No. 20-837

In the Supreme Court of the United States

TUA MENE LEBIE BAKOR, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

ELIZABETH B. PRELOGAR
Acting Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Acting Assistant Attorney General
DONALD E. KEENER
JOHN W. BLAKELEY
BRYAN S. BEIER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals erred in affirming the agency's conclusion that petitioner was convicted of a "crime involving moral turpitude," under 8 U.S.C. 1227(a)(2)(A)(i)(I), based on his felony conviction for violating Minn. Stat. § 243.166 subdiv. 5(a) (2015), a Minnesota law that punishes "knowingly violat[ing]" the sex-offender-registration requirements or intentionally submitting false information in connection with a sex-offender registration.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

No. 20-837

TUA MENE LEBIE BAKOR, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-17a) is reported at 958 F.3d 732. The decisions of the Board of Immigration Appeals (Pet. App. 18a-23a) and the immigration judge (Pet. App. 24a-43a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 2020. A petition for rehearing was denied on July 28, 2020 (Pet. App. 44a). The petition was filed on December 17, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Two years after entering the United States, petitioner sexually assaulted a 13-year-old girl and was convicted of criminal sexual conduct in Minnesota state

court. Pet. App. 2a; Administrative Record (A.R.) 339. Petitioner was therefore required to register as a "predatory offender[]" under Minn. Stat. § 243.166 (2001) (emphasis omitted). See Pet. App. 2a. Years later, petitioner pleaded guilty to having knowingly failed to comply with that requirement. *Ibid.* Based on his convictions for sexual misconduct and failing to register as a sex offender, petitioner was charged with being deportable from the United States as an alien convicted of two crimes involving moral turpitude. *Ibid.* An immigration judge (IJ) determined that petitioner was removable as charged, *id.* at 26a, and the Board of Immigration Appeals (Board) upheld the order of removal, *id.* at 18a-23a. The court of appeals denied a petition for review, rejecting petitioner's argument that his sexual offense, and his failure to register as a sex offender, are not crimes involving moral turpitude. *Id.* at 6a-12a.

1. Petitioner, a citizen of Nigeria, was admitted to the United States as a refugee in 1999. Pet. App. 1a-2a. In 2002, petitioner's immigration status was adjusted to that of an alien lawfully admitted for permanent residence. A.R. 347.[1]

In 2001, petitioner was charged with fourth-degree criminal sexual conduct in violation of Minnesota law.

---

[1] An alien admitted to the United States as a refugee may "be regarded as lawfully admitted to the United States for permanent residence" if the alien is found to be admissible to the United States, subject to waivers of certain grounds of inadmissibility, either by an immigration officer or after a hearing before an IJ. 8 U.S.C. 1159(a)(2) and (c). In this case, petitioner was placed in removal proceedings, in which the IJ granted the waiver and an adjustment of status. See A.R. 348 (noting that petitioner was "placed in proceedings and granted relief").

A.R. 340. According to the criminal complaint, petitioner, then in his early 30s, encountered a 13-year-old girl in a hallway of an apartment building and assaulted her, grabbing one of her breasts and her buttocks and lifting up her sweatshirt, after she refused to go with him to an apartment. A.R. 339. Petitioner was tried on stipulated facts and convicted of the lesser-included charge of fifth-degree criminal sexual conduct. A.R. 326. For that conviction, petitioner was sentenced to 364 days of incarceration, with 274 days stayed; the court further stayed the execution of the sentence for two years and placed petitioner on probation. A.R. 336. As a term of probation, petitioner was required to serve 55 days of confinement. *Ibid.*

Like every other State, Minnesota requires persons convicted of specified sexual offenses to provide certain identification and location information to the State. See *United States* v. *Kebodeaux*, 570 U.S. 387, 413 n.2 (2013) (Thomas, J., dissenting) (citing statutes). Because petitioner had been initially charged with fourth-degree criminal sexual conduct and was convicted of an offense arising out of the same circumstances, he was required to register as a predatory offender for a period of ten years from the conclusion of his probation. See Minn. Stat. § 243.166 subdiv. 1(a)(1)(iii) and subdiv. 6(a) (2001). Additional convictions had the effect, however, of extending petitioner's registration period. *Id.* § 243.166 subdiv. 6(c) (2015); see Pet. App. 29a.[2]

---

[2] In a colloquy with the IJ, petitioner did not specify what other offenses had extended his registration period, A.R. 215-216, but the criminal history recounted in an exhibit indicates that he violated the terms of his probation in 2002, A.R. 343, and that he has a 2009 conviction for obstructing legal process that resulted in a sentence of 42 days, as well as later convictions for possessing marijuana,

By law, petitioner was informed of his duty to register as a sex offender and was required "to read and sign a form stating that the duty of the person to register under this section has been explained." Minn. Stat. § 243.166 subdiv. 2 (2001); see A.R. 317. Despite this, in 2015, according to the statement of probable cause supporting the warrant for his arrest, petitioner filed a notice falsely claiming that his primary address was the one where an ex-girlfriend from several years ago lived. A.R. 317. A compliance check by the Minneapolis Police Department revealed that, according to the ex-girlfriend and her brother, petitioner had never lived at that address. *Ibid.* He was therefore charged with "knowingly fail[ing] to comply with the registration requirements or knowingly provid[ing] false information," a felony punishable by up to five years' imprisonment. A.R. 316; see Minn. Stat. § 243.166 subdiv. 5(a) (2015). That offense has been construed by the Minnesota Supreme Court as including, as an offense element, that the defendant had "knowledge of the law at the time of the violation" and therefore that the defendant "must know that he is violating the statute when the violation occurs," *State* v. *Mikulak*, 903 N.W.2d 600, 603-604 (Minn. 2017)—a scienter requirement that approximates willfulness under federal law, see *Bryan* v. *United States*, 524 U.S. 184, 196 (1998) (equating willfulness with "knowledge that the conduct is unlawful").

Petitioner pleaded guilty, Pet. App. 2a, and was sentenced to 364 days of confinement. A.R. 307. The court stayed the execution of the sentence for two years and placed petitioner on probation. A.R. 308. As a term of

---

public urination, trespass, and the public consumption of alcohol, A.R. 347-348.

probation, petitioner was required to serve 120 days of confinement on work-release. A.R. 309.

2. In 2017, petitioner was charged with being removable from the United States under 8 U.S.C. 1227(a)(2)(A)(ii), as having been convicted of two or more crimes involving moral turpitude. Pet. App. 26a. The IJ found petitioner removable as charged based on his 2001 conviction for criminal sexual conduct and his 2015 conviction for failing to register as a predatory sex offender. *Ibid.*

The Board upheld that determination and dismissed petitioner's administrative appeal. Pet. App. 20a-23a. The Board first rejected petitioner's contention that "criminal sexual conduct in the fifth degree" is not a crime involving moral turpitude. *Id.* at 20a. The Board explained that the offense required nonconsensual sexual contact, which is morally reprehensible, as well as the presence of "'sexual or aggressive intent,'" which is a "culpable mental state of specific intent." *Ibid.* (citation and emphasis omitted).

The Board also rejected petitioner's contention that it is not a crime involving moral turpitude to "knowingly violate[] any of [the predatory offender reporting requirements] or intentionally provide[] false information." Pet. App. 22a (citation omitted) (brackets in original). The Board observed that petitioner did "not challenge that moral turpitude inheres" in the second part of this statute, which punishes the intentional submission of false information. *Id.* at 22a n.4. It therefore construed petitioner's challenge as limited to the contention that the Minnesota offense does not categorically qualify as a crime involving moral turpitude because its first part makes it an offense to fail to provide registration information, which is "tantamount to a regulatory offense."

Id. at 22a. The Board observed that this argument was foreclosed by its previous determination that "'a willful failure to register by a sex offender who has been previously apprised of his obligation to register' is morally turpitudinous in nature." *Ibid.* (quoting *In re Tobar-Lobo*, 24 I. & N. Dec. 143, 146-147 (B.I.A. 2007)). And the Board rejected petitioner's assertion that the Minnesota offense could be distinguished from *Tobar-Lobo* based on its *mens rea*, observing that the Minnesota Supreme Court had rejected claims that the provision punishes "mere forgetfulness" and had further found that "knowledge of the law at the time of the violation is an element of the offense of knowingly violating a provision of the predatory-offender-registration statute." *Id.* at 22a-23a (citing, *inter alia*, *State* v. *Mikulak*, *supra*).

3. a. The court of appeals denied a petition for review. Pet. App. 1a-17a. In an opinion by Judge Colloton, the majority explained that, in general, to qualify as a crime involving moral turpitude, a criminal offense must involve "reprehensible conduct," which includes "conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general." *Id.* at 3a (citations omitted).

The court of appeals first rejected the proposition that petitioner's 2001 conviction for nonconsensual sexual contact "performed with sexual or aggressive intent" fails to qualify as a crime involving moral turpitude. Pet. App. 4a-6a (quoting Minn. Stat. § 609.3451 subdiv. 1 (2001)). The court observed that the Minnesota statute defines "sexual contact" as "the intentional touching by the actor of the complainant's intimate parts," and that, in the absence of consent, such conduct has long been considered morally turpitudinous. *Id.* at

4a (citation omitted). In addition, "[u]nlike some simple assault offenses, the Minnesota sexual conduct statute is not a general intent crime." *Id.* at 6a. Thus, the court found that the Board had "correctly concluded that non-consensual sexual conduct under this statute involves reprehensible conduct committed with a culpable mental state, even if it does not cause bodily injury." *Ibid.*

The court of appeals then turned to petitioner's contention that his knowing failure to comply with Minnesota's sex-offender-registration statute was not a crime involving moral turpitude. Pet. App. 6a. The court described the Board's precedential opinion in *Tobar-Lobo*, *supra*, as concluding that "the crime of willfully failing to register was inherently base or vile and met the criteria for a crime involving moral turpitude." Pet. App. 7a (citing *Tobar-Lobo*, 24 I. & N. Dec. at 146). The court held that the Board's conclusion "is a reasonable interpretation of the statute." *Ibid.* The court found that "[w]hether an offense is reprehensible properly includes consideration of the danger that the crime poses to society at large." *Ibid.* In view of "the compelling societal purpose behind sex-offender registration statutes, and the fact that knowing violations of the law facilitate recidivism and frustrate public safety," the court determined that "the Board permissibly classified a knowing failure to comply as morally turpitudinous." *Id.* at 9a.

The court of appeals recognized that other circuits "have criticized *Tobar-Lobo*," but they had done so "on a ground not applicable here." Pet. App. 9a. The court explained that the criticism is aimed primarily at the portion of *Tobar-Lobo* that suggests that "merely *forgetting* to register as a sex offender qualifie[s] as a" crime involving moral turpitude. *Id.* at 10a. The court

considered such concerns irrelevant in this case, because the Minnesota statute at issue "required proof that [petitioner] knew of the registration requirement at the time of the violation." *Ibid.* (citing *Mikulak*, 903 N.W.2d at 604). And, to the extent other courts had further concluded that even "a *knowing* failure" to comply with a sex-offender-registration statute does not qualify, the court disagreed, pronouncing itself "satisfied that the Board permissibly defined a *knowing* failure to register, as applied in Minnesota, as a crime involving moral turpitude." *Ibid.*

Finally, the court of appeals recognized that petitioner had raised "other contentions that he did not present to the Board," including the assertion that the Minnesota registration statute does not qualify as a crime involving moral turpitude because it allegedly covers offenders who have failed to register after committing lesser offenses, and because the state statute punishes conduct that petitioner classifies as mere "technical" infractions, such as an offender's failure to update the registry's record of the color of his vehicle. Pet. App. 10a-12a & n.2. The court rejected petitioner's "attempt to raise new theories for the first time on judicial review," explaining that considering such arguments in the first instance would "frustrate the purpose of mandating exhaustion" before the Board "by allowing aliens to secure judicial review on legal theories that the agency had no cause to consider." *Id.* at 12a. The court therefore acknowledged that it was "leav[ing] those points for consideration in a future administrative proceeding if raised by another alien." *Ibid.*

b. Judge Kelly dissented. Pet. App. 12a-17a. In her view, violating Minnesota's sex-offender-registration

statute does not constitute a crime involving moral turpitude because "a person may be convicted for something as minor as not 'immediately' updating the authorities about a change in the color of a car that they 'regularly' drive." *Id.* at 14a (citation omitted). Judge Kelly "disagree[d]" with the majority's determination that this argument was not properly before the court. *Id.* at 14a n.4. She read portions of petitioner's brief before the Board as exhausting the argument. *Ibid.* She concluded that the least-serious acts criminalized under the Minnesota statute are "technical and administrative conduct, not morally reprehensible conduct." *Id.* at 16a. Having found that such violations are not reprehensible, she did not reach a clear conclusion about whether the Minnesota statute satisfies the "separate" requirement that a crime involving moral turpitude "involve 'a culpable mental state.'" *Id.* at 14a n.3 (citation omitted).

ARGUMENT

Petitioner renews his contention (Pet. 2, 20-25) that a violation of Minnesota's sex-offender-registration statute is not a crime involving moral turpitude under the immigration laws. The court of appeals identified the proper framework for determining whether an offense constitutes a crime involving moral turpitude. Regardless of whether it reached the correct result as applied to this particular Minnesota offense, petitioner exaggerates the legal and practical significance of the court's narrow holding. Nor is there any division among the circuits that warrants the Court's review at this time. Although the Third Circuit has held that the same Minnesota offense is not a crime involving moral turpitude, the decision below correctly explained that the Third Circuit's decision came before the Minnesota

Supreme Court clarified the heightened nature of that offense's *mens rea* element. Some other circuits have declined to find that offenses under other States' sex-offender-registration statutes qualify as crimes involving moral turpitude, but any conflict is shallow, and review by this Court would be premature, because the decision below treated petitioner's failure to exhaust certain arguments before the Board as a reason to "leave those points for consideration in a future" case, Pet. App. 12a, and the Board itself may respond to criticisms by other courts of aspects of its own reasoning.

1. a. The decision below articulated the proper standard for assessing when an offense constitutes a crime involving moral turpitude. As the court of appeals explained, "to involve moral turpitude, a crime requires two essential elements: reprehensible conduct and a culpable mental state." Pet. App. 3a (quoting *In re Silva-Trevino*, 26 I. & N. Dec. 826, 834 (B.I.A. 2016) (*Silva-Trevino III*)) (brackets omitted). Conduct is "reprehensible" when it is "'inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.'" *Silva-Trevino III*, 26 I. & N. Dec. at 833-834 (citation omitted). And something more than mere negligence is required to establish a "culpable mental state." *Id.* at 834. While a *mens rea* of recklessness "sometimes is sufficient," Pet. App. 3a, the Board has explained that "as the level of conscious behavior decreases, i.e., from intentional to reckless conduct, more serious resulting harm is required" and "where no conscious behavior" is involved, "there can be no finding of moral turpitude." *In re Solon*, 24 I. & N. Dec. 239, 242 (B.I.A. 2007). At the other end of the scale, the Board's precedents have "classif[ied] many different crimes

* * * as crimes involving moral turpitude when those crimes are committed willfully." *In re Silva-Trevino*, 24 I. & N. Dec. 687, 706 n.5 (A.G. 2008) (*Silva-Trevino I*), vacated, 26 I. & N. Dec. 550 (A.G. 2015), remanded, 26 I. & N. Dec. 826 (B.I.A. 2016).[3]

Applying that framework to petitioner's conviction for violating the Minnesota sex-offender-registration statute, the court of appeals deferred to the Board's conclusion that willfully failing to adhere to a sex-offender-registration requirement is morally reprehensible conduct because it "frustrates society's efforts to monitor serious offenders and to protect vulnerable victims from predictable recidivism." Pet. App. 8a. The court further emphasized the presence of a heightened *mens rea* and the significance of that *mens rea* requirement. It described the Board's decision in *In re Tobar-Lobo*, 24 I. & N. Dec. 143 (B.I.A. 2007), as "a reasonable interpretation of the" immigration laws because that decision involved *both* "willfully failing to register" and "'the serious risk involved in a violation of the duty owed by this class of offenders to society.'" Pet. App. 7a (citation omitted). And, in pronouncing itself "satisfied that the Board permissibly classified a knowing failure to comply as morally turpitudinous," *id.* at 9a, the court cited a concurring opinion in *Efagene* v. *Holder*, 642 F.3d 918 (10th Cir. 2011), which expressly

---

[3] When the Attorney General vacated the 2008 opinion in *Silva-Trevino I*, he observed that "[n]othing" in that vacatur was "intended to affect Board determinations that an offense entails or does not entail 'reprehensible conduct and some form of scienter' and is or is not a crime involving moral turpitude for that reason." *In re Silva-Trevino*, 26 I. & N. Dec. 550, 553 n.3 (A.G. 2015) (quoting *Silva-Trevino I*, 24 I. & N. Dec. at 706 n.5), remanded, 26 I. & N. Dec. 826 (B.I.A. 2016).

declared that a failure to register "with intent to avoid the prophylactic purposes of the registration statutes" would be "inherently corrupt; insidious and wicked" and thus morally turpitudinous, even though the Colorado statute at issue there was *not* a crime involving moral turpitude because it included "conduct ranging from merely negligent to intentional to malicious," *id.* at 927 (O'Brien, J., concurring in the result).

The court of appeals then distinguished Minnesota's failure-to-register statute from those in other States on the basis of its heightened *mens rea*, which meant that "[petitioner's] conviction * * * required proof that he knew of the registration requirement at the time of the violation." Pet. App. 10a. In reaching that conclusion, the court relied on *State* v. *Mikulak*, 903 N.W.2d 600 (2017), in which the Minnesota Supreme Court rejected the proposition that a defendant may be convicted under Minn. Stat. § 243.166 subdiv. 5(a) (2016) merely because he "'knows or used to know' what the statute requires." 903 N.W.2d at 603; see Pet. App. 10a. The state court held that the statute does not reflect a general knowledge requirement because "'knowingly' is used as an adverb," which "describes how the defendant must 'violate' the statute to be convicted." 903 N.W.2d at 603 (citation omitted). As a result, "the defendant must know that he is violating the statute when the violation occurs." *Ibid.* Accordingly, "knowledge of the law at the time of the violation is an element of the offense of knowingly violating a provision of the predatory-offender-registration statute." *Id.* at 604. The state supreme court adopted that approach notwithstanding a dissenting justice's criticisms that, by concluding that the Minnesota statute "requir[es] a specific intent to violate the law," it was departing from "longstanding

common law" and the approach in this Court's decisions and was therefore "allowing predatory offenders * * * to escape liability through ignorance of registration duties for which they pledged responsibility." *Id.* at 608-609 (McKeig, J., dissenting).

In light of the heightened *mens rea* in the state supreme court's authoritative construction of the statute, the decision below concluded that "the Board permissibly defined a *knowing* failure to register, *as applied in Minnesota*, as a crime involving moral turpitude." Pet. App. 10a (second emphasis added).

b. Petitioner essentially ignores the central role that a heightened *mens rea* played in the court of appeals' analysis, causing him to present a distorted and exaggerated image of the decision's legal and practical significance.

In petitioner's view (Pet. 21), his offense is not a crime involving moral turpitude. He says that "his action was wrong *only* because a statute said so—and so it follows that his offense is not inherently immoral." Pet. 22 (emphasis altered). But the court found that his action was wrong not just because the statute said so but also for additional reasons: because the scienter element meant that he *knew* he was violating that law; and because his provision of a false address compromised the effectiveness of a registration-and-notification system that protects and reassures the public by managing the recidivism risks posed by sex offenders. See *United States* v. *Kebodeaux*, 570 U.S. 387, 395, 397 (2013) (describing sex-offender-registration as an "eminently reasonable" means of "protect[ing] the public from * * * sex offenders and alleviat[ing] public safety concerns," with state-law roots that go back sev-

eral decades); *id.* at 413 (Thomas, J, dissenting) (recognizing that "[p]rotecting society from sex offenders and violent child predators is an important and laudable endeavor").

Indeed, the act of willfully failing to comply with the State's registration requirements and the act of "intentionally provid[ing] false information" for the registration system are co-equal violations of the same regulatory framework. Minn. Stat. § 243.166 subdiv. 5(a)(1) and (2) (2020). But petitioner has never disputed that "moral turpitude inheres" in the affirmative act of compromising the system with false information. Pet. App. 22a n.4. And he does not explain why an act of omission (i.e., the failure to provide accurate updates) that has the same compromising effect is not similarly reprehensible when it is done with full knowledge of its illegality under the registration framework, as Minnesota's statute requires.

Instead, petitioner repeatedly asserts (Pet. 2) that, because the court of appeals relied in part on the important purposes of sex-offender registration, "[t]he decision below would * * * convert *every* criminal offense into a 'crime involving moral turpitude.'" See Pet. 23 ("[T]he fact that a criminal law is important does not in itself answer [the moral-turpitude] question. If it did, the previously limited universe of 'crimes involving moral turpitude' would expand to fit just about any criminal infraction."); Pet. 24 ("[T]he Board, like the Eighth Circuit, * * * effectively convert[ed] every criminal offense into a crime involving moral turpitude[.]") (citation omitted). In fact, there is no such danger from the court of appeals' analysis, because it found moral turpitude here only in light of the statute's heightened *mens rea* requirement. Of course not "*every*

criminal offense" (Pet. 2) has such a stringent *mens rea* requirement. But many of those that do have been recognized as crimes involving moral turpitude. See *Silva-Trevino I*, 24 I. & N. Dec. at 706 n.5.

For similar reasons, petitioner overstates the practical effect of any potential review by this Court. Because he has identified (Pet. 27) "only five [States] in which it is clear that sex-offender registration laws provide for strict liability," he contends that "a decision in this case would control the analysis as to numerous sex-offender registration laws across the country." But the decision below does not extend to all of the registration regimes that simply have "a" *mens rea* requirement, as petitioner implies (Pet. 26-27). By its terms it applies only to "a *knowing* failure to register, *as applied in Minnesota*." Pet. App. 10a (second emphasis added). A conviction under the Minnesota statute requires proof that the defendant knew of the statutory mandate at the time he flouted it—the sort of culpable state of mind that has corresponded with moral turpitude in many offenses.

By refusing to distinguish among different levels of *mens rea*, petitioner's discussion of the merits fails to account for the roles played by both *mens rea* and reprehensibility when gauging moral turpitude. The Board has recognized that decreases in *mens rea* must be balanced by "more serious resulting harm." *Solon*, 24 I. & N. Dec. at 242. In light of that, the court of appeals saw "no bright line rule that excludes a regulatory offense from the scope of the statute when it involves reprehensible conduct and a culpable mental state." Pet. App. 9a.

c. In any event, the court of appeals' ultimate balancing of *mens rea* and reprehensibility considerations,

even with respect to Minnesota's sex-offender-registration statute, has yet to be struck because the court left unexhausted points for consideration in a future case. Pet. App. 10a-11a.

In petitioner's view (Pet. 21), the failure to comply with any of "a wide range of reporting requirements," including "the color of his car," "even willfully or knowingly, is not an *inherently* reprehensible act." And he purports (Pet. 22) to prove this through a "thought experiment," claiming that, if Minnesota had no sex-offender-registration law, then he would not "have acted immorally by knowingly failing to inform the authorities of his address." But the court of appeals expressly tabled the comparative wrongness of technical violations with respect to things like car color, finding that petitioner had failed to exhaust those points before the Board, and acknowledging that they could be considered by the court in the future "if raised by another alien." Pet. App. 12a.

Petitioner asserts in passing that the court of appeals' failure-to-exhaust finding is wrong because it ignored that his brief before the Board raised the possibility that the Minnesota statute might punish a failure to comply with "technical reporting requirements." Pet. 21 n.4 (citation omitted). But the court explained that the relevant portion of petitioner's brief before the Board merely described the law as one that requires "provid[ing] 'information about [an offender's] primary and secondary addresses, employment, and vehicles they own or operate,'" Pet. App. 11a n.2 (quoting A.R. 22), and then argued that *Tobar-Lobo*—the Board's sex-offender-registration precedent—was wrongly decided, *ibid.* The brief did not argue that Minnesota's statute

fails to describe a crime involving moral turpitude because it sweeps in "technical" reporting infractions beyond a fundamental failure to register or update registration information. To the contrary, it simply argued that "[t]he independent act of failing to register or update a registration as a predatory offender is not, as a category of crime, an inherently despicable act." A.R. 23 (citation omitted); see also A.R. 24 (describing the offenses in question as "failure-to-register offenses").

Further, even if the exhaustion finding was mistaken, it is nevertheless indisputable that the decision below does not purport to determine whether "technical" violations of the sex-offender registration statute would constitute crimes involving moral turpitude, or whether their presence could prevent the offense from satisfying the standard as a categorical matter. Therefore, the decision below is not dispositive as to whether the sex-offender-registration offense would be treated as a crime involving moral turpitude in a future case where all of the relevant arguments were preserved. Pet. App. 12a ("leav[ing] those points for consideration in a future administrative proceeding if raised by another alien").

2. Petitioner contends (Pet. 10-20) that there is an acute and intolerable circuit split about whether sex-offender-registration violations are crimes involving moral turpitude. There is, however, no division in the circuits warranting this Court's review. While there is some tension between the decision below and decisions of the Third, Fourth, Ninth, and Tenth Circuits, the two decisions about the Minnesota statute were predicated on different understandings of the statute's *mens rea* requirement, and any other shallow conflict may resolve

itself. Intervention by this Court would be premature at this time.

a. Petitioner correctly notes (Pet. 1, 11-13) that the Third Circuit concluded, in *Totimeh* v. *Attorney General*, 666 F.3d 109 (2012), that the same Minnesota offense at issue in this case is not a crime involving moral turpitude. But, as recognized by the decision below, Pet. App. 10a, *Totimeh*'s own outcome was partly based on the Third Circuit's mistaken belief that the Minnesota statute "prescribes an offense that can be committed *without intent*, indeed simply by *forgetfulness*." 666 F.3d at 115-116 (emphases added). Five years after *Totimeh*, the Minnesota Supreme Court clarified that the statute requires an especially high level of culpable intent. *Mikulak*, 903 N.W.2d at 603. The Third Circuit has not yet had an opportunity to revisit *Totimeh* in the wake of *Mikulak*, and it is unclear what conclusion it will reach if and when it does.[4] Thus, petitioner is incorrect in contending that "[n]oncitizens who have violated the very same state law in the *very same way* now face wholly different outcomes under federal law based only on where their removal proceedings take place." Pet. 12-13 (some emphasis omitted).

b. Petitioner wrongly asserts (Pet. 17) that there is a "sharp" conflict between the decision below and *Plasencia-Ayala* v. *Mukasey*, 516 F.3d 738 (9th Cir. 2008), overruled by *Marmolejo-Campos* v. *Holder*, 558

---

[4] Petitioner contends (Pet. 17 n.2) that "it is not at all clear that the Third Circuit understood" the scienter element "any differently than the majority below did," but the difference is made clear in the very first sentence of the *Totimeh* opinion analyzing the offense at issue, which states that the offense can be committed "without intent" or through "forgetfulness." 666 F.3d at 115.

F.3d 903 (9th Cir. 2009). That decision addressed a Nevada sex-offender-registration offense that had "no state of mind requirement" and "create[d] strict liability for * * * violating the registration requirements." *Id.* at 747. It therefore expressly distinguished cases that had "required proof of willful conduct." *Id.* at 748 n.5. Petitioner twice quotes the court's statement that Nevada's statute would not involve depraved or base conduct "even if undertaken willfully." Pet. 14, 18 (quoting *Plasencia-Ayala*, 516 F.3d at 747). Even assuming that statement was an "alternative holding[]" (Pet. 18) rather than dictum, the Ninth Circuit has recognized that *Plasencia-Ayala* no longer has precedential effect because it incorrectly applied a *de novo* standard of review to the Board's determination that Nevada's sex-offender-registration statute was a crime involving moral turpitude. *Pannu* v. *Holder*, 639 F.3d 1225, 1228 (2011), remanded, No. A042 385 535, 2011 WL 6965202 (B.I.A. Dec. 14, 2011). Petitioner says that later decisions "did not retreat from 'the merits of *Plasencia-Ayala*[].'" Pet. 15 n.1 (quoting *Pannu*, 639 F.3d at 1228). But *Pannu* belies petitioner's contention that *Plasencia-Ayala* articulates the Ninth Circuit's current position with respect to whether a willful failure to register as a sex offender constitutes a crime involving moral turpitude.

In *Pannu*, the court considered the same California sex-offender-registration offense that the Board had deemed a crime involving moral turpitude in *Tobo-Lobar*. 639 F.3d at 1227. *Pannu* refused to find that either *Plasencia-Ayala* or *Tobo-Lobar* controlled its determination of whether the California offense was morally turpitudinous. *Id.* at 1227-1228. Instead, the court observed that *Plasencia-Ayala* had applied the wrong

standard of review and that, after *Tobo-Lobar*, the Attorney General had issued *Silva-Trevino I*, which held that a crime involving moral turpitude must involve "some form of scienter," 24 I. & N. Dec. at 706 n.5. See *Pannu*, 639 F.3d at 1228. The court discerned some "tension" between that pronouncement and *Tobo-Lobar* because California courts had applied the sex-offender-registration statute in a way that made "clear" that it could reach "even mere forgetfulness." *Id.* at 1228-1229. The court therefore remanded to the Board to reconsider whether California's failure-to-register statute constitutes a crime involving moral turpitude. *Id.* at 1229.

If *Pannu* had agreed with petitioner that a sex offender's failure to register can never be deemed morally turpitudinous, regardless of the accompanying *mens rea*, no such remand would have been necessary. Neither *Pannu* nor any other case raising a similar question has returned to the Ninth Circuit.[5] Accordingly, there is no current conflict between that circuit and the decision below.

c. Petitioner also contends (Pet. 16) that the decision below is "directly contrary" to the decision in *Efagene*, *supra*. But that decision addressed a Colorado offense that the court assumed involved, at most, a general knowledge requirement. *Efagene*, 642 F.3d at 925 & n.4; see also *id.* at 927 (O'Brien, J., concurring in the result) ("Had the Colorado statute singled out conduct (failure to register) accompanied by malignant intent

---

[5] On remand in *Pannu*, the Board itself had no opportunity to revisit *Tobar-Lobo* because it further remanded the case to the IJ for additional evidence and fact finding. *In re Pannu*, No. A042 385 535, 2011 WL 6965202, at *3 (B.I.A. Dec. 14, 2011).

my vote would be different."). The Tenth Circuit concluded that "merely having knowledge as an element of the offense does not convert a regulatory crime into a crime involving moral turpitude" because that still does not entail "an intent to commit a reprehensible act." *Id.* at 925. While that passage did not resolve how the Tenth Circuit would evaluate Minnesota's heightened *mens rea*, the next paragraph of the opinion narrowed the potential dispute with the decision below. The court criticized the Board's decision in *Tobar-Lobo* for using a rationale that "could apply to any and every criminal infraction." *Ibid.* As discussed above, see pp. 14-15, *supra*, that criticism is inapplicable to the decision below, because most criminal offenses lack the heightened *mens rea* that was essential to its reasoning. Moreover, to the extent that the Tenth Circuit's decision was predicated on concerns that it is not "inherently base, vile, or depraved" for sex offenders to violate technical requirements to do such things as "reregister annually on or within one business day of their birthdays," *Efagene*, 642 F.3d at 921-922 (citation omitted), such a complaint may still be open in the Eighth Circuit, see Pet. App. 10a-12a.

d. The same considerations also minimize the tension between the decision below and *Mohamed* v. *Holder*, 769 F.3d 885 (4th Cir. 2014). Although much of that court's discussion was about the reprehensibility factor, it addressed a Virginia failure-to-register offense with no more than a general knowledge requirement, see *id.* at 887-888, and it did not disagree with the noncitizen's assertion that "a conviction may stand even if the defendant simply forgot to register on time, and instead registered a day late," *id.* at 887. The Fourth Circuit began its analysis by stating that "Congress

meant to refer to more than simply the wrong inherent in violating [a] statute," lest "the requirement that moral turpitude be involved" become "superfluous." *Id.* at 888. Again, the heightened *mens rea* requirement in the decision below ensures that it will not transform every crime into one that involves moral turpitude.

3. Finally, this Court's review would be premature for the additional reason that the Board itself has not yet issued a precedential decision addressing the "critici[sms]" of *Tobar-Lobo* advanced by some of the courts of appeals. Pet. App. 9a. The Board might revise its views in light of those criticisms, and *Tobar-Lobo*'s status as an apparent outlier within the Board's precedent, at least with respect to its treatment of offenses involving mere forgetfulness. See *id.* at 9a-10a. As the Ninth Circuit observed, after *Tobar-Lobo*, the Attorney General reiterated that a crime involving moral turpitude generally requires a culpable mental state. *Pannu*, 639 F.3d at 1228 (citing *Silva-Trevino I*, 24 I. & N. Dec. at 706). And the Board itself has since reaffirmed that a crime of moral turpitude requires a "culpable mental state." *Silva-Trevino III*, 26 I. & N. Dec. at 834. The Board had no reason to reconsider that aspect of *Tobar-Lobo* in this case because the Minnesota Supreme Court had made clear that "a forgetful failure to register would not have sufficed." Pet. App. 10a (citing *Mikulak*, 903 N.W.2d at 604). It may have occasion to do so in a future case. But, until it has actually found that a sex-offender-registration offense with a lower *mens rea* than Minnesota's is a crime involving moral turpitude, this Court's intervention is not needed to "control the analysis as to numerous sex-offender registration laws across the country." Pet. 27.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General
BRIAN M. BOYNTON
Acting Assistant Attorney General
DONALD E. KEENER
JOHN W. BLAKELEY
BRYAN S. BEIER
Attorneys

MARCH 2021