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

Amicus Invitation No. 17-01-05 In Removal Proceedings	Case No.: Redacted

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

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I. INTEREST OF AMICUS CURIAE

On behalf of the Federation for American Immigration Reform (FAIR), the Immigration Reform Law Institute (IRLI) respectfully responds to the request by the Board of Immigration Appeals (Board) on August 8, 2016, for supplemental briefing in this matter. FAIR is a nonprofit, public-interest, membership organization of concerned citizens and legal residents who share a common belief that our nation's immigration policies must be reformed to serve the national interest. Specifically, FAIR seeks to improve border security, stop illegal immigration, and promote immigration levels consistent with the national interest. The Board has solicited *amicus* briefs from FAIR for more than twenty years. *See, e.g., In-re-Q- --M-T-*, 21 I. & N. Dec. 639 (BIA 1996) (citing Timothy J. Cooney, Esquire, Washington, D.C., amicus curiae for FAIR and noting "The Board acknowledges with appreciation the brief submitted by amicus curiae.").

II. ISSUES PRESENTED

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

- Does the offense of misprision of a felony under 18 U.S.C. § 4 categorically qualify as a crime involving moral turpitude? Please address *Matter of Robles-Urrea*, 24 I & N Dec. 22 (BIA 2006) *rev, Robles-Urrea v. Holder*, 678 F.3d 702 (9th Cir. 2012); and *Itani v. Ashcroft*, 298 U.F3d 1213 (11th Cir. 2002).
- 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?

III. SUMMARY OF THE FACTS

Amicus FAIR contacted counsel for the Respondent via phone and e-mail on three occasions. Counsel did not respond to Amicus FAIR's request for factual information related to the case.

IV. SUMMARY OF THE ARGUMENT

Under 18 U.S.C. § 4, misprision of a felony requires the active concealment of felonious activity. Misprision of a felony meets the definition of a crime involving moral turpitude because it fulfills both of the required elements of the crime involving moral turpitude analysis. First, it involves reprehensible conduct by affirmatively concealing serious criminal behavior. What is more, it involves dishonesty and breaches a citizen's duty not only to the government, but to his fellow citizen. Second, it fulfills the intent requirement because the individual acts with knowledge that the underlying felony has occurred and that he or she is assisting in concealing that felony.

In its 2006 *Matter of Robles-Urrea* decision, the Board found that misprision of a felony is a crime involving moral turpitude. This finding can be applied to conduct that occurred prior to the decision because Board and Circuit case law from 1968 forward have supported the conclusion that misprision of a felony is a crime involving moral turpitude.

V. ARGUMENT

According to the Immigration and Nationality Act (INA), an "alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of . . . a crime involving moral turpitude . . ." is inadmissible. 8 U.S.C. § 1182(a)(2)(A)(i)(I). An alien who "is convicted of a crime involving moral turpitude committed within five years . . . after the date of admission . . . for which a sentence of one year or longer may be imposed" is

deportable. 8 U.S.C. § 1227(a)(2)(a)(i). Committing a crime involving moral turpitude (CIMT) can also bar the adjustment of status to lawful permanent resident status, or a grant of temporary protected status. *See* 8 U.S.C. § 1255; 8 U.S.C. § 1254(c)(2)(A)(iii)(I).

A. Misprision of a Felony Is a Crime Involving Moral Turpitude Because It Fulfills Each of the Elements Required by *Matter of Silva-Trevino.*

The term, crime involving moral turpitude, has not been specifically defined in the INA. The Board applies the categorical approach to determine if the conviction qualifies as a CIMT. *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (BIA 2016) (responding to the Attorney General's request to develop a "uniform standard" of analysis for CIMTs). The categorical approach examines the definition of the crime to see if it fits within the generic definition of a CIMT. *See e.g., Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013) (citing *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007) (applying the categorical approach to aggravated felonies)).[1] The generic offense must fulfill two elements to qualify as a CIMT: (1) reprehensible conduct and (2) a culpable mental state. *Matter of Silva-Trevino*, 26 I. & N. Dec. at 834 (citing *Nino v. Holder*, 690 F.3d 691, 695 (5th Cir. 2012)).

Under 18 U.S.C. § 4, misprision of a felony is defined as

> 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.

Misprision of felony encompasses verbal statements as well as actions. A variety of affirmative physical activities have been found by numerous courts to constitute misprision of a felony. *See e.g., United States v. Gravitt*, 590 F.2d 123 (5th Cir. 1979)

[1] A discussion of generic crimes involving "multiple alternative elements" would utilize the modified categorical approach. *Mathis v. United States*, 136 S. Ct. 2243 (2016). Misprision of a felony does not have alternative elements and thus the modified categorical approach is inapplicable.

(assisting in the concealment of bank robbers and allowing the robbers to use his apartment to divide money); *United States v. Davila*, 698 F.2d 715 (5th Cir. 1983) (holding payoff money until false testimony is given in court is active concealment); *Lancey v. United States*, 356 F.2d 407 (9th Cir. 1966) (harboring a criminal constitutes concealment). In addition to physical acts, verbal concealment, beyond just mere silence, can constitute misprision of a felony. Specifically, lying to authorities constitutes active concealment. *United States v. Hodges*, 566 F.2d 674 (9th Cir. 1977); *United States v. Pittman*, 527 F.2d 444 (4th Cir. 1975).

To determine if the crime of misprision of a felony categorically fulfills the two elements of the CIMT definition, the Board should apply the realistic probability test. This test focuses on the minimum conduct that has a realistic probability of being prosecuted under the statute. *Matter of Silva-Trevino*, 26 I. & N. Dec. at 831-32 (finding that unless a circuit "expressly dictates otherwise[,]" the realistic probability applies to Board determinations).

In 2006, the Board determined that a conviction for misprision of a felony under 18 U.S.C. § 4 is a CIMT. *Matter of Robles-Urrea*, 24 I. & N. Dec. 22 (2006). The Ninth Circuit reversed the Board's decision by determining that categorically, misprision of a felony is not a CIMT. *Matter of Robles-Urrea*, 678 F.3d 702 (9th Cir. 2012). Prior to *Matter of Robles-Urrea*, the Eleventh Circuit has already addressed whether misprision of a felony constituted a CIMT and categorically found that it did. *Itani v. Ashcroft*, 298 F.3d 1213 (11th Cir. 2002). The court found that misprision of a felony fulfilled both the scienter and act requirements of the CIMT definition. *Id.* at 1219 (finding that misprision

of a felony breached a duty to society and that doing so knowingly fulfilled the scienter requirement).

The Eleventh Circuit got it right. Using the *Silva-Trevino* framework, misprision of a felony is a CIMT. More specifically, as will be shown below, misprision of a felony fulfills both elements of the Board's framework, that is, (1) reprehensible conduct and (2) a culpable mental state. Therefore, the Board should continue to rely on its precedent in *Matter of Robles-Urrea*, 24 I. & N. Dec. 22 (2006) and on the Eleventh Circuit's decision in *Itani v. Ashcroft*, 298 F.3d 1213 (11th Cir. 2002) rather than embrace the analysis of the Ninth Circuit in *Robles-Urrea*, 678 F.3d 702 (9th Cir. 2012) *rev'g Matter of Robles-Urrea*, 24 I. & N. Dec. 22 (2006).

1. Misprision of a felony defies the duties owed in society by actively concealing another's felonious conduct.

The first element of the Board's CIMT definition requires "reprehensible conduct." *Matter of Silva-Trevino*, 26 I. & N. Dec. at 834 (citing *Nino v. Holder*, 690 F.3d at 695). The accepted definition of reprehensible conduct is "an act of baseness, vileness, or depravity, in the private and social duties which a man owes to his fellow man or to society." S. Rpt. No. 1515 (1950) at 351; *see also Robles-Urrea v. Holder*, 678 F.3d at 708; *Itani v. Ashcroft*, 298 F.3d at 1216 (using the same definition but determining that misprision of a felony is a CIMT).

In *Matter of Robles-Urrea*, the Ninth Circuit neglected to analyze the duty that citizens owe to each other. Communities expect that when a crime occurs, individuals have a responsibility to aid law enforcement by not concealing the felony. *See Dirks v. S.E.C.*, 463 U.S. 646, 677 (stating that "misprision of a felony has long been against public policy") (citation omitted). Misprision of a felony is "gross indifference to the

duty to report known criminal behavior" and "is a badge of irresponsible citizenship." *Roberts v. United States*, 445 U.S. 552, 557-58 (1980). Because the Supreme Court considers misprision of a felony to be a "gross indifference" of public policy, it would be inconsistent and arbitrary for the Board to hold that the definition under 18 U.S.C. § 4 does not fulfill the first requirement of the CIMT definition.

Alternatively, the Board has recognized that fraudulent behavior fulfills the first element of the CIMT definition. For instance, when an individual gives misleading information to public officials, the individual has committed a CIMT. *See e.g., In Re Jurado-Delgado*, 24 I. & N. Dec. 29, 35 (BIA 2006) (citing *Matter of Flores,* 17 I&N Dec. 225, 229 (BIA 1980)). Also, "impairing and obstructing a function of a department of government by defeating its efficiency or destroying the value of its lawful operations by deceit, graft, trickery, or dishonest means is a crime involving moral turpitude." *Id.*; *see also Matter of Pinzon*, I. & N. Dec. 189, 194 (BIA 2013) (The offense of knowingly or willfully making any materially false, fictitious, or fraudulent statement to obtain a passport is a CIMT). Finally, deceit and intent to impair law enforcement is sufficient to find a conviction fulfills the CIMT elements. *Rodriguez v. Gonzales*, 451 F.3d 60, 64 (2d Cir. 2006).

Misprision of a felony requires "some affirmative act of concealment or participation in a felony." *Itani v. Ashcroft*, 298 F.3d at 1216. Such behavior is fraudulent, dishonest, and impedes the government from investigating serious crimes that put the public in danger.

While the Ninth Circuit in *Robles-Urrea v. Holder* acknowledged that crimes involving fraud can form the basis of a CIMT, the court did not analyze misprision of a

felony as a CIMT based upon fraud. 678 F.3d at 708 (stating that CIMTs include two types of crimes: "those involving fraud and those involving grave acts of baseness and depravity.") (citing *Navarro-Lopez v. Holder*, 509 F.3d 1063, 1074 (9th Cir. 2007) (Reinhardt, J. concurring for the majority). Instead, the court only focused on misprision of a felony as an act of "baseness and depravity." If the Ninth Circuit had analyzed 18 U.S.C. § 4 as a crime involving fraud, the court would have found misprision of a felony is a CIMT.

2. **Misprision of a felony fulfills the culpable mental state necessary for a CIMT because the actor must knowingly conceal the underlying felony.**

The second element of the *Silva-Trevino* analysis requires that an alien committing a CIMT have a culpable mental state. 26 I. & N. Dec. at 834 (citing *Nino v. Holder*, 690 F.3d 691, 695 (5th Cir. 2012)); *United States ex rel. Meyer v. Day*, 54 F.2d 336, 337 (2d. 1931) ("It is in the intent that moral turpitude inheres[.]"). The Board has acknowledged that different levels of scienter can fulfill the requirements of CIMT. *See Matter of Medina*, 15 I. & N. Dec. 611, 618 (BIA 1979) (finding that intent, knowledge, or recklessness fulfill the scienter requirement of the CIMT test). CIMTs require "some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness," *Matter of Silva-Trevino*, 24 I. & N. Dec. 687, 689 n.1 (AG 2008), *rev'd on other grounds, Silva-Trevino v. Holder*, 742 F.3d 197 (5th Cir. 2014); *see also Gill v. INS*, 420 F.3d 82, 89-90 (2nd 2005) (finding crimes committed knowingly or intentionally by an alien fulfill the scienter element but New York's crime of attempted reckless assault is not a CIMT). Throughout the iterations of *Silva-Trevino*, some level of scienter has been required. *See Matter of Silva-Trevino*, 26 I. & N. Dec. 550, 553 n.3 (AG 2015).

Under 18 U.S.C. § 4, an individual must have knowledge of the underlying felony and have taken some affirmative act of concealing or participating in the underlying felony. *Roberts v. United States*, 445 U.S. at 558 n.5 (citing *Branzburg v. Hayes*, 408 U.S. 665, 696 n.36 (1972)). The mere failure to report a known felony does not meet the knowledge standard required by the statute. *Itani v. Ashcroft*, 298 F.3d at 1216.

In *Matter of Robles-Urrea*, the Board found evil intent present in misprision of a felony because of the steps taken by the individual to affirmatively conceal a felony. 24 I. & N. Dec. at 27 (citation omitted). In the Ninth Circuit's later *Robles-Urrea* decision, the court focused on the finding of evil intent and declared the affirmative act of concealing the felonious conduct of another did not contain evil intent. *Id.* This analysis, even if narrowly accurate, was incomplete.

While the Board may disagree with the Ninth Circuit's determination that misprision of a felony does not involve evil intent, the Board need not require evil intent to continue categorizing misprision of a felony as a CIMT. The Board does not require "evil intent" for a conviction to be a CIMT. Like the Second Circuit, the Board has ruled that mere knowledge fulfills the intent level required for a conviction to be a CIMT. *Matter of Medina*, 15 I. & N. Dec. 611, 613 (BIA 1976). The elements of misprision of a felony establish that an individual need only have knowledge that a felony has been committed for a conviction. 18 U.S.C. § 4. Coupling the knowledge of the felony element with the active concealment of that felony from the authorities, both elements of a CIMT have been fulfilled. The Board thus has clear authority and judicial support to find that misprision of a felony under 18 U.S.C. § 4 is a CIMT.

B. Principles of Retroactivity Do Not Prevent Misprision of a Felony from Being a CIMT Because from 1968 Forward, Misprision of a Felony Could Be Analyzed as a CIMT.

The Board must next determine whether misprision of a felony as a CIMT can apply to conduct that occurred prior to the Board's 2006 decision in *Matter of Robles-Urrea*. 24 I. & N. Dec. at 26. In a 1966 decision, *Matter of Sloan*, the Board determined that misprision of a felony was not a CIMT. 12 I. & N. Dec 840, 842-43 (1966) (finding aiding a prisoner in escaping is not a CIMT). The Board based its extremely brief analysis of misprision of a felony on its full analysis of aiding an escaped prisoner. *Id.* at 842 ("If aiding a prisoner to escape who has been convicted does not involve moral turpitude, it is difficult to see how the mere failure to furnish information as to the escape should involve moral turpitude."). In 1968, the Attorney General overturned *Matter of Sloan* and determined that aiding a prisoner in escaping was a CIMT because "active and knowing interference with the enforcement of the law[] . . . involves moral turpitude . . . ." *Id.* at 854.

While the Board and other courts have discussed the principle of retroactivity, most have not analyzed or defined the correct framework for analyzing the categorization of a CIMT retroactively. In the statutory context, courts have developed a framework to determine whether a statute can be passed retroactively. To determine if INA statutory provisions may be applied retroactively, the Second Circuit has used the framework established in *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994) to decide whether an INA provision could be applied to actions that occurred before the law was passed. *Zuluage Martinez v. INS*, 523 F.3d 365 (2d Cir. 2008). In *Landgraf*, the Supreme Court developed a two-part test. First, a court must determine if Congress expressly proscribed that the statute should be applied retroactively. *Landgraf*, 551 U.S. at 280. Where Congress has not used express language to allow a retroactive application,

the court must decide if there would be a genuine retroactive effect where new legal consequences attached to actions that occurred prior to the enactment. *Id.* at 280.

The first step of *Landgraf* does not apply in the current case. Congress did not speak to the retroactive application the CIMT definition. *See Landgraf*, 551 U.S. at 280. In *Zuluage Martinez v. INS*, the Second Circuit considered whether the stop-time rule could be applied retroactively. *See* 523 F.3d at 365. There, the court was interpreting congressional intent to apply this specific rule. In the present case, Congress did not expressly state which actions constitute a CIMT. Instead, defining what constitutes a CIMT is a constantly developing area of law. The question presented does not fulfill the first step of *Landgraf* because it is not a *statute* being interpreted retroactively.

Where—as in this case—Congress did not address the retroactive question at hand, the analysis moves to step two. The Board must now consider the "retroactive effect" that deciding that misprision of a felony is a CIMT would have on the current case.

> Rather, the court must assess "the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event," and determine "whether the new provision attaches new legal consequences to events completed before its enactment."

Zuluaga Martinez v. INS, 523 F.3d at 369 (quoting *Landgraf*, 511 U.S. at 269-70). Using the second step of the *Landgraf* framework, determining that misprision of a felony is a CIMT even if the conduct occurred prior to the Board's decision in *Robles-Urrea* does not invoke retroactivity concerns.

First, the attorney general reversed *Matter of Sloan* in its entirety. It was not reversed in part and affirmed in part as courts state when an alternative holding survives review. By reversing the decision in its entirety, it did not remain precedent. Additionally, the Board's analysis determining misprision of a felony is a CIMT was

wholly based on the analysis and conclusion that aiding a prisoner in escaping was *not* a CIMT. Once the attorney general reversed the Board's determination by stating that aiding a prisoner in escape fulfilled the requirements of a CIMT, the Board's holding pertaining to the misprision of a felony crumbles. The foundational analysis on which the holding can stand is missing.

Following *Landgraf*, the Board in this case must determine whether making misprision of a felony a CIMT would cause a "retroactive effect." If the action has a retroactive effect, it may be impermissible. Determining that misprision of a felony is a CIMT would not cause a new legal consequence to attach because *Matter of Sloan* had been reversed in its entirety in 1968. While the attorney general did not specifically address misprision of a felony as a CIMT, the attorney general's reversal of aiding a prisoner's escape left no analysis upon which finding misprision of a felony could stand. Without legal analysis on misprision of a felony and the attorney general's determination that *Matter of Sloan* was reversed in its entirety, there is no precedent stating that misprision of a felony is *not* a CIMT. Importantly, neither the Board nor a circuit court has ever cited *Matter of Sloan* to support the proposition that misprision of a felony under 18 U.S.C. § 4 was not a CIMT.

In this case, when the Respondent committed a criminal act under 18 U.S.C. § 4, *Matter of Sloan* was already overturned. Therefore, no legal changes occurred when the Respondent committed actions under 18 U.S.C. § 4, because *Matter of Sloan* was not precedent.

Second, even if the Board were to find that the misprision of a felony holding in *Matter of Sloan* survived the Attorney General's reversal even without legal analysis,

other cases prior to *Robles-Urrea* in 2006 would have given the alien in the present case reason to believe that *Matter of Sloan* had already been overturned.

In *Itani v. Ashcroft*, the Eleventh Circuit determined that misprision of a felony met the requirements of a CIMT. *See generally* 298 F.3d 1213 (11th Cir. 2002). In its opinion, the Eleventh Circuit affirmed the Board's decision that misprision of a felony was a CIMT. *Id.* at 1214 ("On May 30, 2001, the BIA dismissed Itani's appeal concluding that . . . misprision of a felony is a crime of moral turpitude . . . ."). The Board's 2001 decision thus gave Respondent notice that in 2002 misprision was a felony in 2002.

Not only did the *Itani* opinion constitute notice of the Board's changed position from its original decision in *Matter of Sloan*, the Fifth Circuit also noted that *Matter of Sloan* was overruled by the Attorney General, specifically concluding that it has no precedential value. *Smalley v. Ashcroft*, 354 F.3d 332, 339 n.6 (5th Cir. 2003) (stating that a conviction under 18 U.S.C. § 1952 for "travel[ing] in interstate or foreign commerce or us[ing] the mail or any facility in interstate or foreign commerce, with intent to facilitate the promotion, management, establishment, or carrying on, of any unlawful activity" is a CIMT).

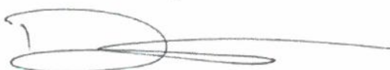
To summarize, in 2002 and again in 2003 Respondent had notice that misprision of a felony was a CIMT. To have a true retroactive effect, new legal consequences must attach to the Respondent's conduct. No new legal consequences attached because both *Itani* and *Smalley* had already determined that misprision was a CIMT. Respondent had no cognizable expectation that *Matter of Sloan* was binding, or that misprision of a felony was not a felony. Rather, effective from 1968 forward *Matter of Sloan* had been reversed in its entirety. As of 2002 Respondent had notice from *Smalley* that misprision of a felony may be a CIMT. This conclusion was confirmed

by *Itani*. *Itani* provided Respondent with authoritative information that the Board now treated misprision of a felony as a CIMT. In *Robles-Urrea*, the Board had acknowledged *Itani* but also stated that *Matter of Sloan* was just being overturned by *Robles-Urrea.* That finding however was false, as *Itani* had already acknowledged that *Matter of Sloan* was no longer binding and misprision of a felony was a CIMT. Therefore, the retroactivity doctrine does not restrain the Board from ruling that the Respondent committed a CIMT.

VI. CONCLUSION

For the reasons stated above, misprision of a felony under 18 U.S.C § 4 fulfills the requirements to be categorized as a CIMT as required by the framework in *Silva-Trevino*. The Board need not be concerned that applying the CIMT framework in the instance case would cause a retroactive effect. No new legal consequence attach because Respondent had notice that the Attorney General had reversed *Matter of Sloan* and that the Eleventh Circuit had affirmed the Board's decision in *Itani v. Ashcroft* to find that misprision of a felony constituted a CIMT.

Respectfully submitted,



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