

Judge Sullivan dissents in a separate opinion.

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9 *the brief*), *for* William P. Barr, U.S. Attorney General,  
10 Washington, DC, *for Respondent*.

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15 BARRINGTON D. PARKER, *Circuit Judge*:

16 Tomas Mendez was admitted to the United States in 2004 as a lawful  
17 permanent resident. In 2010, he was convicted of misprision of a felony in  
18 violation of 18 U.S.C. § 4. That section makes it a crime for one with knowledge  
19 of the commission of a federal felony to conceal it and not promptly report it to  
20 the appropriate authorities. 18 U.S.C § 4.

21 In 2016, upon returning from a trip abroad, the Department of Homeland  
22 Security charged him, based on his misprision conviction, as inadmissible under  
23 § 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act, because he was a  
24 noncitizen convicted of a crime involving moral turpitude (“CIMT”). The  
25 immigration judge sustained the charge, and the Board of Immigration Appeals

1 (“BIA”) affirmed. The BIA concluded that the violation of § 4 meant that he had  
2 committed a CIMT. *Matter of Mendez*, 27 I. & N. Dec. 219, 225 (BIA 2018).

3 The BIA defines a CIMT as crime that is “inherently base, vile, or  
4 depraved, and contrary to the accepted rules of morality and duties owed  
5 between persons or to society in general.” *Rodriguez v. Gonzales*, 451 F.3d 60, 63  
6 (2d Cir. 2006).<sup>1</sup> For decades, the BIA never considered misprision a CIMT. *Matter*  
7 *of Sloan*, 12 I. & N. Dec. 840, 842 (BIA 1966) (holding misprision does not  
8 constitute a CIMT).

9 However, in 2002, the Eleventh Circuit held in *Itani v. Ashcroft* that a  
10 conviction under § 4 is categorically a CIMT “because it necessarily involves an  
11 affirmative act of concealment or participation in a felony, behavior that runs  
12 contrary to accepted societal duties and involves dishonest or fraudulent

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<sup>1</sup> Unless otherwise indicated, in quoting cases all internal quotation marks, alterations, emphases, footnotes, and citations are omitted.

activity.” 298 F.3d 1213, 1216 (11th Cir. 2002).<sup>2</sup> Following the Eleventh Circuit’s lead, the BIA did an about face and determined in a case arising in the Ninth Circuit that misprision was a CIMT. *In re Robles-Urrea*, 24 I. & N. Dec. 22, 25 (BIA 2006).

The Ninth Circuit rejected the BIA’s conclusion. The court held that because § 4 required only knowledge of the felony and did not require an intent to defraud, or conceal, or to obstruct justice, the statute encompassed conduct that was not inherently base or vile. *Robles-Urrea v. Holder*, 678 F.3d 702, 710-12 (9th Cir. 2012). The Ninth Circuit reasoned that “[n]othing in the statute prohibiting misprision of a felony references the specific purpose for which the concealment must be undertaken,” let alone a purpose sufficient to qualify misprision as a categorical CIMT. *Id.* at 710.

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<sup>2</sup> In 2017, the Fifth Circuit joined the Eleventh Circuit to hold that misprision is categorically a CIMT. *Villegas-Sarabia v. Sessions*, 874 F.3d 871, 878 (5th Cir. 2017). We respectfully decline to follow the Fifth and Eleventh Circuit’s approach. We believe that neither *Itani* nor *Villegas-Sarabia* satisfactorily supports the assertion that specific intent, or intent to defraud, can be read into § 4, especially when Congress did not include such a requirement and has shown elsewhere in the criminal code that it knows how to include such a requirement if it so chooses. The Eleventh Circuit in *Itani* reasoned only “that misprision of a felony is a crime of moral turpitude because it necessarily involves an affirmative act of concealment or participation in a felony, behavior that runs contrary to accepted societal duties and involves dishonest or fraudulent activity.” 298 F.3d at 1216. We are reluctant to adopt this reasoning because, “any crime, by definition, runs contrary to some duty owed to society” and “[i]f this were the sole benchmark for a crime involving moral turpitude, every crime would involve moral turpitude.” *Robles-Urrea v. Holder*, 678 F.3d 702, 709 (9th Cir. 2012). We are also unpersuaded by *Villegas-Sarabia*, where the Fifth Circuit relied almost exclusively on *Itani*’s reasoning.

1 Mendez moved to terminate removal proceedings and for cancellation of  
2 removal, arguing that misprision is not a CIMT. Relying on the BIA's decision in  
3 *Robles-Urrea*, the IJ found Mendez removable as charged. The IJ also pretermitted  
4 Mendez's application for cancellation of removal, concluding that because his  
5 2010 misprision conviction constituted a CIMT, it stopped the clock for  
6 calculating length of residency and prevented him from establishing the required  
7 seven years of continuous residency. In February 2018, the BIA issued a  
8 precedential decision in this case. *Matter of Mendez*, 27 I. & N. Dec. at 219. It  
9 reaffirmed its holding that misprision is a CIMT and declined to follow the Ninth  
10 Circuit's rejection of its reasoning in *Robles-Urrea*.

11 Mendez petitions for review. We have jurisdiction under 8 U.S.C. § 1252  
12 (a)(2)(D). Mendez argues that a conviction for misprision is not a CIMT because  
13 it does not categorically involve conduct that is inherently base, vile, or  
14 depraved. He also argues that, contrary to the BIA's contention, its decision is  
15 not entitled to *Chevron* deference. We agree on both points.

## 16 DISCUSSION

17 The dispositive issue is whether misprision is a CIMT. Because the BIA has  
18 no particular expertise in construing federal criminal statutes (as opposed to the  
19 INA), we owe no deference to its construction of § 4. *United States v. Apel*, 571

1 U.S. 359, 369 (2014); *Mendez v. Mukasey* 547 F.3d 345, 346 (2d Cir. 2008).  
2 Accordingly, we review *de novo* the BIA's conclusion that Mendez's conviction  
3 under § 4 is a conviction for a CIMT. *Rodriguez*, 451 F.3d at 63.

## 4 I

5 In *Rodriguez*, we held that to be a CIMT a statute must encompass  
6 "conduct that shocks the public conscience as being inherently base, vile, or  
7 depraved, and contrary to the accepted rules of morality and the duties owed  
8 between persons or to society in general." *Id.* In other words, the act must be "*per*  
9 *se* morally reprehensible and intrinsically wrong or *malum in se*, so it is the nature  
10 of the act itself and not the statutory prohibition of it which renders a crime one  
11 of moral turpitude." *Id.*

12 To determine whether a conviction is for a CIMT, the BIA and the courts  
13 employ a "'categorical approach,' focusing on the intrinsic nature of the offense."  
14 *Gill v. I.N.S.*, 420 F.3d 82, 89 (2d Cir. 2005). Under this approach, "we look only to  
15 the minimum criminal conduct necessary to satisfy the essential elements of the  
16 crime." *Mukasey*, 547 F.3d at 348. To qualify, the crime "must by definition, and  
17 in all instances, contain each of those elements that constitute a CIMT." *Gill*, 420  
18 F.3d at 89.

19 The federal misprision statute provides:

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

7  
8       18 U.S.C. § 4. To convict under § 4, the Government must prove that (1) the  
9       principal committed and completed the alleged felony, (2) the defendant had full  
10      knowledge of that fact, (3) the defendant failed to notify the authorities, and (4)  
11      the defendant took steps to conceal the crime. *United States v. Cefalu*, 85 F.3d 964,  
12      969 (2d Cir. 1996).

13       The categorical approach has not been satisfied in this case. The courts, as  
14      well as the BIA itself, have repeatedly made clear that the indispensable  
15      component of a CIMT is “evil intent,” which means a specific mental purpose  
16      that is “inherently base, vile, or depraved.” *Mukasey*, 547 F.3d at 347.

17       Nothing in § 4—either expressly or by reasonable inference—speaks to  
18      intent. The absence of an intent requirement from § 4 contrasts sharply with  
19      perjury and obstruction of justice—which contain intent requirements and which  
20      are CIMTs. A person commits perjury when, “having taken an oath before a  
21      competent tribunal, officer, or person, . . . that he will testify, declare, depose, or  
22      certify truly, . . . *willfully* and contrary to such oath states or subscribes any

1 material matter which he does not believe to be true.” 18 U.S.C. § 1621(1)  
2 (emphasis added). A person commits obstruction of justice, whenever he  
3 “*willfully* endeavors by means of bribery to obstruct, delay, or prevent the  
4 communication of information relating to a violation of any criminal statute of  
5 the United States by any person to a criminal investigator.” 18 U.S.C. § 1510(a)  
6 (emphasis added). § 4, by contrast, does not speak to any specific mental  
7 purpose.

8       The BIA’s own decisions, which it has inexplicitly disavowed, prove this  
9 point. In *Matter of Sloan*, the BIA held that the “intent with which misprision is  
10 committed” is not “a factor” under § 4. 12 I. & N. Dec. at 842. In *Matter of*  
11 *Espinoza-Gonzales*, the BIA held that misprision “lacks the critical element of an  
12 affirmative and intentional attempt, motivated by a specific intent, to interfere  
13 with the process of justice.” 22 I & N Dec. 892, 896 (BIA 1999). Indeed, in this  
14 case, the BIA acknowledged that § 4 “does not explicitly require that the act of  
15 concealment be intentional.” *Matter of Mendez*, 27 I. & N. Dec. at 223. These  
16 concessions by the BIA are telling: they mean that the BIA itself is of the view  
17 that a defendant can be convicted under § 4 even if the defendant had no evil  
18 intent. Following the BIA’s lead, we conclude that convictions for violating § 4

1 are not entitled to categorical treatment because they can occur in the absence of  
2 conduct that is “inherently base, vile, or depraved.”

3 Consider an individual living in a housing project that is plagued by  
4 violent drug-dealing gangs and drug-related crimes. That individual witnesses a  
5 shooting involving the gangs and knows the individuals involved who happen  
6 to be his neighbors in the projects. When that individual is approached by law  
7 enforcement officers, he falsely denies knowledge of those involved in the  
8 shooting. He does so because he fears that the shooters or other gang members  
9 will retaliate against him and his family. No one can seriously argue that this  
10 individual did not violate § 4 and no one can seriously argue that what he did  
11 was “inherently base, vile, or depraved.”

12 As the case law demonstrates, there exists a realistic probability, not just a  
13 theoretical one, that this conduct could be prosecuted under § 4. *See, e.g., United*  
14 *States v. Davis*, 491 F. App’x 143, 145 (11th Cir. 2012) (noting defendant’s guilty  
15 plea to misprision of felony for “failing to disclose knowledge of illegal drug  
16 activity to authorities”); *United States v. Barker*, 78 F. App’x 767, 769 (2d Cir. 2003)  
17 (noting defendant’s guilty plea “to concealing drug transactions”); *United States*  
18 *v. Blount*, 940 F. Supp. 720, 732 (E.D. Pa. 1996), *aff’d sub nom. United States v.*  
19 *Riddick*, 100 F.3d 949 (3d Cir. 1996) (“Even citizens without law enforcement

1 duties are guilty of a misprision of a felony when they witness a drug transaction  
2 and fail to report it.”).

3 Take as another example, a parent who has reason to believe their son or  
4 daughter is using drugs and distributing them to friends. The parent discovers  
5 the drugs in the teenager’s room and flushes them down the toilet. It is clear that  
6 the parent violated § 4. But no one could seriously contend that the parents  
7 conduct was corrupt or vile or transgressed accepted rules of morality. These  
8 examples are not fringe possibilities or constructions of legal imagination—they  
9 are common occurrences. *United States v. Hill*, 890 F.3d 51, 57 n.9 (2d Cir. 2018).

10 The BIA’s decision that misprision categorically constitutes a CIMT is also  
11 unmoored from its own precedent. The BIA and courts have consistently  
12 declared offenses that involve appreciably higher levels of moral culpability to be  
13 insufficiently grave to qualify as CIMTs. *See, e.g., Soto-Rodriguez v. Holder*, 607 F.  
14 App’x 648 (9th Cir. 2015) (witness tampering); *Tejwani v. Attorney General of the*  
15 *United States*, 349 F. App’x 719 (3d Cir. 2009) (money laundering); *Partyka v.*  
16 *Attorney General of the United States*, 417 F.3d 408 (3d Cir. 2005) (aggravated  
17 assault on a police officer); *In re Sejas*, 24 I. & N. Dec. 236, 239 (BIA 2007) (assault  
18 against a family member); *Robles-Urrea*, 678 F.3d at 708 (noting that assault with a  
19 deadly weapon has been found not to involve moral turpitude).

Moreover, the BIA's decision that misprision categorically involves depraved conduct leads to unsound results under its own precedent because it treats misprision more severely than the more serious offense of accessory after the fact. In *Matter of Riven*s, the BIA concluded that assisting an individual to escape in violation of 18 U.S.C. § 3 is not always a crime involving moral turpitude. 25 I. & N. Dec. 623, 627 (BIA 2011). According to the BIA, "it makes sense to find that an accessory conviction is only one for a crime involving moral turpitude when the aid is knowingly provided to help the principal escape prosecution or punishment for a base or vile crime." *Id.* at 628. Therefore, the BIA held that one "must look to the underlying or substantive crime to determine whether [being an accessory under § 3] involved moral turpitude." *Id.* at 627. The BIA has failed to satisfactorily explain the puzzling disparity its decision creates between the treatment of accessory and misprision offenses.

## II

The Government draws on *Jordan v. De George*, 341 U.S. 223 (1951). There the Court stated "that a crime in which fraud is an ingredient involves moral turpitude." *Id.* at 227. From this authority, the Government argues that the necessary intent to defraud can be implied from the requirement in § 4 that the

1 defendant take steps to conceal the crime. We believe it is unsound to “imply”  
2 the existence of an intent requirement into a criminal statute such as § 4 that  
3 Congress chose not to include. If this approach were correct, it would be  
4 impossible in most instances to ever determine whether a crime was a CIMT.  
5 The short—and conclusive—response is that nothing in the statute speaks to the  
6 specific purpose for which the concealment must be undertaken. The statute  
7 does not mention “intent” or “defraud.” The BIA concedes all of this.

8       Unable to show that § 4 has an intent requirement, the Dissent nonetheless  
9 concludes that misprision qualifies as a CIMT because it involves “dishonest and  
10 deceitful behavior.” Dissent at 13. However, almost all crimes involve—by their  
11 very nature—some dishonest and deceitful behavior, which explains why our  
12 past cases, as explained below (pages 16-17), require more to hold that a crime  
13 categorically constitutes a CIMT. *See, e.g., Rodriguez*, 451 F.3d at 64; *Mendez*, 547  
14 F.3d at 347; *Ahmed v. Holder*, 324 F. App’x 82, 84 (2d Cir. 2009). If we were to  
15 accept the Dissent’s construction, it would eviscerate the distinction in the law  
16 between generic criminal conduct and crimes involving moral turpitude, thus  
17 turning almost all crimes into CIMTs. The Ninth Circuit reached the same  
18 conclusion in *Robles-Urrea*. There it rejected an argument by the government (and  
19 picked up on by the Dissent) that “misprision of a felony is base, vile, and

depraved because it has been historically condemned.” *Robles-Urrea*, 678 F.3d at 710. Cited as support for this proposition is the Supreme Court’s decision in *Roberts v. United States*, 445 U.S. 552 (1980). *Id.* The Ninth Circuit explained that “[t]here is no question that ‘gross indifference to the duty to report known criminal behavior remains a badge of irresponsible citizenship.’” *Id.* (citing *Roberts*, 445 U.S. at 558). However, “[t]hat only explains . . . why we choose to criminalize misprision of a felony in the first place. It says nothing about whether misprision of a felony is worse than any *other* crime.” *Id.*

Moreover, when “Congress uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.” *Cruz-Miguel v. Holder*, 650 F.3d 189, 199 (2d Cir. 2011) (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004)); see also *Nwozuzu v. Holder*, 726 F.3d 323, 327 (2d Cir. 2013). Congress has explicitly required an intent to defraud in other parts of the federal criminal code but did not do so for misprision.<sup>3</sup>

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<sup>3</sup> Compare 18 U.S.C. § 4 (misprision statute) (subjecting to criminal penalties anyone with “knowledge . . . of a felony” and who “conceals” that felony from authorities) with 18 U.S.C. § 152(1) (subjecting to criminal penalties any “person who . . . knowingly and fraudulently conceals from a custodian . . . property belonging to the estate of a debtor”); 18 U.S.C. § 152(2) (subjecting to criminal penalties any person who “knowingly and fraudulently makes a false oath or account in or in relation to any case under title 11”); and 18 U.S.C. § 1002 (subjecting to criminal penalties, any person who “knowingly and with intent to defraud the United States, or any agency thereof, possesses any false, altered, forged, or counterfeited writing or document for the purpose of enabling another to obtain from the United States, or from any agency, officer or agent thereof, any sum of money”).

1           We, of course, readily concede that some individuals who violate § 4  
2   intend to defraud and some act with vile or bases motives. That is beside the  
3   point. As we have seen, the statute can be violated in ways that do not involve  
4   such motives because the statute criminalizes conduct that is not in all instances  
5   fraudulent or base or vile.

6           Moreover, the Government's argument that an "implicit" *mens rea*  
7   requirement can be read into the statute proves too much. It is a concession that  
8   the statute is ambiguous. That ambiguity means that the Government's  
9   approach fails under the rule of lenity: "When a reasonable doubt persists about  
10   a statute's intended scope even *after* resort to the language and structure,  
11   legislative history, and motivating policies of the statute, we resolve doubts in  
12   favor of the defendant rather than imputing to Congress an undeclared will to  
13   criminalize conduct." *United States v. Valle*, 807 F.3d 508, 523 (2d Cir. 2015). "The  
14   rule of lenity ensures that criminal statutes will provide fair warning of what  
15   constitutes criminal conduct, minimizes the risk of selective or arbitrary  
16   enforcement, and strikes the appropriate balance between the legislature and the  
17   court in defining criminal liability." *Id.*; *see also Ali v. Reno*, 22 F.3d 442, 446 (2d  
18   Cir. 1994) ("Lingering ambiguities in a statute concerning the forfeiture of  
19   residence in this country should be resolved in favor of the alien."). Indeed, the

1 BIA itself has recognized that where there are ambiguities as to whether an  
2 offense involves a CIMT, “any doubts in deciding such questions must be  
3 resolved in the alien’s favor.” *Matter of Serna*, 20 I. & N. Dec. 579, 586 (BIA 1992).

4 With these considerations in mind, the Government’s position in this case  
5 becomes even more tenuous. It suggests, without pointing to any persuasive  
6 evidence in the language, structure, legislative history, or motivating policies of  
7 § 4, that individuals who fail to inform law enforcement officers of a felony for  
8 reasons such as the ones we have mentioned have nonetheless committed a  
9 crime that is inherently vile and immoral. That is not a reasonable reading of § 4  
10 and it is highly unlikely—indeed inconceivable—that is what Congress intended.

11 To be sure, establishing a CIMT rooted in fraud does not require the  
12 Government to prove every element of common law fraud. *Mukasey*, 547 F.3d  
13 at 347. However, mere intent to conceal (or an equivalent *mens rea*) is not, on its  
14 own, sufficient because an individual may have a variety of non-culpable  
15 motivations for withholding information about a felony. To account for these  
16 circumstances, we have afforded different treatment to statutes that contained a  
17 *mens rea* element (which was indicative of a CIMT) and those that did not contain  
18 such an element. For example, we have generally held, that deceit must be paired  
19 with an intent to wrongfully extract some benefit or to cause a detriment for the

1 offense to constitute a CIMT. *See, e.g., Ahmed*, 324 F. App'x at 84; *Rodriguez*, 451  
2 F.3d at 64.

3 In *Rodriguez v. Gonzalez*, we held that making a false statement in the  
4 application and use of a passport in violation of 18 U.S.C. § 1542 was a CIMT.  
5 We reasoned that “[a]lthough section 1542 may not contain every element of  
6 common law fraud, it certainly involves deceit *and an intent to impair the efficiency*  
7 *and lawful functioning of the government.*” 451 F.3d at 64 (emphasis added). In  
8 *Mendez v. Mukasey*, we discussed a BIA case, *Matter of Di Filippo*, which held that  
9 making false statements is not a CIMT. We noted that the outcome of the case  
10 turned on the lack of an intent element because “the statute did not require  
11 ‘proof that the false statement was made *for the purpose of obtaining benefits.*’”  
12 *Mukasey*, 547 F.3d at 347 (emphasis added). Most recently, in *Ahmed v. Holder*,  
13 then-Judge Sotomayor wrote that falsely representing a social security number  
14 with an intent to deceive in violation of 18 U.S.C. § 408(a)(7)(B) was not a CIMT.  
15 Pulling from the principles in *Rodriguez*, she reasoned that “[t]he intent to  
16 deceive is not equivalent to the intent to defraud, which generally requires an  
17 intent to obtain some benefit or cause a detriment.” 324 F. App'x at 84. Only the  
18 latter is sufficient to categorize a crime as a CIMT. *Id.*



1 criminal statute. *Baraket v. Holder*, 632 F.3d 56, 58 (2d Cir. 2011); *Mukasey*, 547 F.3d  
2 at 346. Here, the BIA's decision rests on its incorrect interpretation of § 4  
3 (whether it contains a specific type of scienter), not of the INA. Accordingly, we  
4 owe no *Chevron* deference to the BIA's decision.

#### 5 IV

6 For the foregoing reasons, we hold that misprision is not categorically a  
7 CIMT. In so holding, we align ourselves with the Ninth Circuit. *See Robles-Urrea*,  
8 678 F.3d at 710-11. The Government has failed to show that misprision rises to  
9 the level of base, vile, conscience-shocking conduct traditionally attributed to the  
10 gravest and most inherently evil offenses. Moreover, nothing in the misprision  
11 statute suggests that the crime has, as an element, the fraudulent intent necessary  
12 for misprision to constitute a CIMT. *See, e.g., Ahmed*, 324 F. App'x at 84;  
13 *Rodriguez*, 451 F.3d at 64.

#### 15 CONCLUSION

16 For the reasons set forth, we **GRANT** the petition and **VACATE** the  
17 decision of the BIA.