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

Office of the Chief Clerk

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January 30, 2017

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Re: Amicus Invitation No. 17-01-05
[redacted] A [redacted]

Dear Amici:

The Board of Immigration Appeals received on January 23, 2017, your request for extension of time in which to file your amicus curiae brief. Your request is hereby granted as follows:

Your brief and two copies should be submitted to the Board, no later than **March 8, 2017.** In addition please attach a copy of this letter to the front of your brief.

Respectfully,

Rebecca Noguera
Appeals Examiner
Information Management Team

Enclosure, (parties only)

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Amicus Invitation No. 17-01-05
AMICUS INVITATION (MISPRISION OF A FELONY), DUE FEBRUARY 6, 2017

JANUARY 5, 2017

The Board of Immigration Appeals welcomes interested members of the public to file amicus curiae briefs discussing the below issue:

ISSUES PRESENTED:

(1) Does the offense of misprision of a felony under 18 U.S.C. § 4 categorically qualify as a crime involving moral turpitude? Please see in that regard and address *Matter of Robles-Urrea*, 24 I&N Dec. 22 (BIA 2006), reversed, *Robles-Urrea v. Holder*, 678 F.3d 702 (9th Cir. 2012); and *Itani v. Ashcroft*, 298 F.3d 1213 (11th Cir. 2002).

(2) Assuming the Board should decide to adhere to *Matter of Robles-Urrea*, supra, in circuits other than the Ninth, is the application of such precedent impermissibly retroactive to convictions for acts committed prior to the publication of *Matter of Robles-Urrea* inasmuch as that decision overruled a prior precedent holding that misprision of a felony was not a crime involving moral turpitude?

Request to Appear as Amicus Curiae: Members of the public who wish to appear as amicus curiae before the Board must submit a Request to Appear as Amicus Curiae ("Request to Appear") pursuant to Chapter 2.10, Appendix B (Directory), and Appendix F (Sample Cover Page) of the Board of Immigration Appeals Practice Manual. The Request to Appear must explicitly identify that it is responding to Amicus Invitation No. 17-01-05. The decision to accept or deny a Request to Appear is within the sole discretion of the Board. Please see Chapter 2.10 of the Board Practice Manual.

Filing a Brief: Please file your amicus brief in conjunction with your Request to Appear pursuant to Chapter 2.10 of the Board of Immigration Appeals Practice Manual. The brief accompanying the Request to Appear must explicitly identify that it is responding to Amicus Invitation No. 17-01-05. An amicus curiae brief is helpful to the Board if it presents relevant legal arguments that the parties have not already addressed. However, an amicus brief must be limited to a legal discussion of the issue(s) presented. The decision to accept or deny an amicus brief is within the sole discretion of the Board. The Board will not consider a brief that exceeds the scope of the amicus invitation.

Request for Case Information: Additional information about the case may be available. Please contact the Amicus Clerk by phone or mail (see contact information below) for this information prior to filing your Request to Appear and brief.

Page Limit: The Board asks that amicus curiae briefs be limited to 30 double-spaced pages.

Deadline: Please file a Request to Appear and brief with the Clerk's Office at the address below by **February 6, 2017**. Your request must be received at the Clerk's Office within the prescribed time limit. Motions to extend the time for filing a Request to Appear and brief are disfavored. The briefs or extension request must be RECEIVED at the Board on or before the due date. It is *not* sufficient simply

to mail the documents on time. We strongly urge the use of an overnight courier service to ensure the timely filing of your brief.

Service: Please mail three copies of your Request to Appear and brief to the Clerk's Office at the address below. If the Clerk's Office accepts your brief, it will then serve a copy on the parties and provide parties time to respond.

Joint Requests: The filing of parallel and identical or similarly worded briefs from multiple amici is disfavored. Rather, collaborating amici should submit a joint Request to Appear and brief. *See generally* Chapter 2.10 (Amicus Curiae).

Notice: A Request to Appear may be filed by an attorney, accredited representative, or an organization represented by an attorney registered to practice before the Board pursuant to 8 C.F.R. § 1292.1(f). A Request to Appear filed by a person specified under 8 U.S.C. § 1367(a)(1) will not be considered.

Attribution: Should the Board decide to publish a decision, the Board may, at its discretion, name up to three attorneys or representatives. If you wish a different set of three names or you have a preference on the order of the three names, please specify the three names in your Request to Appear and brief.

Clerk's Office Contact and Filing Address:

To send by courier or overnight delivery service, or to deliver in person:

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Business hours: Monday through Friday, 8:00 a.m. to 4:30 p.m.

Fee: A fee is not required for the filing of a Request to Appear and amicus brief.

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

	)
In re:	)
	)
Amicus Invitation No. 17-01-05	)
	)
	)

MOTION OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION, HEARTLAND ALLIANCE'S NATIONAL IMMIGRANT JUSTICE CENTER, IMMIGRANT DEFENSE PROJECT, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND UNIVERSITY OF HOUSTON LAW CENTER IMMIGRATION CLINIC FOR LEAVE TO APPEAR AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

Pursuant to 8 C.F.R. § 1292.1(d) and Rule 2.10 of the Board of Immigration Appeals Practice Manual, proposed *amici curiae* American Immigration Lawyers Association, Heartland Alliance's National Immigrant Justice Center, Immigrant Defense Project, National Association of Criminal Defense Lawyers, and University of Houston Law Center Immigration Clinic respectfully move the Board of Immigration Appeals ("BIA" or "Board") for leave to submit the enclosed brief in response to Amicus Invitation No. 17-01-05. Respondent's counsel has consented to this request.

Amicus Invitation No. 17-01-05 presents two questions of great importance to the public: 1) whether conviction under 18 U.S.C. § 4, misprision of a felony, is categorically a crime involving moral turpitude ("CIMT"), and 2) whether the Board may retroactively apply a decision that 18 U.S.C. § 4 is categorically a CIMT, should the Board decide that misprision is categorically a CIMT. The Board's decision in this case has the potential to dramatically impact how noncitizen defendants choose to resolve their cases where they have been charged under 18 U.S.C. § 4; how criminal defense and immigration attorneys advise noncitizen defendants who have been charged under 18 U.S.C. § 4; how criminal defense attorneys and immigration attorneys assess whether a conviction is a CIMT under the decisions of the federal courts and the Board; and the impermissibility of retroactively applying new rules fashioned through agency adjudication.

In the enclosed brief, proposed *amici* urge the Board to conclude that conviction under 18 U.S.C. § 4 is not categorically a CIMT. The least-acts-criminalized under 18 U.S.C. § 4 do not involve moral turpitude because they do not require an intent to conceal or obstruct justice, and because they include concealing offenses that are not themselves turpitudinous. They do not involve "reprehensible conduct" or "a culpable mental state," thereby satisfying neither of the

requisite elements to be a CIMT. *Matter of Silva-Trevino III*, 26 I&N Dec. 826, 832 (BIA 2016). Proposed *amici* urge the Board to adopt the position of the Ninth Circuit in *Robles-Urrea v. Holder*, 678 F.3d 702 (9th Cir. 2012), and hold that conviction under 18 U.S.C. § 4 is not categorically a CIMT.

If the Board adheres to its current position in *Matter of Robles-Urrea*, 24 I&N Dec. 22 (BIA 2006), that conviction under 18 U.S.C. § 4 is categorically a CIMT, that holding may not be applied retroactively to convictions prior to *Robles-Urrea*'s issuance in 2006. Proposed *amici* urge the Board to adopt the federal court-recognized presumption against retroactive application of rules fashioned through agency adjudication. *See, e.g.*, *De Niz Robles v. Lynch*, 803 F.3d 1165, 1172 (10th Cir. 2015); *Velasquez-Garcia v. Holder*, 760 F.3d 571, 579 (7th Cir. 2014).

Proposed *amici* also urge the Board to recognize that where there has been an existing rule in place regarding immigration adjudications, including the immigration consequences of a criminal conviction, there is *per se* reliance on that decision—a significant factor in the test for impermissibility of retroactive application of a new rule. *Cf. Retail, Wholesale and Department Store Union, AFL–CIO v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972) (stating the standard for permitting retroactivity widely adopted by the federal courts).

Proposed *amici* are immigrants' rights and criminal defense not-for-profit organizations and law school clinics who regularly represent and advise noncitizens in criminal and immigration proceedings. Proposed *amici* appear regularly before the U.S. Supreme Court, Courts of Appeals, and the Board, on issues germane to the Board's invitation in this case: application of the categorical approach, determining whether a conviction is for a CIMT, the treatment of federal criminal statutes in criminal prosecutions, and retroactivity in immigration adjudications. *See, e.g.*, *Mathis v. United States*, 136 S. Ct. 2243 (2016); *Luna-Torres v. Lynch*,

135 S. Ct. 2918 (2015); *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001); *Matter of Silva Trevino III*, 26 I&N Dec. 826 (BIA 2016).

Proposed *amicus* **American Immigration Lawyers Association ("AILA")** is a national organization comprised of more than 14,000 lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to promote reforms in the laws; to facilitate the administration of justice; and to elevate the standard of integrity, honor, and courtesy of those appearing in representative capacity in immigration, nationality and naturalization matters. AILA's members practice regularly before the Department of Homeland Security and before the Executive Office for Immigration Review, as well as before the United States District Courts, Courts of Appeals, and Supreme Court, often on a *pro bono* basis. In this capacity, many of AILA's constituent lawyer-members represent foreign nationals who will be significantly affected by this case.

Proposed *amicus* **Heartland Alliance's National Immigrant Justice Center ("NIJC")** is a not-for-profit organization providing legal education and representation to more than 10,000 low-income immigrants annually. NIJC represents and counsels asylum seekers, refugees, detained immigrant adults, children, and families, and other noncitizens facing removal and family separation. Their advocacy includes survivors of domestic violence, human trafficking, and other violent crime. NIJC appears frequently before the federal courts on important issues impacting the rights of immigrants in the United States. NIJC seeks to promote human rights and access to justice for immigrants, refugees, and asylum seekers nationwide.

Proposed *amicus* **Immigrant Defense Project ("IDP")** is one of the nation's leading non-profit organizations with specialized expertise in the interrelationship of criminal and

immigration law. IDP specializes in advising and training criminal defense and immigration lawyers nationwide, as well as immigrants themselves, judges, and policymakers, on issues involving the immigration consequences of criminal convictions.

Proposed *amicus* **National Association of Criminal Defense Lawyers ("NACDL")** is a not-for-profit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous *amicus* briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has a significant interest in whether conviction under 18 U.S.C. § 4 is a CIMT under the categorical approach, and protections against the retroactive application of new immigration rules to past conduct, which are the central issues addressed in this brief. NACDL urges the Board to fortify those rights.

Proposed *amicus* **University of Houston Law Center Immigration Clinic ("the Clinic")** advocates on behalf of immigrants in a broad range of legal proceedings before the immigration and federal courts and the Department of Homeland Security, and collaborates with other immigrant and human rights groups on projects that advance the cause of social justice for immigrants. Under the direction of law school professors who practice and teach in the field of

immigration and nationality law, the Clinic provides legal training to law students and representation in asylum cases on behalf of victims of torture and persecution, victims of domestic violence, human trafficking and crime, children and those fleeing civil war, genocide and political repression including representation of detained and non-detained individuals in removal proceedings.

For the aforementioned reasons, proposed *amici* respectfully request leave of the Board to file the accompanying brief in support of Respondent.

Dated: March 8, 2016

Respectfully submitted,

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

In re:

Amicus Invitation No. 17-01-05

BRIEF OF *AMICI CURIAE* AMERICAN IMMIGRATION LAWYERS ASSOCIATION, HEARTLAND ALLIANCE'S NATIONAL IMMIGRANT JUSTICE CENTER, IMMIGRANT DEFENSE PROJECT, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND UNIVERSITY OF HOUSTON LAW CENTER IMMIGRATION CLINIC IN SUPPORT OF RESPONDENT

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INTRODUCTION AND ISSUES PRESENTED[1]

On January 5, 2017, the Board of Immigration Appeals ("BIA" or "Board)" issued an invitation to interested members of the public to file *amicus curiae* briefs addressing two questions: 1) whether conviction for misprision of a felony under 18 U.S.C. § 4 is categorically a crime involving moral turpitude ("CIMT"), and 2) if the Board adheres to its current position that the conviction is categorically a CIMT, *see Matter of Robles-Urrea*, 24 I&N Dec. 22 (BIA 2006), whether the application of such precedent would be impermissibly retroactive to convictions for acts committed before the Board issued *Robles-Urrea*. Proposed *amici* immigrants' rights and criminal defense not-for-profit organizations and law school clinics respectfully submit this brief to assist the Board in adjudicating these two issues of great importance to the administration of the nation's immigration laws.

STATEMENT OF INTEREST OF *AMICI CURIAE*

Proposed *amici curiae* are immigrants' rights and criminal defense not-for-profit organizations and law school clinics.[2] *Amici* appear regularly before the U.S. Supreme Court, Courts of Appeals, and the Board, on issues germane to the Board's invitation in this case: application of the categorical approach, determining whether a conviction is for a CIMT, the treatment of federal criminal statutes in criminal prosecutions, and retroactivity in immigration adjudications. *See, e.g.*, *Mathis v. United States*, 136 S. Ct. 2243 (2016); *Luna-Torres v. Lynch*, 135 S. Ct. 2918 (2015); *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001); *Matter of Silva-Trevino III*, 26 I&N Dec. 826 (BIA 2016).

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[1] University of Houston Law Center Immigration Clinic students Rebecca Chavez and Edwin Villa contributed research and writing to this brief.

[2] *See* Motion for Leave to Appear as *Amici Curiae*, submitted herewith, for additional information about proposed *amici*.

As organizations that represent noncitizens in criminal and immigration proceedings, and advise noncitizens about the immigration consequences of criminal dispositions, *amici* have a significant interest in the questions presented in the Board's *amicus* invitation. The questions of whether a conviction constitutes a CIMT for immigration purposes, and whether a new rule established through agency adjudication may be applied retroactively, have the potential to dramatically affect the functioning of the immigration and criminal justice systems in the United States, including dispositions in state and federal criminal prosecutions, and removability and eligibility for relief from removal for substantial categories of noncitizens.

SUMMARY OF ARGUMENT

Regarding the first question in the Board's amicus invitation, conviction under 18 U.S.C. § 4 is not categorically a CIMT. The least-acts-criminalized under the misprision statute do not involve moral turpitude because they do not require an intent to conceal or obstruct justice, and because they include concealing offenses that are not themselves turpitudinous. As the Ninth Circuit has observed, it would make scant sense to hold a noncitizen liable for concealing conduct that would not trigger immigration consequences if he or she had been the principal offender. The Board should adopt the position of the Ninth Circuit in *Robles-Urrea v. Holder*, 678 F.3d 702 (9th Cir. 2012), and issue a published decision withdrawing from its existing precedent in *Matter of Robles-Urrea*.

Regarding the second question, if the Board adheres to its position in *Matter of Robles-Urrea*, it may not retroactively apply the decision to acts committed prior to its issuance in 2006. The Supreme Court and Courts of Appeals strongly disfavor retroactive application of the laws, including in the immigration context. Several Courts of Appeals recognize a presumption against retroactivity in cases of adjudicative rulemaking—the mode of rulemaking the Board is

undertaking in this case—which the Board should likewise adopt. The factors the federal courts and the Board consider in determining the impermissibility of retroactive application do not rebut that presumption in this case. If this Court continues to find that 18 U.S.C. § 4 is categorically a CIMT, it must then recognize and adopt the presumption against retroactivity in adjudicative rulemaking and find the presumption unrebutted in this case.

ARGUMENT

I. CONVICTION FOR MISPRISION OF A FELONY UNDER 18 U.S.C. § 4 IS NOT CATEGORICALLY A CRIME INVOLVING MORAL TURPITUDE

A. This Board Applies The Categorical Approach To Determine Whether A Conviction Is For A Crime Involving Moral Turpitude

For more than a century, courts have applied the categorical approach when deciding whether a conviction constitutes a CIMT for immigration purposes. *See, e.g.*, *United States ex rel. Mylius v. Uhl*, 203 F. 152 (S.D.N.Y. 1913), *aff'd* 210 F. 860 (2d Cir. 1914); *United States ex rel. Robinson v. Day*, 51 F.2d 1022 (2d Cir. 1931). The Board formally adopted this position in 2016 in *Silva-Trevino III*. 26 I&N Dec. at 830. Under the categorical approach, the adjudicator compares "the elements of the crime of conviction" with the elements of the "generic offense" in the immigration laws (*i.e.*, the generic definition of a CIMT). *Mathis*, 136 S. Ct. at 2247-48. If the elements of the statute of conviction "are the same as, or narrower than, those of the generic offense, the conviction is categorically an immigration offense. *Id.* at 2248. "But if the [statute] of conviction covers any more conduct than the generic offense, then it is" *not* an immigration offense. *Id.* Under the categorical approach, the particulars of the noncitizen's conduct are never subject to review. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013). There is a

presumption that the noncitizen's "conviction rested upon nothing more than the least of the acts criminalized." *Id.* (internal quotation and brackets omitted).[3]

Under the decisions of the federal courts and the Board, the generic definition of a CIMT is "generally" an offense 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." *Silva-Trevino III*, 26 I&N Dec. at 833 (internal quotation omitted). *See also Efstathiadis*, 752 F.3d at 595 ("Whether a prior conviction constitutes a CIMT turns on whether the crime is inherently base, vile, or depraved.") (internal quotation omitted). "To involve moral turpitude, a crime requires two essential elements: reprehensible conduct and a culpable mental state." *Silva-Trevino III*, 26 I&N Dec. at 832 (citing *Nino v. Holder*, 690 F.3d 691, 695 (5th Cir. 2012)). The least-acts-criminalized under the misprision statute satisfy neither element. Therefore, the conviction is not categorically a CIMT.

B. The Least-Acts-Criminalized Under 18 U.S.C. § 4 Do Not Involve Moral Turpitude

The misprision statute is a broadly written and applied statute that reaches conduct that does not meet the generic definition of a CIMT. The elements of the misprision offense do not require an intent to conceal, or obstruct or interfere with the administration of justice. The elements reach a range of motives for engaging in conduct that conceals the commission of an

[3] The categorical approach sometimes permits application of a "realistic probability" standard for identifying the least-acts-criminalized under a statute. *Moncrieffe*, 133 S. Ct. at 1685. There is discord among the Circuits and the Board as to whether the standard applies to questions of CIMTs. *See Silva-Trevino III*, 26 I&N Dec. at 831-32. As the Board acknowledged in *Silva-Trevino III*, the Second Circuit, where the Respondent's case arises, has long applied the categorical approach in CIMT adjudications without applying the realistic probability standard. 26 I&N Dec. at 832 (citing *Efstathiadis v. Holder*, 752 F.3d 591, 595 (2d Cir. 2014)). Regardless, though, the issue does not present in this case. Both the statutory text of 18 U.S.C. § 4 and published case law establish that the minimum conduct punishable is beyond the generic definition of a CIMT without the need for any further realistic probability showing.

offense, all of which lack the culpable mental state and degree of reprehensibility required for a conviction to constitute a CIMT. The statutory text of the federal misprision statute reads:

> 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. The Courts of Appeals almost universally agree that the crime's elements are: 1) the principal committed and completed the alleged felony; 2) defendant had full knowledge of that fact; 3) defendant failed to notify the authorities; and 4) defendant took steps to conceal the crime. *See United States v. Caraballo-Rodriguez*, 480 F.3d 62, 70 (1st Cir. 2007) (collecting cases). *See also United States v. Cefalu*, 85 F.3d 964, 969 (2d Cir. 1996). As the Ninth Circuit and the Board have identified, the statute's elements do not require "a specific *intent* to conceal or obstruct justice, but only *knowledge* of the felony." *Robles-Urrea*, 678 F.3d at 710. *See also Matter of Espinoza-Gonzalez*, 22 I&N Dec. 889, 893 (BIA 1999). This lack of intent is what distinguishes misprision "from other crimes of concealment" and what renders misprision a broader statute than the generic definition of a CIMT. *Robles-Urrea*, 678 F.3d at 710. "Because "it is in the intent that moral turpitude inheres," the focus of the analysis is generally "on the mental state reflected" in the statute." *Efstathiadis*, 752 F.3d at 595 (quoting *Gill v. I.N.S.,* 420 F.3d 82, 89 (2d Cir. 2005)).

Moreover, the misprision statute criminalizes the concealment of felonies that are not themselves turpitudinous. As the Ninth Circuit identified in *Robles-Urrea*, it would make "scant sense," *Mellouli v. Lynch*, 135 S. Ct. 1980, 1982 (2015), for noncitizens to become removable or ineligible for relief for conviction for concealing offenses that themselves would not trigger those same immigration consequences. *Robles-Urrea*, 678 F.3d at 710-11. For this additional

reason, the misprision statute reaches conduct that falls outside the generic definition of a CIMT, and under the categorical approach the conviction is not for a CIMT.

1. Misprision of a felony lacks the culpable mental state required for a conviction to be a CIMT

To constitute a CIMT, a criminal statute must require a "culpable mental state" to sustain conviction. *Silva-Trevino III*, 26 I&N Dec. at 832. Both the Ninth Circuit and the Board have examined the contours of the misprision statute and determined that they do not require a culpable mental state.

In *Espinoza-Gonzalez*, the Board examined the misprision statute to determine whether its elements categorically correspond to conduct that involves the obstruction of justice. In doing so, the Board concluded that the misprision statute is far broader than an obstruction of justice offense, and drew a sharp distinction between concealing a crime and obstructing justice. In contrasting the misprision statute with obstruction of justice offenses, the Board found that the misprision statute "does not require as an element either active interference with proceedings of a tribunal or investigation, or action or threat of action against those who would cooperate in the process of justice[;] does not require proof that the defendant acted with a motive, or even knowledge, of the existence of the work of an investigation or tribunal[;]" and does not require proof "that the defendant had any contact with, was influenced by, or acted with any motive toward the participants in the underlying crime." *Espinoza-Gonzalez*, 22 I&N Dec. at 893. The Board continued that misprision "lacks the critical element of an affirmative and intentional attempt, motivated by a specific intent, to interfere with the process of justice." *Id.* at 894.

The Board further held that "concealment of a crime is qualitatively different from an affirmative action to hinder or prevent another's apprehension, trial, or punishment. It is a lesser offense to conceal a crime where there is no investigation or proceeding, or even an intent to

hinder the process of justice, and where the defendant need not be involved in the commission of the crime." *Id.* at 895. The Board's analysis in *Espinoza-Gonzalez* is consistent with the range of conduct for which the Supreme Court and the Courts of Appeals permit conviction under the misprision statute. In *Branzburg v. Hayes*, 408 U.S. 665 (1972), the Supreme Court considered a collection of cases in which journalists who had witnessed criminal conduct in the course of investigating and reporting a story refused to divulge requested information to state and federal grand juries. *Id.* at 667. The Court "decline[d]" to "afford … First Amendment protection" to journalists "to conceal information relevant to commission of crime." *Id.* at 696. Citing to 18 U.S.C. § 4, the Court refused to distinguish between the duties of "citizen[s]" and "reporter[s]" to report information about criminal offenses, indicating its tacit approval that a reporter situated as those in *Branzburg* can be criminally prosecuted for misprision. *Id.* at 696-97.

Branzburg evinces the Board's conclusion in *Espinoza-Gonzalez* that misprision does not require an intent to obstruct justice, and thus lacks the requisite culpable mental state. The individuals implicated by the Court's decision in *Branzburg* do not necessarily have any intent to obstruct justice or to assist perpetrators in eluding criminal enforcement. Their interest is in maintaining the confidentiality of their sources and, consequently, their "effectiveness" as reporters." *Id.* at 670. Similarly, the Ninth Circuit recognized in *Robles-Urrea* that "[n]othing in the statute prohibiting misprision of a felony "references the specific purpose for which the concealment must be undertaken."" *Id.* at 710 (quoting *United States v. Daddano*, 432 F.2d 1119, 1129 (7th Cir. 1970)). As the Ninth Circuit concluded, the lack of purpose or culpable mental state shows that the statute does not meet the Board's mental state criteria for an offense to be a CIMT.

2. Misprision of a felony includes concealment of offenses that themselves do not involve moral turpitude

As the Board is well-aware, not all federal felonies constitute CIMTs. *E.g.*, possession of a controlled substance under 21 U.S.C. § 959(a); illegal entry under 8 U.S.C. § 1325; illegal reentry under 8 U.S.C. § 1326; fraudulent use of a social security number under 42 U.S.C. § 408(a)(7)(B), *see Arias v. Lynch*, 834 F.3d 823, 824 (7th Cir. 2016); structuring transactions to avoid a reporting requirement under 31 U.S.C. § 5324(a)(1), (3), *see Matter of L-V-C-*, 22 I&N Dec 594, 603 (BIA 1999).

Any of these offenses may serve as the object crime of concealment to sustain conviction for misprision. *See* 18 U.S.C. § 4. Principal offenders convicted under these statutes do not suffer the immigration consequences of a CIMT designation. Yet if the Board finds misprision to be categorically a CIMT, those convicted of misprision of the principal offender's offense will become deportable, inadmissible, ineligible for multiple forms of relief from removal, or ineligible for naturalization as a consequence. The Ninth Circuit focused on this "peculiar" outcome in *Robles-Urrea*, rejecting it as an "absurd result" and finding that misprision is categorically not a CIMT. *Robles-Urrea*, 678 F.3d at 711.

C. 18 U.S.C. § 4 Is Indivisible And Not Categorically A CIMT

In some circumstances, the adjudicator may apply a modified categorical approach and consult a "limited set of documents" from the noncitizen's underlying criminal case "to determine what crime, with what elements, [the] defendant was convicted of." *Mathis*, 136 S. Ct. at 2249. Those circumstances are not present here. The modified categorical approach may be applied only when the statute of conviction treats generic and non-generic conduct as "alternative" crimes (or elements) rather than alternative means of committing one crime (or element). *Id.* An "element" is "what the jury must find beyond a reasonable doubt to convict the defendant [or] what the defendant necessarily admits when he pleads guilty." *Id.* at 2248. If the statute is constructed of alternative elements rather than alternative means of committing an

offense, the adjudicator may consult the record of conviction to see if it reveals the offense of conviction. *Id.*

In this case, prosecutors charging 18 U.S.C. § 4 are not required to prove to a jury whether or not a defendant, in concealing a felony, intended to obstruct justice. The different motives for concealing a felony are alternative means of committing the offense of misprision; they are not separate crimes. *Cf. Cefalu*, 85 F.3d at 969 (identifying the elements of misprision as: "1) the principal committed and completed the alleged felony; 2) defendant had full knowledge of that fact; 3) defendant failed to notify the authorities; and 4) defendant took steps to conceal the crime"). Half of a jury may conclude a defendant intended to obstruct justice, while the other half may conclude the same defendant had no intent to obstruct, and conviction under 18 U.S.C. § 4 can still be sustained. The misprision statute is indivisible, and thus categorically not a CIMT.

II. IF THE BOARD ADHERES TO ITS POSITION IN *ROBLES-URREA*, THIS NEW POSITION REVERSING ITS OVER FIFTY YEAR OLD PRECEDENT IN *MATTER OF SLOAN* MAY NOT BE APPLIED RETROACTIVELY

Should the Board maintain its shift in position from *Matter of Sloan,* 12 I&N Dec. 840, 848 (A.G. 1968, BIA 1966) to *Robles-Urrea* on the question of whether conviction under 18 U.S.C. § 4 is categorically a CIMT, the Board may not apply its decision retroactively to convictions entered prior to 2006. The Supreme Court and federal Courts of Appeals strongly disfavor retroactivity, including in the immigration context. This disfavoring of retroactivity extends not only to legislative rulemaking but also to agency adjudicative rulemaking. Several Courts of Appeals have adopted a formal presumption against retroactive application of agency rules, which the Board should likewise recognize and adopt. The factors the Courts of Appeals consider when deciding whether to permit retroactive application fail to rebut that presumption

in this case. Nor do these factors otherwise permit retroactive application under the standards applied by the federal courts. The Board must follow the instructions of the judicial branch and decline to retroactively apply *Robles-Urrea* to convictions entered prior to its date of issuance in 2006.

A. The Supreme Court And The Courts Of Appeals Disfavor Retroactive Application Of New Rules Established Through Agency Adjudication Because Of Unfairness That Often Results

"Retroactivity is not favored in the law." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). This principle pervades immigration jurisprudence. *See, e.g.*, *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001). *See also Velasquez-Garcia v. Holder*, 760 F.3d 571, 579 (7th Cir. 2014) (Wood, C.J.) (citing Supreme Court precedent in *St. Cyr* and *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987), to describe a judicial "reluctance to impose rules retroactively" in "the immigration context"). The Supreme Court has written that "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). "[T]he principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal." *Id.*

The federal courts describe retroactivity as "'attach[ing] new legal consequences to events completed before [the] enactment.'" *Velasquez-Garcia*, 760 F.3d at 579 (quoting *Landgraf,* 511 U.S. at 270). Whether retroactive application of a new rule is allowable must "be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations." *Velasquez-Garcia*, 760 F.3d at 579 (internal quotations omitted). The federal courts are vigilant about protecting against the "retroactive effect" of "a legal rule," *id.*: application that "takes away or impairs vested rights acquired under existing laws, or creates new obligations, imposes a new duty, or attaches a new disability, in respect to transactions or

considerations already past." *Soc'y for Propagation of Gospel v. Wheeler,* 22 F.Cas. 756, 767 (C.C.D.N.H. 1814) (Story, J.) (cited in *St. Cyr*, 533 U.S. at 321).

"The appropriate standard for determining whether a legal rule may be applied retroactively depends on the source of the rule." *Velasquez-Garcia*, 760 F.3d at 579. For legislatively enacted rules, "courts presume that a rule lacks retroactive effect 'absent clear congressional intent favoring such a result.'" *Id.* (quoting *Landgraf,* 511 U.S. at 280). *See also Vartelas v. Holder,* 566 U.S. 257, 273 (2012). For judicially enacted rules, the courts presume the rule takes "full retroactive effect." *Harper v. Va. Dep't of Tax*, 509 U.S. 86, 97 (1993). Agency adjudications "are presumed not to have retroactive effect" because they are "legislative and quasi-legislative," *Velasquez-Garcia*, 760 F.3d at 579, a presumption this Board should recognize and adopt. The Tenth Circuit has joined the Seventh in expressly adopting this view:

> [T]he more an agency acts like a legislator—announcing new rules of general applicability—the closer it comes to the norm of legislation and the stronger the case becomes for limiting application of the agency's decision to future conduct. The presumption of prospectivity attaches to Congress's own work unless it plainly indicates an intention to act retroactively. *That same presumption, we think, should attach when Congress's delegates seek to exercise delegated legislative policymaking authority: their rules too should be presumed prospective in operation unless Congress has clearly authorized retroactive application*.

De Niz Robles v. Lynch, 803 F.3d 1165, 1172 (10th Cir. 2015) (Gorsuch, J.) (emphasis added). The Second Circuit in *Lugo v. Holder* indicated that it favors this approach: "[T]he gravitational pull of … constitutional norms—the rights of fair notice and effective assistance of counsel—may provide a reason not to apply, retroactively, new agency rules that establish deportation as a consequence of certain crimes." 783 F.3d 119, 122 (2d Cir. 2015). In the context of rulemaking "through adjudicatory action, retroactivity must be balanced against the mischief of producing a

result which is contrary to a statutory design or to legal and equitable principles." *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 951 (9th Cir. 2007) (citing *Heckler v. Cmty. Health Servs. of Crawford County, Inc.,* 467 U.S. 51, 60 n. 12 (1984); *SEC v. Chenery Corp.,* 332 U.S. 194, 203 (1947)). The Supreme Court required this protection in *St. Cyr* out of concern that a legislative or quasi-legislative body's "responsivity [*sic*] to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." *St. Cyr,* 533 U.S. at 315. The federal courts offer no deference to the agency's decision of whether retroactive application is permitted. *See Velasquez-Garcia*, 760 F.3d at 578-79 (citing *St. Cyr*, 533 U.S. at 320 n.45); *Retail, Wholesale and Department Store Union, AFL–CIO v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972).

B. The Factors The Federal Courts Consider In Deciding Whether Retroactive Application Of An Agency Rule Is Permissible Preclude Retroactivity In This Case

The Courts of Appeals have "fleshed out" a "test" of "five non-exhaustive factors for determining when an agency" may rebut the presumption against "retroactive application of an adjudicatory decision." *Miguel-Miguel*, 500 F.3d at 951. The majority of Courts of Appeals, including the Second Circuit, where the Respondent's case arises, apply the test originally created by the D.C. Circuit in the seminal *Retail, Wholesale and Department Store Union, AFL–CIO v. NLRB* case:

> (1) whether the case is one of first impression,
>
> (2) whether the new rule presents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law,
>
> (3) the extent to which the party against whom the new rule is applied relied on the former rule,
>
> (4) the degree of the burden which a retroactive order places on a party, and

(5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

466 F.2d 380 (D.C. Cir. 1972) . *See also Lugo*, 783 F.3d at 121 (citing *N.L.R.B. v. Oakes Mach. Corp.*, 897 F.2d 84, 90 (2d Cir. 1990)); *De Niz Robles v. Lynch*, 303 F.3d 1165 (10th Cir. 2015); *Velasquez-Garcia v. Holder*, 760 F.3d 571, 581 (7th Cir. 2014); *Miguel-Miguel*, 500 F.3d at 951; *McDonald v. Watt*, 653 F.2d 1035, 1042 (5th Cir. 1981). "Like most such unweighted multi-factor lists, this one serves best as a heuristic; no one consideration trumps the others." *Velasquez-Garcia*, 760 F.3d at 581. "[T]he totality of the circumstances are to be taken into account in order to strike a just balance." *Retail, Wholesale*, 466 F.2d at 392.

An agency must reach an extraordinarily high bar to overcome the presumption against retroactivity, given the profound unfairness in imposing immigration consequences on people under rules that did not previously exist. As a review of the *Retail, Wholesale* factors show, and as the Second Circuit has indicated, that bar is not met here and retroactivity is not permitted.

1. As the Second Circuit Recognized in *Lugo*, the Question of Whether Conviction under 18 U.S.C. § 4 Is Categorically a CIMT Is Not a Question of First Impression

The first *Retail,Wholesale* factor asks whether the question is one of first impression. The Second Circuit has already held in *Lugo* that this first factor "clearly" weighs against retroactive application of *Robles-Urrea*. *Lugo*, 783 F.3d at 121. The question of whether conviction under 18 U.S.C. § 4 is categorically a CIMT "is not one of first impression." *Id.* In *Lugo*, the Second Circuit assessed the BIA's changing position on this question, finding that "[o]riginally, in *Matter of Sloan*, 12 I&N Dec. 840, 848 (A.G. 1968, BIA 1966), the Board held that misprision of a felony was not a CIMT," but "switched" its view in *Robles-Urrea*. *Lugo*, 783 F.3d at 120.

There is little more to say about this factor, as it is clear that BIA addressed this issue previously in *Sloan*, and so its renewed consideration in *Robles-Urrea* was not one of first impression.

2. *Robles-Urrea* Was an Abrupt Departure from the Board's Nearly 50-Year-Old Precedent In *Matter of Sloan*

The second factor asks "whether the new rule presents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area." *Lugo*, 783 F.3d at 121. The Second Circuit has all but ruled conclusively that this factor weighs against retroactivity. The Court observed in *Lugo* that "the Board" itself takes the position that "the prior rule" from *Sloan* "remained valid until 2006." *Id.* (citing *Robles-Urrea*, 24 I&N Dec. at 25 ("We therefore conclude that *Matter of Sloan* … remained binding authority on the question whether a violation of 18 U.S.C. § 4 is a crime involving moral turpitude.")). The Department of Homeland Security does not dispute this point in its brief, and also characterizes *Robles-Urrea* as overruling its precedent in *Sloan*, and *Sloan* as holding that conviction for misprision of a felony is not a CIMT. *See* DHS Supp. Br. at 5, n.2.

Where a precedential decision directly addresses the legal question at issue, there has been a *per se* showing that the question is "settled," and any change in position by the agency is an "abrupt departure." *Lugo*, 783 F.3d at 121. *See also Velasquez-Garcia*, 760 F.3d at 576 (finding a sharp departure where the Board had previously issued only "non-precedential" decisions and where "the only court of appeals to consider [those] decisions[]elected to follow their approach").

With respect to 18 U.S.C. § 4, in between *Sloan* and *Robles-Urrea*, the Board had issued an unpublished decision contradicting *Sloan*. *Matter of Aoun*, 2004 WL 2952812 (BIA Nov. 10, 2004). As a result, the Second Circuit asked the BIA to state its position on the specific question of "whether defendants should be treated as warned by opinions marked as non-precedential in

the face of published Board precedent to the contrary." 783 F.3d at 121-22. The answer to this question must be no. The Second Circuit guided the Board's inquiry, "point[ing] the Board to … analysis from the Supreme Court" in *Padilla v. Kentucky*, 559 U.S. 356 (2010), "that raises constitutional concerns with the retroactive use of deportation as a collateral consequence to a guilty plea." *Lugo*, 783 F.3d at 122. It would be unreasonable of the Board to expect that many of the noncitizens and attorneys representing noncitizens facing charges under 18 U.S.C. § 4 did not rely on *Sloan*'s holding. For convictions entered prior to 2004, *Aoun* had not yet been issued, and so reasonable reliance on *Sloan* must be presumed. For convictions entered between 2004 and 2006, the Board must acknowledge that many noncitizens and their attorneys who sought to mitigate immigration consequences knew of *Sloan* and its holding, as *Sloan* has always been publicly available as a precedential decision, but never knew about *Aoun*, which in any event is an unpublished case and therefore not legally binding. *See* BIA Practice Manual, § 1.4(d)(ii) (unpublished decisions "are *not* considered precedent").

Where a precedential decision remains in effect, unpublished agency decisions do not disrupt the conclusion that for purposes of retroactivity analysis, the question is settled and a change in the agency's position is an abrupt departure.

3. In Resolving Federal Criminal Charges to Mitigate Immigration Consequences, Noncitizens Have Long-Relied on *Matter of Sloan*'s Holding That 8 U.S.C. § 4 Is Not a Crime Involving Moral Turpitude

"The third [factor] examines the extent to which the party against whom the new rule is applied may have relied on the former rule." *Velasquez-Garcia*, 760 F.3d at 582. "Importantly, the critical question is not whether a party actually relied on the old law, but whether such reliance would have been reasonable." *Id.* (citing *Vartelas,* 566 U.S. at 273). As the first two factors demonstrate, it was the state of the law prior to 2006 that conviction under 18 U.S.C. § 4

was not a CIMT except in the Eleventh Circuit. *See* § II.B.1, 2, *supra*. The Board must conclude there has been reliance where there was an "existing rule[] limiting deportation at the time [the noncitizen] pled guilty." *Lugo*, 783 F.3d at 122. *See also Nunez-Reyes v. Holder*, 646 F.3d 684, 696 (9th Cir. 2011) (en banc) (citing *St. Cyr*, 533 U.S. at 323 n. 50) ("Even if the defendant were not initially aware of" dispositive case law—like *Sloan*—"competent defense counsel … would have advised him [or her] concerning the [decision's] importance.").

In *Lugo*, the Second Circuit asked the BIA on remand to state its position on the question of "whether a defendant should automatically be assumed to have relied on existing rules limiting deportation at the time she pled guilty to a crime where that guilty plea, because of a change in rules, subsequently becomes a basis for deporting her." 783 F.3d at 122. The Court cited to *St. Cyr*'s statement that "[t]here can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions." *St.* Cyr, 533 U.S. at 322.

This Board should adopt a rule where "a defendant [is] automatically … assumed to have relied on existing rules limiting deportation at the time she pled guilty to a crime." *Lugo*, 783 F.3d at 122. To hold otherwise would effectively "hoodwink" noncitizen defendants "into waiving their constitutional rights on the promise of no legal consequences and" then impose "the particularly severe penalty of removal" through retroactive application of a new rule. *Nunez-Reyes*, 646 F.3d at 694 (internal quotation omitted). "The potential for unfairness in … retroactive application" would be "significant." *Id.* (citing *St. Cyr*, 533 U.S. at 323). Indeed, the Ninth Circuit has articulated the "reasonable assumption that Congress" did not "intend" this. *Id.* at 694.

It would be "contrary to familiar considerations of fair notice, reasonable reliance, and settled expectations to" deprive a noncitizen of the "possibility of relief" where a prosecutor has "received the benefit of" a plea agreement that was "likely facilitated by the" noncitizen's belief in .. continued eligibility for … relief." *St. Cyr*, 533 U.S. at 323.

4. As the Second Circuit Recognized in *Lugo*, the Burden a Retroactive Order Would Place on Noncitizens in the Respondent's Circumstances Would Be Massive

The Second Circuit held in *Lugo* that this fourth factor "clearly favor[s]" the noncitizen, describing "the degree of burden" as "massive (removal from the United States, with life-changing consequences)." 738 F.3d 121. The Supreme Court has also "long recognized the obvious hardship imposed by removal." *Velasquez-Garcia*, 760 F.3d at 584. *See also Vartelas*, 566 U.S. at 268 ("recognize[ing] the severity of [the] sanction" of deportation); *Fong Yue Ting v. United States,* 149 U.S. 698, 740 (1893) (describing deportation as a "penalty"); *Fong Haw Tan v. Phelan,* 333 U.S. 6, 10 (1948) (describing "deportation" as a "drastic measure").

And as the Board is well-aware, categorizing a conviction as a CIMT widely impacts vulnerability to deportation for whole categories of immigrants. If the Board concludes that conviction under 18 U.S.C. § 4 is categorically a CIMT and applies that position retroactively to convictions entered prior to 2006, the Board's decision will render lawful permanent residents deportable, and in some instances ineligible for cancellation of removal (*see* INA §§ 237(a)(2)(A)(i)-(ii), 240A(a)(2), 240A(d)(1)(b)); render parents, spouses, and children of U.S. citizens and lawful permanent residents ineligible for cancellation of removal, including individuals who have been battered (*see* INA §§ 240A(b)(1)(C), 240A(b)(2)(A)(iv)); render family members of U.S. citizens ineligible for adjustment of status without a discretionary waiver (*see* INA §§ 212(a)(2)(A)(i)(I)); and prevent longtime lawful permanent residents from

traveling abroad without facing removal proceedings when they attempt to return to their lives in the United States (*see id.*). "[T]hat burden is immense." *Velasquez-Garcia*, 760 F.3d at 584. *Accord Miguel–Miguel,* 500 F.3d at 952 ("[D]eportation alone is a substantial burden that weighs against retroactive application of an agency adjudication.").

5. The Statutory Interest in Retroactive Application of *Robles-Urrea* Is Negligible, Particularly When Compared to the Reliance of Noncitizens on *Matter of Sloan* in Seeking to Continue Their Established Lives in the United States

The statutory interest in enforcing the INA's CIMT provisions would be "substantially served by prospective application." *Miguel-Miguel*, 500 F.3d at 952. "[C]ourts have not infrequently declined to enforce administrative orders when in their view the inequity of retroactive application has not been counterbalanced by sufficiently significant statutory interests." *Retail, Wholesale*, 466 F.2d at 390 (collecting cases from the First, Sixth, and Eighth Circuits). Here there is no sufficiently significant statutory interest to mitigate the unfairness of applying *Robles-Urrea* retroactively.

The Second Circuit and Ninth Circuits have likewise established high bars for an agency to demonstrate a statutory interest justifies retroactive application to conduct that previously violated no rule. The Second Circuit has permitted the National Labor Relations Board to apply a new rule retroactively to help avoid "tremendous instability," *W.P.I.X., Inc. v. N.L.R.B.*, 870 F.2d 858, 867 (2d Cir. 1989)), and where the new rule "stems from" the relevant statute's "central concerns." *Ewing v. N.L.R.B.*, 861 F.2d 353, 362 (2d Cir. 1988). The Board cannot plausibly rule that prospective application of *Robles-Urrea* would create instability of any kind, or that the holding that misprision of a felony is a CIMT stems from the INA's central concerns. In an immigration case in many ways similar to the Respondent's, the Ninth Circuit found no sufficient statutory interest in the INA for retroactively applying an altered methodology for

determining whether a drug offense is a "particularly serious crime" for purposes of barring withholding of removal. *Miguel-Miguel*, 500 F.3d at 950-51. Under the Ninth Circuit's standard, the outcome here should be the same.

CONCLUSION

The Board should take this opportunity to withdraw from its position in *Matter of Robles-Urrea*, and recognize in a published opinion that conviction for misprision of a felony under 18 U.S.C. § 4 is not categorically a CIMT. Should the Board adhere to its position in *Robles-Urrea*, the Board may not retroactively apply the decision to conduct prior to the Board's decision. In deciding this issue, the Board should adopt the federal court-recognized presumption against retroactive application of rules fashioned through agency adjudication.

DATED this 8th day of March, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Brief of *Amici Curiae* via first class United States mail, postage-prepaid, to:

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