Northwest
IMMIGRANT RIGHTS Project

Western Washington Office
615 Second Avenue
Suite 400
Seattle, Washington 98104

PHONE: 206-587-4009 TOLL-FREE: 800-445-5771 FAX: 206-587-4025 WEB: www.nwirp.org EMAIL: info@nwirp.org

January 22, 2010

Board of Immigration Appeals
Office of the Chief Clerk
P.O. Box 8530
5107 Leesburg Pike, Ste. 2000
Falls Church, VA 22041

RE: TAN, Fransisca Moningka
A088 223 001

Dear Clerk:

Please find attached my motion for leave to file a brief on behalf of *Amici Curiae* Northwest Immigrant Rights Project, American Immigration Lawyers' Association, and American Immigration Council. The motion includes a certificate of service for both the motion and the attached brief.

Please let me know if you need any more information.

Sincerely,

Matt Adams
Attorney

Granger Office
121 Sunnyside Avenue
P.O. Box 270
Granger, Washington 98932

Moses Lake Office
1405 South Pioneer Way
Suite A
Moses Lake, Washington 98837

Tacoma Office
402 Tacoma Avenue South
Suite 300
Tacoma, Washington 98402

Matt Adams
NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Ave., Ste. 400
Seattle, WA 98104

Stephen W. Manning
Jessica Boell
Jennifer Rotman
Debbie Smith
for the AMERICAN IMMIGRATION
LAWYERS ASSOCIATION
PO BOX 40103
Portland OR 97240

Mary Kenney
AMERICAN IMMIGRATION COUNCIL
1331 G. St., Suite 200
Washington, D.C., 20005-3141

Attorneys for Amici Curiae

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

In the Matter of **Fransisca Moningka TAN,** Respondent In Removal Proceedings	**File No.: A 088-223-001** ***Amici Curiae's* Request for Leave to File Amicus Brief**

MOTION OF AMICI CURIAE FOR LEAVE TO SUBMIT A BRIEF

Pursuant to Rules 2.10 and 4.6(i) of the Practice Manual of the Board of Immigration Appeals (BIA), *Amici Curiae* Northwest Immigrant Rights Project (NWIRP), American Immigration Council (Immigration Council)[1] and the American Immigration Lawyers Association (AILA) request leave to file an *amicus* brief in the instant removal proceedings. This *amicus* brief is submitted with this motion. The motion and brief are timely filed in accordance with the Board's most recent briefing schedule in this case.

This case raises an issue of national importance and of first impression for the Board: Can the Board rely on the Supreme Court's decision in *National Cable & Telecomm. Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), to decline to follow the Ninth Circuit's "disfavored group" analysis? The importance of the issue is highlighted by the fact that the Board issued a supplemental briefing schedule to the parties, requesting they address this specific question. Moreover, the Board has scheduled this case for oral arguments.

Amici agree that the application of *Brand* X to prior interpretations of the courts of appeals in published decisions raise important questions that the agency must now address in many contexts. The Supreme Court's opinions in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) and *National Cable & Telecommunications Ass'n v. Brand X Internet Service*, 545 U.S. 967 (2005) compel the Board to follow the Ninth Circuit's "disfavored group" analysis because that analysis is based on the Court's determination that such an approach is required by the plain language of the statute.

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[1] The American Immigration Council is the new name for the American Immigration Law Foundation. *See* http://www.americanimmigrationcouncil.org/newsroom/release/american-immigration-council-born.

Northwest Immigrant Rights Project ("NWIRP") is a non-profit legal organization dedicated to the defense and advancement of the rights of noncitizens in the United States. NWIRP provides direct representation to low-income immigrants in removal proceedings both before the Executive Office for Immigration Review and before the federal courts of appeals. A central goal in NWIRP's work before the Federal Courts of Appeals is to help clarify general tenets of the law so that other persons in proceedings, both represented and unrepresented, may benefit from a clear set of rules implementing the Immigration & Nationality Act. Accordingly, NWIRP has a direct interest in the issues in this case.

American Immigration Council is a non-profit organization established to advance fundamental fairness, due process, and constitutional and human rights in immigration law. Immigration Council has a direct interest in ensuring that the provisions of the INA relating to adjustment of K-2 visa holders are fairly and accurately interpreted to achieve Congress' intent. Immigration Council has appeared as *amicus curiae* in numerous cases examining the meaning of the adjustment provisions at 8 U.S.C. § 1255.

AILA is a national association with more than 11,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security and

before the Executive Office for Immigration Review (immigration courts), as well as before the United States District Courts, Courts of Appeal, and the Supreme Court of the United States.

For all of the reasons stated, *amici* request leave to file the accompanying amicus brief in support of Respondent.

Dated: January 22, 2010

Respectfully submitted,

Matt Adams
NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Ave., Ste. 400
Seattle, WA 98104
(206) 957-8611

Stephen W. Manning
Jessica Boell
Jennifer Rotman
Debbie Smith
for the AMERICAN IMMIGRATION
LAWYERS ASSOCIATION
PO BOX 40103
Portland OR 97240

Mary Kenney
AMERICAN IMMIGRATION COUNCIL
1331 G. St., Suite 200
Washington, D.C., 20005-3141

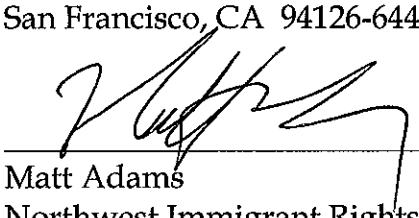
Attorneys for Amici Curiae

CERTIFICATE OF SERVICE **A 088-223-001**

I, Matt Adams, hereby certify that I served a copy of Motion for Leave of Amicus Curiae along with the attached brief for Amici Curiae by first class mail on January 22, 2010 to:

Chung N. Phang, Esquire
405 14th St., Suite 1615
Oakland, CA 94612

Office of the District Counsel/SFR
P.O. Box 26449
San Francisco, CA 94126-6449



Matt Adams
Northwest Immigrant Rights Project
615 Second Ave., Ste. 400
Seattle, WA 98104
Tel: (206) 957 8611
Fax: (2060 587-4025

Matt Adams
NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Ave., Ste. 400
Seattle, WA 98104

Stephen W. Manning
Jessica Boell
Jennifer Rotman
Debbie Smith
for the AMERICAN IMMIGRATION
LAWYERS ASSOCIATION
PO BOX 40103
Portland OR 97240

Mary Kenney
AMERICAN IMMIGRATION COUNCIL
1331 G. St., Suite 200
Washington, D.C., 20005-3141

Attorneys for Amici Curiae

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In the Matter of	
Fransisca Moningka TAN,	**File No.: A 088-223-001**
Respondent	
In Removal Proceedings	

BRIEF OF AMICI CURIAE, NORTHWEST IMMIGRANT RIGHTS PROJECT, AMERICAN IMMIGRATION LAWYERS ASSOCIATION and AMERICAN IMMIGRATION COUNCIL

Introduction

On December 2, 2009, the Board of Immigration Appeals issued notice to the parties requesting oral argument and supplemental briefing regarding the following three questions:

> Can the Board rely on the Supreme Court's decision in *National Cable & Telecomm. Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), to decline to follow the Ninth Circuit's "disfavored group" analysis?
>
> If no, what is the effect of *Sael v. Ashcroft*, 386 F.3d 922 (9th Cir. 2004), and *Wakkary v. Holder*, 558 F.3d 1049 (9th Cir. 2009), on the respondent's claim? Does the record establish that the respondent is part of a disfavored group in Indonesia and, if so, what is that group?
>
> If yes, has the respondent established eligibility for asylum and related relief?

Amici Curiae proffer this brief to assist the Board with its consideration of the first question.[1] Amici respectfully submit that the Supreme Court's opinions in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) and *National Cable & Telecommunications Ass'n v. Brand X Internet Service*, 545 U.S. 967 (2005) compel the Board to follow the Ninth Circuit's "disfavored group" analysis because that analysis is based on the Court's determination that such an approach is required by the plain language of the statute. Accordingly, the Board continues to be bound by the holdings in *Wakkary v. Holder* and *Sael v. Ashcroft*, and must apply them in resolving whether Respondent possesses a well-founded fear of persecution on account of her membership in a particular social group.

[1] Amici take no position on the remaining two questions posed by the Board.

Statement of Interest

Northwest Immigrant Rights Project ("NWIRP") is a non-profit legal organization dedicated to the defense and advancement of the rights of noncitizens in the United States. NWIRP provides direct representation to low-income immigrants in removal proceedings both before the Executive Office for Immigration Review and before the federal courts of appeals. A central goal in NWIRP's work before the Federal Courts of Appeals is to help clarify general tenets of the law so that other persons in proceedings, both represented and unrepresented, may benefit from a clear set of rules implementing the Immigration & Nationality Act. Accordingly, NWIRP has a direct interest in the issues in this case.

The 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 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. AILA's members practice regularly before the Department of Homeland Security and before the Executive Office for Immigration Review (immigration courts), as well as before the United States District Courts, Courts of Appeal, and the Supreme Court of the United States.

American Immigration Council is a non-profit organization established to increase public understanding of immigration law and policy and to advance fundamental

fairness, due process, and constitutional and human rights in immigration law and administration. American Immigration Council has a direct interest in ensuring that noncitizens are not unduly prevented from accessing the courts and seeking review of immigration decisions, and in ensuring that the decisions of the federal courts are followed in accord with the law by immigration agencies.

Argument

I. OVERVIEW OF THE *BRAND X* AND *CHEVRON* STANDARDS

a. *Brand X* Further Clarifies and Reinforces the Framework For Statutory Interpretation Laid Out by the Supreme Court in *Chevron*.

The Supreme Court's holding in *Brand X* requires the Board to interpret circuit law through the framework laid out in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The Chevron structure remains the central focus when there is a prior judicial interpretation of an immigration statute. "In the 25 years since *Chevron* was decided, [the Supreme Court] has continued to recognize that courts and agencies play complementary roles in the project of statutory interpretation." *Negusie v. Holder*, 129 S.Ct. 1159, 1171 (2009) (Stevens, J. concurring in part and dissenting in part). *Brand X* does not alter or modify the long-standing principles articulated in *Chevron*. Rather, it clarifies how courts and agencies work together to achieve the goals articulated by Congress in legislation.

Chevron and, by extension, *Brand X* provide a two-step structure for judicial review of agency decision-making that preserves the legitimate authority of an agency and, ultimately, Congress. 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" a court must proceed to step two, where the inquiry is whether Congress was silent or used language that is ambiguous. If so, the agency's interpretation is given controlling weight unless it is unreasonable. *Chevron*, 467 U.S. at 843-44.

Brand X reiterates this structure, explaining that a "court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Brand X*, 545 U.S. at 982. *Brand X* requires the Board to interpret circuit law through the *Chevron* lens; accordingly, the *Chevron* structure remains the central focus when there is a prior judicial interpretation of an immigration statute.

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.

Moreover, courts are to "employ[] traditional tools of statutory construction" in determining the intent of Congress. *Chevron*, 467 U.S. at 843 n.9. The Supreme Court has explained that under step one of *Chevron*, the traditional canons allow a court to rely on a statute's "text, structure, purpose, and history" to resolve meanings of statutory terms. *General Dynamics Land Systems, 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.*[2] Reliance on tools of statutory construction does not in and of itself indicate that a statute is ambiguous. Only where the Courts have determined that a statute remains ambiguous after applying such tools does it then turn to step two under *Chevron*, which in turn brings *Brand X* into play.

b. The Federal Court is Responsible for Determining Whether the Plain Language of the Statute Controls its Meaning or Whether it is Ambiguous.

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, requiring an interpretation under step two. In moving forward with the analysis in *Brand X*, the agency must first determine if the federal court that previously interpreted the statute, did so under step one of *Chevron* by applying traditional tools of statutory construction to determine Congress's intent through the plain language, or under step two of *Chevron*, by interpreting an ambiguous statute. A critical element in this analysis – recognized by the Board – is the precept that an agency must defer to the Court's determination of whether its opinion is rendered under step one or step two. *See, e.g., Matter of Velasquez-Herrera*, 24 I&N Dec. 503, 514 (BIA 2008) (holding that it is bound by Ninth Circuit precedent in cases arising within that circuit because the court found no ambiguity in the relevant statute); *Matter of Armendarez-Mendez*, 24 I&N Dec.

[2] *See also I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 445-446 (1987) ("The question whether Congress intended the two standards to be identical is a pure question of statutory construction for the courts to decide. Employing traditional tools of statutory construction, we have concluded that Congress did not intend the two standards to be identical.").

646 (BIA 2008) (recognizing binding nature of Fourth Circuit precedent where court found statute clear under *Chevron* step one).

Article III courts always retain the power to say "what the law is". *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177 (1803). A federal court is not bound by an agency's legal determination that a statute is ambiguous. *See, e.g., Dillingham v. INS,* 267 F.3d 996, 1011 (9th Cir. 2001)-(finding the statutory language at issue plain, and thus rejecting "BIA argu[ment] that *Chevron* deference should be accorded its 'reasonable' interpretation of the statutory language"). Rather, the federal court must first provide *de novo* review of the statute to determine if its intent can be deciphered from the plain language. If a federal court determines that the language is unambiguous, there is no room for the agency to counter with its own interpretation; at that point, *Chevron* deference is inapplicable because, "[i]f the intent of Congress is clear, that is the end of the matter [and] the agency [] must give effect to th[is] unambiguously expressed intent." *Chevron,* 467 U.S. at 842-43 (footnote omitted). Thus, deference is afforded to an agency interpretation only after the federal court determines that neither the express terms of the statute, nor the application of traditional tools of statutory construction to the plain language, demonstrate the clear intent of Congress.

The agency does not have the authority to dispute a federal court's holding made under step one, finding that a statute is unambiguous. As explained by Justice Stevens in his partial dissent and partial concurrence in *Negusie v. Holder*, courts must remain the primary arbiters of the meaning of a statute even under the *Chevron* model due to "the different institutional competencies of agencies and courts: Courts are expert at statutory construction, while agencies are expert at statutory implementation." *Negusie*, 129 S.Ct.

at 1171. In one of the first appellate court decisions applying *Brand X*, the Fourth Circuit clarified that *Chevron* step one remains in force after *Brand X*: "if the court has previously held that Congress has spoken directly to the precise question at issue, 'that is the end of the matter,' and no amount of *Chevron* step two posturing on the part of the agency will undo the court's interpretation." *Puentes Fernandez v. Keisler,* 502 F.3d 337, 347 (4th Cir. 2007) (quoting *Chevron*, 467 U.S. at 842).

In the instant case the Board would have the authority to provide a new interpretation of the relevant statute if, and only if, the Ninth Circuit has interpreted the statute under *Chevron* step two. That is, if the Ninth Circuit has found the statute ambiguous and proffered its own interpretation of it, then the Board may rely on its delegated authority to interpret the statute in a different manner.

Application of this rule is straightforward where the federal courts have carefully labeled the steps of their analysis, making clear with explicit language whether the interpretation falls under step one or step two of *Chevron.* To this end in *Brand X,* the Supreme Court directs federal courts to overtly and plainly communicate whether its holding is under the first step of *Chevron.* 545 U.S. at 982-83.

However, application of this precept is much more difficult when faced with two decades of case law issued between *Chevron* and *Brand X.* Those judicial opinions were not written with *Brand X*'s future directive in mind and therefore did not always use the exacting language noted by *Brand X.*[3] Moreover, even subsequent to *Brand X* many federal courts continue to use language that fails to clearly identify the *Chevron* step

[3] *See Brand X*, 545 U.S. at 1018 (Scalia, J., dissenting) (questioning the implications for pre-*Brand X* cases and asking "what of the many cases decided in the past, before this dictum's requirement was established?").

applicable to the holding. "Opinions, unlike statutes, are not usually written with the knowledge or expectation that each and every word may be the subject of searching analysis." *United States v. Muckleshoot Indian Tribe*, 235 F.3d 429, 433 (9th Cir. 2000).

Accordingly, it is incumbent on the agency to examine the language of the federal court's opinion in order to determine whether the interpretation was derived from the plain language of the statute after applying the traditional tools of statutory construction, or whether the court at step two interpreted the statute as an ambiguous one. A court's statutory analysis need not "say in so many magic words that its holding is the only permissible interpretation of the statute in order for that holding to be binding on an agency." *Fernandez v. Keisler,* 502 F.3d 337, 347 (4th Cir. 2007). This is particularly true in decisions in which "the exercise of statutory interpretation makes clear the court's view that the plain language of the statute was controlling and that there existed no room for contrary agency interpretation." *Id.*

c. Application of Brand X by the Attorney General and his Delegate, the Board.

In addressing the *Chevron* and *Brand X* analysis in the context of other statutory provisions, the Board has correctly recognized that it is bound by circuit precedent finding a statutory provision unambiguous. In *Matter of Velasquez-Herrera*, 24 I&N Dec. 503, 514 (BIA 2008), DHS urged, on policy grounds, that the BIA consider the victim's age to determine whether a conviction was for a crime of child abuse, even though the victim's age was not an element of the state crime. The Board rejected the government's argument, holding that it,

> simply ha[s] no authority to consider such policy matters except as they may bear on the proper interpretation of an otherwise ambiguous statute. Most importantly for present purposes, the [Ninth Circuit] in whose jurisdiction this proceeding arises, has found no such ambiguity and has held in a precedent decision that the "categorical approach is applicable to [the relevant INA provision] in its entirety."

Id. (quoting *Tokatly v. Ashcroft,* 371 F.3d 613, 624 (9th Cir. 2004)). Thus, although the BIA did not cite *Brand X,* it applied the *Brand X* methodology.

Similarly in *Matter of Armendarez-Mendez*, 24 I&N Dec. 646 (BIA 2008), the Board recognized that it did not have the authority to disregard contradicting case law in the Fourth Circuit, but could do so in the Ninth Circuit. This was because the Fourth Circuit opinion was based on a step one *Chevron* analysis, while the Ninth Circuit interpretation was based on a step two analysis. The BIA announced that it would not follow the Ninth Circuit's decisions in *Lin v. Gonzales,* 473 F.3d 979 (9th Cir. 2007), and *Reynoso-Cisneros v. Gonzales,* 491 F.3d 1001 (9th Cir. 2007), even for those cases arising within the Ninth Circuit. The agency had the authority to reject the court of appeals' interpretation pursuant to *Brand X*, precisely because it was based on the federal court's finding that the statute and implementing regulations were ambiguous.[4]

[4] Of course, only published Board decisions are *Chevron*-eligible. *Rotimi v. Gonzales,* 473 F.3d 55, 57 (2d Cir. 2007); *Marmolejo-Campos v. Holder*, 558 F.3d 903, 909 (9th Cir. 2009) (en banc). This rule limits *Chevron's* power to only those Board decisions which have the force of law. Unpublished Board decisions do not have a binding effect and do not create a rule of law. *Matter of Medrano*, 20 I&N Dec. 216, 220 (BIA 1991) ("Decisions which the Board does not designate as precedents are not binding on the Service or the immigration judges in cases involving the same or similar issues."). Likewise, decisions by Immigration Judges are not *Chevron*-eligible because they lack the capability of making law. A corollary to this precept is that only the Board can invoke *Brand X* because it is the only actor capable of making law that is binding on third parties. For any agency adjudicator without a law-making capacity, *Brand X* is irrelevant.

Nonetheless, in that same decision, the BIA concluded that it could not apply its interpretation to cases arising within the Fourth Circuit. This is because the holding of the Fourth Circuit demonstrated that its interpretation was based on the plain language of the statute. *William v. Gonzales,* 499 F.3d 329 (4th Cir. 2007). Because *William* was a *Chevron* step one case, unlike *Lin* and *Reynoso-Cisneros,* the BIA appropriately recognized that it was bound to follow it in cases arising within the Fourth Circuit, notwithstanding its own contrary interpretation.

On the other hand, the Attorney General ("AG") incorrectly asserted authority pursuant to *Brand X* to decline to follow controlling case law from the different Courts of Appeals in order to discard the categorical analysis in determining whether a conviction constitutes a crime involving moral turpitude. *Matter of Silva-Trevino*, 24 I&N Dec 687 (AG 2008). The Third Circuit, the first court of appeals to directly address the AG's analysis, forcefully rejected the AG's assertion in *Silva-Trevino* that he had the authority to disregard controlling case law from the Courts of Appeals. *Jean-Louis v. Attorney General of U.S.*, 582 F.3d 462, 466 (3rd Cir. 2009). The Third Circuit convincingly demonstrated that the Attorney General erred in claiming that pursuant to *Brand X* he had the authority to reverse decades of case law establishing the analysis for defining which crimes involving moral turpitude under the Act.

The AG claimed that prior interpretations could be disregarded because their analytical approach was based on ambiguity in the statutory language. The AG claimed that since the Immigration and Nationality Act utilizes both the terms 'committed' and 'conviction,' it creates an ambiguity, an ambiguity where the AG was authorized to apply his expertise in administering the statute. *Silva-Trevino* at 693. The Third Circuit

pointed out that this contention has been repeatedly rejected and violates decades of case law:

> To say that this reading has been rejected is an understatement: the BIA, prior attorneys general, and numerous courts of appeals have repeatedly held that the term "convicted" forecloses individualized inquiry in an alien's specific conduct and does not permit examination of extra-record evidence. It could not be clearer from the text of the statute-which defines "conviction" as a "formal judgment of guilt," and which explicitly limits the inquiry to the record of conviction or comparable judicial record evidence -that the CIMT determination focuses on the *crime* of which the alien was *convicted*-not the specific *acts* that the alien may have *committed.*

Jean-Louis, 582 F.3d at 473-474.

Likewise, the Third Circuit found that the AG erred by claiming the authority to resolve ambiguity in the phrase "crime involving moral turpitude" where the AG himself *creates* the ambiguity by artificially dividing the phrase into two parts, the crime divided from the manner in which it involves moral turpitude. *Id.* at 477. The Court noted that the AG failed to recognize that the phrase itself is a term of art derived from a long history in criminal law, a history that predates the Immigration & Nationality Act. *Id.* Thus, the AG erred in asserting that an ambiguous statute provided him with the authority to rewrite a century of case law. He impermissibly sought to refocus the analysis away from the elements of the crime for which the person was convicted to an open inquiry into the underlying conduct.

The AG's opinion in *Silva-Trevino* is especially noteworthy given that at first glance most might readily concede that the term "crime involving moral turpitude" is ambiguous at best on its face. However, as the courts of appeals have almost uniformly ruled, the plain language of the statute does indeed establish parameters for analyzing the individual convictions. This is not to say the agency does not have room to continue to

apply its expertise in filling in the gaps on a case-by-case basis, applying the categorical approach to different crimes to determine whether they involve moral turpitude. There are undoubtedly many aspects of the definition for which the agency has foremost responsibility. But the agency does not have authority to displace a holding from the court of appeals that is based on the plain language of the statute.

This is precisely the type of error that the Board must now avoid: asserting authority to decline to follow controlling precedent from a court of appeals where that precedent is based on a *Chevron* step one analysis, as apposed to an analysis of a gap in the statute or an ambiguous statute (where it is appropriately left to the agency to apply its expertise in rendering a new interpretation).

II. Application of *Chevron* and *Brand X* to Disfavored Group Analysis.

In applying these precepts to the first question presented by the Board, Amici respectfully submit that the Board must follow the Ninth Circuit's disfavored group analysis, as laid out in *Kotasz v. INS,* 31 F.3d 847 (9th Cir.1994) and its progeny, and most recently clarified in *Wakkary v. Holder*, 558 F.3d 1049 (9th Cir. 2009). This is because the Ninth Circuit has clarified that its approach to analyzing claims of well-founded fear of future persecution is mandated by the plain language of the statute and its implementing regulations. As such, the Board must defer to the Article III court's determination that it's holding identified the clear intent of Congress under *Chevron* step one, as opposed to interpreting an ambiguous statute under step two.

What is now referred to as the "disfavored group analysis" emerged over fifteen years ago in *Kotasz v. INS,* 31 F.3d 847 (9th Cir.1994). In that decision the Ninth Circuit

explained that "although the asylum regulations provide two ways to establish a well-founded fear of future persecution -- showing a 'pattern or practice' of persecution, or showing a likelihood of being 'individually singled out,'[ ] -- these two categories of future-fear claims should not be understood to require discrete sorts of *evidence.*" *Wakkary*, 558 F.3d at 1062 (explaining *Kotsz*) (emphasis in original). The Court clarified that these are not two mutually exclusive paths to demonstrating eligibility. Rather, there is necessarily overlap in the evidence that will be presented in both types of future-fear asylum claims:

> Group membership is an aspect of nearly all asylum claims, not a special problem limited to pattern or practice cases. To begin with, the Refugee Act's bases for asylum eligibility refer almost exclusively to groups. Specifically, a petitioner must face persecution on the basis of race, religion, nationality, membership in a particular social group, or political opinion. *See* 8 U.S.C. § 1158(a). The first four categories enumerated in the statute obviously relate to group characteristics, and even the category of persecution on account of political opinion is largely group-based, although the group may not be formally structured or easily defined. Proof that the government or other persecutor has discriminated against a group to which the petitioner belongs is, accordingly, *always* relevant to an asylum claim.

Kotasz, 31 F.3d at 853 (emphasis in original). In short, the Court's emphasis that membership in a targeted group is "*always*" relevant to the existence of a reasonable fear of persecution on account of a protected ground, is premised on the plain language of the statutory and regulatory scheme which specifically requires such group membership. It is "*always*" relevant based on the plain language of the statutory and regulatory scheme which delineates a framework for establishing eligibility, a framework that is governed by references to precisely this type of group membership.

This simple concept is the essence of the "disfavored group analysis". It is "*always*" relevant to consider whether an individual is a member of a targeted or

disfavored group when adjudicating a claim based on future fear: "there is a significant correlation between the asylum petitioner's showing of group persecution and the rest of the evidentiary showing necessary to establish a particularized threat of persecution. Specifically, the more egregious the showing of group persecution -- the greater the risk to all members of the group -- the less evidence of individualized persecution must be adduced." *Id.* at 853.

Unfortunately, some adjudicators have interpreted this concept to mean that there is a lower standard for establishing eligibility if a person has demonstrated membership in a disfavored or targeted group. This is incorrect, as the Ninth Circuit now has made clear. *Wakkary,* 558 F.3d at 1062 (recognizing that "the disfavored group mode of analysis needs clarification, as it has been misunderstood by both the agency and some other circuits"). Rather, the rule derived from the plain language of the statute clarifies that the very fact that someone is a member of a disfavored or targeted group constitutes *some* evidence that they may be individually persecuted. Of course, that in and of itself is not enough to demonstrate that under 8 C.F.R. § 1208.13(b)(2)(iii), there is a reasonable possibility that he or she will be singled out for persecution. *See Wakkary,* 558 F.3d at 1066 (explaining that under the disfavored group analysis, applicants "must 'prove something more than their status as ... members of' that group") (citing *Lolong v, Gonzales,* 484 F.3d 1173, 1179 (9th Cir. 2007) (en banc)). Instead, the applicant must provide evidence that a combination of the factors meets the thresholds for asylum and withholding. "The relationship between these two factors is correlational; that is to say, the more serious and widespread the threat of persecution to the group, the less

individualized the threat of persecution needs to be." *Mgoian v. I.N.S.*, 184 F.3d 1029, 1035 n. 4 (9th Cir. 1999).[5]

The misunderstanding of the Ninth Circuit's earlier decisions may in part be attributed to the imprecise language of the court of appeals, particularly in the *Sael* decision where the court stated, "[b]ecause the record establishes that ethnic Chinese are significantly disfavored in Indonesia, Sael must demonstrate a "comparatively low" level of individualized risk in order to prove that she has a well-founded fear of future persecution." *Sael v. Ashcroft* 386 F.3d 922, 927 (9th Cir. 2004).[6] Indeed, in *Wakkary* the court expressed regret at the label of the concept: "what has come to be called-perhaps unfortunately, as the terminology may be misleading -- "disfavored group" analysis." *Wakkary*, 558 F.3d at 1062.

Regardless of any label that is attached, the court of appeals repeatedly has affirmed that it represents a necessary and common-sense evaluation of two components required by the statute—evidence demonstrating the amount of danger posed to the disfavored group in general *and* the amount of evidence demonstrating that the person is individually targeted even within that disfavored group. "The main point, at any rate, is

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[5] *See also Wakkary*, 558 F.3d at 1064: "the 'lesser' or 'comparatively low' burden to which we averted in *Kotasz,* 31 F.3d at 854, and *Sael,* 386 F.3d at 927, refers not to a lower *ultimate* standard, but to the lower proportion of specifically individualized evidence of risk, counterbalanced by a greater showing of group targeting, that an applicant must adduce to *meet* that ultimate standard under the regulations' 'individually singled out' rubric."

[6] However, it should be noted that the Court in *Sael* had previously clarified the same, common-sense principles derived from the plain language of the regulation: namely that the "claim consists of two elements -- membership in a "disfavored group" and an individualized risk of being singled out for persecution -- that operate in tandem. Thus, the "more serious and widespread the threat" to the group in general, "the less individualized the threat of persecution needs to be." *Sael*, 386 F.3d at 925 (citations omitted).

that the categories of group targeting and individual targeting are not absolute and distinct. In most cases, they co-exist." *Kotasz v. I.N.S.*, 31 F.3d 847, 854 (9th Cir.1994).

Hence in *Wakkary*, citing to *Kotasz*, the Court reemphasized a basic precept of the statutory and regulatory scheme:

> so, in a case in which the asylum applicant attempts to show that he faces a reasonable likelihood of being singled out individually on account of a protected characteristic, "[p]roof that the government or other persecutor has discriminated against a group to which [he] belongs is ... *always* relevant," because that proof says something about the chances that he, as a member of that group, will be persecuted.

Wakkary, 558 F.3d at 1063. But the very fact that the Court has found that it is "*always*" relevant to the statutory and regulatory scheme, it necessarily follows that such a finding is based on the plain language of the statute and regulations.

Significantly, the Ninth Circuit is not alone in concluding that the plain language of the statute governs many of the basic eligibility standards for asylum and withholding. For example, in *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987), the Supreme Court explained that it would not defer to the agency's interpretation on whether the same legal standard governed eligibility for asylum and withholding of deportation. Instead, the court determined that the plain language demonstrated the clear intent of Congress. The Court agreed that "[t] here is obviously some ambiguity in a term like 'well-founded fear'" and that it was appropriate for the agency to flush out its meaning "through a process of case-by-case adjudication." But the Supreme Court concluded, "our task today is much narrower, and is well within the province of the judiciary." *Cardoza-Fonseca*, 480 U.S. at 448, 107 S.Ct. 1207, 1221-22.

Likewise, the Ninth Circuit's holding that membership in a disfavored group is directly relevant to the analysis of whether an individual meets their burden of

demonstrating a future fear of persecution for both asylum and withholding of removal is a discrete component of the analysis based on the plain language of the statute and its implementing regulations. Moreover, like the standard analyzed in *Cardoza-Fonseca*, the disfavored group analysis is based on the plain language of the statute defining eligibility with regards to membership or association with a group. "This ordinary and obvious meaning of the phrase is not to be lightly discounted." *Cardoza-Fonseca*, 480 at 431.

Pursuant to the clear language of *Wakkary*, the disfavored group analysis is a common sense evidentiary issue required by the plain language of the statute and governing regulations. Thus, the Board must now determine whether, in accordance with this analysis, Respondent has demonstrated sufficient evidence to qualify for relief. Amici do not provide input on this point as the parties are in the best position to address the record, and ultimately, eligibility for relief.

Conclusion

Viewed through a *Chevron* lens, it is evident that the Ninth Circuit applied the traditional canons of statutory construction and enforced the plain language of the statutory and regulatory scheme. The disfavored group analysis, as defined in *Wakkary*, resolves the statutory interpretation question at step one of *Chevron*. The court did not identify an ambiguity it was resolving. As such, the Board may not disregard the interpretation provided by the court of appeals.

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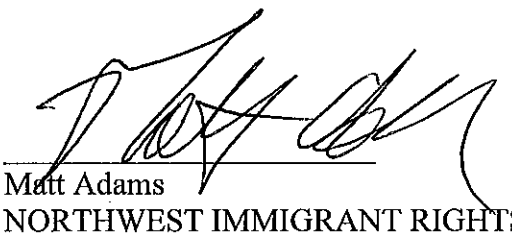
Respectfully submitted,



Matt Adams
NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Ave., Ste. 400
Seattle, WA 98104
(206) 957-8611

Stephen W. Manning
Jessica Boell
Jennifer Rotman
Debbie Smith
for the AMERICAN IMMIGRATION
LAWYERS ASSOCIATION
PO BOX 40103
Portland OR 97240

Mary Kenney
AMERICAN IMMIGRATION COUNCIL
1331 G. St., Suite 200
Washington, D.C., 20005-3141

Attorneys for Amici Curiae