No. 20-1828

In the Supreme Court of the United States

FERNANDO MUNOZ-RIVERA, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly sustained the Board of Immigration Appeals' determination that a conviction for false representation of a social security number under 42 U.S.C. 408(a)(7)(B) is a "crime involving moral turpitude" because an element of the offense is that the false representation was made "with intent to deceive."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 986 F.3d 587. The decisions of the Board of Immigration Appeals (Pet. App. 11a-18a) and the immigration judge (Pet. App. 19a-22a, 23a-33a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 2021. The petition for a writ of certiorari was filed on June 25, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is a citizen of Mexico who entered the United States unlawfully. Pet. App. 2a. In 2015, he was convicted of using a false social security number with an "intent to deceive," in violation of 42 U.S.C. 408(a)(7)(B).

Pet. App. 20a. An immigration judge (IJ) subsequently found petitioner removable both as a noncitizen who has been convicted of a crime involving moral turpitude and as a noncitizen who is in the United States without having been admitted or paroled.[1] *Id.* at 20a-21a. The IJ also pretermitted petitioner's request for cancellation of removal, finding that petitioner's violation of 42 U.S.C. 408(a)(7)(B) constituted a crime involving moral turpitude and therefore rendered petitioner ineligible for that form of relief. Pet. App. 21a; see *id.* at 26a-33a. The Board of Immigration Appeals (Board) affirmed the denial of petitioner's request for cancellation of removal, *id.* at 11a-18a, and the court of appeals denied a petition for review, *id.* at 1a-10a. The court agreed with the Board's determination that the use of a false social security number with an "intent to deceive" qualifies as a crime involving moral turpitude, rendering petitioner ineligible for cancellation of removal. *Ibid.*

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, a noncitizen who has been found removable may seek various forms of relief from removal, including cancellation of removal for nonpermanent residents under 8 U.S.C. 1229b(b). To be eligible for that form of relief, the noncitizen must establish that he has been in the United States for at least ten years; that he has been a person of "good moral character"; that he has not been convicted of certain types of offenses, including a crime involving moral turpitude; and that his removal would result in "exceptional and extremely unusual hardship" to a close relative who is a citizen or permanent resident of the United States.

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[1] This brief uses the term "noncitizen" as equivalent to the statutory term "alien." See *Barton* v. *Barr*, 140 S. Ct. 1442, 1446 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)).

8 U.S.C. 1229b(b)(1); see *Pereida* v. *Wilkinson*, 141 S. Ct. 754, 759 (2021). Even if the noncitizen meets all of those statutory requirements, the decision whether to grant the application is confided to the Attorney General's discretion, and there is a statutory limit of no more than 4000 cancellations per year. See 8 U.S.C. 1229b(b) and (e); *Pereida*, 141 S. Ct. at 759.

2. Petitioner is a native and citizen of Mexico who entered the United States illegally in January 2010.[2] Pet. App. 2a; Certified Administrative Record (A.R.) 205. He has never been lawfully admitted to the United States. See Pet. App. 20a.

In 2015, a federal agent determined that petitioner had provided false information on a Form I-9, Employment Eligibility Verification. Pet. 17. Petitioner was "charged with [making a] false statement to obtain benefits or employment, [the] use of [an] unauthorized social security number[,] and aggravated identity theft." A.R. 134. He ultimately pleaded guilty to one count of making a false statement of citizenship to obtain employment, in violation of 18 U.S.C. 1015(e), and one count of using an unauthorized social security number, in violation of 42 U.S.C. 408(a)(7)(B). A.R. 156; Pet. 17. Petitioner was sentenced to a term of imprisonment of eight months on each count, to be served concurrently, and he was required to pay a special monetary assessment and serve one year of supervised release. Pet. App. 24a; A.R. 157-158, 160-161.

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[2] Petitioner suggests (Pet. 16 n.1) that the 2010 entry date is not supported by the record because his application for cancellation of removal referred only to earlier unlawful entries. But that date was among the five allegations in the Notice to Appear that he admitted. A.R. 84, 97-98, 205.

The Department of Homeland Security (DHS) subsequently served petitioner with a Notice to Appear, alleging that his conviction under Section 408(a)(7)(B) was for a crime involving moral turpitude, which rendered him inadmissible to the United States. Pet. App. 2a; A.R. 203-205; see 8 U.S.C. 1182(a)(2)(A)(i)(I). In October 2017, DHS lodged an additional charge of inadmissibility, alleging that petitioner was present in the United States without having been admitted or paroled. Pet. App. 26a; A.R. 201; see 8 U.S.C. 1182(a)(6)(A)(i). Petitioner denied the first charge, contending that his prior conviction was not for a crime involving moral turpitude, and submitted an application for cancellation of removal. Pet. App. 2a, 25a; A.R. 84, 130-144.

An IJ found petitioner removable both as a noncitizen who has been convicted of a crime involving moral turpitude under 8 U.S.C. 1182(a)(2)(A)(i)(I) and as a noncitizen who is present in the United States without being admitted or paroled under 8 U.S.C. 1182(a)(6)(A)(i). Pet. App. 20a-21a. The IJ also pretermitted petitioner's application for cancellation of removal because his conviction for a crime involving moral turpitude rendered him ineligible for that form of relief. *Ibid.* In a written opinion, the IJ explained that petitioner's violation of Section 408(a)(7)(B) was a crime involving moral turpitude because the statute specifically requires the government to prove that a defendant used a false social security number with an "intent to deceive," 42 U.S.C. 408(a)(7)(B). See Pet. App. 31a-32a.

The Board dismissed petitioner's administrative appeal. Pet. App. 11a-18a. It agreed with the IJ's determination that, because "intentional deception is an element of [petitioner's] conviction * * * under 42 U.S.C.

§ 408(a)(7)(B), [he] has been convicted of a" crime involving moral turpitude. *Id.* at 16a (citing *Fuentes-Cruz* v. *Gonzales*, 489 F.3d 724, 726 (5th Cir. 2007) (per curiam)).

3. The court of appeals denied a petition for review, Pet. App. 1a-10a, holding that "the § 408(a)(7)(B) offense categorically constitutes a [crime involving moral turpitude]." *Id.* at 5a. The court observed that it had "repeatedly held that crimes including an element of intentional deception are crimes involving moral turpitude," *id.* at 5a (quoting *Fuentes-Cruz*, 489 F.3d at 726), and that its "precedent firmly establishes that '[c]rimes including dishonesty or lying as an essential element involve moral turpitude,'" *id.* at 6a (quoting *Villegas-Sarabia* v. *Sessions*, 874 F.3d 871, 881 (5th Cir. 2017), cert. denied, 139 S. Ct. 320 (2018), in turn quoting *Hyder* v. *Keisler*, 506 F.3d 388, 391 (5th Cir. 2007)) (brackets in original). Moreover, the court observed that it had already held that the related offense in the adjacent subparagraph—using a social security number obtained from the Commissioner of Social Security using false information, 42 U.S.C. 408(a)(7)(A)—constitutes a crime involving moral turpitude, supporting the conclusion that an offense under Section 408(a)(7)(B) also qualifies. Pet. App. 6a-7a.

The court of appeals rejected petitioner's contention that a criminal offense requiring an intent to deceive must also require "some further aggravating element" before it qualifies as a crime involving moral turpitude. Pet. App. 8a; see *id.* at 7a-8a. But the court proceeded to conclude that, even "[a]ssuming, arguendo," that another aggravating factor is required, Section 408(a)(7)(B) includes such an element because "the use of an unauthorized social security number 'disrupts the

ability of the government to oversee the management of social security accounts; impacts legitimate tax collection efforts; and imposes a public cost in efforts to protect personal information.'" *Id.* at 8a-9a.

Finally, the court of appeals recognized some disagreement in the courts of appeals regarding whether Section 408(a)(7)(B) constitutes a crime involving moral turpitude. Pet. App. 9a & n.25. But it observed that it had previously declined to follow the lead of the Ninth Circuit on this "precise issue," and it declined to do so again in this case. *Id.* at 9a-10a.

ARGUMENT

Petitioner renews (Pet. 28-35) his challenge to the Board's determination that his violation of 42 U.S.C. 408(a)(7)(B), which prohibits the use of a false social security number with the "intent to deceive," *ibid.*, was a crime involving moral turpitude. The court of appeals' decision is correct. More than six decades ago, this Court held that fraud offenses constitute crimes involving moral turpitude. *Jordan* v. *De George*, 341 U.S. 223, 229 (1951). Petitioner acknowledges (Pet. 5-6, 9) the vitality of *Jordan.* He nonetheless seeks to distinguish it by characterizing (Pet. 4) his offense as one that involved "merely dishonesty, not fraud." But his offense did not entail only a false statement. It also included, as an element, an intent to deceive, and this Court has repeatedly recognized that the term "fraud" itself "connotes *deception* or trickery." *Husky Int'l Elecs., Inc.* v. *Ritz*, 578 U.S. 356, 360 (2016) (emphasis added). And, while petitioner has identified some disagreement in the courts of appeals as to whether his particular statutory offense constitutes a crime involving moral turpitude, he exaggerates the extent of that conflict. Only the Ninth Circuit has squarely held that the crime does not

involve moral turpitude, *Beltran-Tirado* v. *INS*, 213 F.3d 1179 (2000), and its analysis—which was based on the particular facts of that case and the unique legislative history of a related statute—has been repeatedly rejected by other courts of appeals. This Court has previously denied certiorari on the same question, see *Guardado-Garcia* v. *Holder*, 563 U.S. 987 (2011) (No. 10-922), and the same result is warranted here.[3]

1. a. As petitioner himself repeatedly acknowledges (*e.g.*, Pet. 5-6, 9, 27, 29), a crime involving fraud represents a paradigmatic example of a crime involving moral turpitude. In its 1951 decision, *Jordan* v. *De George*, this Court held that defrauding the government of tax revenue from alcohol constitutes a crime involving moral turpitude. 341 U.S. at 229. The Court explained that "fraud has consistently been regarded as such a contaminating component in any crime that American courts have, without exception, included such crimes within the scope of moral turpitude." *Ibid.*

Because fraud and deceit are closely related concepts, courts have often recognized that statutory offenses that speak in terms of deceit and dishonesty qualify as crimes involving moral turpitude under the immigration laws. Thus, in *Guarneri* v. *Kessler*, 98 F.2d 580 (5th Cir.), cert. denied, 305 U.S. 648 (1938), the court held that illegal smuggling of alcohol with intent to defraud the United States was a crime involving moral turpitude. It explained: "where [an] offense involves *dishonesty or fraud*, it also involves moral turpitude." *Id.* at 581 (emphasis added); see *Jordan*, 341 U.S. at 228-229 (approvingly invoking *Guarneri*). And,

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[3] Another petition for a writ of certiorari that presents the same question is currently pending before the Court. See *Zavala* v. *Garland*, No. 20-8317 (filed June 4, 2021).

in the decades since *Jordan*, the Fifth Circuit has repeatedly interpreted the phrase "crime involving moral turpitude" as including "crimes whose essential elements involve fraud *or deception*." *Hyder* v. *Keisler*, 506 F.3d 388, 391 (2007) (emphasis added). Similarly, the Seventh Circuit has observed that "nearly every court to consider the issue has concluded that crimes involving willful false statements are turpitudinous." *Ghani* v. *Holder*, 557 F.3d 836, 841 (2009). And the Board has explained that "it is the intent to mislead that is the controlling factor." *In re Jurado-Delgado*, 24 I. & N. Dec. 29, 35 (2006).

The decision below reflects a straightforward application of that principle. In order to be found guilty of using a false social security number in violation of Section 408(a)(7)(B), an individual must have done more than merely make a false representation; he must also have used the false social security number "with [the] intent to deceive." 42 U.S.C. 408(a)(7)(B). Deception is therefore an essential element of the offense, and the crime falls comfortably within the long line of cases recognizing that "crimes including an element of intentional deception are crimes involving moral turpitude." Pet. App. 5a (quoting *Fuentes-Cruz* v. *Gonzales*, 489 F.3d 724, 726 (5th Cir. 2007) (per curiam)).

b. Petitioner does not dispute that a violation of Section 408(a)(7)(B) requires an "intent to deceive." Instead, he seeks (Pet. 4) to draw a categorical distinction between fraud and deceit by equating the latter with "*any* act of dishonesty." But petitioner faces an uphill battle in establishing his proposed distinction because 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 a commercial dispute that predated *Jordan* by 100 years, the Court stated flatly that "[f]raud means an intention to deceive." *Lord* v. *Goddard*, 54 U.S. (13 How.) 198, 211 (1852); see *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.*, 578 U.S. at 360 (emphasis added). And in numerous criminal cases the Court has treated fraud and deceit as related and overlapping terms. *See, e.g.*, *Dennis* v. *United States*, 384 U.S. 855, 867 (1966) (describing defendant's falsehoods as a "calculated course of fraud and deceit").

To take just one notable example from the Court's criminal docket, in *Shaw* v. *United States*, 137 S. Ct. 462 (2016), the Court held that a defendant's conduct constituted bank fraud under 18 U.S.C. 1344 even though the bank did not ultimately suffer financial harm. It quoted 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." *Id.* at 467 (quoting O. W. Holmes, Jr., *The Common Law* 132 (1881)) (emphasis added). In the quoted paragraph, Holmes went on call that "typical case" of deceit "a case of intentional moral wrong," adding that "[t]he elements which make it immoral are the knowledge that

the statement is false, and the intent that it shall be acted on." *The Common Law* 132-133.

Congress, too, has recognized the close relationship between fraud and deceit, frequently grouping them in statutes, including those governing immigration and federal crimes. See, *e.g.*, 8 U.S.C. 1101(a)(43)(M)(i) (defining "aggravated felony" to include "an offense that—(i) involves fraud or deceit" in which the loss exceeds $10,000); 18 U.S.C. 670(a)(1) (prohibiting the "obtain[ing]" of certain medical products "by fraud or deception"); 15 U.S.C. 77q(a) (regulating the "[u]se of interstate commerce for purpose of fraud or deceit") (emphasis omitted); 7 U.S.C. 6b(e)(3) (making it unlawful for those who sell certain securities to engage in acts that "would operate as a fraud or deceit upon any person").

c. Petitioner nonetheless insists (Pet. 4) that crimes committed with an intent to deceive are materially distinct from frauds because "many individual acts of dishonesty harm no one, and may be understandable or even justified." To that end, he proffers (Pet 4, 30, 34) a number of hypotheticals in which someone might give a false social security number with the intent of helping rather than hurting someone else. But petitioner's attempt to distinguish fraud from deceit on the premise that fraud requires an intentional deception that is "intended to hurt someone else," Pet 30 (emphasis omitted), cannot be squared with *Shaw*, where the Court explicitly rejected the argument that bank fraud requires a defendant to inflict or "intend" to inflict some financial harm on the bank. 137 S. Ct. at 467. *Shaw* also vitiates petitioner's assumption that a falsehood uttered with an intent to deceive will sometimes be harmless. The

Court recognized that the victim of a deception "suffer[s] a wrong" simply by losing "his chance to bargain with the facts before him." *Ibid.* (internal quotation marks and citation omitted).

Moreover, long before *Shaw*, this Court had rejected an analogous argument that a policy holder had not committed fraud against insurance companies because he had lied not to "prejudice" the companies "but merely to promote his own personal interest." *Claflin* v. *Commonwealth Ins. Co.*, 110 U.S. 81, 97 (1884). The Court explained that, under Claflin's insurance policies, the companies were entitled to truthful statements from the policy holder. *Id.* at 94-95. Thus, when he made "statements, known to be false" and "intended to deceive," he engaged in "fraud upon the companies," regardless of the "motive that induced" his lies, or of the lack of damages caused by the statements. *Id.* at 96-97; *see id.* at 95. Similarly, in *Jeffries* v. *Life Ins. Co.*, 89 U.S. (22 Wall.) 47 (1875), the petitioner claimed that an insured's false representations about his marital status to an insurance company had not been material because the company was "deceived to its advantage." *Id.* at 52. The Court rejected that as "bad morality and bad law," because "the utterance of a falsehood * * * is an equal offence in morals, whether committed for his own benefit *or that of another*." *Ibid.* (emphasis added).

d. In any event, even if petitioner were correct that an intent to deceive must be accompanied by the infliction of harm to bring an offense within *Jordan*'s ambit, the court of appeals correctly held that Section 408(a)(7)(B) meets that requirement. The court expressly stated that, even assuming "arguendo" that some aggravating factor is required, a "[c]onviction under [Section] 408(a)(7)(B) necessarily involves" such a

factor because every conviction under the statute involves "conduct that obstructs the function of government." Pet. App. 8a. The court explained that "the use of an unauthorized social security number disrupts the ability of the government to oversee the management of social security accounts; impacts legitimate tax collection efforts; and imposes a public cost in efforts to protect personal information." *Id.* at 8a-9a (internal quotation marks omitted).

Petitioner urges (Pet. 35 n.11) this Court to disregard the court of appeals' alternative holding on the theory that it conflicts with a prior Fifth Circuit decision recognizing that a defendant may violate Section 408(a)(7)(B) even if he does not use a false social security number for financial gain or in a manner that "affects the integrity of the social security system." *United States* v. *Silva-Chavez*, 888 F.2d 1481, 1482 (1989). Petitioner ignores, however, that the court in this case listed several *other* ways in which using a false social security number would "obstruct[] the function of government," Pet. App. 8a, including by undermining tax-collection efforts and imposing costs to avoid identity theft, see *id.* at 8a-9a. And this Court has similarly recognized, in a case involving a state fraud statute, that "using another person's Social Security number * * * threatens harm[s]," including by undermining the "accuracy" of tax collection efforts. *Kansas* v. *Garcia*, 140 S. Ct. 791, 805 (2020).

2. Petitioner asserts (Pet. 21-23) that the court of appeals' decision implicates disagreement in the circuits. He acknowledges (Pet. 4) that the Eighth and Eleventh Circuits have agreed with the Fifth Circuit that Section 408(a)(7)(B) constitutes a crime involving moral turpitude. See *Guardado-Garcia* v. *Holder*, 615

F.3d 900, 902 (8th Cir. 2010), cert. denied, 563 U.S. 987 (2011); *Moreno-Silva* v. *U.S. Att'y Gen.*, 481 Fed. Appx. 611, 613 (11th Cir. 2012) (per curiam). He contends (Pet. 3-4), however, that the Ninth, Second, and Seventh Circuits have adopted a conflicting view. Petitioner exaggerates the extent of any disagreement because the Ninth Circuit itself has recognized that its decision is an outlier and the Second and Seventh Circuits have not yet reached a firm conclusion on the question presented.

a. Petitioner primarily relies (Pet. 13-14) on the Ninth Circuit's decision in *Beltran-Tirado*, *supra*. In that case, a divided panel of the Ninth Circuit concluded that a noncitizen did not commit a crime involving moral turpitude when she violated 42 U.S.C. 408(g)(2) (1988), the statutory predecessor of Section 408(a)(7)(B).[4] But *Beltran-Tirado* cannot bear the weight petitioner gives it because, as the Ninth Circuit has acknowledged, the case's holding was the result of an idiosyncratic set of circumstances, and the case "now stands, at best, as an isolated exception to the prevailing rule that a conviction for a fraud offense is categorically a crime involving moral turpitude." *Espino-Castillo* v. *Holder*, 770 F.3d 861, 865 (9th Cir. 2014).

In *Beltran-Tirado*, a noncitizen allegedly found a social security card on a bus in 1972 and began using that person's name and social security number as her own. 213 F.3d at 1182. Beltran-Tirado was arrested in April 1991 and was subsequently convicted under Section 408(g)(2) of making a false attestation to obtain employ-

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[4] Congress redesignated the provision in 1990 but did not substantively amend it. See Omnibus Budget Reconciliation Act of 1990, Pub. L. No 101-508, § 5121(b)(2)-(4), 104 Stat. 1388-283.

ment at a restaurant. *Ibid.* She applied for registry under 8 U.S.C. 1259, a form of relief from removal available to noncitizens who, *inter alia*, entered the United States before 1972 and are persons of "good moral character." 8 U.S.C. 1259(c). The Board held that her conviction was for a crime involving moral turpitude and therefore prevented her from satisfying the moral character criterion, *Beltran-Tirado*, 213 F.3d at 1183, but the Ninth Circuit reversed, *id.* at 1185.

The *Beltran-Tirado* majority stated that the "text of the statute and federal decisional law provide[d] no clear answer to" the question whether violation of Section 408 is a crime involving moral turpitude. 213 F.3d at 1183. But, the court concluded, the Board's decision could not be sustained because it was contrary to the legislative history of a subsequent amendment to another part of Section 408. *Id.* at 1183-1184.

Specifically, the Ninth Circuit observed that, in 1990, Congress had amended Section 408 expressly to exempt certain violations of Section 408(a)(7) from prosecution, *if* those violations were committed before January 4, 1991, by an individual who (*inter alia*) was awarded registry under Section 1259. See 42 U.S.C. 408(d) (1994) (now 42 U.S.C. 408(e)).[5] Beltran-Tirado was not exempted by that amendment because she had not yet sought or been awarded registry and because she fell outside the statute's time period. *Beltran-Tirado*, 213 F.3d at 1184 & n.9. But at the time the exemption from prosecution was adopted, members of a House-Senate conference committee had stated in a conference report that they "believe[d] that individuals who are provided

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[5] Congress redesignated Subsection (d) as Subsection (e) in 2004. Social Security Protection Act of 2004, Pub. L. No. 108-203, § 209(a)(1), 118 Stat. 513.

exemption from prosecution under this proposal should not be considered to have exhibited moral turpitude with respect to the exempted acts for purposes of determinations made by the Immigration and Naturalization Service." *Id.* at 1183 (quoting H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess. 948 (1990) (Conference Report)). Based on that legislative history, the Ninth Circuit concluded that "the crimes of which [Beltran-Tirado] was convicted do not establish 'moral turpitude,'" because even though Beltran-Tirado was not eligible for the exemption from prosecution, "the underlying behavior is the same." *Id.* at 1184.

Petitioner cannot establish a meaningful conflict based on *Beltran-Tirado* because the Ninth Circuit's decision did not address or apply this Court's decision in *Jordan*, *supra*, or any other generally applicable precedent on the meaning of moral turpitude. Rather, the Ninth Circuit concluded that the legislative history made "the intent of Congress" "clear" with respect to Beltran-Tirado's case. 213 F.3d at 1185. But petitioner gives no reason to conclude that the Ninth Circuit would reach a similar conclusion here. The exemption at issue in *Beltran-Tirado* applied only to noncitizens who were eligible for particular, limited categories of relief, such as registry, which (as noted above) is open only to aliens who entered the United States before 1972. 8 U.S.C. 1259(a); 42 U.S.C. 408(e)(1). And the exemption did not apply to crimes committed after January 4, 1991. 42 U.S.C. 408(e)(1). Petitioner has never applied for registry or any other similar qualifying form of relief, and there is no indication that he could because he entered the United States long after 1972 and his unlawful conduct began well after the exemption ceased to apply to anyone, Pet. App. 2a-3a, whereas Beltran-Tirado's

offenses were committed, at most, "a few weeks too late." *Beltran-Tirado*, 213 F.3d at 1184.

The Ninth Circuit's reasoning in *Beltran-Tirado* is also unpersuasive. In adopting the exemption from prosecution now set out in Section 408(e), Congress did not amend the INA at all, let alone the provisions governing moral turpitude. Neither the statutory text nor the Conference Report manifested any intent to overturn the agency's longstanding view, grounded in *Jordan*, that an element of intent to deceive supports classifying an offense as one involving moral turpitude. Nor did Congress remove the element of intent to deceive from the offense of which petitioner was later convicted.

Moreover, even if it were proper to give controlling weight to a passage of legislative history, the Ninth Circuit misread the passage on which it relied. The conference report did not opine that individuals who were *ineligible* for the exemption from prosecution, and who thus were convicted under Section 408(a)(7)(B), necessarily acted without moral turpitude. To the contrary, it emphasized that "individuals *who are provided exemption from prosecution* under this proposal should not be considered to have exhibited moral turpitude." Conference Report 948 (emphasis added).

Other courts of appeals have therefore joined the Fifth Circuit in expressly declining to adopt the Ninth Circuit's analysis. See *Hyder*, 506 F.3d at 393 (5th Cir.) (observing that *Beltran-Tirado* "appears to have expanded a narrow exemption beyond what Congress intended"; declining to follow *Beltran-Tirado* because it "would require us to ignore our existing precedents, which establish that crimes involving intentional decep-

tion as an essential element are generally [crimes involving moral turpitude]"); *Lateef* v. *DHS*, 592 F.3d 926, 929 (8th Cir. 2010) (rejecting *Beltran-Tirado*; "[t]he mere fact that Congress chose to exempt a certain class of aliens from prosecution for certain acts does not necessarily mean that those acts do not involve moral turpitude in other contexts") (citation omitted); accord *Guardado-Garcia*, 615 F.3d at 902-903; *Serrato-Soto* v. *Holder*, 570 F.3d 686, 692 (6th Cir. 2009).

b. Petitioner contends (Pet. 14-15) that the Second Circuit has "reached the same conclusion" as *Beltran-Tirado* and that the Seventh Circuit has "strongly suggested that it would side with the Second and Ninth Circuits." Petitioner is mistaken on both counts.

Petitioner asserts (Pet. 21) that the Second Circuit "held" that Section 408(a)(7)(B) does not establish a crime involving moral turpitude "because it requires merely dishonesty, not fraud." But the Second Circuit has only addressed the question directly in its unpublished decision in *Ahmed* v. *Holder*, 324 Fed. Appx. 82 (2009), where the court "remand[ed] to the agency to determine * * * whether 'moral turpitude' should be construed to encompass any crime that includes intentional deception as an element." *Id.* at 84 (capitalization omitted). Thus, while *Ahmed* suggested that offenses involving deceit are distinct from those involving fraud, it did not make any ultimate holding on that question.

Petitioner suggests (Pet. 22) that further support for his position can nonetheless be gleaned from *Mendez* v. *Barr*, 960 F.3d 80 (2d Cir. 2020). But *Mendez* involved a different statute that contained no "intent" requirement whatsoever. *Id.* at 86. Accordingly, the court's discussion of *Ahmed* and its observation that it has

"*generally* held[] that deceit must be paired with an intent to wrongfully extract some benefit or to cause a detriment" in order for the crime to involve moral turpitude were dicta. *Id.* at 88 (emphasis added). And even those dicta do not help petitioner because *Mendez* specifically recognized that the Second Circuit has also concluded that making a false statement in a passport application constitutes a crime involving moral turpitude because it necessarily involves "deceit and an intent to impair the efficiency and lawful functioning of the government." *Ibid.* (quoting *Rodriguez* v. *Gonzalez*, 451 F.3d 60, 64 (2d. Cir. 2006) (per curiam) (emphasis omitted). As the decision below explains, Section 408(a)(7)(B) involves a similar impairment of government functions. Pet. App. 8a-9a; see pp. 11-12, *supra*.

Petitioner himself acknowledges (Pet. 21) that the Seventh Circuit has not yet decided whether Section 408(a)(7)(B) constitutes a crime involving moral turpitude. In *Arias* v. *Lynch*, 834 F.3d 823 (7th Cir. 2016), the court provided some reasons why it believed that the offense might not qualify, but it remanded to allow the Board to address the question in the first instance. *Id.* at 829-830. Petitioner contends (Pet. 15) that the reasoning in *Arias* nonetheless suggests that the Seventh Circuit will eventually adopt his position. But *Arias* acknowledged that, given its remand to the Board, it was not "overruling" *Marin-Rodriguez* v. *Holder*, 710 F.3d 734 (7th Cir. 2013). 834 F.3d at 830. In *Marin-Rodriguez*, the Seventh Circuit concluded that a noncitizen's use of a fraudulent social security number to obtain employment in violation of 18 U.S.C. 1546(a) was a crime involving moral turpitude. 710 F.3d at 741; see *id.* at 738 ("Crimes entailing an intent to de-

ceive or defraud are unquestionably morally turpitudinous."). That express holding undercuts any suggestion that the Seventh Circuit is in petitioner's camp.

c. Petitioner also invokes (Pet. 26) what he describes as a "broader circuit disagreement about whether an element of dishonesty alone is sufficient to render an offense a categorical crime involving moral turpitude." Petitioner does not present that issue as an independent question on which this Court should grant a writ of certiorari, and for good reason. Any conflict regarding whether dishonesty must be accompanied by some aggravating factor in order to render an offense a crime involving moral turpitude is not implicated in this case because the Fifth Circuit expressly held that, even if an aggravating factor is required, Section 408(a)(7)(B) satisfies that requirement because it involves conduct that impedes a governmental function and imposes other costs on the public. Pet. App. 8a-9a; see pp. 11-12, *supra*.

3. Finally, even if this Court were to hold that an offense under Section 408(a)(7)(B) is not a crime involving moral turpitude, that would not alter petitioner's removability, because he was also found removable on the ground that he is in the United States without having been admitted or paroled. Pet. App. 20a-21a. Nor would such a holding prevent petitioner from being found ineligible for cancellation of removal on the ground that he lacks good moral character.

The ultimate decision whether to grant cancellation of removal is committed to the sound discretion of the Attorney General, but the noncitizen bears the burden of establishing that he satisfies all of the statutory prerequisites. *Pereida* v. *Wilkinson*, 141 S. Ct. 754, 759, 764 (2021). Here, there is reason to doubt that

petitioner could meet that burden with respect to establishing his good moral character. See 8 U.S.C. 1101(f); 8 U.S.C. 1229b(b). Having a conviction for a crime involving moral turpitude suffices to defeat a showing of good moral character. 8 U.S.C. 1101(f)(3). Even if his Section 408(a)(7)(B) offense did not trigger that bar, petitioner does not dispute that he has also been convicted of making a false statement of citizenship to obtain employment, in violation of 18 U.S.C. 1015(e). A.R. 156. The immigration courts have previously found that a Section 1015(e) offense qualifies as a crime involving moral turpitude. See *Cuellar Lopez* v. *Gonzales*, 427 F.3d 492, 494-495 (7th Cir. 2005) (describing IJ decision affirmed by the Board holding in part that presentation of a false birth certificate in violation of Section 1015(e) is a crime involving moral turpitude); see also *Korir* v. *Sessions*, 700 Fed. Appx. 514, 515 (6th Cir. 2017) (describing an uncontested charge of removability on the ground that a violation of Section 1015(e) was a crime involving moral turpitude).

But even if neither of petitioner's convictions was a crime involving moral turpitude, those convictions could still be the basis for making a "finding that for other reasons such person is or was not of good moral character." 8 U.S.C. 1101(f). The conduct to which petitioner admitted in his plea agreement included falsely declaring that he is a United States citizen and using someone else's name, identification card, and social security number to obtain employment. A.R. 154, 156; 15-cr-34, D. Ct. Doc. 18, at 1 (E.D. Tex. May 27, 2015). Even after *Beltran-Tirado*, the Board found—in a case arising within the Ninth Circuit—that the "use of a false social security number precludes a finding of good moral character." *Romo* v. *Gonzales*, 140 Fed. Appx. 711, 711 (9th

Cir. 2005); but see *Jimenez* v. *Gonzalez*, 158 Fed. Appx. 7, 9 (2005) (unpublished opinion remanding similar "good moral character" finding to the Board because of alleged inconsistency with *Beltran-Tirado*). And conduct involving the use of a false social security number has prevented others from establishing their good moral character. See, *e.g.*, *Lara-Mijares* v. *Mukasey*, 278 Fed. Appx. 814, 817-818 (10th Cir. 2008) (describing the Board's finding that petitioner had not established good moral character because she had used a U.S. citizen's birth certificate and social security card "to obtain a Colorado identification card, employment, college courses, car insurance, emergency medical services, and telephone service"); *Aviles* v. *INS*, 46 F.3d 1135, 1995 WL55145, at *2 (8th Cir. 1995) (Tbl.) (per curiam) (allowing Board's affirmance of IJ's denial of voluntary departure to stand because, "[b]ased on Aviles's admission that she illegally purchased and used a false social security card and birth certificate, a reasonable fact-finder could find that [she] was not a person of good moral character and, therefore, not statutorily eligible for voluntary departure").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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