No. 15-73120

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANTONIO ISLAS-VELOZ,
Petitioner,
v.

WILLIAM P. BARR, 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

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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.

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.

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). 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. 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. The absence of clear standards governing CIMTs encourages arbitrary enforcement in the removal system, where structural barriers and practical realities make fair enforcement of the law already difficult to attain. Furthermore, the Executive Branch's oversized role (through the

Board of Immigration Appeals) in defining CIMTs violates the separation of powers concerns protected by the void for vagueness doctrine.

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. Efforts by the Board of Immigration Appeals (the "Board") to define the term CIMT demonstrates 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 determined *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, e.g.*, *Islas-Veloz v. Whitaker*, 914 F.3d 1249, 1256-7 (9th Cir. 2019) (Fletcher, J., concurring) (noting that courts and administrators have significant expanded conduct that qualifies as morally turpitudinous since the *Jordan v. DeGeorge* decision and that the "definition of non-fraud CIMTs continues to be hopelessly and irredeemably vague); *Aguirre Barbosa v. Barr*, 919 F.3d 1169, 1175 (9th Cir. 2019) (Berzon, J., concurring) ("writ[ing] separately to join the chorus of voices calling for renewed consideration as to whether the phrase 'crime involving moral turpitude' is unconstitutionally vague"); *Garcia-*

Martinez v. Sessions, 886 F.3d 1291, 1296 n.11 (9th Cir. 2018) (noting that the vagueness challenge to the CIMT definition was potentially viable but holding it unnecessary to decide based on the facts of that case); *Romero v. Sessions*, 736 F. App'x 632, 635 (9th Cir. 2018) (granting petition for review on ground that BIA interpretation could not be applied retroactively, but noting a "compelling argument for holding that the statutory phrase 'crime involving moral turpitude' is unconstitutionally vague" and that "language, usage, and cultural norms may have changed" since the Supreme Court's decision in *Jordan v. DeGeorge*); *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 supposed "'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"); Jennifer Lee Koh, *Crimmigration Beyond the Headlines: the Board of Immigration Appeals' Quiet Expansion of the Meaning of Moral Turpitude*, 71 STANFORD L. REV. ONLINE 267 (March 2019) (reviewing recent BIA decisions showing increasing inclusion of offenses as CIMTS); 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 meaning of moral turpitude. 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. at 387.

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 discrepancies 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.

Three years later, 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. *Sessions v. Dimaya*, __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 features that created intolerable levels of uncertainty in the ACCA and in section 16(b) find parallels in the CIMT analysis. Both the term and the attempts by the Board and courts to define it create grave uncertainty about what moral turpitude is, requiring judges to apply an ever-changing abstraction of contemporary moral standards. As noted earlier in this brief, the Board and courts have provided various definitions of the term, but those definitions have created increasing confusion and inconsistency over time. The Board's definitive description is 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. at 833-34. Rather than providing meaningful elements derived from

either the statute or decades of case law, the Board has instructed that moral turpitude is conduct that offends "contemporary moral standards," which in turn "may be susceptible to change based on the prevailing views in society." *Matter of Ortega-Lopez*, 27 I & N Dec. at 385.

Thus, the current understanding of a "crime involving moral turpitude" is defined by evolving social standards. "Prevailing views of society" may, and do, vary based upon the date in question, region, age, religious views, socio-economic class, culture, and many other factors. How is a judge to determine with any specificity the prevailing views of our large society as to whether a given offense is morally turpitudinous? And how is a noncitizen to predict whether conduct may eventually be determined to be turpitudinous? It is not sufficient that society has criminalized the conduct, for "[n]ot every offense that runs against 'accepted rules of social conduct' will qualify as a CIMT." *Robles-Urrea*, 678 F.3d at 708. 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*.

Furthermore, the process of applying the CIMT definition to a specific statute requires yet another judicial abstraction through the application of the least culpable conduct standard. The court must compare the current amorphous and changeable definition of moral turpitude with the least culpable conduct associated

with a particular statute. The court must thus rely on an analogous level of judicial abstraction criticized in *Johnson* and *Dimaya* as a result of the "ordinary case" analysis.

Although it is well-settled that the Board and this Court must apply the categorical approach to CIMTs; *see*, *e.g.*, *Matter of Silva-Trevino*, 26 I. & N. Dec. at 831 (applying the categorical approach to CIMTs); *Aguirre Barbosa v. Barr*, 919 F.3d at 1173 (same), the Board has failed to consistently and properly follow aspects of the categorical approach. In *Matter of Ortega-Lopez*, for instance, 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. *Ortega-Lopez* serves as one illustration of the Board's repeated failure to properly apply the least culpable conduct required under the categorical approach, but instead to focus on the worst dimensions of the offense in question. *See* Koh, *Crimmigration Beyond the Headlines*, 71 STAN. L. REV. ONLINE at 273-74. As a further indication of the lack of anchoring principles guiding its CIMT analysis, the Board also insisted on its ability to assess the character, gravity, and significance of the conduct on a case-by-case basis. *Matter of Ortega-Lopez*, 27 I. & N. Dec. at 386. Without a clearer definition of the term CIMT, case-by-case analysis will

continue to involve subjective decisions, not the clear comparison of statutory elements required under the categorical approach.

C. 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 non-detained) 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 2013-2018," http://trac.syr.edu/immigration/reports/judge2018/denialrates.html; TRAC Immigration, "Asylum Decisions and Denials Jump in 2018," https://trac.syr.edu/immigration/reports/539/ (reporting that the outcome for asylum seekers in 2018 continued to depend on the identity of the immigration judge hearing the case). 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.

D. Allowing the Executive Branch to Define the Term "Crime Involving Moral Turpitude" Violates the Separation of Powers.

As Justice Gorsuch explained in *Dimaya*, "vague laws also threaten to transfer legislative powers to police and prosecutors, leaving to them the job of shaping a vague statute's contours through their enforcement decisions." 138 S. Ct. at 1228 (Gorsuch, J., concurring in part and concurring in the judgment). This is dangerous, Justice Gorsuch explained, because "[u]nder the Constitution, the adoption of new laws restricting liberty is supposed to be a hard business, the product of an open and public debate among a large and diverse number of elected representatives. Allowing the legislature to hand off the job of lawmaking risks substituting this design for one where legislation is made easy, with a mere handful of unelected judges and prosecutors free to 'condem[n] all that [they] personally disapprove and for no better reason than [they] disapprove it.'" *Id.* (*quoting Jordan v. DeGeorge*, 341 U.S. 223, 242 (1951)). *See also Kolender*, 461 U.S. at 357–58 (The more important aspect of vagueness doctrine "is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement"); *Goguen*, 415 U.S. at 575 (Legislators may not "abdicate their responsibilities for setting the standards of the criminal law).

In the case of the term "crime involving moral turpitude," Congress has left the definition of this vague, general term to the courts and, increasingly, to the

Executive Branch, through the Board of Immigration Appeals. Over the past several years, the Board has displayed a disturbing trend towards increasingly classifying offenses as morally turpitudinous. *See* Koh, *Crimmigration Beyond the Headlines*, 71 STAN. L. REV. ONLINE at 272-276. In doing so, the Board has failed to comply with the requirement of utilizing the "least culpable conduct" standard under the statute of conviction to determine turpitude, *id.* at 273-274, and has relied on the mere criminalization of conduct as sufficient to confer turpitude. *Id.* at 275. In effect, the Board has designated itself as an "arbiter of moral standards" in the United States. *Id.* at 272. This problem is exacerbated by *Chevron*'s requirement that courts defer to the Board's pronouncements on interpreting of the Immigration and Nationality Act. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

Because the vagueness of the term "crime involving moral turpitude" leaves its definition to the courts and the Board, rather than to Congress, it raises the danger of violating the separation of powers described by Justice Gorsuch in *Dimaya*.

CONCLUSION

"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).

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

Dated: May 2, 2019

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 3,885 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 May 2, 2019, 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/ *Jennifer Lee Koh*
Jennifer Lee Koh

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 –*

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[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

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[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