No. 23-538

In the Supreme Court of the United States

MOISES CRUZ CRUZ, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
JOHN W. BLAKELEY
MELISSA NEIMAN-KELTING
BRYAN S. BEIER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether petitioner's conviction for providing false identification "to a law-enforcement officer with the intent to deceive the law-enforcement officer as to" his "real identity after having been lawfully detained and after being requested to identify himself," in violation of Va. Code Ann. § 19.2-82.1, constitutes a "crime involving moral turpitude" under 8 U.S.C. 1182(a)(2)(A)(i)(I).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

No. 23-538

MOISES CRUZ CRUZ, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is not published in the Federal Reporter but is available at 2023 WL 4118011. The opinion of the Board of Immigration Appeals (Pet. App. 22a-28a) is unreported. The decision and order of the immigration judge (Pet. App. 29a-45a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 2023. A petition for rehearing was denied on August 21, 2023 (Pet. App. 46a). The petition for a writ of certiorari was filed on November 16, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of Mexico who entered the United States without authorization in

2000. Pet. App. 3a. In 2013, petitioner was charged with being removable under 8 U.S.C. 1182(a)(6)(A)(i) as "[a]n alien present in the United States without being admitted or paroled." Pet. App. 4a. Petitioner conceded his removability, but sought cancellation of removal under 8 U.S.C. 1229b(b). Pet. App. 4a.

Cancellation of removal is a "narrow pathway to relief" from removal that is available to eligible noncitizens without permanent-resident status. *Pereida* v. *Wilkinson*, 592 U.S. 224, 228 (2021).[1] To qualify for cancellation of removal, an applicant must prove that he: "has been present in the United States for at least 10 years"; "has been a person of good moral character"; "has not been convicted of certain criminal offenses"; and that "his removal would impose an exceptional and extremely unusual hardship on a close relative who is either a citizen or permanent resident of this country." *Id.* at 227-228 (citation and internal quotation marks omitted). As relevant here, one kind of disqualifying conviction is for any "crime involving moral turpitude" under 8 U.S.C. 1182(a)(2)(A)(i)(I). See 8 U.S.C. 1229b(b)(1)(C). Even if a noncitizen is eligible for cancellation, "this still yields no guarantees" of relief because "[t]he Attorney General may choose to grant or withhold [cancellation of removal] in his discretion, limited by Congress's command that no more than 4,000 removal orders may be cancelled each year." *Pereida*, 592 U.S. at 228.

In a letter supporting petitioner's request for cancellation of removal, petitioner's counsel provided a list of petitioner's prior arrests and convictions for offenses including driving under the influence, driving on a sus-

---

[1] This brief uses "noncitizen" as equivalent to the statutory term "alien." See *Barton* v. *Barr*, 140 S. Ct. 1442, 1446 n.2 (2020).

pended license, failing to appear at a court hearing, and providing false identification to a police officer in violation of Va. Code Ann. § 19.2-82.1. See Administrative Record (A.R.) 211-212. The letter stated that, while "[t]here is no denying that [petitioner] has a criminal history," it should not "preclude him" from establishing his eligibility for cancellation of removal. A.R. 211. As relevant here, the letter contended that the Virginia false-identification statute under which petitioner had been convicted in 2013 does not qualify as a crime involving moral turpitude. A.R. 213-215. The statutory definition of the offense requires the government to prove that the defendant "falsely identif[ied] himself to a law-enforcement officer with the intent to deceive the law-enforcement officer as to" his "real identity after having been lawfully detained and after being requested to identify himself." Va. Code Ann. § 19.2-82.1.

The records from petitioner's 2013 conviction do not indicate the underlying facts, but his application for cancellation of removal offered his account of the events leading up to his arrest. A.R. 264-265. According to petitioner, the police stopped him after he "drove through a 7-Eleven parking lot to get through a jammed intersection." A.R. 264. When the police officer stopped him and asked for his name in "badly spoken Spanish," petitioner became "confused and very scared" and gave the officer his first name "but added [his] brother's name," providing the name "Moises Cecilio Cruz." *Ibid.*; see Pet. App. 32a (describing "Moises Cecilio Cruz" as "his brother's name). But, when the officer asked for his name a second time, "he did so in English" and petitioner "understood him better this time" and wrote down his own name, "Moises Cruz Cruz." A.R. 264. The criminal records petitioner included with his application

indicate that, at the time of this event, he was listed as a "fugitive" with an outstanding warrant. A.R. 376. He was arrested, and he pleaded guilty to charges of falsely providing identification to an arresting officer and of driving with a suspended license. A.R. 264, 390-393.

2. a. An immigration judge (IJ) held a hearing on petitioner's application for cancellation of removal and found that petitioner is ineligible for cancellation because the Virginia offense of falsely identifying oneself to a police officer qualifies as a crime involving moral turpitude under the categorical approach. Pet. App. 32a-44a. The IJ found that Va. Code Ann. § 19.2-82.1 requires both the "culpable mental state" and the "reprehensible conduct" that characterize a crime involving moral turpitude because the state law requires an "intent to deceive" and, by deceiving a law-enforcement officer, a person "impairs and obstructs a function of the government." *Id.* at 33a, 35a, 36a (brackets and citations omitted).

The IJ also concluded that petitioner had not "shown a 'realistic probability' that conduct not involving moral turpitude could result in a conviction" under the Virginia statute. Pet. App. 36a (citation omitted). The IJ recognized that, "[i]f [petitioner's] testimony at his individual calendar hearing" about the nature of the conduct that led to his arrest is "taken at face value," it "is difficult to understand why those actions should result in his being ineligible for cancellation of removal." *Id.* at 39a. But the IJ observed that the categorical approach requires examining the offense of conviction, not the underlying conduct. *Id.* at 39a-40a. And while the IJ assumed that, in some circumstances, a noncitizen might be able to use his own non-turpitudinous conduct to establish a "realistic probability" that a statute that

appears to cover only turpitudinous conduct is broader in practice, *id.* at 43a, petitioner could not make that showing because he had pleaded guilty to an offense that involves moral turpitude because it expressly requires deceit and the obstruction of the police. *Id.* at 42a-43a.

b. The Board of Immigration Appeals (Board) affirmed the IJ's decision and dismissed petitioner's appeal. Pet. App. 22a-28a. The Board agreed that the Virginia statute "specifically requires as an element an 'intent to deceive'" as well as the aggravating factor of deceiving a law-enforcement official, which "obstructs a function of government." *Id.* at 25a.

The Board rejected petitioner's attempt to use the facts of his own case to demonstrate a "realistic probability that the minimum conduct prosecuted * * * under section 19.2-82.1 would not rise to the level of moral turpitude," explaining that, because petitioner pleaded guilty to the offense, there are no "judicially established facts to indicate that the statute of conviction was in fact expanded to cover conduct that involved something less than 'an intent to deceive.'" *Id.* at 26a-27a. The Board observed that the IJ "was not obliged to accept [petitioner's] characterization of the facts as the official record of events or explanation of why he was convicted," and that petitioner's "recollection * * * could differ from the actual event in question" because he had not "proffered any documents, like a plea colloquy transcript or a charging document or complaint, that shows what the judge accepting the plea agreement found to be the factual basis underlying the plea." *Id.* at 27a-28a. Without such facts "on the record, and because [petitioner] ha[d] not otherwise shown that there is a realistic probability that" the Virginia offense could be "applied to non-mor-

ally turpitudinous conduct," the Board found "no reason to disturb the [IJ's] decision." *Id.* at 28a.

3. Petitioner sought review in the court of appeals, which denied his petition for review in an unpublished, per curiam opinion. Pet. App. 1a-13a.

a. The court of appeals first found that it was appropriate to defer under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to the Board's "reasonable," precedential decisions finding that a crime qualifies as a crime involving moral turpitude where it involves "impairing or obstructing an important function of a department of the government by deceit, graft, trickery, or dishonest means." Pet. App. 8a (quoting *In re Jurado-Delgado*, 24 I. & N. Dec. 29, 35 (B.I.A. 2006)) (brackets and ellipsis omitted).

The court of appeals then analyzed whether petitioner's specific offense of conviction is a crime involving moral turpitude under that definition. Pet. App. 8a. The court observed that, in performing this analysis, it was required to apply a "categorical approach," under which "a crime does not involve moral turpitude if there is a realistic probability that the statute of conviction could be applied to reach conduct that does not involve moral turpitude." *Id.* at 8a-9a (citations and internal quotation marks omitted). The court also observed that, under circuit precedent, "[t]he generic definition of a [crime involving moral turpitude] requires two essential elements: a culpable mental state and reprehensible conduct." *Id.* at 9a (citation and internal quotation marks omitted).

The court of appeals found that the "mens rea element[] is easily satisfied" by the Virginia statute because it "requires making a false statement 'with the intent to deceive the law-enforcement officer.'" Pet. App.

10a. The court then found that the "'reprehensible conduct'" requirement is also satisfied based on its analysis of "two relevant cases," *Ramirez* v. *Sessions*, 887 F.3d 693 (4th Cir. 2018), and *Nunez-Vazquez* v. *Barr*, 965 F.3d 272 (4th Cir. 2020)). Pet. App. 10a-11a (citation omitted). The court explained that, in *Ramirez*, it had held that a Virginia obstruction-of-justice statute did not constitute a crime involving moral turpitude because "*deceit* was the critical aggravator that rendered an obstruction offense" morally turpitudinous under the Board's precedent. *Id.* at 10a (quoting *Ramirez*, 887 F.3d at 702). The court further explained that, in *Nunez-Vazquez*, it had held that an identity-theft statute did not qualify as a crime involving moral turpitude because, while it involved deceit, it did "not require perpetrators to intend *to impair or obstruct a government function through deceit* because an individual [could] violate the statute by misleading a private person." *Id.* at 11a (quoting and adding emphasis to *Nunez-Vazquez*, 965 F.3d at 284). The court observed that *Nunez-Vazquez* "cited the very statute at issue here" in reaching its conclusion, observing that "'it is a separate crime to falsely identify oneself to a law-enforcement officer.'" *Ibid.* (quoting *Nunez-Vazquez*, 965 F.3d at 284)) (internal alterations, citation, and quotation marks omitted).

In light of its previous decisions, the court of appeals found it had "no choice but to conclude" that the Virginia crime of providing a false identity to a police officer constitutes a crime involving moral turpitude. Pet. App. 11a. The court rejected petitioner's contention that the facts of his own case demonstrate that the Virginia law covers some "conduct" that does "not involve moral turpitude." *Id.* at 12a. The court acknowledged that "[p]etitioner's *description* of his conduct would not

make him guilty of violating" the Virginia law—because "a moment of heightened nerves" and an "immediate[]" correction to the officer would not establish intent to deceive. *Ibid.* But petitioner had "*pled guilty* to all of the elements" of the statute, "including its requirement that he act with an 'intent to deceive the law enforcement officer.'" *Ibid.* (citation omitted). The court found that, in these circumstances, the guilty plea presents "a problem [p]etitioner cannot overcome." *Ibid.*

b. Judge Keenan dissented. Pet. App. 14a-21a. She "agree[d] with the majority's conclusion that a conviction under the false name statute satisfies th[e] mens rea requirement" of the generic definition of a crime involving moral turpitude. *Id.* at 15a n.3. But she took the view that the Virginia offense does not satisfy the "reprehensible conduct" requirement because it "does not require or even address whether the individual's conduct must impede an officer in the performance of his duties." *Id.* at 18a. She postulated that "[a] lawfully detained defendant initially could intend to deceive an officer regarding his identity, but soon thereafter have a change of heart and give his true name without causing any impediment to that officer's duties or harm to another." *Id.* at 19a-20a. In those circumstances, the conduct would "not necessarily involve vile or depraved conduct that independently violates a moral norm." *Id.* at 21a.

ARGUMENT

Petitioner renews (Pet. 3, 9-12, 18-21) the contention that his conviction for providing false information to a police officer "with the intent to deceive the law-enforcement officer as to" his "real identity after having been lawfully detained and after being requested to identify himself," in violation of Va. Code Ann. § 19.2-82.1,

does not constitute a crime involving moral turpitude. The decision of the court of appeals is correct, and there is no division in the circuits warranting this Court's intervention. But petitioner also contends (Pet. 9-12) that the court of appeals erroneously afforded *Chevron* deference to some of the Board's precedents. Accordingly, the Court may wish to hold the petition for a writ of certiorari pending its decisions in *Loper Bright Enterprises* v. *Raimondo*, No. 22-451 (argued Jan. 17, 2024), and *Relentless, Inc.* v. *Department of Commerce*, No. 22-1219 (argued Jan. 17, 2024).

1. a. The court of appeals correctly concluded that petitioner's offense of conviction is a crime involving moral turpitude. As petitioner acknowledges (Pet. 6), two elements typically define a crime involving moral turpitude: a "culpable mental state" and "reprehensible conduct." Pet. App. 9a (citation omitted). Both of those elements are present in the Virginia offense of falsely identifying oneself to an officer after being lawfully detained. First, the statute requires a culpable mental state because the statute expressly provides that a defendant must have the "intent to deceive," Va. Code Ann. § 19.2-82.1, and this Court has long recognized that offenses involving fraud and deception fall squarely "within the scope of moral turpitude." *Jordan* v. *De George*, 341 U.S. 223, 229 (1951). Second, the statute requires "reprehensible conduct" because the deceit frustrates a police officer's need to learn the "real identity" of someone the officer has "lawfully detained" and whose identity the officer has requested. Va. Code Ann. § 19.2-82.1.

Petitioner appears to concede that an offense qualifies as a crime involving moral turpitude where it involves both "deception" and "'harm to others, *which can*

include obstructing an important government function.'" Pet. 17 (citations omitted; emphasis added). Petitioner contends (*ibid.*), however, that the Virginia offense does not meet those requirements. That is incorrect. The offense requires deception on its face, and its application is expressly limited to circumstances in which the deceit obstructs an important government function—law enforcement. A police officer who has detained a person needs to be able to identify him for several reasons, including to locate any outstanding warrants or other information in law enforcement databases that may be relevant to determining, for example, whether the individual can be released without jeopardizing public safety. The Virginia statute applies to a form of deception that will inevitably thwart the police officer in carrying out his duties.

b. Petitioner nonetheless contends (Pet. 16, 18-20) that the Virginia offense does not qualify as a crime involving moral turpitude because it involves an "'intent to deceive,'" rather than an "'intent to defraud.'" That contention is unavailing.

This Court has never suggested that there is a meaningful distinction between an "intent to defraud" and an "intent to deceive" that would justify treating the two mental states differently in analyzing whether an offense qualifies as a crime involving moral turpitude in petitioner's case. To the contrary, in a wide variety of cases issued over the last two centuries, this Court has recognized that the concepts of fraud and deceit are overlapping and—in some cases—identical. Thus, in resolving a commercial dispute more than 150 years ago, this Court stated flatly that "[f]raud means an intention to deceive." *Lord* v. *Goddard*, 54 U.S. (13 How.) 198, 211 (1852); see, *e.g.*, *Pence* v. *United States*, 316 U.S.

332, 338 (1942) (recognizing that a party may establish the defense of fraud in a contract dispute where he has acted in reliance on false representations made "with the intent to deceive"); *Russell* v. *Clark's Ex'rs*, 11 U.S. (7 Cranch) 69, 94 (1812) (a business "recommendation, known at the time[] to be untrue, would be deemed fraudulent").

More recently, the Court observed in a bankruptcy case that, while fraud is a term that is "difficult to define" with "precis[ion]," it "generally" "connotes *deception* or trickery." *Husky Int'l Elecs., Inc.* v. *Ritz*, 578 U.S. 356, 360 (2016) (emphasis added). And in numerous criminal cases the Court has treated fraud and deceit as related and overlapping terms. See, *e.g.*, *Shaw* v. *United States*, 580 U.S. 63, 67 (2016) (finding that a defendant was guilty of federal bank fraud and quoting Oliver Wendell Holmes's hornbook explanation that "[a] man is liable to an action for *deceit* if he makes a false representation to another, knowing it to be false, but intending that the other should believe and act upon it") (quoting O. W. Holmes, Jr., *The Common Law* 132 (1881)) (emphasis added); *Dennis* v. *United States*, 384 U.S. 855, 867 (1966) (describing defendant's falsehoods as a "calculated course of fraud and deceit").

Accordingly, both the courts of appeals and the Board have recognized that statutory offenses that speak in terms of deceit and dishonesty can qualify as crimes involving moral turpitude under the immigration laws. See, *e.g.*, *Ghani* v. *Holder*, 557 F.3d 836, 841 (7th Cir. 2009) ("nearly every court to consider the issue has concluded that crimes involving willful false statements are turpitudinous"); *Hyder* v. *Keisler*, 506 F.3d 388, 391 (5th Cir. 2007) (interpreting the phrase "crime involving moral turpitude" to include "crimes whose essential el-

ements involve fraud *or deception*") (emphasis added); *In re Jurado-Delgado*, 24 I. & N. Dec. 29, 35 (B.I.A. 2006) ("it is the intent to mislead that is the controlling factor").

c. Petitioner also errs in contending (Pet. 20) that the particular conduct that he describes as underlying his own offense should have caused the court of appeals to conclude that his Virginia offense of conviction is not a crime involving moral turpitude. As petitioner recognizes (Pet. 18), courts must apply a categorical approach to determining whether an offense constitutes a crime involving moral turpitude. That approach analyzes whether the "minimum conduct" the statute covers qualifies as a crime involving moral turpitude; courts do not look to the noncitizen's own offense conduct. *Moncrieffe* v. *Holder*, 569 U.S. 184, 190-191 (2013). And while a noncitizen's offense conduct might serve as some evidence of what conduct the statute covers, a noncitizen bears the "burden of proof" with respect to any "factual" matters relevant to the question whether he was convicted of an offense that qualifies as a crime involving moral turpitude. *Pereida* v. *Wilkinson*, 592 U.S. 224, 234 (2021) (holding that a noncitizen was required to prove the specific offense for which he was convicted when that offense appeared in a divisible statute). As the Board explained, the IJ was not required to accept petitioner's own account of the events leading up to his arrest because he did not provide any official records substantiating that account, and—if the events were as petitioner describes them—there would have been no reason for him to enter a guilty plea. See Pet. App. 27a-28a.

Nor is petitioner correct in asserting (Pet. 18-19) that the court of appeals failed to perform any analysis

of whether there is a "realistic probability" that the Virginia offense covers conduct that does not qualify as a crime involving moral turpitude. Petitioner says that "[t]he words realistic probability appear nowhere in the Fourth Circuit's opinion." Pet. 18-19. But he overlooks the court of appeals' explanation that, under the categorical approach, "a crime does not involve moral turpitude if there is a *realistic probability* that the statute of conviction could be applied to reach conduct that does not involve moral turpitude," *id.* at 9a (emphasis added; citation and internal quotation marks omitted), as well as the court's conclusion "that even the least culpable conduct that has a *realistic probability* of being prosecuted pursuant to Va. Code section 19.2-82.1 is morally turpitudinous," *id.* at 12a-13a (emphasis added). And because petitioner did not present evidence of offense conduct prosecuted under the statute beyond his own self-serving account of what led to his arrest, the court of appeals reasonably based its understanding of the covered offense on the plain text of the state law.

2. Petitioner contends (Pet. 12-17) that this case implicates a division in the courts of appeals regarding whether an intent to deceive is sufficient, by itself, to render an offense a crime involving moral turpitude. But the court of appeals found that the Virginia offense of failing to provide identification to an arresting officer requires both an intent to deceive *and* the obstruction of a government function. Pet. App. 11a-12a. Accordingly, this case does not implicate any disagreement in the lower courts regarding whether an intent to deceive, by itself, can render an offense a crime involving moral turpitude.

Petitioner also asserts (Pet. 13-14, 23) that the courts of appeals have reached conflicting decisions regarding

whether the offense of providing false identification to the police can constitute a crime involving moral turpitude. But each of the decisions petitioner cites involves a different state statute, and none of the other laws required an "intent to deceive" like the one in Va. Code Ann. § 19.2-82.1. In *Bobadilla* v. *Holder*, 679 F.3d 1052 (8th Cir. 2012), for example, the Minnesota state statute required "proof of 'intent to obstruct justice,'" rather than to deceive. *Id.* at 1058. And in *Flores-Molina* v. *Sessions*, 850 F.3d 1150 (10th Cir. 2017), the court found that the Colorado ordinance at issue did not require that false information "be given with the intent to mislead the city official, to disrupt the official's investigation, or to otherwise cause any harm or obtain any benefit." *Id.* at 1165; see also *id.* at 1166-67 (explaining that state law "confirms that" the ordinance "cannot be read to implicitly include the requisite intent"). And in *Blanco* v. *Mukasey*, 518 F.3d 714 (9th Cir. 2008), the court found that the California statute at issue required an individual to "knowingly misrepresent[] his or her identity," rather than characterizing the mens rea as an intent to deceive. *Id.* at 719. Given those differences in the underlying state laws, the disparities in how the courts analyzed those laws do not present a conflict warranting this Court's review.

3. Petitioner also contends (Pet. 9-12) that this Court should grant review to determine whether the court of appeals erred in applying *Chevron* deference to the Board's precedential decisions regarding what constitutes a crime involving moral turpitude. Petitioner does not advance a general objection to the concept of judicial deference to the Board. Instead, the gravamen of his objection appears to be his belief that the Fourth Circuit deferred to Board decisions that he thinks are

distinguishable from his case, see Pet. 9, and that the Fourth Circuit's decisions reflect "gross inconsistency" with each other, Pet. 12. Of course, this Court does not typically grant review to resolve intra-circuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

Nevertheless, the court of appeals affirmatively invoked *Chevron* deference when describing what elements are necessary to establish a crime involving moral turpitude. Pet. App. 8a. And petitioner contends that it erred in doing so—albeit not because of any general objection to judicial deference to the Board. See Pet. 9-12. This Court appears to be holding other petitions for writs of certiorari posing interpretive questions under the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, that implicate assertions of judicial deference to the Board, presumably pending its decisions in *Loper Bright*, *supra* (No. 22-451), and *Relentless*, *supra* (No. 22-1219). See, *e.g.*, *Debique* v. *Garland*, No. 23-189 (filed Aug. 25, 2023); *Diaz-Rodriguez* v. *Garland*, No. 22-863 (filed Mar. 8, 2023); *Bastias* v. *Garland*, No. 22-868 (filed Mar. 8, 2023); *Kerr* v. *Garland*, No. 22-867 (filed Mar. 8, 2023). Accordingly, the Court may wish to take a similar course here.

CONCLUSION

The petition for a writ of certiorari should be denied. Alternatively, the Court may wish to hold the petition pending the decisions in *Loper Bright Enterprises* v. *Raimondo*, No. 22-451 (argued Jan. 17, 2024), and *Relentless, Inc.* v. *Department of Commerce*, No. 22-1219 (argued Jan. 17, 2024), and dispose of it as appropriate thereafter.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
JOHN W. BLAKELEY
MELISSA NEIMAN-KELTING
BRYAN S. BEIER
Attorneys

FEBRUARY 2024