No. 17-1559

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The government, the BIA, and several courts of appeals have all acknowledged that there is a circuit conflict regarding whether misprision of felony is a crime involving moral turpitude. The government does not dispute the importance of the misprision issue the split presents (Pet. 31-37) and does not deny that the split involves the circuits responsible for the majority of immigration appeals (Pet. 12-16, 34). Under the current state of the law, noncitizens cannot receive uniform treatment of a misprision conviction under the INA.

Despite the persistence of this conflict for over six years, the government now argues that this Court should wait while lower courts consider the BIA's latest opinion on misprision. That opinion, however, adds little in the way of reasoning; it cannot itself resolve the split because it does not apply to courts within the Ninth Circuit, as the BIA expressly acknowledges; and it is unlikely to lead any of the conflicting courts of appeals to change their positions. The BIA's new opinion serves only to highlight and further entrench the circuits' disagreement as to whether misprision specifically, and deceit crimes generally, are CIMTs. There is no reason to postpone resolving the split over misprision. The need to restore constitutionally mandated uniformity to this area of immigration law warrants the Court's immediate attention. *See* U.S. CONST. art. I, § 8, cl. 4.

ARGUMENT

I. THE ENTRENCHED CONFLICT ACKNOWLEDGED BY THE COURTS OF APPEALS, THE BIA, AND THE GOVERNMENT'S BRIEF IN OPPOSITION WARRANTS IMMEDIATE REVIEW.

The government does not deny that the Fifth and Eleventh Circuits disagree with the Ninth Circuit as to whether misprision is a CIMT. *Compare Robles-Urrea v. Holder*, 678 F.3d 702, 711 (9th Cir. 2012) (holding that misprision is not categorically a CIMT), *with* App. 19a-20a (holding that misprision is categorically a CIMT), *and Itani v. Ashcroft*, 298 F.3d 1213, 1216 (11th Cir. 2002) (same). And while the government characterizes that circuit split as "shallow," Opp. 14, it remains undisputed that the split involves the courts of appeals that hear the majority of immigration appeals. *See* Pet. 34 (citing John Guendelsberger, *Federal Court Activity: Circuit Court Decisions for December 2016 and Calendar Year Totals for 2016*, IMMIGR. L. ADVISOR, Jan. 2017, at 3, https://www.justice.gov/eoir/page/file/934171/download) (showing that approximately 62% of decisions in cases appealed from the BIA in 2016 originated in the Fifth, Ninth, and Eleventh Circuits). Moreover, the Ninth Circuit—which applies a rule different from that prescribed by the BIA for all other circuits—accounts for around half of all immigration appeals. *See id.* (showing that in 2016 the Ninth Circuit alone heard about 52% of cases appealed from the BIA).

The government does not dispute those statistics but tentatively posits that review is unnecessary "because it is not clear that a circuit conflict will persist following *Mendez*," the BIA's latest misprision opinion. Opp. 15 (citing *In re Mendez*, 27 I&N Dec. 219 (BIA 2018)). It is unrealistic to expect the circuit conflict to be resolved without this Court's intervention.

First, the BIA's action in *Mendez* cannot directly lead to a change in Ninth Circuit precedent. As noted in the BIA opinion itself, the *Mendez* ruling does not apply to any person within the jurisdiction of the Ninth Circuit. 27 I&N Dec. at 225. To change the rule applied within the Ninth Circuit, the government would need to appeal the adverse ruling of an Immigration Judge (who would have followed the Ninth Circuit rule regarding the treatment of misprision) to the BIA. *See* 8 C.F.R. § 1003.1(b)(3). The BIA would then have to issue an opinion concerning the treatment of misprision within the Ninth Circuit, retreat from the two-rule approach adopted in *Mendez*, hold in favor of the government, and thereby create an appealable order of removal. *See* 8 U.S.C. § 1252(a)(1) (conferring appellate jurisdiction over removal orders). The noncitizen would then have to appeal the decision to the Ninth Circuit. And that court would have to reverse its determination that misprision is not a CIMT.[1]

[1] The government notes that *Mendez* is now before the Second Circuit, Opp. 15, but whatever action that court takes cannot resolve the conflict.

Second, even if the Ninth Circuit were presented with a BIA ruling that followed *Mendez* but made the rule applicable within the Ninth Circuit, nothing in *Mendez* would cause the Ninth Circuit to change its position. When the Ninth Circuit addressed the issue in *Robles-Urrea*, it considered whether to afford *Chevron* deference to the BIA's ruling but ultimately determined "that the BIA's analysis is an impermissible construction of the INA." 678 F.3d at 710. The government argues that this determination was based on the circuit court's conclusion that the BIA's decision "lacked" reasoning, Opp. 15, but it is clear that the Ninth Circuit instead *rejected* the BIA's reasoning. *See* 678 F.3d at 708-10. In particular, it rejected the BIA's adoption of "the flawed reasoning of *Itani*" and "the BIA's argument that misprision of a felony must be morally turpitudinous because 'evil intent' is 'implicit in the statutory requirement that the actor take an affirmative step to conceal a felony from the proper authorities.'" *Id.* at 709 (quoting *In re Robles-Urrea*, 24 I&N Dec. 22, 27 (BIA 2006)). Those are precisely the same rationales the BIA repeats in *Mendez*. *See* 27 I&N Dec. at 223-24 (concluding, again, that concealing a felony is "reprehensible conduct" that is morally turpitudinous and citing, again, *Itani*, 298 F.3d at 1216, along with the decision below).

Mendez expands only slightly on the BIA's *Robles-Urrea* decision that the Ninth Circuit previously rejected, and the additions reiterate the same conclusion the Ninth Circuit held was an "impermissible construction of the INA." 678 F.3d at

710. Specifically, *Mendez* discusses why an accessory-after-the-fact conviction is a CIMT only if the underlying crime is a CIMT, while holding, as it did in *Robles-Urrea*, that misprision is always a CIMT because of the deception required by the statute. 27 I&N Dec. at 222-23; *see also Robles-Urrea*, 24 I&N Dec. at 27. The BIA's discussion of the intent requirement for misprision is longer than that in *Robles-Urrea*, but its reasoning is the same: "While the language of 18 U.S.C. § 4 does not explicitly require that the act of concealment be intentional, such intent is implicit because it must be shown that the 'defendant took steps to conceal the crime,'" and thus "we conclude that the concealment element of misprision requires an intentional act that is sufficiently reprehensible to be considered morally turpitudinous." 27 I&N Dec. at 223-24.

To the extent the BIA's conclusion reflects its interpretation of 18 U.S.C. § 4, a federal criminal statute, the interpretation is not entitled to deference. Section 4 is not a statute the BIA administers. *See*, *e.g.*, *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999) (contemplating deference to the BIA in appropriate cases under the statute it administers); *see also United States v. Apel*, 571 U.S. 359, 369 (2014) ("[W]e have never held that the Government's reading of a criminal statute is entitled to any deference."). Regardless, the BIA's interpretation of misprision does not contain anything substantively different from its original interpretation in *Robles-Urrea*, which similarly held that "'evil intent' . . . is implicit in the statutory

requirement that the actor take an affirmative step *to conceal* a felony from the proper authorities." 24 I&N Dec. at 27. Far from supplying the reasoning the Ninth Circuit found lacking in *Robles-Urrea*, Opp. 15, the BIA doubled down on the same CIMT interpretation the Ninth Circuit has already determined is invalid. *See Robles-Urrea*, 678 F.3d at 708-10; *Mendez*, 27 I&N Dec. at 223-24. As the Ninth Circuit recently reaffirmed, it will not hesitate to overrule the BIA when the BIA adopts an impermissible construction of the INA and makes an erroneous CIMT classification. *See Vasquez-Valle v. Sessions*, No. 13-74213, 2018 WL 3795325, at *3-4 (9th Cir. Aug. 10, 2018) (rejecting the BIA's conclusion that witness tampering under Oregon law is a CIMT, notwithstanding the BIA's "fairly extensive" analysis).

Finally, the Ninth Circuit is unlikely to reverse its decision in *Robles-Urrea*, because that decision has been worked into the fabric of Ninth Circuit law regarding CIMTs: The Ninth Circuit has extended the core reasoning of *Robles-Urrea* to other cases involving deceit but not fraudulent intent. *See*, *e.g.*, *Rivera v. Lynch*, 816 F.3d 1064, 1074 (9th Cir. 2016) (distinguishing deceit from fraud in holding that perjury under California law is not a CIMT and reiterating that "nonfraudulent CIMTs generally involve base, vile, and depraved conduct that shocks the public conscience").

The government acknowledges that a broader circuit split exists over the CIMT classification of crimes involving deceit but not fraudulent intent,

noting only the possibility that this Court's consideration of misprision might not give guidance on the broader conflict. But that is hardly a reason to allow the misprision conflict to persist. Moreover, even if it would be possible for this Court to hold that misprision is turpitudinous without commenting on the broader deceit issue, any decision that misprision is *not* turpitudinous would necessarily give guidance on whether all crimes of deceit are CIMTs.

II. MISPRISION OF FELONY IS NOT CATEGORICALLY A CIMT.

Petitioner and the government agree that conduct beyond rape, incest, and murder can be "inherently base, vile, or depraved" for purposes of CIMT classification and that this Court in *Jordan v. De George*, 341 U.S. 223 (1951), included fraud in that category. Opp. 12; Pet. 22-23, 26-27. But that does not mean that misprision is categorically a CIMT. Although the government asserts that "misprision involves fraud, because 'an affirmative act calculated to deceive the government [is] inherently fraudulent,'" Opp. 12 (citing *In re Flores*, 17 I&N Dec. 225, 229 (BIA 1980)), that characterization misstates the elements of misprision. Misprision requires a defendant who (1) has "knowledge of the actual commission of a felony" and (2) "conceals and does not as soon as possible make known the same" to someone in authority. 18 U.S.C. § 4. The statute says nothing about "an affirmative act *calculated to deceive the government*." Opp. 12 (emphasis added). Accordingly, most lower courts have construed the statute merely "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); *cf. United States v. Caraballo-Rodriguez*, 480 F.3d 62, 73 (1st Cir. 2007) ("[W]hile this court and the Supreme Court may someday adopt the majority rule in the circuits that an affirmative act is required for a misprision offense, there is now no binding precedent to that effect."). Specifically, intending to conceal the crime from the government or intending to interfere with or obstruct justice is not an element of the crime. *See* 18 U.S.C. § 4. Indeed, even the BIA previously acknowledged that, "[a]lthough misprision of a felony has as an element the affirmative concealment of the felony, there is . . . nothing in § 4 that references the specific purpose for which the concealment must be undertaken." *In re Espinoza-Gonzalez*, 22 I&N Dec. 889, 894 (BIA 1999).

The government makes the leap that misprision involves "an affirmative act calculated to deceive the government" and is therefore "inherently fraudulent" based on the BIA's decision in *In re Flores*, Opp. 12, but that case involved the sale of counterfeit documents related to alien registry, not misprision. *See In re Flores*, 17 I&N Dec. at 229. In determining that the crime in *Flores* was a CIMT, the BIA observed that this Court had already decided that "counterfeiting obligations of the United States is plainly a crime involving moral turpitude." *Id.* (citing *United States ex rel. Volpe v. Smith*, 289 U.S. 422 (1933)). It is well-established, therefore, that fraud inheres in counterfeiting offenses. But neither the government

nor the BIA has explained why the mere concealment inherent in the offense of misprision necessarily translates into fraudulent intent to procure gain at the government's or another's expense, the hallmark of fraud.[2]

It is possible to picture cases in which a person could be convicted of misprision without the inherently fraudulent intent and "reprehensible conduct" assumed by the government and by the BIA, both in *Mendez* and in the earlier *Robles-Urrea* ruling rejected by the Ninth Circuit. *See* Opp. 12-13 (quoting, *inter alia*, *Mendez*, 27 I&N Dec. at 222-24); *Robles-Urrea*, 24 I&N Dec. at 26-27. For example, a United States citizen learns that her undocumented brother recently reentered the United States unlawfully after being deported, which is a felony pursuant to 8 U.S.C. § 1326. She loves her brother, chooses not to report his conduct, and agrees to set up basic utility service in his apartment because he lacks the requisite social-security number to open his own account. He pays the bills in full, procuring nothing to the detriment of the utility company. But by placing her name on the utility bills, the sister's actions have the effect of providing a false impression that she resides in the apartment, thereby concealing her brother's felonious presence.

Although the government contends there is a "long history" of applying the CIMT classification to both

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[2] Fraud consists of "a knowing misrepresentation or knowing concealment of a material fact to induce another to act to his or her detriment." *See Fraud*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see also* Pet. 23-25.

fraud *and* concealment, Opp. 14, it supports that assertion only with a citation to *Jordan*, which the government acknowledges elsewhere did not reach beyond fraud. Opp. 12. Indeed, the handful of concealment cases cited earlier in the government's opposition (Opp. 10) serve only to illustrate that lower courts are divided as to whether mere deceit supports a finding that a crime is a CIMT. *See* Pet. 16-22.

It is difficult to see how this long history of disagreement "provides notice" (Opp. 14) that all concealment crimes are CIMTs, when several circuits follow the rule that "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), while several others find moral turpitude only if a crime 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." *Flores-Molina v. Sessions*, 850 F.3d 1150, 1163-64 (10th Cir. 2017); *see also* Pet. 16-22 (detailing the split over the CIMT status of mere-deceit crimes). Unlike in *Jordan*, in which the Court avoided void-for-vagueness concerns due to a long line of cases unanimously treating fraud as morally turpitudinous, 341 U.S. at 229-32, no such unanimity exists regarding the CIMT classification of crimes of deceit "in peripheral cases," *id.* at 232, that do not involve fraud. As suggested in the petition (Pet. 29-30), the Court can avoid constitutional void-for-vagueness concerns by

holding that the INA's CIMT provision in 8 U.S.C. § 1182(a)(2)(A)(i)(I) does not include misprision of felony.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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