. The Project's vision is to ensure that all immigrants facing removal have

---

6 *See* the NLG website, at https://www.nationalimmigrationproject.org/publications.html.

7 *See, e.g.*, amicus brief of the NLGNIP and other amici before the U.S. Supreme Court, in *Sessions v. Dimaya*, http://www.scotusblog.com/wp-content/uploads/2016/12/15-1498_amicus_resp_national_immigration_project.pdf.

access to counsel, understand their rights under the law, and are treated fairly and humanely.[8]

Authorization to file this brief as amicus was given by Laura St. John, Legal Director of the Florence Project.

U.C. Davis Immigration Law Clinic

The U.C. Davis Immigration Law Clinic is a law office based at the UC Davis King Hall School of Law, in which law student practitioners represent noncitizens before state and federal courts, under the supervision of attorney professors. Through its Immigration Litigation Project, the Clinic represents individuals facing removal proceedings in Immigration Court. The Clinic also emphasizes the critical intersection between immigration and criminal law and, through its King Hall Immigration Detention Project, provides counsel to public defenders so that they may render effective assistance in accordance with their duties under the U.S. Supreme Court's *Padilla v. Kentucky* decision In addition, the Detention Project provides legal assistance to immigration detainees and litigates detention issues of national impact in immigration court and at the appellate level. Because of the Clinic's commitment to serving noncitizens and experience, particularly in the intersection of immigration and criminal law, it has

8 *See* the FIRRP website, at https://firrp.org/who/mission/.

a vital interest in ensuring that the immigration laws are interpreted clearly and applied fairly. [9]

Authorization to file this brief as amicus was given by Holly Cooper, Co-Director of the UC Davis Immigration Clinic.

[9] *See* the Law Clinic webpages, at https://law.ucdavis.edu/clinics/immigration-law-clinic.html and https://law.ucdavis.edu/clinics/ilc-programs-and-projects.html