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

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

Amicus Invitation No. 17-02-02	Case No.: Redacted

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

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I. INTEREST OF AMICUS CURIAE

On behalf of the Federation for American Immigration Reform (FAIR), the Immigration Reform Law Institute (IRLI) respectfully responds to the request by the Board of Immigration Appeals (Board) on February 2, 2017, for supplemental briefing in this matter. FAIR is a nonprofit, public-interest, membership organization of concerned citizens and legal residents who share a common belief that our nation's immigration policies must be reformed to serve the national interest. Specifically, FAIR seeks to improve border security, stop illegal immigration, and promote immigration levels consistent with the national interest. The Board has solicited *amicus* briefs from FAIR for more than twenty years. *See, e.g.*, *In-re-Q- --M-T-*, 21 I. & N. Dec. 639 (B.I.A. 1996) (citing Timothy J. Cooney, Esquire, Washington, D.C., amicus curiae for FAIR and noting "The Board acknowledges with appreciation the brief submitted by amicus curiae.").

II. ISSUES PRESENTED

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

- Whether, in light of the decision of the United States Court of Appeals for the Ninth Circuit in *Oretga-Lopez v. Lynch*, 834 F.3d 1015 (9th Cir. 2016), a conviction under 7 U.S.C. § 2156(a)(1), constitutes a crime involving moral turpitude (CIMT) under the Immigration and Nationality Act (INA). In this regard, discuss whether a CIMT requires a protected class of victims and, if so, whether animals may constitute a protected class.

III. SUMMARY OF THE FACTS

The amicus invitation stated that additional facts may be made available. IRLI contacted David Shamloo, counsel for Respondent, for additional facts. Counsel refused to make additional facts available.

IV. SUMMARY OF THE ARGUMENT

A conviction under 7 U.S.C. § 2156 (a)(1) for sponsoring or exhibiting an animal fight constitutes a crime involving moral turpitude (CIMT). The statute fulfills both CIMT elements under *Silva-Trevino*. First, animal fighting is a "base, vile, and depraved" act that shocks the moral conscious of society. It serves no purpose other than to entertain individuals by watching animals fight to the death. Second, it fulfills the culpable mental state requirement because the statute requires a person knowingly sponsor or exhibit an animal. The mental state of "knowingly" committing a crime fulfills the Board's culpable mental state requirement.

Reprehensible conduct and culpable mental state are the only requirements for a CIMT finding. The Ninth Circuit has attempted to require "intent to harm, actual harm, or a protected class of victim" (harm element) finding, but this additional element is not a requirement under the *Silva-Trevino* framework. The Board has specifically rejected this additional element and its decision to do so should be afforded *Chevron* deference. Even in the Ninth Circuit, the court has not uniformly applied this additional harm element which makes it near impossible to know when its analysis is required and when it is not. Finally, requiring "intent to harm, actual harm, or a protected class of victim" would exclude many common law property crimes that the Board and other circuits have found to be CIMTs. Therefore, the Board should determine that including the Ninth Circuit's harm element does

not comport with the CIMT elements, Ninth Circuit case law, or the case law of sister circuits.

V. ARGUMENT

The INA attaches serious immigration consequences to aliens who commit a crime that qualifies as a crime involving moral turpitude (CIMT). Under INA § 212(a)(2)(A)(i)(I), any alien who commits a CIMT is ineligible to receive a visa or be admitted into the United States. After admission, an alien may be deported for committing a CIMT within five years of admission or within ten years of obtaining permanent resident status in the United States if convicted of a crime that carries a possible sentence of one year or longer. INA § 237(a)(2)(A)(i)(I) & (II).

Unlike other categories of conduct for which removability is a consequence, the INA does not define CIMT. *Compare* INA § 101(a)(43) (describing the different types of aggravated felonies), *with* INA § 212(a)(2)(A)(i)(I); INA § 237(a)(2)(A)(i)(I) & (II). The Board applies the categorical approach to determine if a criminal conviction qualifies as a CIMT under the INA. *Matter of Silva-Trevino,* 26 I. & N. Dec. 826 (B.I.A. 2016) (responding to the Attorney General's request to develop a "uniform standard" of analysis for CIMTs). The categorical approach examines the definition of the crime to see if it fits within the generic definition of a CIMT. *See e.g., Moncrieffe v. Holder,* 133 S. Ct. 1678 (2013) (citing *Gonzales v. Duenas-Alvarez,* 549 U.S. 183 (2007) (applying the categorical approach to aggravated felonies)). Whether an alien's crime involves moral turpitude is determined by the criminal statute and the record of conviction, not the alien's conduct. *Partyka v. Attorney Gen. of the United States,* 417 F.3d 408, 411 (3d Cir. 2005) (internal citations omitted). The generic offense must categorically fulfill two elements to qualify as a CIMT:

(1) reprehensible conduct and (2) a culpable mental state. *Matter of Silva-Trevino*, 26 I. & N. Dec. at 834 (citing *Nino v. Holder*, 690 F.3d 691, 695 (5th Cir. 2012)).

To determine if a conviction categorically fulfills the two elements of the CIMT definition, the Board should apply the realistic probability test. The Ninth Circuit has adopted this test in deciding if a crime is a CIMT. *Leal v. Holder*, 711 F.3d 1140, 1145 (9th Cir. 2014). The realistic probability test focuses on the minimum conduct that has a realistic probability of being prosecuted under the statute. *Matter of Silva-Trevino,* 26 I. & N. Dec. at 831-32 (finding that unless a circuit "expressly dictates otherwise[,]" the realistic probability applies to Board determinations).

A. Under 7 U.S.C. § 2156(a), Sponsoring or Exhibiting an Animal in an Animal Fighting Venture is a Crime Involving Moral Turpitude Because It Involves Reprehensible Conduct and a Requisite Mental State.

Under 7 U.S.C. § 2156(a)(1), it is "unlawful for any person to knowingly sponsor or exhibit an animal in an animal fighting venture." The statute defines an "animal fighting venture" as "any event . . . that involves a fight conducted or to be conducted between at least 2 animals for purposes of sport, wager, or entertainment . . . ." 7 U.S.C. § 2156(g)(1). The definition specifically exempts hunting. *Id.*

The Board has previously analyzed whether a conviction under 7 U.S.C. § 2156(a)(1) categorically constituted a CIMT in *Matter of Oretga-Lopez*, 26 I. & N. Dec. 99 (B.I.A. 2013), *remanded, Ortega-Lopez v. Lynch*, 834 F.3d 1015 (9th Cir. 2016). Using the realistic probability approach, the Board found that animal fighting was nothing more than a "spectacle of animal suffering engaged in purely for entertainment." *Matter of Oretga-*

Lopez, 26 I. & N. Dec. at 101. The Board also found that such actions were vile and reprehensible, thus fulfilling the CIMT definition. *Id.* at 103.[1]

CIMTs are "intrinsically wrong or *malum in se*." *Matter of Serna*, 20 I. & N. Dec. 579, 582 (B.I.A. 1992). "[I]t is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude." *Matter of Flores*, 17 I. & N. Dec. 225, 227 (B.I.A. 1980). The act must be base, vile, or depraved, and contrary to the accepted rules of morality. *Matter of Franklin*, 20 I. & N. Dec. 867, 868 (B.I.A. 1994).

Sponsoring or exhibiting animal fighting fulfills the first elements of the *Silva-Trevino* CIMT test. It is reprehensible conduct, "the entire purpose of which is the intentional infliction of harm or pain on sentient beings that are compelled to fight, often to the death. The spectacle of forcing animals to cause each other extreme pain or death necessarily appeals to prurient interests." *Matter of Oretga-Lopez*, 26 I. & N. Dec. at 101 (citing *United States v. Stevens*, 130 S. Ct. 1577, 1601-02 (2010) (Alito, J., dissenting)). Additionally, the legislative history of 7 U.S.C. § 2156(a)(1) details the atrocities that occur at animal fighting events and concluded that animal fighting was "dehumanizing, abhorrent, and utterly without redeeming social value." H.R. Rep. No. 94-801, at 9-10 (1976).

Animal fighting is not just an act that is criminalized by statute. Causing animals to be tortured is a *malum in se* crime. "Animal fighting, unlike hunting or racing, is a spectacle of animal suffering engaged in purely for entertainment, the entire purpose of which is the intentional infliction of harm or pain on sentient beings that are compelled to fight, often to the death." *In Re Vicente Nava-Ruiz*, A060 391 106, 2015 WL 1605457 at *1 (B.I.A. Feb. 27, 2015) (finding that "intentionally or knowingly caus[ing] one livestock animal to fight

[1] The Ninth Circuit remanded the case back to the Board because the Board did not discuss whether a "class of victims" was required in a CIMT finding. *Ortega-Lopez v. Lynch*, 934 F.3d at 1018.

with another livestock animal or with an animal" is a CIMT). The Seventh Circuit has stated that dog fighting, which was prosecuted under 7 U.S.C. § 2156 "is closely associated with some of the most serious crimes plaguing our society . . . [and is] a threat running to the very heart of civil society . . . ." *United States v. Courtland*, 642 F.3d 545, 548 (7th Cir. 2011).

This is not just the opinion of our elected representatives or judges, but of members of society. American society recognizes hurting innocent animals or forcing them to hurt each other is inexcusable and vile behavior. In a 2007 Washington Post article, a community was outraged that an individual who had torture animals was allowed to teach at a local school.[2] As a member of the community noted, "[h]urting an animal is really no different than hurting a child[.]" *Id.* Because animal fighting is a form of cruelty that serves no purpose other than entertaining individuals at the cost of an animal's life, the Board should find that it fulfills the first element of the *Silva-Trevino* CIMT test.

The second CIMT element requires a requisite mental state. *Matter of Silva-Trevino*, 26 I. & N. Dec. at 834 (citation omitted). A knowingly or intentional mental state fulfills the requisite mental state needed for a crime to constitute a CIMT. *Matter of Khourn*, 21 I. & N. Dec. 1041, 1045-46 (B.I.A. 1997). A conviction under 7 U.S.C. § 2156(a)(1) requires proof of knowledge of the stated factual elements of the offense. *United States v. Gibert*, 677 F.3d 613, 628 (4th Cir. 2012) (discussing the interstate commerce aspects of 7 U.S.C. 2156).

Under 7 U.S.C. § 2156(a)(1), an individual must knowingly sponsor or exhibit animal fighting. Because the criminal statute requires knowledge, a conviction under the statute has a requisite intent level necessary for a CIMT finding. Therefore, under the Board's CIMT

[2] Daniel de Vise, *Spanish Teacher Remains Despite Conviction for Animal Cruelty*, WASHINGTON POST (Nov. 25, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/11/24/AR2007112401216.html.

framework, sponsoring or exhibiting an animal fight under 7 U.S.C. § 2156(a)(1) constitutes a CIMT.

As an attribute of the requisite mental state, the Board and courts often look at whether the crime involves evil motive or a corrupt mind. *Matter of Flores*, 17 I. & N. Dec. 225, 228 (B.I.A. 1980). As the Washington Post article stated, animal cruelty is no less abhorrent than harming a child, an act categorized as a CIMT. *Supra* note 1; *Nodahl v. INS*, 407 F.2d 1405 (9th Cir. 1969).

In addition to fulfilling both elements of the *Silva-Trevino* CIMT framework, the Board must determine whether there is a realistic probability that the statute would apply to conduct that is broader than the generic definition of moral turpitude. *Turijan v. Holder*, 744 F.3d 617, 620 (9th Cir. 2014) (finding that false imprisonment is not a CIMT). The statute's language and definitions ensure that only conduct that falls within the CIMT definition would be prosecuted. First, the term "animal" is limited to only live birds and mammals. 7 U.S.C. § 2156(g)(4). The statute defines "animal fighting venture" as a fight between at least 2 animals for "sport, wagering, or entertainment." § 2156(g)(1). Second, the statute specifically excludes hunting. *Id.* Unlike animal fighting, hunting does not result in the prolonged suffering of animals for the pure entertainment of watching a living being die. Third, even though the statute creates a special rule for certain states, an action is a violation of § 2156 regardless "if the person knew that the bird in the fighting venture was knowingly bought, sold, delivered, transported, or received . . . for the purpose of participation in the fighting venture." Indeed, the statute has been utilized to prosecute individuals for cock fighting. *See e.g.*, *United States v. Gibert*, 677 F.3d at 616–17; *compare United States v. Courtland*, 642 F.3d at 548 (affirming sentences for dog fighting prosecuted under statute).

Reviewing the application of the statute by different circuits, no indication exists that § 2156(a)(1) would be applied to conduct that was not morally turpitudinous.

B. The CIMT Definition under *Silva-Trevino* Does Not Require a "Protected Class" Finding for a Conviction to Constitute a CIMT.

The Ninth Circuit remanded *Matter of Oretga-Lopez* back to the Board because the Board did not discuss within its opinion whether a CIMT finding under 7 U.S.C. § 2156(a)(1) involved a "protected class of victims." *Ortega-Lopez v. Lynch*, 834 F.3d at 1018. The court found that non-fraudulent CIMTs normally involve "intent to harm, the actual infliction of harm upon someone, or an action that affects a protected class of victim." *Id.* (citing *Nunez v. Holder*, 549 F.3d 1124, 1131 (9th Cir. 2010) (finding that indecent exposure under the California Penal Code statute was not categorically a CIMT). However, Board precedent has never required "an intent to harm, actual harm or action that affects a protected class of victim" (harm element). Notably, the Ninth Circuit itself has only sparingly used a "protected class of victims" analysis for CIMTs.

1. Board precedent does not require identifying a "protected class of victim" as an element of the CIMT analysis.

The Ninth Circuit first announced the "protected class of victim" element in *Nunez v. United States*. 594 F.3d 1124 (9th Cir. 2010). The *Nunez* court stated that a review of B.I.A. case law revealed that non-fraudulent CIMTs almost always involved intent to harm, actual harm upon someone, or an action that affects a protected class of victim. *Id.* at 1130.

"The Ninth Circuit has described the phrase [CIMT] as quintessentially ambiguous and has expressly held that it is appropriate to accord Chevron deference to [] precedent decisions on whether a particular offense falls within the definition of that term." *Matter of Medina*, 26 I. & N. Dec. 79, 81 (B.I.A. 2013) (citing *Marmolejo-Campos v. Holder*, 558 F.3d

903, 909-12 (9th Cir. 2009) (en banc)). The Supreme Court has held that were a statute is ambiguous the agency's interpretation of the statute should be given deference if the interpretation is one based on "permissible construction." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). "Where the Board has determined 'that certain conduct is morally turpitudinous in a precedential decision, [it] appl[ies] *Chevron* deference regardless of whether the order under review is the precedential decision itself or a subsequent unpublished order that relies upon it." *Rohit v. Holder*, 670 F.3d 1085, 1088 (9th Cir. 2012) (citation omitted) (concluding that disorderly conduct involving prostitution was a CIMT without requiring an analysis to determine if the conviction involved intent to harm, actual harm, or a protected class of victim).

The Board has never required that a non-fraudulent CIMT involve intent to harm, actual harm, or actions that affect a protected class of victim. In fact, it specifically rejected the Ninth Circuit's "protected class of victim" element in *Matter of Medina*. 26 I. & N. Dec. 79 (B.I.A. 2013). In *Matter of Medina*, the Board analyzed the Ninth Circuit's *Nunez* decision and found that the definition of a CIMT does not necessarily have to involve intent to harm, actual harm, or a protected class of victim. *Id.* at 84. The Board considered the Ninth Circuit's definition to be "too narrow" and has consistently excluded the added harm element from its CIMT analysis. *See id.*

The Ninth Circuit did not afford the Board's analysis of 7 U.S.C. § 2156(a)(1) the proper level of deference. Through precedential decisions, the Board has announced what elements are necessary for a CIMT determination. First, only two elements were necessary for a conviction to constitute a CIMT, that is, reprehensible conduct and a culpable mental state. *See supra* sec. IV.A. Second, the Board has specifically excluded the "protected class

of victim" requirement from its CIMT analysis. *Matter of Medina*, 26 I. & N. Dec. at 84. The definition of a CIMT does not require an additional finding of intent to harm, actual harm, or a protected class of victim as the Ninth Circuit asserts is necessary in the CIMT analysis.

The Board's decision in *Ortega-Lopez* was a published decision. As such, the Ninth Circuit should have afforded the Board's determinations *Chevron* deference. Under *Chevron*, the Ninth Circuit would have given the Board's analysis deference so long as the interpretation is reasonable. 467 U.S. at 844. In its decision, the Ninth Circuit stated that the Board did not provide sufficient analysis for its conclusion that sponsoring or exhibiting an animal fight was a CIMT. *Ortega-Lopez v. Holder*, 834 F.3d at 1017. The question of whether a conviction under 7 U.S.C. § 2156(a)(1) constitutes a CIMT is one of first impression for the Board. To support its findings, the Board used precedent from the Supreme Court as well as a circuit court to conclude that sponsoring or exhibiting an animal fight was reprehensible and vile conduct. *See United States v. Stevens*, 559 U.S. 460 (2010) (Alito, J., dissenting); *United States v. Hackman*, 630 F.3d 1078, 1084 (8th Cir. 2011). The Board analysis included support that each element of the *Silva-Trevino* test was fulfilled. Therefore, the Ninth Circuit should have afforded the Board's decision *Chevron* deference and affirmed that a conviction under 7 U.S.C. § 2156(a)(1) is a CIMT.

2. The Ninth Circuit has not uniformly applied the "protected class of victim" element to CIMTs.

In *Ortega-Lopez v. Lynch*, the Ninth Circuit remanded the case back to the Board to consider a conviction under 7 U.S.C. § 2156(a)(1) involving a "protected class of victim." 834 F.3d at 1018. The Ninth Circuit stated that a protected class of victim analysis was

necessary for a complete CIMT analysis. *See id.* However, this added element has only been sporadically and inconsistently applied in Ninth Circuit case law.

Excluding *Oretga-Lopez v. Lynch*, the Ninth Circuit has only analyzed a CIMT with the additional harm element less than ten times, in unpublished, non-binding B.I.A. decisions. In *Nunez v. Holder*, the Ninth Circuit chided the Board for being "inconsistent and incoherent" in its CIMT case law but provides no guidance as to when and how this judicially created additional element is to be applied. In *Gonzales-Cervantes v. Holder*, the court stated that sexual offenses turned on the harm element. 709 F.3d 1265, 1967 (9th Cir. 2013) (extending the harm element to not just physical harm but also mental harm in sexual offense cases). The court has used the harm element to allow more flexibility in the intent prong of the CIMT analysis. *Escobar v. Lynch*, 849 F.3d 1019, 1024 (9th Cir. 2017) (discussing whether knowingly and maliciously preventing or dissuading a victim or witness from attending or giving testimony is a CIMT). Other than these two cases, the Ninth Circuit has not indicated how or when this additional element should be applied and when it is not. *Compare Vinh Tan Nguyen v. Holder*, 763 F.2d 1022, 1028-29 (9th Cir. 2012) (using the harm element in the analysis of whether misusing a passport to facilitate an act of international terrorism is a CIMT) *with Leal v. Holder*, 771 F.3d 1140, 1148-49 (9th Cir. 2014) (failing to analyze harm element for reckless endangerment). The only Ninth Circuit case to provide any information on who may comprise a "protected class of victim" was *Escobar v. Lynch*, 846 F.3d 1019 (9th Cir. 2017). In passing, the Court stated that children or someone in a special relationship with the perpetrator may constitute a "special class of victim." *Id.* at 1024. Beyond this passing mention, the Ninth Circuit has not given any indication how this additional harm element should be applied.

In cases where you would expect to see a harm analysis, the Ninth Circuit has cited *Nunez* but not for the proposition that non-fraudulent crimes require intent to harm, actual harm, or a protected class of victim. In *Rohit v. Holder*, the Ninth Circuit found that disorderly conduct involving prostitution was a CIMT but did not require a *Nunez* harm analysis. *See* 670 F.3d 1085 (9th Cir. 2012). The Court found that soliciting an act of prostitution was no less "base, vile or depraved" than an act of prostitution which is a CIMT. *Id.* at 1089.

Because *Rohit* occurred in the Ninth Circuit and involved acts of sexual depravity like *Nunez*, the Ninth Circuit would require a harm element analysis. However prostitution, a consensual criminal act, is inherently wrong or a *malum in se* crime. *Florentine-Fransisco v. Lynch*, 611 Fed. App'x 936 (10th Cir. 2015). As such, it does not require a harm finding because the act itself is so depraved that it contravenes accepted rules of morality. *See id.* at 937. Similarly, a conviction under 7 U.S.C. § 2156(a)(1) for animal fighting does not require the Board to find "intent to harm, actual harm, or a protected class of victim" because the conduct, regardless of harm, is a *malum in se* crime. As such, it does not require a particularized class of victim because the moral turpitude is in the act, not in the result.

Without concrete guidance from the Ninth Circuit, the Board should not apply the harm element in the instant case. The Board's prior decision that the harm element is "too narrow" should be given the proper *Chevron* deference.

3. Other circuits have made CIMT determinations on crimes that did not involve fraudulent behavior or a "protected class of victim' finding.

No other circuit has adopted the Ninth Circuit's novel approach in requiring intent to harm, actual harm upon someone, or an action that affects a protected class of victim. The Board and other courts have found many crimes may constitute a CIMT without a "protected

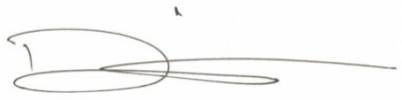
class of victims" analysis. For example, the Eleventh Circuit has announced that arson constitutes a CIMT. *Vusksanovic v. Att'y Gen. of the U.S.*, 439 F.3d 1308, 1311 (11th Cir. 2006) (finding second degree arson in Florida is a willful act "done without a legitimate, lawful purpose") (internal citation omitted). Both the Board and the Ninth Circuit prior to *Nunez* has stated that burglary is a CIMT. *See Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013 (9th Cir. 2005) (finding accomplice to residential burglary was a CIMT because the respondent entered a residence with intent to steal property); *Matter of Frentescu*, 18 I. & N. Dec. 244 (B.I.A. 1982) (finding burglary with intent to commit theft is a CIMT). Finally, theft of property is categorized as a CIMT. *See Okoro v. INS*, 125 F.3d 920 (5th Cir. 1997); *Rashtabadi v. INS*, 23 F.3d 1256 (9th Cir. 1999) (grand theft constitutes a CIMT).

These cases serve as examples where harm to property—where no individual was harmed or could be harmed—constituted a CIMT. Arson, burglary, and theft are all common law crimes and requiring an additional "protected class of victim" analysis would exclude them from being a CIMT. To find that these categories of common law crimes are *malum in se* but not CIMTs would produce absurd results.

V. CONCLUSION

For the foregoing reasons, the Board should determine that sponsoring or attending an animal fighting venture under 7 U.S.C. § 2156(a)(1) is a CIMT under the *Silva-Trevino* legal framework which does not include the Ninth Circuit's added harm element. The Board should not embrace the use of this added element because it is too narrow and the Ninth Circuit has not given proper guidance on when and how the element should be applied to non-fraudulent CIMTs.

Respectfully submitted,



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