No. _____

In The
Supreme Court of the United States

LEONARDO VILLEGAS-SARABIA,

Petitioner,

v.

JEFFERSON B. SESSIONS III,
ATTORNEY GENERAL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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May 14, 2018

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QUESTION PRESENTED

Under the Immigration and Nationality Act, immigrants are inadmissible, and thus barred from adjusting their status to that of "lawful permanent resident" without a waiver, if they have been convicted of a "crime involving moral turpitude." 8 U.S.C. §§ 1182, 1255. The courts of appeals are split regarding whether misprision of felony—the crime of "having knowledge of the actual commission of a felony" and concealing it, 18 U.S.C. § 4—is a crime involving moral turpitude. The Fifth Circuit and the Eleventh Circuit hold that misprision of felony is categorically a crime involving moral turpitude, but the Ninth Circuit holds that it is not.

The question presented is:

Is misprision of felony categorically a crime involving moral turpitude?

PARTIES TO THE PROCEEDINGS

Two cases were consolidated in the United States Court of Appeals for the Fifth Circuit. In No. 15-60639 in the court of appeals, which was the lead case in the Fifth Circuit, petitioner Leonardo Villegas-Sarabia sought review of a decision of the Board of Immigration Appeals. In No. 15-50993 in the court of appeals, the government appealed a decision of the United States District Court for the Western District of Texas. Petitioner now seeks certiorari only in the first of those two cases.

Petitioner was the respondent before the immigration judge and the Board of Immigration Appeals and the petitioner in the court-of-appeals proceedings. Respondent, the Honorable Jefferson B. Sessions III, Attorney General, was the respondent in the court-of-appeals proceedings.

The other parties in No. 15-50993 in the court of appeals, who are not parties in this Court because petitioner is not seeking certiorari in that case, were petitioner's father, Leonardo Villegas, Jr.; Jeh Johnson, Secretary, Department of Homeland Security, succeeded by Elaine C. Duke, Acting Secretary, Department of Homeland Security; Enrique Lucero, Field Office Director for Immigration and Customs Enforcement; Leon Rodriguez, Director, U.S. Citizenship and Immigration Services; Mario Ortiz, San Antonio District Director for U.S. Citizenship and Immigration Services; and Reynaldo Castro, Warden, South Texas Detention Center.

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Petitioner Leonardo Villegas-Sarabia respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

INTRODUCTION

The Constitution directs Congress to establish a "uniform Rule of Naturalization." U.S. CONST. art. I, § 8, cl. 4. No uniform rule exists, however, as to the status of immigrants convicted of misprision of felony under 18 U.S.C. § 4—an offense that can determine an immigrant's admissibility or removability under the Immigration and Nationality Act (INA) in jurisdictions like the Fifth and Eleventh Circuits that categorize the offense as a "crime involving moral turpitude" (CIMT). The decision below deepens an entrenched conflict on this issue that undermines the constitutional directive for uniformity and warrants this Court's review.

Immigrants who face the harsh and drastic consequences of deportation but are "admissible" under the INA may seek to "adjust" their immigration status by applying for "lawful permanent resident" status. Immigrants who have been convicted of a CIMT, however, are inadmissible. A crime's CIMT characterization is accordingly dispositive for some immigrants resisting deportation and seeking to regularize their status through the adjustment process. Inconsistencies in CIMT classifications thus defeat uniformity in immigration law.

The courts of appeals irreconcilably conflict on the proper characterization of misprision. The Ninth Circuit holds that misprision is *not* categorically a CIMT, as it lacks the requisite element of depravity or fraud. In direct conflict, the Fifth and Eleventh Circuits hold that because misprision involves deceit it is categorically a CIMT.

The Second Circuit acknowledged the conflict but declined to decide the question, instead seeking guidance from the Board of Immigration Appeals (BIA). The BIA, in turn, recently acknowledged the conflict and held that misprision of felony is categorically a CIMT *except within the Ninth Circuit*. As a result, there are effectively two versions of immigration law for the Nation.

Resolving this entrenched conflict over misprision also will lend guidance on a related issue over which the circuits disagree: whether any crime involving mere deceit or dishonesty—not rising to the level of fraud—is categorically a CIMT. In a 3-3 split, the First, Fifth, and Eleventh Circuits hold that mere deceit or dishonesty is sufficient to categorize a crime as a CIMT, while the Second, Ninth, and Tenth Circuits state that deceit or dishonesty is insufficient. As that broader conflict lies at the heart of the conflict over misprision, resolving the question presented also will help courts uniformly apply the "moral turpitude" standard to a broad category of crimes.

This Court's precedent does not support the unwarranted leap taken by the Fifth and Eleventh

Circuits in holding that crimes like misprision, which involve deceit but not fraud, are CIMTs. On the contrary, this Court's touchstone for delineating between non-turpitudinous criminal acts and CIMTs has been the presence of *fraudulent* conduct, not mere deceit or concealment. *See Jordan v. De George*, 341 U.S. 223, 232 (1951). If fraud were no longer required for a crime of concealment to be a CIMT, courts would be forced to guess at what Congress intended by a "crime involving moral turpitude." Although the BIA has associated a CIMT with "inherently base, vile, or depraved" conduct, that vague benchmark offers little guidance to courts or immigrants when crimes, like misprision, involve deception but not fraud. Some courts have attempted to avoid the problem by equating "moral turpitude" with "contrary to societal duties." But all crimes, including misprision, are presumably contrary to accepted societal duties; and Congress would have had no need to specify CIMTs as grounds for inadmissibility and deportation if it had intended any violation of law to suffice. The absence of a concrete, consistent CIMT standard for non-fraudulent crimes is particularly dangerous in this context when the harsh and drastic measure of deportation is at stake.

This case provides an ideal vehicle to resolve a question of national importance that is cleanly presented. The court below acknowledged the square conflict, which involves circuits that hear the majority of immigration cases. The essential facts are undisputed, and all that remains is a pure question of law. This Court's guidance is essential to ensure that the

uniform nature of immigration law is restored and that ordinary people have fair notice of what a "crime involving moral turpitude" entails.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-26a) is reported at 874 F.3d 871. The BIA opinion (App. 27a-35a) and the decision and order of the Immigration Judge (App. 36a-44a) are not reported.

JURISDICTION

The court of appeals entered its judgment on October 31, 2017, and denied a timely petition for rehearing on December 15, 2017 (App. 45a-47a). On March 7, 2018, Justice Alito extended the time to file a petition for a writ of certiorari to and including May 14, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions—18 U.S.C. § 4 and 8 U.S.C. § 1182(a)(2)(A)(i)(I)—are reproduced at App. 48a-50a.

STATEMENT

A. Statutory Background

This case exemplifies the complex interplay between the criminal and immigration statutes that govern admissibility and removability of immigrants. Section 237 of the INA governs the removability[1] of an immigrant "in and admitted to the United States." 8 U.S.C. § 1227(a). Under 8 U.S.C. § 1227(a)(2)(A)(iii)—the INA provision that triggered removal proceedings against petitioner—an immigrant convicted of an "aggravated felony" after being admitted to the United States is removable. To avoid removal, an immigrant may seek to "adjust" his immigration status by applying for "lawful permanent resident" status. *See id.* § 1255(a). That adjustment request revives threshold admissibility criteria, as the Attorney General may adjust an admitted immigrant's status to "an alien lawfully admitted for permanent residence" only if the immigrant is otherwise eligible for admission under the INA. Immigrants are inadmissible, however, if they have been convicted of a CIMT. *See id.* § 1182(a)(2)(A)(i)(I). Although the Attorney General has the power, in some cases, to "waive" inadmissibility,

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[1] The INA and the case law refer to "removal proceedings," which determine both inadmissibility and deportability. 8 U.S.C. § 1229(a). The grounds of "inadmissibility" apply to an immigrant who has not been admitted to the United States. *Id.* § 1229a(e)(2)(A). The grounds of "deportation" (and its related forms) apply to an immigrant already admitted into the United States. *Id.* § 1229a(e)(2)(B); *see, e.g.*, *id.* § 1229b(b)(1) (stating that "[t]he Attorney General may cancel *removal* of . . . an alien who is inadmissible or *deportable*") (emphasis added).

see id. § 1182(h), no waiver is allowed if an immigrant has committed an aggravated felony after being admitted. *Id.* § 1182(h)(2). Thus, an immigrant convicted of an aggravated felony (which triggers removability) cannot avoid removal through status adjustment if he also has been convicted of a CIMT (which defeats admissibility).

In determining whether a crime constitutes a CIMT, the BIA and the circuits, including the court below, generally apply a "categorical" approach, evaluating the conduct criminalized by the statute rather than the particular circumstances of the case. *See, e.g.*, App. 11a; *Chavez-Alvarez v. Att'y Gen.*, 850 F.3d 583, 587-88 (3d Cir. 2017); *Gelin v. U.S. Att'y Gen.*, 837 F.3d 1236, 1241 (11th Cir. 2016); *In re Silva-Trevino*, 26 I&N Dec. 826, 830-33 (BIA 2016).[2] As this Court explained in an analogous context, the "modified categorical" approach, which permits a limited inquiry into the underlying facts, is inappropriate "when the crime of

[2] This Court's opinion in *Mathis v. United States* supports applying the categorical approach to CIMT determinations. 136 S. Ct. 2243, 2253 n.3 (2016) (discussing potential for removability inequities if assault conviction required proof of single *mens rea* element satisfied by intentional *or* reckless conduct, but only intentional assault would qualify as CIMT triggering removal). Although some circuits look categorically at the minimum conduct with a "realistic probability" of being prosecuted, rather than the minimum conduct satisfying the statute, the circuits and BIA all agree that the categorical approach governs either inquiry. *Compare, e.g.*, *Rodriguez-Heredia v. Holder*, 639 F.3d 1264, 1267 (10th Cir. 2011) (adopting realistic-probability version of categorical approach), *with, e.g.*, App. 11a (applying categorical approach based on the minimum conduct necessary to sustain a conviction).

which the defendant was convicted has a single, indivisible set of elements." *Descamps v. United States*, 570 U.S. 254, 258 (2013) (discussing categorical and modified categorical approaches in the Armed Career Criminal Act context).

"Misprision of felony" is a crime with a single, indivisible set of elements. *See* 18 U.S.C. § 4 (App. 50a). Specifically, a person with "knowledge of the actual commission of a felony" who "conceals and does not as soon as possible make known the same" to someone in authority is guilty of misprision of felony. *Id.* Most lower courts have construed the statute "to require both knowledge of a crime and some affirmative act of concealment or participation." *Branzburg v. Hayes*, 408 U.S. 665, 696 & n.36 (1972) (collecting cases). *But see United States v. Caraballo-Rodriguez*, 480 F.3d 62, 73 (1st Cir. 2006) ("[W]e have not yet adopted [that] construction . . . .").

B. Administrative Background

The BIA has attempted to clarify which crimes involve moral turpitude.[3] "[M]oral turpitude refers generally 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." *In re Mendez*, 27 I&N Dec. 219, 221 (BIA 2018). "Moral turpitude has been defined as an act of

[3] This Court has said that the BIA should be accorded *Chevron* deference in appropriate cases. *See, e.g.*, *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999).

baseness and depravity which is *per se* morally reprehensible and intrinsically wrong or *malum in se*." *In re P—*, 6 I&N Dec. 795, 798 (BIA 1955). "Among the tests to determine if a crime involves moral turpitude is whether the act is accompanied by a vicious motive or a corrupt mind." *In re Franklin*, 20 I&N Dec. 867, 868 (BIA 1994).

The BIA has been inconsistent in deciding whether misprision of felony is a CIMT. In 1966, the Board held misprision was not a CIMT because it did not "see how the mere failure to furnish information [about a crime] should involve moral turpitude" when aiding in that same crime did not. *In re Sloan*, 12 I&N Dec. 840, 842 (BIA 1966), *rev'd on other grounds*, 12 I&N Dec. 853 (Att'y Gen. 1968).

In 2004, the BIA followed *Itani v. Ashcroft*, 298 F.3d 1213 (11th Cir. 2002), in categorizing misprision as a CIMT "because it 'necessarily involves an affirmative act of concealment or participation in a felony, behavior that runs contrary to accepted societal duties and involves dishonest or fraudulent activity.'" *In re Aoun*, No. A72 8224 506-Houston, 2004 WL 2952182, at *2 (BIA Nov. 10, 2004) (non-precedential) (quoting *Itani*, 298 F.3d at 1216). In 2006, the BIA restated that view in a precedential decision and explicitly overruled *Sloan*. *See In re Robles-Urrea*, 24 I&N Dec. 22, 26 (BIA 2006), *rev'd*, *Robles-Urrea v. Holder*, 678 F.3d 702 (9th Cir. 2012). The Ninth Circuit, in turn, reversed the BIA and held that misprision of felony is not categorically a CIMT. *Robles-Urrea*, 678 F.3d at 711.

After that reversal, the BIA continued to hold that misprision is categorically a CIMT—but only outside the Ninth Circuit. *See*, *e.g.*, *In re Ellis*, A046 843 022-Philadelphia, 2014 WL 3697740, at *1 (BIA May 29, 2014) (non-precedential opinion). Most recently, in *Mendez*, 27 I&N Dec. at 225, the BIA adhered to that position. It thus treats immigrants in the Ninth Circuit differently than immigrants in other circuits. *See id.*

The Administrative Appeals Office (AAO)—an immigration review body with appellate jurisdiction separate from the BIA—treats *Robles-Urrea* in a similar manner. *See In re* [*Redacted*], 2013 Immig. Rptr. LEXIS 10195, at *6 (AAO July 23, 2013) (non-precedential opinion) (rejecting the applicant's argument that misprision is not a CIMT in light of *Robles-Urrea* because "this case arises in the jurisdiction of the Sixth Circuit Court of Appeals, not the Ninth Circuit Court of Appeals"); *In re T-H-P-*, 2016 WL 1555506, at *3 (AAO April 1, 2016) (non-precedential opinion) (noting that the BIA "still holds outside the Ninth Circuit" that misprision convictions involve moral turpitude).

C. Petitioner's Status And Family Background

Petitioner was born in Mexico in 1974, the son of a U.S.-citizen father and Mexican-citizen mother. App. 3a-4a, 30a. A few months later, his parents brought him to the United States. App. 4a. In 1985, at age ten, he became a lawful permanent resident. App. 4a, 37a.

In 2012, petitioner applied for a certificate of citizenship with the United States Citizenship and Immigration Services (USCIS), claiming derivative citizenship through his U.S.-citizen father. *See* App. 4a. The USCIS denied his application because his father did not meet the 8 U.S.C. § 1401(a)(7) residency requirement for unwed fathers in effect at the time of petitioner's birth. App. 4a-5a.

Because the statute provided a shorter residency requirement for unwed mothers, 8 U.S.C. § 1409(c), petitioner and his father filed a habeas action in the Western District of Texas challenging the statute on equal-protection grounds. App. 8a. The district court —ruling before this Court's decision in *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017)—found the provision unconstitutional and granted the writ. *Villegas-Sarabia v. Johnson*, 123 F. Supp. 3d 870, 895 (W.D. Tex. 2015), *rev'd*, 874 F.3d 871, 895 (5th Cir. 2017). The Fifth Circuit reversed, however, holding that under *Morales-Santana*, which was decided while the government's appeal was pending, the remedy for the equal-protection violation was not to extend the more favorable residency rule for unwed U.S.-citizen mothers to unwed U.S.-citizen fathers, but to remove favorable treatment for either unwed parent. App. 23a. The court rejected petitioner's argument that his claim for derivative citizenship, under *Morales-Santana*, should be governed by current residency requirements for all U.S.-citizen parents. App. 23a-26a. Although the court acknowledged that petitioner's

father satisfied current residency requirements, it held that the derivative-citizenship claim was controlled by the 1970 version of the statute applicable when petitioner was born, which petitioner's father did not satisfy. App. 24a-26a. Petitioner does not challenge that derivative-citizenship ruling.

D. Proceedings Below

The Department of Homeland Security took custody of petitioner and initiated removal proceedings in January 2015 after petitioner finished serving a thirty-month sentence for being a felon in possession of a firearm, in violation of 18 U.S.C. § 922. App. 4a-5a. The underlying felony was a 1996 conviction of misprision of felony under 18 U.S.C. § 4. App. 28a-29a. When the immigration judge (IJ) held in April 2015 that petitioner was removable, petitioner's counsel advised the IJ that petitioner was seeking relief from removal through an adjustment of status under 8 U.S.C. § 1255, using his U.S.-citizen daughter's visa petition as support. App. 38a. The IJ held that petitioner was not eligible to adjust his status because his misprision conviction constituted a CIMT, which prohibited him from seeking adjustment without a waiver under 8 U.S.C. § 1182(h). App. 6a. Petitioner was unable to seek a waiver under 8 U.S.C. § 1182(h) because his felon-in-possession conviction is an aggravated felony under 8 U.S.C. § 1101(a)(43)(E)(ii). App. 6a-7a.

On appeal, a three-member BIA panel affirmed the IJ's decision that misprision is a CIMT. App. 35a.

Petitioner challenged the BIA's order in the Fifth Circuit, which consolidated his petition for review of the BIA's CIMT ruling with the government's separate appeal of the district-court order granting petitioner derivative citizenship in the habeas proceeding. App. 8a-9a; *see supra* at 10-11. In a single opinion, the court of appeals affirmed the BIA's ruling that misprision is a CIMT (the issue on which petitioner now seeks certiorari) and reversed the district court's finding that petitioner had acquired derivative citizenship through his father (an issue on which, as noted above, petitioner does not seek further review). *See* App. 26a.

The court below concluded that misprision is a CIMT because "[c]rimes including dishonesty or lying as an essential element involve moral turpitude" and "[m]isprision of a felony 'necessarily entails deceit.'" App. 19a-20a. In reaching that conclusion, the court expressly rejected the Ninth Circuit's decision holding that misprision is not categorically a CIMT because misprision is not decidedly "inherently base, vile, or depraved." App. 17a & n.43, 19a-20a (citing *Robles-Urrea*, 678 F.3d at 709-10).

REASONS FOR GRANTING THE PETITION

I. THE COURTS OF APPEALS ARE DIVIDED OVER WHETHER MISPRISION OF FELONY IS CATEGORICALLY A CIMT.

The decision below deepens an entrenched, acknowledged conflict on an immigration-law issue of

national importance: whether misprision of felony under 18 U.S.C. § 4 is categorically a CIMT. The Ninth Circuit holds that misprision is *not* categorically a CIMT, reasoning that misprision does not require any intent to obstruct justice and does not require inherently base, vile, or depraved conduct. By contrast, the Eleventh Circuit and the court below hold that misprision constitutes a CIMT because it necessarily involves deception and runs contrary to accepted societal duties. This Court should grant the petition to resolve the acknowledged conflict and restore national uniformity in immigration law.

A. The Ninth Circuit Holds That Misprision Of Felony Is Not Categorically A CIMT.

The decision below places the Fifth Circuit in direct and acknowledged conflict with the Ninth Circuit. In *Robles-Urrea*, the Ninth Circuit refused to classify misprision as categorically a CIMT. 678 F.3d at 711. In declining to give deference to the BIA's "impermissible" determination that it was, the court held that misprision is not "*categorically* so base, vile, or depraved as to be morally turpitudinous." *Id.* at 708-10. The court reasoned that the federal misprision statute requires only knowledge that a felony was committed, not a specific intent to interfere with the process of justice. *Id.* at 710. The Ninth Circuit also noted that "not all offenses against the accepted rules of social conduct qualify as crimes involving moral turpitude." *Id.* at 708. Rather, to "be considered a crime of moral

turpitude, a crime other than fraud must be more than serious; it must offend the most fundamental moral values of society, or as some would say, 'shock the public conscience.'" *Id.* (quoting *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1074-75 (9th Cir. 2006)). It concluded that misprision "lacks the requisite element of depravity or fraud" to constitute a CIMT. *Id.* at 711.

B. The Fifth And Eleventh Circuits Hold That Misprision Of Felony Is Categorically A CIMT.

Unlike the Ninth Circuit, the court below determined that crimes involving "dishonesty or lying as an essential element" are categorically CIMTs because deceit is a "behavior that runs contrary to accepted societal duties and involves dishonest or fraudulent activity." App. 19a. Because misprision "necessarily entails deceit," the Fifth Circuit held that misprision under 18 U.S.C. § 4 is categorically a CIMT. App. 19a-20a. In conducting its *de novo* review of the BIA's misprision-CIMT ruling, App. 10a, the Fifth Circuit explicitly rejected the Ninth Circuit's conclusion that misprision is not categorically a CIMT, App. 17a & n.43, 19a-20a.

Like the court below, the Eleventh Circuit holds that misprision under 18 U.S.C. § 4 is categorically a CIMT. *Itani*, 298 F.3d at 1216. That court determined that misprision "involves an affirmative act of concealment," which is behavior that runs "contrary to accepted societal duties." *Id.* at 1216; *cf.* App. 18a.

Because the Eleventh Circuit, like the court below, holds that dishonesty is sufficient to trigger a CIMT categorization, *see infra* at 17-18, it holds that misprision is categorically a CIMT. *See* 298 F.3d at 1216.

C. Adding To The Demonstrated Confusion, The BIA Responded To The Second Circuit's Request For Guidance With A Rule That Varies Across Circuits.

In addition to the Fifth, Ninth, and Eleventh Circuits, which are sharply divided on the question of whether misprision is categorically a CIMT, the Second Circuit has confronted, but not yet ruled on, this question. In *Lugo v. Holder*, the court identified the entrenched split. 783 F.3d 119, 120-21 (2d Cir. 2015). In light of the split and the lack of guidance on the issue, however, it declined to resolve the question. *Id.* at 121. It instead vacated the BIA's ruling on the immigrant's claim for cancellation of removal and remanded the issue to the BIA for further consideration. *Id.* at 121, 123. But the BIA "did not resolve this issue in *Lugo* because the case was administratively closed after the Second Circuit rendered its decision." *Mendez*, 27 I&N Dec. at 220 n.3.

Although the BIA did not issue further guidance in *Lugo*, the Board has now acknowledged the split and held, in a February 2018 published opinion, that misprision of felony is categorically a CIMT for purposes of all proceedings outside the Ninth Circuit's jurisdiction. *Mendez*, 27 I&N Dec. at 220, 225. For jurisdictions

within the Ninth Circuit, the BIA apparently will *not* treat misprision of felony as categorically a CIMT. *See id.* at 225. Thus, absent guidance from this Court, the BIA intends to apply different rules in different jurisdictions. *See id.*

II. RESOLVING THE CIRCUIT SPLIT ON MISPRISION WILL PROVIDE GUIDANCE ON A BROADER SPLIT OVER WHETHER DECEIT OR DISHONESTY IS SUFFICIENT TO MAKE A CRIME ONE "INVOLVING MORAL TURPITUDE."

The decision by the Fifth Circuit further entrenches a 3-3 circuit split on whether crimes that involve mere deceit or dishonesty—not rising to the level of fraud—are categorically CIMTs. The First, Fifth, and Eleventh Circuits hold that mere deceit or dishonesty is sufficient to categorize a crime as a CIMT. In contrast, the Second, Ninth, and Tenth Circuits state that mere deceit or dishonesty is insufficient; dishonest conduct must be fraudulent or otherwise "base, vile, or depraved" to trigger the CIMT characterization.

While this Court has held that "crimes in which fraud [is] an ingredient have always been regarded as involving moral turpitude," *Jordan*, 341 U.S. at 232, it has never addressed whether mere deceit or dishonesty—without fraud—is sufficient for a crime to be a CIMT. Indeed, the *Jordan* Court carefully limited its holding and implicitly suggested that the result could be different "in peripheral cases." *Id*. at 226-27, 232. It

is thus unsurprising that the lower courts have taken very different approaches in non-fraud cases. This Court should grant the petition to resolve the circuit split over whether misprision is categorically a CIMT and, in the process, provide guidance on the broader split over whether crimes involving mere deceit or dishonesty necessarily qualify as CIMTs.

A. The First, Fifth, And Eleventh Circuits Hold That Crimes That Involve Mere Deceit Or Dishonesty—Even When Not Rising To The Level Of Fraud—Are Categorically CIMTs.

The decision below reaffirms the Fifth Circuit's broader view that any crime that necessarily "involves fraud or deception," or "include[s] dishonesty or lying," is a CIMT. App. 12a (alteration in original). The court emphasized that its interpretation of moral turpitude—that all crimes involving mere deceit or dishonesty are CIMTs—is firmly established in its precedent. App. 19a (citing cases).

Reaching the same conclusion, the Eleventh Circuit highlighted its longstanding view that "[g]enerally, a crime involving dishonesty or false statement is considered to be one involving moral turpitude." *Itani*, 298 F.3d at 1215 (internal quotation marks omitted). The court viewed misprision as categorically a CIMT because it "necessarily involves an affirmative act of concealment" and "dishonest *or* fraudulent activity." *Itani*, 298 F.3d at 1215-17 (emphasis added). And,

since *Itani*, the Eleventh Circuit has ruled consistently that additional crimes involving mere deceit or dishonesty are categorically CIMTs. *See, e.g.*, *Vilchiz-Bello v. U.S. Att'y Gen.*, 709 F. App'x 596, 599 (11th Cir. 2017) (stating that criminal use of personal identification "includ[es], at the very least, dishonesty, which we have consistently held to involve moral turpitude"); *Walker v. Att'y Gen.*, 783 F.3d 1226, 1229 (11th Cir. 2015) ("Because uttering a forged instrument involves deceit, we hold that it is a crime of moral turpitude. Uttering a forged instrument is behavior that runs contrary to accepted societal duties and involves dishonest or fraudulent activity.") (internal quotation marks omitted); *Walters v. Att'y Gen.*, 626 F. App'x 887, 889 (11th Cir. 2015) ("This concealment of parts of motor vehicles that a defendant knows to be stolen necessarily involves dishonesty, which has been recognized by binding precedent as involving moral turpitude.").

Although the First Circuit has not weighed in on misprision specifically, its precedent aligns with the Fifth and Eleventh Circuits' broad rule that crimes involving mere deceit or dishonesty are CIMTs. For example, the First Circuit held that using a false license in connection with operating a vehicle categorically qualifies as a CIMT because "[t]he attempt at deceit is inherent in this act." *Montero-Ubri v. INS*, 229 F.3d 319, 320-21 (1st Cir. 2000). This broad approach shared by the First, Fifth, and Eleventh Circuits sets these courts apart from the Second, Ninth, and Tenth Circuits, all of which require more than mere dishonesty or deceit to classify a crime categorically as a CIMT.

B. The Second, Ninth, And Tenth Circuits Require More Than Mere Deceit Or Dishonesty For A Crime To Be A CIMT.

The Second, Ninth, and Tenth Circuits all reject the rule underlying the decision below—that mere dishonesty qualifies a crime as a CIMT—and require more to place a crime in the CIMT category. Accordingly, the Ninth Circuit holds that crimes involving mere deceit or dishonesty are not necessarily CIMTs. In concluding that false identification to a peace officer is not a CIMT, the Ninth Circuit reasoned that a mere "element of knowing misrepresentation" is insufficient to make a crime categorically a CIMT. *Blanco v. Mukasey*, 518 F.3d 714, 719-20 (9th Cir. 2008). Distinguishing between fraud and knowing misrepresentation, the court clarified that it requires "fraudulent conduct" for a crime to be a CIMT, and "[f]raud . . . does not equate with mere dishonesty, because fraud requires an attempt to induce another to act to his or her detriment." *Id.* at 719. Fraudulent intent is manifested only when employed "to obtain something tangible." *Id.*

The Ninth Circuit elaborated on the distinction between fraud and mere deceit in a recent decision refusing to categorize a perjury conviction under California law as a CIMT. *See Rivera v. Lynch*, 816 F.3d 1064, 1076-77 (9th Cir. 2016). As the court explained, fraud is "distinguishable from 'mere dishonesty[] because fraud requires an attempt to induce another to act to his or her detriment.'" *Id.* (quoting *Blanco*, 518 F.3d at 719) (alterations in original).

The Tenth Circuit also uses a benchmark for CIMTs that is more restrictive than the mere-deceit rule used by the First, Fifth, and Eleventh Circuits. The Tenth Circuit recently held that giving a false statement to a city official is not categorically a CIMT because the dishonest conveyance of information did not necessarily "have the capacity to impair or pervert" the government, and the false statement was not necessarily "given with the intent to mislead" the government. *Flores-Molina v. Sessions*, 850 F.3d 1150, 1164-65 (10th Cir. 2017). Unlike fraud, deception or dishonesty alone is accordingly insufficient to make a crime a CIMT. *Id.* at 1163-65. Only when deception is accompanied by an aggravating factor that necessarily results from the commission of the crime can the crime be categorized as a CIMT. *See id.* at 1160. Thus, a crime that "involves deception *and* necessarily causes harm to the government or to society, another person, or some other entity" or involves "deception *and* a specific intent to harm or obtain a benefit at the government's or another person's expense" functionally tracks fraud requirements and thereby qualifies as a CIMT. *See id.* (emphasis added).

The Second Circuit also states that a CIMT requires that deceit be accompanied by the other elements of fraud or by "an intent to impair the efficiency and lawful functioning of the government." *Rodriguez v. Gonzales*, 451 F.3d 60, 64 (2d Cir. 2006). It notes that "the intent to deceive is not equivalent to the intent to defraud, which generally requires an intent to obtain some benefit or cause a detriment." *Ahmed v. Holder*,

324 F. App'x 82, 84-85 (2d Cir. 2009) (remanding for the BIA to determine whether obtaining employment based upon a falsified social-security number would be a CIMT, even though it did not necessarily involve fraud).

* * *

This conflict now involves six circuits that are equally divided as to whether deceit or dishonesty, alone, is sufficient to make a crime a CIMT for purposes of determining immigration status.[4] And the Seventh Circuit, which has yet to rule directly on the issue, has acknowledged the conflict and sought guidance from the BIA. *See Arias v. Lynch*, 834 F.3d 823, 826, 829 (7th Cir. 2016) (noting the conflict among the circuits as to whether crimes involving mere deceit are CIMTs but remanding whether falsely using a social-security number to obtain work is a CIMT because the BIA failed to apply the proper categorical approach to its first determination).[5] Because this broad

[4] At least one other circuit has made arguably inconsistent statements on this issue. *Compare Bobadilla v. Holder*, 679 F.3d 1052, 1058 (8th Cir. 2012) (giving a false name to a peace officer is not categorically a CIMT because it does not necessarily involve fraud or any "base, vile, or depraved" conduct), *with Villatoro v. Holder*, 760 F.3d 872, 877-78 (8th Cir. 2014) (determining that record tampering is categorically a CIMT because the statute requires an "intent to *deceive* or *injure* anyone or to *conceal* any wrongdoing") (emphasis in original).

[5] Describing "moral turpitude" as a "stale, antiquated, and, worse, meaningless phrase," Judge Posner's concurrence in *Arias* explained that the court had never determined whether mere-deception crimes were CIMTs: Prior cases "that ha[d] purported to extend [*Jordan v.*] *De George*'s fraud rule to cover *any* deception

disagreement over mere-deceit crimes underlies the conflict over misprision implicated by the decision below, resolving the split on whether misprision is categorically a CIMT will provide much-needed guidance on the broader split as to whether crimes that involve mere deceit or dishonesty qualify as CIMTs.

III. MISPRISION OF FELONY IS NOT CATEGORICALLY A CIMT.

Misprision of felony under 18 U.S.C. § 4 is not categorically a CIMT because misprision does not necessarily involve fraud or base, vile, or depraved actions. This Court has held that crimes involving fraud are CIMTs. *Jordan*, 341 U.S. at 229. The BIA additionally defines crimes involving moral turpitude as those consisting of inherently base, vile, or depraved conduct. *E.g.*, *In re Sejas*, 24 I&N Dec. 236, 237 (BIA 2007). Thus, misprision may be considered a CIMT if its elements necessarily involve either fraud or base, vile, or depraved actions. *See Mathis*, 136 S. Ct. at 2248, 2253 n.3 (supporting the propriety of applying a categorical approach to CIMTs). Because the conduct required to violate the misprision statute does not necessarily involve fraud or base, vile, or depraved conduct, misprision is not categorically a CIMT.

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ha[d] generally done so in dicta, because the cases involved more than simple deception." 834 F.3d at 831, 835 (Posner, J., concurring in the judgment) (citing, *inter alia*, *Padilla v. Gonzales*, 397 F.3d 1016, 1021 (7th Cir. 2005) (describing, in dicta, misprision as a concealment crime and CIMT)).

A. The Mere Deception Required For Misprision Of Felony Does Not Rise To The Level Of Fraud—This Court's Touchstone For Categorizing CIMTs.

In holding that misprision is categorically a CIMT, the court below erroneously conflated deception with fraud. While this Court has stated that "fraud has ordinarily been the test to determine whether crimes not of the gravest character involve moral turpitude," *Jordan*, 341 U.S. at 227, the Court has said nothing about crimes, like misprision, that include an element involving deception, but not an element of fraud.[6] *See supra* at 16-17. Instead, *Jordan*, which held that conspiracy to defraud the United States of tax revenue qualifies as a CIMT, surveyed cases illustrative of moral turpitude that all clearly involved fraud, not mere deceit. *See* 341 U.S. at 227-29 (citing cases involving obtaining goods under fraudulent pretenses; conspiracy to defraud by deceit and falsehood; forgery with intent to defraud; using the mails to defraud; execution of chattel mortgage with intent to defraud; concealing assets in bankruptcy; and issuing checks with intent to defraud). Although this Court has never decided that all crimes of deceit categorically involve moral turpitude, the court below made that unwarranted leap, concluding categorically that "[c]rimes including dishonesty or lying as an essential element

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[6] Black's Law Dictionary defines "fraud" as "[a] knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment." *Fraud*, BLACK'S LAW DICTIONARY 775 (10th ed. 2014).

involve moral turpitude," and "[m]isprision of a felony necessarily entails deceit." App. 19a-20a (internal quotation marks omitted). This Court's precedent does not support that dramatic expansion of the CIMT universe.

Indeed, in other areas of the law, this Court has distinguished mere deception from an act involving moral turpitude. *See, e.g.*, *Husky Int'l Elecs., Inc. v. Ritz*, 136 S. Ct. 1581, 1586 (2016). In the bankruptcy context, this Court considered the difference between "actual fraud" and "implied fraud," explaining that implied fraud could consist merely of "acts of deception that may exist without the imputation of bad faith or immorality," whereas actual fraud involves "moral turpitude." *Id.* at 1586 (internal quotation marks omitted). Similarly, this Court held in *Marbury v. Brooks*, 20 U.S. 556, 574-76 (1822) (Marshall, C.J.), that attempting to conceal criminal activity does not rise to the level of fraud.

Misprision of felony is a crime of concealment, not a crime of fraud. No fraudulent intent is required to meet the statutory definition of misprision:

> Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.

18 U.S.C. § 4. Although most lower courts have construed 18 U.S.C. § 4 to require knowledge of a crime and some affirmative act of concealment or participation, *see supra* at 7, an affirmative act of concealment is not the same thing as a knowing action taken for the purpose of achieving a fraudulent end. A person may commit misprision of felony with an intent to defraud, but the statute does not require it. *See* 18 U.S.C. § 4; *see also In re Espinoza-Gonzalez*, 22 I&N Dec. 889, 894 (BIA 1999) ("[T]here is . . . nothing in § 4 that references the specific purpose for which the concealment must be undertaken."). And, under the categorical approach, hypothetical extensions of a statute's elements do not control the CIMT analysis. *See supra* at 6-7 & n.2. Not only is an intent to defraud not explicitly required by 18 U.S.C. § 4, but because misprision does not require an individual to have acted for the purpose of procuring anything or harming anyone, fraudulent intent also is not implicitly linked to the nature of the offense.

Further, even the State Department's Foreign Affairs Manual distinguishes between deception and fraud, listing "[f]alse statements (not amounting to perjury or involving fraud)" among offenses that "would not constitute [CIMTs]." 9 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL 302.3-2(B)(2)(c)(2)(b)(x) (Apr. 2, 2018), https://fam.state.gov/FAM/09FAM/09FAM030203.html. Thus, the agency responsible for determining whether immigrants qualify for visas recognizes that mere deceit, without more, will not constitute a CIMT.

B. Misprision Is Not A CIMT Because Baseness, Vileness, And Depravity Do Not Inhere In The Offense.

The BIA defines crimes involving moral turpitude, a term undefined by the INA, as those comprising "conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general." *In re Short*, 20 I&N Dec. 136, 139 (BIA 1989). That definition has generally been adopted by the courts of appeals. *See*, *e.g.*, App. 12a; *Sanchez v. Holder*, 757 F.3d 712, 715 (7th Cir. 2014); *Robles-Urrea*, 678 F.3d at 705. But the conduct required to commit misprision under 18 U.S.C. § 4 is not inherently base, vile, or depraved. Thus, to hold that misprision is categorically a CIMT would expand what constitutes a CIMT beyond the accepted scope of "moral turpitude."

The BIA has offered further guidance, none of which supports categorizing misprision as a CIMT:

> Moral turpitude has been defined as an act which is per se morally reprehensible and intrinsically wrong, or malum in se, so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude. Among the tests to determine if a crime involves moral turpitude is whether the act is accompanied by a vicious motive or a corrupt mind.

Franklin, 20 I&N Dec. at 868 (internal citations omitted). Misprision, though, is not necessarily accompanied by a "vicious motive or a corrupt mind." *Id.* And while misprision is a crime, and all crimes in a sense run "contrary to accepted rules of morality and the duties owed between persons or to society in general," *Sejas*, 24 I&N Dec. at 237 (internal quotation marks omitted), that fact alone does not elevate an otherwise non-turpitudinous offense to one involving moral turpitude. If that were the sole benchmark for determining which violations amounted to CIMTs, then "every crime would involve moral turpitude" as all crimes, by definition, run contrary to some duty owed to society. *Robles-Urrea*, 678 F.3d at 709. That is why even crimes of violence like assault, burglary, and unauthorized use of a vehicle are not necessarily considered CIMTs. *In re Brieva-Perez*, 23 I&N Dec. 766, 772-73 (BIA 2005), *overruled on other grounds by Judulang v. Holder*, 565 U.S. 42 (2011); *see also Judulang*, 565 U.S. at 56 (acknowledging that the BIA considers some crimes of violence not to be CIMTs). Rather, only truly reprehensible conduct—conduct like rape, incest, and murder—rises to the level of baseness, vileness, and depravity required to establish moral turpitude. Misprision of felony fails to reach, much less surpass, that threshold.

C. Congress Could Not Have Intended For Mere Deceit To Constitute Moral Turpitude.

An interpretation of moral turpitude that ignores the BIA's limitation to inherently base, vile, or

depraved conduct and conflates fraud and deception frustrates Congress's intent in drafting 8 U.S.C. § 1182(a)(2)(A)(i)(I), the CIMT inadmissibility provision applied to petitioner, as well as 8 U.S.C. § 1227(a)(2)(A)(i), which uses the same CIMT language to define a ground for deportability. Congress would not have specified "crimes of moral turpitude" as deportable offenses if it intended any offense contrary "to the duties owed between persons or to society in general" to serve as a predicate for deportation. *See Sejas*, 24 I&N Dec. at 237 (internal quotation marks omitted); *Robles-Urrea*, 678 F.3d at 708-09. The current, expansive federal regulatory scheme creates a broad list of crimes constituting felonies and aggravated felonies, and it would be strange indeed if Congress intended to incorporate the entirety of such a sweeping list into the CIMT regulatory regime. As this Court has recognized, "deportation is a drastic measure and at times the equivalent of banishment or exile . . . ." *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948).

There is also an unreasonably wide discrepancy between the harsh consequence of committing a CIMT within the immigration context—removal from the country—and the typically mild punishment associated with the offense of misprision in general—a fine, or imprisonment not to exceed three years. *See* 18 U.S.C. § 4. Dissenting in *Jordan*, Justice Jackson noted the harsh distinction that resulted from classifying a crime as a CIMT. 341 U.S. at 241 (Jackson, J., dissenting) (finding "no reason to strain to make the penalty for the same act so much more severe in the case of an

alien 'bootlegger' than it is in the case of a native 'moonshiner' ").

Additionally, absurdity would result if this Court were to recognize misprision as categorically a CIMT because, in some instances, the principal offender would not have committed a crime involving moral turpitude, yet the person concealing the crime—such that it amounted to misprision of felony—would be considered to have done so. For example, an immigrant convicted of transporting an alien under 8 U.S.C. § 1324(a)(1)(A)(ii) or illegal reentry under 8 U.S.C. § 1326 would not have committed a CIMT, but an immigrant who concealed one of these crimes could be convicted of misprision of felony. *See In re Tiwari*, 19 I&N Dec. 875, 882-83 (BIA 1989) (holding that violations of 8 U.S.C. § 1324(a)(1)(A)(ii) are not CIMTs and noting that "[v]iolations of the immigration laws, in the absence of 'fraud or evil intent,' are not ordinarily regarded as involving moral turpitude"). To equate misprision with moral turpitude would be to cast the CIMT net beyond what Congress intended to cover.

Extending the CIMT designation to misprision of felony also would raise serious constitutional issues under the void-for-vagueness doctrine, which, as this Court reaffirmed last month, applies to immigration statutes. *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1212-13 (2014) (plurality opinion); *id*. at 1231 (Gorsuch, J., concurring). In *Jordan*, this Court held that a crime involving fraud could be designated a CIMT without offending that doctrine because of a long line of cases unanimously treating fraud as morally

turpitudinous. 341 U.S. at 229-32. But, in doing so, the Court carefully limited its holding specifically to fraud, contemplating that the result might be different "in peripheral cases" when fraud was not involved. *See id*. at 226-27, 232.

Designating misprision, a peripheral non-fraud crime, as morally turpitudinous would raise serious void-for-vagueness issues. Individuals hardly have "fair notice"[7] of the consequences of their actions when Congress failed to define CIMTs; the term "moral turpitude" has no uniformly understood meaning; the BIA has vacillated in its approach and now applies different rules in different parts of the country, *see supra* at 8-9, 15-16; and the courts of appeals cannot agree on the proper approach outside of the fraud context, *see supra* at 12-22. This Court should avoid constitutional vagueness concerns, *see*, *e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001), and construe the INA's CIMT provision in 8 U.S.C. § 1182(a)(2)(A)(i)(I) not to include misprision of felony.

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[7] *Dimaya*, 138 S. Ct. at 1212 (plurality opinion) (quoting *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972)); *id.* at 1225 (Gorsuch, J., concurring).

IV. WHETHER MISPRISION OF FELONY IS A CIMT IS AN ISSUE OF PRESSING NATIONAL IMPORTANCE THAT WARRANTS THIS COURT'S ATTENTION.

A. Ensuring The Uniform Application Of Immigration Laws Is Important.

The text and history of the Constitution establish the need for uniformity in immigration matters. The Naturalization Clause specifically directs Congress to "establish an uniform Rule of Naturalization." U.S. CONST. art. I, § 8, cl. 4. That textual charge reflects a political response to the confusion and inequities that arose when each state applied its own naturalization standard under the Articles of Confederation, with the Framers exclusively reserving to the federal government the duty of establishing a "uniform Rule" for immigration matters. THE FEDERALIST NO. 32, at 146 (Alexander Hamilton), NO. 42, at 207-08 (James Madison) (Terence Ball ed., 2003); Michael T. Hertz, *Limits to the Naturalization Power*, 64 GEO. L.J. 1007, 1009 (1976). The Framers so valued consistency in immigration matters that immigration is one of only three subjects in the Constitution (alongside tax and bankruptcy) in which uniformity is explicitly mandated. *See* U.S. CONST. art. I, § 8, cls. 1, 4.

Every branch of government has recognized the need for uniformity in immigration matters. This Court has cited uniformity as a significant consideration when ruling on immigration issues. *Zadvydas v. Davis*, 533 U.S. 678, 700 (2001) ("[R]eview must take appropriate account of . . . the Nation's need to speak

with one voice in immigration matters.") (internal quotation marks omitted); *Graham v. Richardson*, 403 U.S. 365, 382 (1971) (noting the Naturalization Clause's "explicit constitutional requirement of uniformity").

Congress has similarly noted the importance of uniformly enforcing immigration laws. *See* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 115(1), 100 Stat. 3359, 3384 (1986) ("It is the sense of the Congress that . . . the immigration laws of the United States should be enforced . . . uniformly . . . . ").

Finally, one of the BIA's primary purposes is to ensure that "the immigration laws receive fair and uniform application." *Board of Immigration Appeals*, DEP'T OF JUSTICE, https://www.justice.gov/eoir/board-of-immigration-appeals-bios (last updated Apr. 12, 2018). Indeed, the government has invoked uniformity requirements in urging this Court's review of immigration issues over which the circuits conflict: "Review is warranted because the division among the courts of appeals undermines the uniform nationwide system of naturalization called for in the Constitution." Reply Brief for the Petitioner at 2, *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (No. 15-1191) (2017) (*reply brief supporting petition filed* June 6, 2016) (capitalization altered) (seeking review of the Second Circuit's ruling that gender-based rules for derivative citizenship violate equal protection). Just as the government urged in *Morales-Santana* that the Court's intervention is "warranted to eliminate a regime in which different rules of naturalization apply in different parts

of the United States," *id.* at 3, so too is the Court's intervention warranted here to eliminate a regime in which different rules for CIMTs apply in different parts of the United States.

Uniformity is important not only in constitutional theory but also for practical reasons. The current lack of uniformity, for example, creates opportunities for unfair forum shopping on both sides. The government can forum shop in removal cases (such as this) because it can transport a detained immigrant to any location, thus determining the venue for any judicial review. *See Rosendo-Ramirez v. INS*, 32 F.3d 1085, 1092 (7th Cir. 1994) ("Since the INS has the authority to detain aliens in circuits other than the one in which they were apprehended, the INS may establish venue in its chosen circuit by transferring an alien to a remote detention site and instigating administrative proceedings in that circuit.") (citation omitted).

On the other side, applicants for adjustment of status outside of removal proceedings, who still must demonstrate admissibility, have some flexibility in where they file their applications, *see* 8 C.F.R. §§ 1208.4(b)(1), 1245.2(c), thus permitting an immigrant to shop for a forum that is more likely to reverse an unfavorable BIA decision. *See* Immigration Litigation Reduction: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 8 (2006) (statement of Judge Carlos T. Bea) (suggesting that immigrants "do everything in the world" to seek asylum within the Ninth Circuit rather than the Fifth Circuit). Clarifying the

legal standard governing CIMTs would diminish both sides' incentive to forum shop in immigration cases.

B. The Conflict Has Broad Implications.

The conflict over misprision reflects a fundamental disagreement among the circuits that oversee a major portion of immigration cases, and thus warrants clarification now. The Fifth, Ninth, and Eleventh Circuits—the three circuits that have directly addressed the question of whether misprision is a CIMT—consistently have been responsible for about 60% of immigration appeals from the BIA. *See, e.g.*, John Guendelsberger, *Federal Court Activity: Circuit Court Decisions for December 2016 and Calendar Year Totals for 2016*, IMMIGRATION L. ADVISOR, Jan. 2017, at 3, https://www.justice.gov/eoir/page/file/934171/download (showing that 62% of decisions in cases appealed from the BIA in 2016 originated in the Fifth, Ninth, and Eleventh Circuits). Meanwhile, the Second Circuit—which, after recognizing the split, preferred to wait for BIA clarification in lieu of picking a side—accounts for roughly another 17%. *Id.* The conflict over misprision looms even larger considering that the Ninth Circuit alone is responsible for roughly half of immigration appeals from the BIA. *Id*. These statistics reflect and reinforce the Ninth Circuit's historically important role in shaping immigration law. *See* Matthew Diller & Alexander A. Reinert, *The Second Circuit and Social Justice*, 85 FORDHAM L. REV. 73, 73 (2016); *see generally* ANNA O. LAW, THE IMMIGRATION BATTLE IN AMERICAN

COURTS 144-87 (Cambridge 2010) (studying the Ninth Circuit's extensive role in the immigration system).

Moreover, a conviction for a "crime involving moral turpitude" has repercussions beyond adjustment of status. It governs immigrants' admissibility to the United States and, through cross-references in the INA, triggers a variety of consequences such as mandatory detention and ineligibility for temporary protected status. *See, e.g.*, 8 U.S.C. §§ 1182(a)(2)(A)(i), 1231(a)(2), 1254a(c)(2)(A). In addition, a conviction for a CIMT can be a ground for deportation. *Id.* § 1227(a)(2)(A)(i).

States, too, have numerous statutes using the phrase "crime involving moral turpitude," especially in the licensing context. *See, e.g.*, W. VA. CODE ANN. § 30-31-8(7); 72 PA. STAT. AND CONS. STAT. ANN. § 205-A(a)(3); GA. CODE ANN. § 43-40-15(b). And several states use the phrase "moral turpitude" in their rules of evidence. *See* OKLA. STAT. ANN. tit. 12, § 2609(B); TEX. R. EVID. 404(a)(2), 609(a)(1); VA. SUP. CT. R. 2:609. Given the frequency with which this phrase is used, guidance here would assist courts searching for answers in other immigration contexts, as well as state legislatures attempting to make informed choices when using the phrase in non-immigration contexts.

Furthermore, the conflict here goes beyond the consequences of a conviction for misprision. As noted above, the split over misprision of felony is only one aspect of a broader split over whether mere deceit

makes a crime a CIMT. *See supra* at 16-22. Combined with the serious consequences of committing a CIMT, widespread inconsistency regarding the line between fraud and mere deceit yields significantly differing consequences based on an arbitrary factor—the location where removal proceedings are commenced.

The unsettled state of both conflicts also impacts the duty of criminal-defense counsel, under the Sixth Amendment, to inform a noncitizen client "whether [a criminal] plea carries a risk of deportation." *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010); *see also Lee v. United States*, 137 S. Ct. 1958, 1968-69 (2017) (overturning a conviction because an immigrant's guilty plea was based on his attorney's erroneous advice that the conviction would not result in deportation). The confusion and lack of uniformity stemming from circuit disagreement over not only misprision, but also other mere-deceit crimes, jeopardizes attorneys' ability to render effective legal advice on CIMTs, deprives immigrants of certainty as to the consequences of a potential conviction, and opens the door to ineffective-assistance claims and habeas challenges, clogging an already-overburdened legal system. Perhaps most fundamentally for noncitizen criminal defendants, it leaves them unable to make informed choices on matters that will have a profound impact on them and their families.

Clear guidance on whether a client's conviction would be for a CIMT would assist prosecutors and defense lawyers negotiating at the plea-bargain stage to "reach agreements that better satisfy the interests of

both parties." *Id.* at 373. Knowing the CIMT implications with certainty might provide a noncitizen defendant with an incentive to plead guilty to an offense that does not lead to deportation in exchange for dismissal of a charge that does. *Id.* Without clear guidance, criminal-defense lawyers will face uncertainty in fulfilling their constitutional duty, and, more importantly, the clients' constitutional rights to counsel articulated in *Padilla* will be significantly compromised.

V. THIS CASE PROVIDES AN IDEAL VEHICLE FOR RESOLVING THE ACKNOWLEDGED CONFLICT AMONG THE COURTS OF APPEALS AS TO WHETHER MISPRISION IS A CIMT.

The square conflict over misprision was expressly recognized by the court below and is cleanly presented. The essential facts are undisputed, and all that remains is a pure question of law: whether a particular crime involves moral turpitude. Under the categorical approach, resolving this question does not depend on the circumstances surrounding petitioner's conviction, but on the nature of the conduct that 18 U.S.C. § 4 criminalizes. Because the circuits that hear the majority of immigration cases explicitly disagree on whether misprision of felony is a CIMT, this case places the conflict in clear focus.

Further percolation in the lower courts will not alleviate entrenched uncertainty over this legal issue.

Indeed, the longer it goes unresolved, the more confusion is likely to result. The Fifth and Eleventh Circuits hold that misprision is a CIMT while the Ninth Circuit holds that it is not. The Second Circuit recognized this split but declined to rule on it, instead encouraging the BIA to clarify the matter. The BIA has taken inconsistent positions over the years and recently demonstrated that it will not even attempt to establish a uniform national rule. *See Mendez*, 27 I&N Dec. at 225. To the contrary, it intends to apply different rules to immigrants within the Ninth Circuit's jurisdiction and immigrants elsewhere. *Id.* The conflict is fully developed with no prospect of resolution in the lower courts. Whether misprision of felony is a CIMT is cleanly presented in this case and is ripe for adjudication by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 14, 2018

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-60639

LEONARDO VILLEGAS-SARABIA,
also known as Leonardo Villegas, Jr.,

Petitioner

v.

JEFFERSON B. SESSIONS, III,
U.S. ATTORNEY GENERAL,

Respondent

Petition for Review of an Order of the
Board of Immigration Appeals

Consolidated with

No. 15-50993

LEONARDO VILLEGAS-SARABIA;
LEONARDO VILLEGAS, JR.,

Petitioners-Appellees

v.

ELAINE C. DUKE, ACTING SECRETARY, DEPARTMENT OF HOMELAND SECURITY; ENRIQUE LUCERO, Field Office Director for Immigration and Customs Enforcement; LEON RODRIGUEZ, Director, United States Citizenship and Immigration Services; MARIO ORTIZ, San Antonio District Director for United States Citizenship and Immigration Services; REYNALDO CASTRO, Warden, South Texas Detention Center,

Respondents-Appellants

No. 15-60639 c/w 15-50993

Appeal from the United States District Court
for the Western District of Texas

(Filed October 31, 2017)

Before WIENER, HIGGINSON, and COSTA, Circuit Judges.

WIENER, Circuit Judge.

In the first of the cases consolidated in this appeal, Petitioners-Appellees Leonardo Villegas-Sarabia ("Villegas-Sarabia") and his father, Leonardo Villegas, Jr. ("Villegas"), seek review of the order of the Board of

Immigration Appeals ("BIA") holding that Villegas-Sarabia, a Mexican citizen, is inadmissible to the United States and ineligible to adjust his citizenship status because his conviction for misprision of a felony is a crime involving moral turpitude. In the second case, the government appeals two aspects of the district court's decision: (1) that the differing physical presence requirements for unmarried U.S.-citizen mothers and such fathers in 8 U.S.C. §§ 1401 and 1409(c) violates equal protection and (2) that the remedy of the constitutional violation is extending citizenship to Villegas-Sarabia under 8 U.S.C. § 1409(c). We affirm the BIA's order in the first case and reverse the district court's judgment granting citizenship in the second case.

I. Facts & Proceedings

A. Factual Background

The facts of this case are not disputed by the parties. Leonardo Villegas-Sarabia was born in Mexico on March 16, 1974. At the time of his birth, his parents were not married, but Villegas, his father, was a United States citizen, who lived in the United States from the time he was born in 1955 through 1960, and again from 1965 to the present. In 1974, when Villegas-Sarabia was born, Villegas was 18 years old and had only been present in the United States for four years after

he reached 14 years of age.[1] At the time of Villegas-Sarabia's birth, his mother was a citizen of Mexico.

Villegas-Sarabia's parents married when he was 13 years old. He has lived in the United States continuously since he was a few months old, and in July 1985, he became a lawful permanent resident of the United States.

In November 2011, Villegas-Sarabia was indicted for possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922. He pleaded guilty in June 2012 and was sentenced to a thirty-month term of imprisonment in June 2013. Between his plea and his sentencing, Villegas-Sarabia applied for citizenship, claiming that he was a United States citizen by virtue of his father's citizenship. At the time of Villegas-Sarabia's birth, his citizenship was governed by the 1970 version of 8 U.S.C. § 1401(a)(7), which granted U.S. citizenship to:

> a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States, who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which

[1] At the time of Villegas-Sarabia's birth, he would only have qualified for derivative citizenship if his father had lived in the United States for a total of ten years, and at least five years after reaching the age of 14. *See* 8 U.S.C. § 1401(a)(7) (1970).

> were after attaining the age of fourteen years.[2]

This provision applied expressly to married parents, but it was made applicable to unmarried parents under § 1409(a).[3] Significant to this case, § 1409(c) granted an exception to unmarried mothers:

> [N]otwithstanding the provision of subsection (a) of this section, a person born, on or after the effective date of this chapter, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States . . . for a continuous period of one year.[4]

Applying these statutes, the United States Citizenship and Immigration Services denied Villegas-Sarabia's citizenship application, after determining that his father did not satisfy the residency requirements under § 1401(a)(7).

B. Immigration Proceedings

In January 2015, the Department of Homeland Security initiated removal proceedings based on Villegas-Sarabia's firearms conviction. In his appearance before

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[2] 8 U.S.C. § 1401(a)(7) (1970). The relevant provisions of the 1970 statute were originally codified in 1958. *See* 8 U.S.C. § 1409 (1958).

[3] 8 U.S.C. § 1409(a) (1970).

[4] 8 U.S.C. § 1409(c).

the immigration judge ("IJ"), Villegas-Sarabia conceded that he was admitted to the United States as the child of a citizen and that he had been convicted of illegal possession of a firearm, but he denied that he was an alien or that he was subject to removal.[5] Villegas-Sarabia argued that, because § 1409(c)'s discriminatory one-year exception covered only unmarried U.S.-citizen *mothers* it violated equal protection. He insisted that, under a constitutional reading of the statute, he was entitled to derivative citizenship.

In April 2015, the IJ determined that Villegas-Sarabia was not a citizen and sustained the removal charge. Villegas-Sarabia responded that he would seek an adjustment of status. The IJ held that Villegas-Sarabia's conviction for misprision of a felony was a crime involving moral turpitude ("CIMT"), making him inadmissible to the United States and ineligible for adjustment of his status.[6] The IJ explained further that Villegas-Sarabia could only adjust his immigration status if he could obtain a waiver of inadmissibility pursuant to 8 U.S.C. § 1182(h). Villegas-Sarabia's firearm

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[5] During the hearing before the immigration judge, the Department of Homeland Security submitted evidence of Villegas-Sarabia's firearm conviction and a 1997 judgment of conviction for misprision of a felony.

[6] The IJ determined that misprision of a felony was indivisible, because the criminal statute did not list potential offenses in the alternative. Consequently, the IJ applied the categorical approach, which dictates that a court should evaluate the statutory definition rather than the facts underlying a conviction when determining if the conviction qualifies as a particular generic offense—such as a crime involving moral turpitude. *See United States v. Carrasco-Tercero*, 745 F.3d 192, 195 (5th Cir. 2014).

conviction was an aggravated felony, however, statutorily barring him from seeking such a waiver. The IJ pretermitted Villegas-Sarabia's application for an adjustment of status, holding that he had committed a CIMT and therefore could not attempt to adjust his immigration status without a waiver. But Villegas-Sarabia's aggravated felony conviction barred him from seeking such a waiver.[7]

Villegas-Sarabia appealed the IJ's decision to the BIA, challenging the constitutionality of the disparate sex-based residency requirements of §§ 1401 and 1409(c). He argued in the alternative that, because misprision of a felony is not a CIMT, he is not required to obtain a waiver of inadmissibility to adjust his immigration status. In August 2015, a three-member panel of the BIA dismissed Villegas-Sarabia's appeal, holding that he was not a citizen under the statutes that were in place at the time of his birth and that the BIA lacked jurisdiction to address his constitutional challenge. The BIA also affirmed the IJ's holding that misprision of a felony is a CIMT. Villegas-Sarabia now seeks our review of the BIA's order holding that misprision of a felony is a CIMT.

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[7] The IJ explained that if applicants have been convicted of a CIMT, they are inadmissible to the United States. Even if an applicant is inadmissible, and thus ineligible to adjust his status, he can seek a discretionary waiver of inadmissibility under 8 U.S.C. § 1182(h). However, 8 U.S.C. § 1182(h)(2) provides that "No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States . . . if . . . since the date of such admission the alien has been convicted of an aggravated felony . . . " 8 U.S.C. § 1182.

C. District Court Proceedings

In February 2015, Villegas and Villegas-Sarabia filed a joint complaint and habeas corpus petition, claiming that Villegas-Sarabia is a United States citizen and therefore not subject to detention and removal.[8] They also sought a declaration that the disparate requirements of 8 U.S.C. §§ 1401 and 1409 are unconstitutional. The government filed a motion to dismiss in response to which the district court applied a heightened level of scrutiny and held that "the different physical presence requirements [in §§ 1401 and 1409] violate the Fifth Amendment's guarantee of equal protection." To remedy this constitutional violation, the district court extended § 1409(c)' s one-year continuous presence requirement applicable to unmarried U.S.-citizen *mothers* to unmarried U.S.-citizen *fathers*, then held Villegas-Sarabia to be an United States citizen.[9]

The government timely appealed and advanced two contentions: The district court erred (1) in holding that the distinction between unmarried mothers and unmarried fathers violated equal protection, and (2) in

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[8] Villegas-Sarabia later amended his pleading to dismiss his father from the habeas petition. Villegas-Sarabia and his father filed a new lawsuit, alleging the same equal protection theories, but seeking relief beyond the habeas petition. The district court later consolidated these cases.

[9] The court explained that this decision did not grant Villegas-Sarabia new rights, but merely confirmed his pre-existing citizenship. *Villegas-Sarabia v. Johnson*, 123 F. Supp. 3d 870, 895 (W.D. Tex. 2015).

extending the one-year continuous residency requirement to unmarried fathers.

II. DISCUSSION

These consolidated appeals seek review of the BIA's order and the district court's ruling on the habeas petition. We address each in turn.

A. BIA Order

Villegas-Sarabia contends that the BIA erred in ruling that misprision of a felony is a CIMT, so that he should not be required to seek a waiver of inadmissibility to adjust his status pursuant to 8 U.S.C. § 1182(h). The government urges this court to defer to the BIA's reasonable decision that misprision of a felony is a CIMT.

i. Standard of Review

"When considering a petition for review, this court has the authority to review only the BIA's decision, not the IJ's decision, unless the IJ's decision has some impact on the BIA's decision."[10] If the BIA adopts the findings and conclusions of the IJ, this court may review the IJ's decision.[11] Here, the BIA affirmed the IJ's

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[10] *Wang v. Holder*, 569 F.3d 531, 536 (5th Cir. 2009) (citing *Mikhael v. INS*, 115 F.3d 299, 302 (5th Cir. 1997)).

[11] *Id*. (citing *Efe v. Ashcroft*, 293 F.3d 899, 903 (5th Cir. 2002)).

findings and conclusions, so we may review both decisions.

We review the BIA's legal conclusions de novo but give "considerable deference to the BIA's interpretation of the legislative scheme."[12] In appeals addressing whether a particular conviction is a CIMT, we give "*Chevron* deference to the BIA's interpretation of the term 'moral turpitude' and its guidance on the general categories of offenses which constitute CIMTs;" however, we review de novo the decisions of the BIA addressing whether a particular crime is a CIMT.[13]

ii. Subject-Matter Jurisdiction

Pursuant to 8 U.S.C. § 1252, this court lacks jurisdiction to review "any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in § 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by § 1227(a)(2)(A)(ii) of this title."[14] However, this court retains jurisdiction to review colorable questions of law and constitutional claims under

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[12] *Mercado v. Lynch*, 823 F.3d 276, 278 (5th Cir. 2016).

[13] *Esparza-Rodriguez v. Holder*, 699 F.3d 821, 823 (5th Cir. 2012).

[14] 8 U.S.C. § 1252. 8 U.S.C. § 1227(a)(2)(C) provides that "[a]ny alien who at any time after admission is convicted under any law of . . . possessing . . . a firearm or destructive device (as defined in section 921(a) of Title 18) in violation of any law is deportable."

8 U.S.C. § 1252(a)(2)(D). Villegas-Sarabia has raised a colorable question of law, so we have jurisdiction.[15]

iii. Analysis

1. Crimes Involving Moral Turpitude

This court uses a categorical approach to determine whether a particular crime meets the BIA's definition of a CIMT.[16] Under such an approach, this court "focuses on the inherent nature of the crime, as defined in the statute . . . rather than the circumstances surrounding the particular transgression."[17] "When applying the categorical approach, the statute must be read as the minimum criminal conduct necessary to sustain a conviction under the statute."[18] Thus, for Villegas-Sarabia to have committed a CIMT, the minimum conduct criminalized under 8 U.S.C. § 4 must constitute moral turpitude.[19]

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[15] 8 U.S.C. § 1252(a)(2)(D); *see Orosco v. Holder*, 396 F. App'x 50, 52 (5th Cir. 2010).

[16] *Amouzadeh v. Winfrey*, 467 F.3d 451, 455 (5th Cir. 2006); *see Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016).

[17] *Amouzadeh*, 467 F.3d at 455 (internal quotation marks omitted).

[18] *Rodriguez-Castro v. Gonzales*, 427 F.3d 316, 320 (5th Cir. 2005) (internal quotation marks omitted).

[19] *See Amouzadeh*, 467 F.3d at 455. If a statute is divisible, the court will apply a modified categorical approach. As 8 U.S.C. § 4 is not divisible, the modified categorical approach is not applicable in this case.

The BIA, through its administrative decisions, has crafted the following definition of "moral turpitude":

> Moral turpitude refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general. Moral turpitude has been defined as an act which is per se morally reprehensible and intrinsically wrong, or *malum in se*, so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude. Among the tests to determine if a crime involves moral turpitude is whether the act is accompanied by a vicious motive or a corrupt mind.[20]

We have further explained that if a crime's essential element "involves fraud or deception,"[21] or "include[s] dishonesty or lying,"[22] it is a CIMT.[23]

2. Misprision of a Felony

The determinative question we must answer is whether Villegas-Sarabia's conviction for misprision of

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[20] *Hyder v. Keisler*, 506 F.3d 388, 391 (5th Cir. 2007) (internal quotation marks omitted); *see also Matter of Sejas*, 24 I. & N. Dec. 236, 237 (BIA 2007) ("Generally, a crime involves moral turpitude if it is inherently base, vile, or depraved, and contrary to accepted rules of morality and the duties owed between persons or to society in general.").

[21] *Hyder*, 506 F.3d at 391.

[22] *Omagah v. Ashcroft*, 288 F.3d 254, 260 (5th Cir. 2002).

[23] *Hyder*, 506 F.3d at 391; *Omagah*, 288 F.3d at 260.

a felony under 18 U.S.C. § 4 is a CIMT. The misprision of felony statute provides:

> Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.[24]

There is no binding precedent of this circuit establishing whether misprision of a felony is a CIMT. Under our case law, however, deceit is an essential element of misprision of a felony, and "this [c]ourt has repeatedly held that crimes including an element of intentional deception are crimes involving moral turpitude."[25]

Misprision of felony consists of the following elements: "(1) knowledge that a felony was committed; (2) failure to notify the authorities of the felony; and (3) an affirmative step to conceal the felony."[26] "Mere

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[24] 18 U.S.C. § 4.

[25] *Fuentes-Cruz v. Gonzales*, 489 F.3d 724 (5th Cir. 2007); *see Patel v. Mukasey*, 526 F.3d 800 (5th Cir. 2008); *see also Omagah*, 288 F.3d at 260 (conspiracy to obtain, possess and use illegal immigration documents is a crime involving moral turpitude); *Pichardo v. INS*, 104 F.3d 756, 760 (5th Cir. 1997) (aggravated assault is a crime involving moral turpitude); *Okabe v. INS*, 671 F.2d 863, 865 (5th Cir. 1982) (bribery is a crime involving moral turpitude).

[26] *Patel*, 526 F.3d at 803; *United States v. Davila*, 698 F.2d 715, 717 (5th Cir. 1983) ("Violation of the misprision statute

failure to make known does not suffice."[27] In *Patel v. Mukasey*, a petitioner sought our review of a BIA decision which held that misprision of a felony was an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i).[28] To qualify as an aggravated felony under § 1101, the offense must "necessarily entail[] fraud or deceit" and involve a loss of greater than $10,000.[29] We concluded that the final element of misprision of a felony—that the defendant must commit some affirmative act to conceal the felony—"necessarily entails the act of intentionally giving a false impression, *i.e.*, the false impression that the earlier felony never occurred."[30] We explained that, because misprision of a felony requires assertive dishonest conduct, it necessarily requires an intentional act of deceit.[31] Viewing *Patel* in conjunction with this court's repeated holdings that "crimes including an element of intentional deception are crimes

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additionally requires some positive act designed to conceal from authorities the fact that a felony has been committed.").

[27] *Patel*, 526 F.3d at 803 (quoting *United States v. Adams*, 961 F.2d 505, 508-09 (5th Cir. 1992)) (internal citations omitted).

[28] *Patel*, 526 F.3d at 801-02. While *Patel* addressed the question whether misprision of a felony was an aggravated felony—rather than a CIMT—the Court's analysis of whether misprision involves fraud or deceit is germane to the inquiry in this case.

[29] *Id*. at 804.

[30] *Id*. at 803.

[31] *Id.* (citing *Itani v. Ashcroft*, 298 F.3d 1213, 1216 (11th Cir. 2002)).

involving moral turpitude," necessarily leads to the conclusion that misprision of a felony is a CIMT.[32]

Two panels of this court, (in unpublished and thus non-precedential opinions), have affirmed BIA decisions that reached the same conclusion. The panel in *Ahmad v. Holder* held that the BIA did not err in holding that a defendant who was convicted of misprision of a felony had committed a CIMT.[33] Similarly, the panel in *Aguilar-Cortez v. Gonzales* held that the BIA did not err in holding that the petitioner was "ineligible for adjustment of status because his conviction for misprision of felony was a conviction for a crime of moral turpitude."[34] Although this court has not yet held bindingly that misprision of a felony is a CIMT, our case law lends support to the BIA's determination to that effect in this case.

The question whether misprision of a felony is categorically a CIMT, however, has led to a split among other circuits.[35] In *Lugo v. Holder*, the Second Circuit provided a brief history of the existing circuit split.[36] The petitioner in *Lugo* sought review of a BIA decision holding that misprision of a felony is a CIMT.[37] The

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[32] *See*, *e.g.*, *Patel*, 526 F.3d 800; *Fuentes-Cruz v. Gonzales*, 489 F.3d 724.

[33] *Ahmad v. Holder*, 451 F. App'x 438, 440 (5th Cir. 2011).

[34] *Aguilar-Cortez v. Gonzales*, 186 F. App'x 515, 515-16 (5th Cir. 2006).

[35] *See Lugo v. Holder*, 783 F.3d 119, 120-21 (2d Cir. 2015).

[36] *Id*.

[37] *Id*. at 120.

Second Circuit declined to rule on the issue, concluding instead that the question would "best [be] addressed in the first instance by the Board in a precedential opinion."[38] The circuit court explained:

> Originally, in [1966], the Board held that misprision of felony was not a CIMT. The Eleventh Circuit then adopted the contrary rule in *Itani v. Ashcroft*, 298 F.3d 1213, 1216 (11th Cir. 2002), holding that misprision of felony *is* a categorical CIMT. The Board switched to the Eleventh Circuit's view in *Matter of Robles-Urrea*, but the Board's decision in that case was reversed by the Ninth Circuit. *Robles-Urrea v. Holder*, 678 F.3d 702, 711 (9th Cir. 2012) (holding that misprision of felony is not a CIMT). We are thus left to wonder whether, going forward, the Board wishes to adopt the Ninth Circuit's rule or the Eleventh Circuit's. We believe it is desirable for the Board to clarify this matter in a published opinion.[39]

In an attempt to clarify this issue, the Second Circuit remanded the case for further proceedings, but the BIA has yet to issue a precedential ruling in response.[40]

Villegas-Sarabia urges us to follow the Ninth Circuit's holding in *Robles-Urrea v. Holder*, that misprision of a felony is not a CIMT. In reaching that result,

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[38] *Id*.

[39] *Id.* at 120-21; *cf. Ortiz-Franco v. Holder*, 782 F.3d 81, 93 (2d Cir. 2015) (Lohier, J., concurring) (noting an analogous circuit split, and stating "[t]his is not a sustainable way to administer uniform justice in the area of immigration").

[40] *Lugo*, 783 F.3d at 120-21.

the Ninth Circuit explained that an offense does not involve moral turpitude merely because it "contravenes societal duties."[41] Instead, the court returned to the original definition and explained that crimes of moral turpitude must be "inherently base, vile, or depraved;" and ruled that the BIA had not adequately discussed how misprision of a felony meets these requirements.[42] The appeals court stated that, because "the misprision of a felony statute will encompass conduct that is not morally turpitudinous . . . misprision of a felony is not categorically a crime involving moral turpitude."[43]

The government responds here that *Robles-Urrea* is unpersuasive because it failed to consider fully the BIA's reasoning that misprision involves dishonest activity and that dishonest activity is what makes an offense a CIMT. The government urges this court to

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[41] *Robles-Urrea v. Holder*, 678 F.3d 702, 705 (9th Cir. 2012) (internal quotation marks omitted).

[42] *Id*. at 708.

[43] *Id*. at 711. In *Robles-Urrea*, the Ninth Circuit stated that misprision is different than other CIMTs because it "requires not a specific intent to conceal or obstruct justice, but only knowledge of the felony." *Id*. at 710. That court, however, also recognized that knowledge alone is insufficient, as misprision requires "'both knowledge of a crime and some affirmative act of concealment or participation.'" *Id*. at 709 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 696 n.36 (1972)). Even though[] that court acknowledged that this definition fails to include an additional element, *viz*., that the crime "involve some level of depravity or baseness," *Branzburg* conclusively establishes that misprision requires knowledge of a felony and an affirmative act to conceal. This two-part definition accords with the elements of misprision we set out in *Patel*. *See Patel*, 526 F.3d at 803.

adopt the Eleventh Circuit's rule in *Itani*, that misprision of a felony under 8 U.S.C. § 4 is a CIMT.[44]

The petitioner in *Itani* sought review of a BIA order holding that misprision of a felony is a CIMT.[45] Relying on this court's precedent, the Eleventh Circuit explained that moral turpitude involves:

> An act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man. Generally, a crime involving dishonesty or false statement is considered to be one involving moral turpitude.[46]

Based on this reasoning, the Eleventh Circuit ruled that, because misprision of a felony requires an affirmative act to conceal a crime, misprision of a felony is a CIMT.[47]

Our court has not expressly adopted *Itani*, but some of our panels have cited it favorably. We explained in *Patel* that if "an affirmative step to conceal the felony," is an element of a crime, that crime "necessarily entails fraud or deceit."[48] Citing *Itani*, the panel in *Patel* reasoned that such conduct "necessarily

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[44] *Itani*, 298 F.3d at 1216.

[45] *Id*. at 1215.

[46] *Id*. (quoting *United States v. Gloria*, 494 F.2d 477, 481 (5th Cir. 1974)).

[47] *Id*. at 1216.

[48] *Patel*, 526 F.3d at 803.

entails the act of intentionally giving a false impression" and thus requires deceitful conduct.[49]

Another panel of this court cited *Itani* in support of its holding that making a false statement to the Federal Aviation Administration was a CIMT.[50] And yet another panel of this court relied on *Itani's* reasoning that deceit is a "[']behavior that runs contrary to accepted societal duties and involves dishonest or fraudulent activity'" as "strong support" for holding that "crimes involving the intentional concealment of illegal drug activity are intrinsically wrong and, therefore, turpitudinous."[51]

We are satisfied that, in light of this court's favorable treatment of *Itani*, as well as its decisions in *Patel* and *Fuentes*, the BIA did not err in holding that misprision of a felony is a CIMT. This court's precedent firmly establishes that "[c]rimes including dishonesty or lying as an essential element involve moral turpitude."[52] Misprision of a felony "necessarily entails

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[49] *Id*. (citing *Itani*, 298 F.3d at 1216).

[50] *Martinez-Castelan v. Gonzales*, 188 F. App'x 246, 247 (5th Cir. 2006) ("Crimes including dishonesty or lying as an essential element involve moral turpitude."); *see Padilla v. Gonzales*, 397 F.3d 1016, 1020 (7th Cir. 2005); *Itani*, 298 F.3d at 1215.

[51] *Smalley v. Ashcroft*, 354 F.3d 332, 339 (5th Cir. 2003) (quoting *Itani*, 298 F.3d at 1216). As Villegas-Sarabia argues, *Smalley* is not controlling, as it involved the intentional concealment of illegal drug activity. Nonetheless, it demonstrates the favorable treatment *Itani* has received from this court.

[52] *Hyder*, 506 F.3d at 391 (quoting *Omagah*, 288 F.3d at 260); *Fuentes-Cruz*, 489 F.3d at 726.

deceit."[53] We therefore affirm the BIA's order and deny Villegas-Sarabia's petition for review.

B. District Court Decision

i. Standard of Review

When considering a district court's ruling on a request for habeas relief, this court reviews that court's findings of fact for clear error and its conclusions of law de novo.[54] We review claims of constitutional violations, including equal protection under the Fifth Amendment, de novo.[55]

ii. Analysis

First, although the government argued in its brief that the district court erred in holding that the disparate residency requirements applicable to unwed U.S.-citizen mothers vis-à-vis fathers violated equal protection, it now acknowledges that this issue is controlled by the Supreme Court's recent decision in *Sessions v. Morales-Santana*.[56] In that case, Morales-Santana claimed United States citizenship based on the citizenship of his father, José Morales.[57] Morales is a United States citizen who was unable to satisfy § 1401(a)(7)'s requirement that, at the time of his son's birth, he

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[53] *Patel*, 526 F.3d at 803.

[54] *Richards v. Thaler*, 710 F.3d 573, 575 (5th Cir. 2013).

[55] *See De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004).

[56] *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1686 (2017).

[57] *Id*. at 1687.

must have resided in the United States for five years after reaching the age of 14.[58] An IJ held that José Morales's son, Morales-Santana, was therefore an alien and ordered his deportation.[59] Morales-Santana argued that the disparate residency requirements for mothers and fathers under §§ 1401 and 1409 violated equal protection so that, under a constitutional reading of the statutes, he derived citizenship from his father at the time of his birth.[60]

Addressing the equal protection challenge, the Court reasoned that the exception provided to mothers under § 1409(c) was a sex-based differential, and therefore "must substantially serve an important governmental interest" to justify its discrimination.[61] The Court concluded that the government had failed to demonstrate an "exceedingly persuasive justification for § 1409(a) and (c)'s gender-based and gender-biased disparity."[62] The Court therefore held that the exception provided to unwed U.S.-citizen mothers under 8 U.S.C. § 1409(c) violated the Fifth Amendment's requirement that all persons are entitled to equal

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[58] *Id*. In 1986, Congress reduced the residency requirement to five years, two of which must occur after the parent reaches age 14. *Morales-Santana*, 137 S. Ct. at 1687 (citing § 1401(g)[)]. However, as both Villegas-Sarabia and Morales-Santana were born before 1986, their citizenship is governed by the previous version of the statute.

[59] *Id*. Like Villegas-Sarabia's in this case, Morales-Santana's deportation order was based on criminal activity.

[60] *Id*.

[61] *Id*. at 1690.

[62] *Id*. (internal citations and quotation marks omitted).

protection under the law.[63] Applying the Court's holding to the instant case, we affirm this facet of the district court's decision.

The second issue that the government raises on appeal is whether the district court exceeded its constitutional and statutory authority when it rewrote § 1409(c) to extend the one-year residency exception to unwed fathers. This issue is also governed by *Morales-Santana*.[64]

After concluding that the statutory scheme in §§ 1401 and 1409 violated equal protection, the Court explained that, when a statute violates equal protection, the Court may remedy the deficiency "by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class."[65] The choice between withdrawal or extension, said the Court, must be guided by the legislative intent behind the statute.[66]

The Court next recognized that, generally, "extension, rather than nullification, is the proper course" when rectifying equal protection violations. But it went on to note that, in that case, "the discriminatory exception consists of favorable treatment for a discrete group."[67] Convinced that Congress established the

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[63] *Id*.

[64] *Id*. at 1701.

[65] *Id.* (quoting *Heckler v. Mathews*, 465 U.S. 728, 740 (1984)).

[66] *Id*. at 1699.

[67] *Id*. (quoting *Califano v. Westcott*, 443 U.S. 76, 89 (1979)).

residency requirements to ensure that unmarried parents had an adequate connection to the United States before their children were granted citizenship, the Court determined that expanding the one-year exception to include unmarried fathers would undermine the legislative intent.[68] It therefore held that, prospectively, § 1401's general residency requirement should apply to children born to unwed U.S.-citizens, both mothers and fathers.[69]

Applying the rule in *Morales-Santana* to the instant case, the district court erred in extending the one-year exception provided in § 1409(c) to fathers. Instead, the general rule in § 1401 should apply to unwed U.S.-citizen parents—regardless of sex—until Congress addresses the issue.[70] We therefore reverse this aspect of the district court's decision.

During oral argument, counsel for Villegas-Sarabia contended that, under *Morales-Santana*, Villegas-Sarabia's citizenship is governed by the *current* version of 8 U.S.C. § 1401(g), which provides that a child born to an unwed U.S.-citizen father will receive derivative citizenship if his father has lived in the United States for five years, at least two of which were after he reached the age of fourteen.[71] The success of this argument

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[68] *Id*.

[69] *Id*. at 1701.

[70] *Id*.

[71] 8 U.S.C. § 1401(g) (2012); *see also Morales-Santana*, 137 S. Ct. at 1701 ("In the interim, as the Government suggests, § 1401(a)(7)'s now-five-year requirement should apply, prospectively, to children born to unwed U.S.-citizen mothers.")).

hinges on the following portion of the Supreme Court's decision: "In the interim, as the Government suggests, § 1401(a)(7)'s now-five-year requirement should apply, prospectively, to children born to unwed U.S.-citizen mothers."[72] The government insists that this rule applies to children born after the date of that decision; Villegas-Santana contends that, now, any child whose U.S.-citizen mother or father satisfies the new five-year rule qualifies for derivative citizenship as the proper interim solution until Congress remedies the equal protection violation created by § 1409(c).

Based on the record in this case, Villegas-Sarabia would be a citizen if his derivative citizenship were to be determined by the current residency requirements of § 1401. Villegas-Sarabia acknowledges that this is a different statutory requirement than the one which was in place at the time of his birth, but he nevertheless contends that applying the current rule retroactively would be the proper way to cure the constitutional deficiency until Congress addresses the issue. The government disagrees, maintaining that *Morales-Santana* invalidated the one-year exception provided only to mothers in § 1409(c), but did not otherwise modify the statutory regime.

Villegas-Sarabia is correct that the Court remanded *Morales-Santana* for further proceedings consistent with the opinion, but there is no indication that

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[72] *Morales-Santana*, 137 S. Ct. at 1701. Under the current version of the statute, the residency requirements are codified under § 1401(g), rather than § 1401(a)(7). 8 U.S.C. § 1401 (g).

the Court intended to replace the ten-year rule in effect at the time of Morales-Santana's birth with the subsequently revised five-year rule.[73] First, the Court emphasized that it had two—but only two—options for remedying such a constitutional deficiency: (1) extend the one-year exception to mothers and fathers, or (2) eliminate the discriminatory benefit.[74] The Court cited substantial case law to support its decision that eliminating rather than extending the exception was the correct course to remedy the equal protection violation in that case.[75]

Other than eliminating the discriminatory benefit to mothers, the Court did not rewrite the previous statutory regime or apply the "now-five-year" rule retroactively.[76] Instead, the Court emphasized that its decision would affect future rights only.[77] Villegas-Sarabia's citizenship is therefore governed by the statutes in place at the time of his birth, which required an unwed U.S.-citizen father to live in the United States for ten years, at least five of which were after he reached 14 years of age, before he could pass derivative citizenship to his child. Because Villegas did not satisfy this requirement, Villegas-Sarabia cannot acquire derivative

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[73] *Morales-Santana*, 137 S. Ct. at 1687. ("Congress has since reduced the duration requirement to five years, two after age 14.").

[74] *Id.* at 1698-99.

[75] *See id.*

[76] *Id*. at 1686, 1700 (explaining that this holding will impact rights "going forward" and the new rule will apply "prospectively.").

[77] *Id*.

citizenship.[78] We therefore reverse this facet of the district court's decision.

III. CONCLUSION

We affirm the BIA's ruling that misprision of a felony is a crime involving moral turpitude and its denial of Villegas-Sarabia's petition for review. Although the district court correctly held that the residency requirements of §§ 1401 and 1409 violate equal protection, we reverse its judgment that Villegas-Sarabia is a United States citizen under a constitutional reading of those statutes in light of the limited remedy the Supreme Court announced for that violation. We therefore affirm the BIA's determination that Villegas-Sarabia is not a United States citizen.[79]

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[78] *See* 8 U.S.C. § 1401(a)(7) (1970).

[79] Respondents-Appellants motions to sever the petition for review from the appeal and for summary reversal of the judgment of the district court in appeal no. 15-50993 previously carried with the case are DENIED.

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A039 289 368 - San Antonio, Texas

Date: AUG 26 2015

In re: LEONARDO VILLEGAS-SARABIA a.k.a. Leonardo Villegas, Jr.

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Lance Curtright, Esquire

CHARGE:

Notice: Sec. 237(a)(2)(C), I&N Act [8 U.S.C. § 1227(a)(2)(C)] - Convicted of firearms or destructive device violation

APPLICATION: Termination, adjustment of status, waiver of inadmissibility

The respondent has filed a timely appeal from an Immigration Judge's May 28, 2015, decision wherein he denied the respondent's request to terminate proceedings based upon his putative claim to United States citizenship; determined that he is subject to removal, as charged, on account of his 2013 federal conviction for a firearms offense[1] (Exh. 2); found him

[1] The record reflects the respondent was convicted on June 14, 2013, upon a plea of guilty, in the United States District Court for the Western District of Texas, Del Rio Division, for the offense

statutorily ineligible for the requested relief from removal;[2] and ordered his removal to Mexico. The appeal will be dismissed. The request for oral argument before the Board is denied. 8 C.F.R. § 1003.1(e)(7).

The Board reviews an Immigration Judge's findings of fact, including findings as to the credibility of testimony, and the likelihood of future events, under the "clearly erroneous" standard. *See* 8 C.F.R. § 1003.1(d)(3)(i); *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015); *Matter of R-S-H-*, 23 I&N Dec. 629 (BIA 2003); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). The Board reviews questions of law, discretion, and judgment and all other issues in an appeal of an Immigration Judge's decision de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent presents no arguments on appeal to persuade us to disturb the Immigration Judge's decision. The respondent contests the Immigration Judge's denial of his request to terminate proceedings based on his putative claim to have acquired United States citizenship under former section 301(a)(7) of the Immigration and Nationality Act, 8 U.S.C. § 1401(a)(7). Alternatively, the respondent does not dispute the Immigration Judge's removability findings, based on his record of conviction as to his 2013 federal firearms offense (Exh. 2). However, as to relief from removal, the

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of Felon in Possession of a Firearm, in violation of 18 U.S.C. § 922, and sentenced to a term of imprisonment of 30 months (Exh. 2).

[2] As the respondent's requests for relief from removal were filed after May 11, 2005 they are subject to the provisions of the REAL ID Act of 2005. *See Matter of S-B-,* 24 I&N Dec. 42 (BIA 2006).

respondent contends the Immigration Judge erred in pretermitting his application for adjustment of status under section 245 of the Act, 8 U.S.C. § 1255, based on a determination that he was inadmissible on account of a 1996 federal conviction for misprision of a felony,[3] which the Immigration Judge found to constitute a crime involving moral turpitude. Moreover, the Immigration Judge concluded the respondent was statutorily precluded from seeking a waiver of that ground of inadmissibility on account of having been convicted of an aggravated felony offense.[4] *See* section 212(h)(2) of the Act, 8 U.S.C. § 1182(h)(2).

In removal proceedings, evidence of foreign birth gives rise to a rebuttable presumption of alienage, and a claim to United States citizenship, as has been proffered by the respondent, raises issues directly related to this Board's jurisdiction over the instant case, shifting the burden to the respondent to come forward with evidence to substantiate his citizenship claim. *See*

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[3] The record reflects the respondent was convicted on May 13, 1996, upon a plea of guilty, in the United States District Court for the Western District of Texas, Del Rio Division, for the offense of Misprision of a Felony, in violation of 18 U.S.C. § 4, for an offense committed on December 8, 1995, and sentenced to a term of imprisonment of 15 months (Exh. 2).

[4] The Immigration Judge found the respondent's 2013 federal firearms conviction pursuant to 18 U.S.C. § 922(g)(1), to categorically qualify as an aggravated felony as defined under section 101(a)(43)(E)(ii) of the Act, 8 U.S.C. § 1101(a)(43)(E)(ii). As the respondent was admitted to the United States as an immigrant on July 11, 1985, at a port of entry, he is statutorily precluded from obtaining a waiver under section 212(h) of the Act. *See Martinez v. Mukasey,* 519 F.3d 532 (5th Cir. 2008).

Matter of Tijerina-Villareal, 13 I&N Dec. 327, 330 (BIA 1969). Thus, the threshold issue before us is whether the respondent, who was born out-of-wedlock in Mexico in 1974, to a United States citizen father and a Mexican-born mother, is a citizen of the United States. *See INS v. Pangilinan*, 486 U.S. 875, 886 (1988) (burden is on alien applicant to show his eligibility for citizenship in every respect); *see also Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153, 164 (BIA 2001) (evidence of foreign birth gives rise to a rebuttable presumption of alienage, shifting the burden to respondent to substantiate U.S. citizenship claim).

Pursuant to former section 301(a)(7) of the Act, 8 U.S.C. § 1401(a)(7), the law in effect at the time of the respondent's birth in Mexico in 1974, a child born to an unwed United States citizen father and non-citizen mother has a claim to United States citizenship only if the father was present in the United States (or an outlying possession) prior to the child's birth for a period or periods totaling at least 10 years, at least five of which occurred after the age of 14. The respondent does not dispute that even though his father was born in the United States in 1955, and was physically present in this country for the first five years of his life until he left to go to Mexico with his mother in 1960, only to return to the United States in 1965, this was insufficient to establish that, at the time of the respondent's birth in Mexico in 1974, his father met the statutory requirement of having "been physically present in the United States . . . for a period or periods totaling not less than ten years, at least five of which

were after attaining the age of fourteen years."[5] *See* former section 301(a)(7) of the Act.

However, as he contends on appeal, referring to former section 309(c) of the Act, 8 U.S.C. § 1409(c) (which has not been amended since the time of the respondent's birth in 1974), a child born abroad to an unwed United States citizen mother and non-citizen father acquired United States citizenship at birth so long as the mother was present in the United States (or its outlying possessions) for a continuous period of at least one year at some point prior to the child's birth. The respondent argues on appeal that he satisfied the physical presence requirement for transmitting United States citizenship applicable to unwed mothers, but not the more stringent requirement applicable to unwed fathers. The respondent argues on appeal that this is an impermissible form of gender discrimination that violates his constitutional right to equal protection under the law.

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[5] The requisite period of physical presence was shortened in November 1986, and section 301(g) of the Act (which replaced section 301(a)(7) in 1978) was amended by striking out "ten years, at least five," and inserting in lieu thereof "five years, at least two." *See* section 12 of the Immigration and Nationality Act Amendments of 1986, Pub. L. 99-653, 100 Stat. 3655, (Nov. 14, 1986). However, Congress limited the application of the 1986 amendments to section 301(g), only to those persons born on or after November 14, 1986. *See* Immigration Technical Corrections Act of 1988, Pub.L. 100-525, § 8(r), 102 Stat. 2609 (Oct. 4, 1988). As the respondent was born before that date, he does not benefit from the statutory changes to the physical presence requirement now found in section 301(g) of the Act.

To the extent the respondent raises a constitutional challenge, we note that this Board and the Immigration Judges lack the authority to consider constitutional challenges to the statutes and regulations we administer. *See Matter of Romalez-Alcalde*, 23 I&N Dec. 423, 439 fn.1 (BIA 2002) (citing *Matter of Fede*, 20 I&N Dec. 35, 36 (BIA 1989), and *Matter of C-*, 20 I&N Dec. 529, 532 (BIA 1992)); *see also Matter of Valdovinos*, 18 I&N Dec. 343 (BIA 1982). The Supreme Court in *Tuan Anh Nguyen v. INS*, 533 U.S. 53 (2001), addressed a similar equal protection challenge to the citizenship statutes at issue here, and held that even though the statute makes it more difficult for a child born abroad and out of wedlock to one United States parent to claim citizenship through that parent if the citizen parent was the father, there was no violation of the equal protection guarantee of the Fifth Amendment.[6] *See id.*

As such, we agree with the Immigration Judge that the respondent has not met his burden of proof to having automatically acquired United States citizenship at the time of his birth because of his relationship

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[6] We consider, however, the United States Court of Appeals for the Second Circuit, in a recent decision rendered subsequent to the filing of the respondent's appeal, agreed with the respondent's denial of equal protection argument, and distinguishing the concerns raised by the Supreme Court in *Tuan Anh Nguyen v. INS*, *supra*, concluded that the statutory scheme controlling acquired citizenship, which favors out-of-wedlock children who qualify based on the citizenship status of their mothers, compared to the provision applicable to U.S. fathers, violates the Fifth Amendment's guarantee of equal protection. *See Morales-Santana v. Lynch*, ___ F.3d ___, 2015 WL 4097296 (2d Cir. 2015).

to his biological father pursuant to former section 301(a)(7) and section 309(c) of the Act. *See Matter of Tijerina-Villareal*, *supra.* Consequently, as the respondent has not established that he is a United States citizen, the respondent is subject to the provisions of the Act, and we have jurisdiction over the remaining issues raised by the respondent's appeal in this case.

As the respondent does not contest the Immigration Judge's findings as to his removability, he must be removed unless he demonstrates that he qualifies for, and merits, some form of relief or protection from removal. *See* section 240(c)(4)(A) of the Act, 8 U.S.C. § 1229a(c)(4)(A). The respondent bears the exclusive burden of proving all requisite facts pertinent to his eligibility for relief from removal, and where the evidence indicates that a ground for mandatory denial of an application for relief *may* apply, the alien has the burden of demonstrating by a preponderance of the evidence that such grounds do not apply (emphasis added). *See* 8 C.F.R. § 1240.8(d).

In order to establish his eligibility for adjustment of status, the respondent must demonstrate that he is not inadmissible under the Act, or be able to waive that ground of inadmissibility. *See* section 245(a)(2) of the Act, 8 U.S.C. § 1255(a)(2). We are not persuaded by the respondent's appellate challenge to the Immigration Judge's determination that his 1996 federal conviction for misprision of a felony constitutes a conviction for a crime involving moral turpitude, a ground of inadmissibility that he would be precluded from waiving pursuant to section 212(h)(2) of the Act, on account of his

2013 federal firearms conviction, which the Immigration Judge found to qualify as an aggravated felony under section 101(a)(43)(E)(ii) of the Act.

The Board in *Matter of Robles-Ur[r]ea*, 24 I&N Dec 22 (BIA 2006), following the reasoning of the United States Court of Appeals for the Eleventh Circuit in *Itani v. Ashcroft*, 298 F.3d 1213, 1216 (11th Cir. 2002) (holding that the offense of misprision of a felony under 18 U.S.C. § 4 involved moral turpitude because it "necessarily involves an affirmative act of concealment or participation in a felony, behavior that runs contrary to accepted societal duties and involves dishonest or fraudulent activity."), concluded that misprision of a felony in violation of 18 U.S.C. § 4 qualifies categorically as a crime involving moral turpitude within the meaning of the Act, overruling in part, *Matter of Sloan,* 12 I&N Dec. 840 (BIA 1966, A.G. 1968). *See id* at 26.

Although the Ninth Circuit disagreed with the Board's decision in that case, and reversed in *Robles-Urrea v. Holder*, 678 F.3d 702, 711 (9th Cir. 2012) (holding that misprision of felony is not a CIMT), the court's decision is not binding authority on the Board in cases arising outside of that circuit. *See Matter of U. Singh*, 25 I&N Dec. 670 (BIA 2012) (a decision by a Federal court of appeals reversing a precedent decision of the Board is not binding authority outside the circuit in which the case arises). Rather, we are bound to apply the law of the circuit in cases arising in that circuit. *See Matter of Salazar*, 23 I&N Dec. 223, 235 (BIA 2002) (citing *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993), and *Matter of Anselmo,* 20 I&N Dec. 25 (BIA 1989)).

We consider that the Fifth Circuit, the jurisdiction wherein this case arises, has expressed agreement with the rationale of the Eleventh Circuit in *Itani v. Ashcroft. See Smalley v. Ashcroft*, 354 F.3d 332, 339 & n.6 (5th Cir. 2003) (expressing agreement with *Itani v. Ashcroft*, *supra*). As such, we agree with the Immigration Judge's conclusion that the respondent's 1996 federal conviction for misprision of a felony constitutes a conviction for a crime involving moral turpitude, precluding the respondent from establishing his eligibility for adjustment of status.

The respondent has presented no arguments on appeal that would persuade us to disturb the Immigration Judge's decision that he is removable, as charged, and has not established his eligibility for any relief or protection from removal. Accordingly the appeal will be dismissed.

ORDER: The appeal is dismissed.

/s/ Roger A. Pauley
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
IMMIGRATION COURT
800 DOLOROSA STREET, SUITE 300
SAN ANTONIO, TEXAS 78207

IN THE MATTERS OF	)	
Leonardo VILLEGAS-Sarabia	)	**Case No.:**
RESPONDENT	)	**A 039 289 368**
IN REMOVAL PROCEEDINGS	)	

CHARGE: Section 237(a)(2)(C) of the Immigration and Nationality Act (Act), as amended: an alien who any time after admission, has been convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, in violation of any law, any weapon, part, or accessory which is a firearm or destructive device, as defined in Section 921(a) of title 18, United States Code.

APPLICATION: Adjustment of Status; Waiver pursuant to 212(h)

ON BEHALF OF THE RESPONDENTS
Lance Curtright, Esq.
De Mott, McChesney, Curtright, Armendariz
800 Dolorosa, Suite 100
San Antonio, TX 78207

ON BEHALF OF THE GOVERNMENT
U.S. Immigration & Customs Enforcement
Office of Chief Counsel
8940 Fourwinds Dr., 5th Fl.
San Antonio, TX 78239

WRITTEN DECISION & ORDER OF THE IMMIGRATION JUDGE

I. Procedural History

The respondent is a forty-one-year-old male, native and citizen of Mexico, who was admitted to the United States as a lawful permanent resident (LPR) on or about 11 July 1985. See Exhibit #1. On a Notice to Appear (NTA) dated 13 January 2015, the Department of Homeland Security (DHS) charged the respondent as removable pursuant to section 237(a)(2)(C) of the Immigration and Nationality Act (the Act), as amended, as an alien who at any time after admission has been convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, in violation of any law, any weapon, part, or accessory which is a firearm or destructive device, as defined in section 921(a) of title 18, United States Code. Id.

On 16 March 2015, the respondent appeared with counsel at his initial master calendar hearing. At this hearing he denied allegations one and two, admitted

allegations three and four, and denied he was removable as charged on the NTA. The Court admitted the judgment and conviction documents filed by the DHS as Exhibit #2. At a master calendar hearing on 24 March 2015, the Court admitted into evidence DHS's filing of the Form I-213 dated 13 January 2015. At the 28 April 2015 master calendar hearing, the Court ruled DHS had established removability by clear and convincing evidence based upon the respondent's admissions through counsel and the information contained in Exhibits #2 and #3. The Court sustained the charge of removability.

The respondent through counsel advised the Court he was challenging in the District Court the USCIS's decision denying his United States citizenship claim, and provided documentation supporting his claim to United States citizenship. See Exhibit #4. The basis of his challenge is the respondent's position that the physical presence requirement of old section 301(a)(7) of the Immigration and Nationality Act violates the Equal Protection Clause because it impermissibly discriminates on the basis of gender. The respondent through counsel advised the Court he was seeking relief from removal in the form of Adjustment of Status through his United States citizen daughter.

In addition to the criminal conviction upon which he is charged as removable, the respondent, on 17 April 1997, was adjudged guilty of Misprision of a Felony in violation of section 4 of title 18 United States Code for an offense committed on 8 December 1995. See Exhibit #2, pages 4-8.

The issue before this Court is whether the respondent is eligible for relief from removal in the form of Adjustment of Status. The Court finds the respondent is not statutorily eligible for the relief he seeks.

II. Adjustment of Status Eligibility Requirements

To be eligible for Adjustment of Status, a respondent must be present in the United States with an admission or parole after having been inspected; apply for adjustment; be eligible to receive an immigrant visa and is admissible to the United States for permanent residence; and an immigrant visa is immediately available to him at the time his application is filed. INA § 245(a). If eligibility is established, adjustment of status may be granted in the exercise of discretion. Matter of Arai, 13 I&N Dec. 494 (BIA 1970). The alien bears the burden of establishing eligibility for adjustment of status and demonstrating that relief is merited in the exercise of discretion. See Matter of Ibrahim, 18 I&N Dec. 55 (BIA 1981); Matter of Cavazos, 17 I&N Dec. 215 (BIA 1980); Matter of Blas, 15 I&N Dec. 626 (BIA 1974).

III. 212(h) Waiver Requirements

Section 212(h) of the Immigration and Nationality Act provides that the Attorney General may, in his discretion, waive the application of subparagraph 212(a)(2)(A)(I) (crimes involving moral turpitude), 212(a)(2)(B) (multiple criminal convictions), 212(a)(2)(D) (prostitution and commercial vice), 212(a)(2)(E) (certain

aliens who have asserted immunity from prosecution), and 212(a)(2)(A)(i)(II) (an offense of simple possession of 30 grams or less of marijuana).

Section 212(h) relief is available in deportation and removal proceedings in conjunction with an application for adjustment of status, where it may be used to waive inadmissibility that would otherwise preclude adjustment of status. See 8 C.F.R. 1245.1(f); Matter of Michel, 21 I&N Dec. 1101, 1104 (BIA 1998); Matter of Parodi, 17 I&N Dec. 608, 612 (BIA 1980); Matter of Barnabella, 13 I&N Dec. 42, 43-44 (BIA 1968). The 212(h) waiver is available *nunc pro tunc*, allowing the applicant to reapply for admission retroactively, which may effectively dispose of the charges against him. Matter of Ducret, 15 I&N Dec. 620 (BIA 1976); Matter of Vrettakos, 14 I&N Dec. 593 (BIA 1974). Finally, the Attorney General, in his discretion, must consent to the alien's applying or reapplying for a visa, for admission to the United States, or for adjustment of status. INA § 212(h)(2).

IV. Respondent's Criminal Conviction Record

On 13 May 1996, the respondent pled guilty to and was later found guilty of Misprision of a Felony in violation of 18 U.S.C. § 4, committed on 8 December 1995. Exhibit #2 at 4. He was sentenced to 15 months confinement in the custody of the United States Bureau of Prisons. Id. at 5. On 28 June 2012, the respondent pled guilty to and was later found guilty of being a Felon in Possession of a Firearm in violation of 18 U.S.C. § 922,

committed on 30 November 2011. Exhibit #2 at 1. He was sentenced to 30 months imprisonment in custody of the United States Bureau of Prisons. Id. at 2.

V. Analysis

A respondent who is inadmissible to the United States because of his conviction of crimes involving moral turpitude may have that inadmissibility waived pursuant to INA § 212(h). The respondent has been convicted of misprision of a felony. While the Fifth Circuit has not specifically ruled whether a violation of 18 U.S.C. § 4, is a crime involving moral turpitude, it has favorably cited another circuit's decision that holds it is. Patel v. Mukasey, 526 F.3d 800, 803 (5th Cir. 2008) (citing Itani v. Ashcroft, 298 F.3d 1213, 1216 (11th Cir. 2002)). In Itani, the Eleventh Circuit held misprision of a felony "require[s] both knowledge of a crime and some affirmative act of concealment or participation". Itani, 298 F.3d at 1216. Mere failure to report a known felony does not violate 18 U.S.C. § 4. Id. The court concluded a violation of that statue is a crime involving moral turpitude because it "necessarily involves an affirmative act of concealment or participation in a felony, behavior that runs contrary to accepted societal duties and involves dishonest or fraudulent activity." Id. In Patel, the Fifth Circuit held a misprision of felony offense necessarily entails deceit. Patel, 526 F.3d at 803.

The BIA in Matter of Robles, 24 I&N Dec 22, 25-27 (BIA 2006) held misprision of a felony represents

conduct that is inherently base or vile and contrary to the basic rules of morality and the duties owed between persons or to society in general and concluded it is categorically a crime involving moral turpitude. For his conviction of a violation of 18 U.S.C. § 4, the respondent was sentenced to fifteen months confinement. The respondent has been convicted of a crime involving moral turpitude for which a Section 212 (h) waiver is available.

On 14 June 2013, the respondent was adjudged guilty, pursuant to his plea, of being a felon in possession of a firearm in violation of 18 U.S.C. §922. Exhibit #2 at 1. Section 922(g)(1) of title 18 of the United States Code provides that "It shall be unlawful for any person— (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to . . . possess in or affecting commerce, any firearm or ammunition[.]" Thus, the Court finds the specific subsection under which the respondent was convicted was 18 U.S.C. § 922(g)(1). For this conviction, the respondent was sentenced to thirty months confinement. Exhibit #2 at 2.

The respondent's conviction pursuant to 18 U.S.C. § 922(g)(1) qualifies as an aggravated felony. INA § 101(a)(43)(E)(ii). The respondent, through counsel, admitted allegation 3 on the NTA which states he was admitted into the United States as a Lawful Permanent Resident on or about 11 July 1985 at or near Eagle Pass, Texas. In Matter of J-H-J, 26 I&N Dec 563 (BIA 2015), the BIA acceded to the circuit courts and held section 212(h) of the Act only precludes aliens who

entered the United States as lawful permanent residents from establishing eligibility for a waiver on the basis of an aggravated felony conviction. This follows the Fifth Circuit's decision in Martinez v. Mukasey, 519 F.3d 532 (5th Cir. 2008).

The Court finds the respondent is not eligible for a waiver under section 212(h) of the Act because he was admitted to the United States as a Lawful Permanent Resident and has been convicted of an aggravated felony. He did not adjust his status after entering the United States. The Court is not aware of any other waiver under which the respondent can seek to readjust his status.

The Court finds the respondent is present in the United States with an admission or parole after inspection, that he seeks to apply for adjustment of status, and that he is inadmissible to the United States because of his conviction for a crime involving moral turpitude. INA § 212(a)(2)(A)(i)(I). The respondent is ineligible to seek a section 212(h) waiver due to his 2013 conviction for an aggravated felony. The Court finds there is no waiver available to the respondent to which he could apply in conjunction with an application to adjust status.

Accordingly, the following orders shall be entered:

ORDER

IT IS HEREBY ORDERED that the respondent's request for Adjustment of Status is PRETERMITTED as he is statutorily ineligible for that relief.

IT IS FURTHER ORDERED that the respondent be removed from the United States to his country of citizenship and nativity, Mexico.

Date: 28 May 2015

/s/ Thomas G. Crossan
Thomas G. Crossan, Jr.
United States
Immigration Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-60639

LEONARDO VILLEGAS-SARABIA,
also known as Leonardo Villegas, Jr.,

Petitioner

v.

JEFFERSON B. SESSIONS, III,
U. S. ATTORNEY GENERAL,

Respondent

Petition for Review of an Order of the
Board of Immigration Appeals

Consolidated with

No. 15-50993

LEONARDO VILLEGAS-SARABIA;
LEONARDO VILLEGAS, JR.,

Petitioners - Appellees

v.

ELAINE C. DUKE, ACTING SECRETARY, DEPARTMENT OF HOMELAND SECURITY; ENRIQUE LUCERO, Field Office Director for Immigration and Customs Enforcement; LEON RODRIGUEZ, Director, United States Citizenship and Immigration Services; MARIO ORTIZ, San Antonio District Director for United States Citizenship and Immigration Services; REYNALDO CASTRO, Warden, South Texas Detention Center,

Respondents - Appellants

Appeal from the United States District Court
for the Board of Immigration Appeals

ON PETITION FOR REHEARING EN BANC

[Filed Dec. 15, 2017]

(Opinion 10/31/2017 , 5 Cir., ___, ___ F.3d ___)

Before WIENER, HIGGINSON, and COSTA, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the

panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Jacques Wiener
UNITED STATES CIRCUIT JUDGE

Statutory Provisions Involved

8 U.S.C. § 1182 provides in pertinent part:

Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * *

(2) Criminal and related grounds

(A) Conviction of certain crimes

(i) In general

Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

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

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21),

is inadmissible.

(ii) Exception

Clause (i)(I) shall not apply to an alien who committed only one crime if—

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

* * *

18 U.S.C. § 4 provides:

Misprision of felony

Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.