CRIME AND (DISPARATE) PUNISHMENT: THE EIGHTH CIRCUIT'S ERRONEOUS APPLICATION OF THE CATEGORICAL APPROACH IN *BAKOR V. BARR*

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Two individuals enter the United States—one as a refugee, the other as a visitor, and later, as a graduate student. Several years later, each adjusts his status,[1] becoming a lawful permanent resident.[2] Before naturalizing,[3] however, they change addresses, but fail to immediately tell the authorities. Soon after, they both receive a Notice to Appear,[4] as enforcement authorities believe they are now deportable for not immediately updating their address.

What is the outcome of these deportation hearings? As it turns out, it depends where the hearing is held. For one immigrant, failing to immediately update his sex offender registration upon moving was not found to be a crime involving moral turpitude (CIMT), so he was able to return to his life as it was.[5] For another,[6] who was convicted under the same

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1. Immigration and Nationality Act (INA) § 245(i), 8 U.S.C. § 1255(i). Adjustment of status occurs when an individual is currently in the United States, typically on a nonimmigrant (temporary) visa, and would like to become a lawful permanent resident, *see infra* note 3, without returning to their country of birth to apply for a visa to re-enter as a lawful permanent resident.

2. "Lawful permanent residents (LPRs), also known as 'green card' holders, are non-citizens who are lawfully authorized to live permanently within the United States." *Lawful Permanent Residents*, DEP'T OF HOMELAND SECURITY, https://www.dhs.gov/immigration-statistics/lawful-permanent-residents [https://perma.cc/J33T-ZPGD].

3. "Naturalization is the process by which U.S. citizenship is granted to a lawful permanent resident . . . ." *Citizenship and Naturalization*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, https://www.uscis.gov/citizenship/learn-about-citizenship/citizenship-and-naturalization [https://perma.cc/69NV-2TGS].

4. "A Notice to Appear (NTA) is a document given to an alien that instructs them to appear before an immigration judge on a certain date. The issuance of an NTA commences removal proceedings against the alien." *USCIS Updates Notice to Appear Policy Guidance to Support DHS Enforcement Priorities*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (July 5, 2018), https://www.uscis.gov/news/news-releases/uscis-updates-notice-to-appear-policy-guidance-to-support-dhs-enforcement-priorities [https://perma.cc/LH45-STSE].

5. Totimeh v. Att'y Gen., 666 F.3d 109, 116 (3d Cir. 2012).

6. Bakor v. Barr, 958 F.3d 732 (8th Cir. 2020).

state failure-to-register statute, the impact on his federal immigration status was much more severe: he was found deportable.[7]

In *Bakor v. Barr*,[8] the Eighth Circuit determined that, for immigration purposes, failing to register as a sex offender was categorically a CIMT.[9] In doing so, the Court determined that the defendant, Bakor, had committed two CIMTs (he had also been convicted of the original sexual misconduct that led to his requirement to register as a sex offender[10]) and was therefore subject to the INA's deportability grounds.[11]

However, this interpretation did not align with the conclusion of other circuits who interpreted similar state statutes;[12] most notably, the decision of a neighboring circuit court which interpreted the same state statute and reached the opposite conclusion.[13] To that end, two defendants, convicted of violating the same state criminal statute, experienced two very different punishments: one went on with his life, and the other was now subject to being sent back to his country of birth, which he had fled in 1999 when he was admitted to the United States as a refugee.[14]

Although the precise contours of federalism are undefined, consistent application of federal law has been an important policy consideration since the founding of the United States.[15] Therefore, the extreme disparity in outcome between these two otherwise similar cases begs the question: When can the violation of a state registration crime rise to the level of moral reprehensibility? This Note will argue that the answer should be "never"—the distinction in criminal law between *malum in se* and *malum prohibitum*

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7. *Id.* Technically, being deported is not considered a criminal sanction; rather, it is recognized as a "particularly severe 'penalty' in a civil proceeding." *See* Padilla v. Kentucky, 559 U.S. 356, 365 (2010) (quoting Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893)).

8. *Bakor*, 958 F.3d 732.

9. *See infra* Section I.A.2, regarding the definition of CIMT as well as the immigration implications of being convicted of a CIMT.

10. *Bakor*, 958 F.3d at 736.

11. *See infra* notes 32–33, identifying the relevant provisions of the Immigration and Nationality Act which lay out the removability consequences of both single and subsequent CIMT convictions.

12. *Bakor*, 958 F.3d at 741–742 (Kelly, J., dissenting).

13. Totimeh v. Att'y Gen., 666 F.3d 109, 116 (3d Cir. 2012).

14. *Bakor*, 958 F.3d at 734.

15. *See* Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 VAND. L. REV. 1137, 1138–1139 (2012). "That . . . doctrine differs based on geographic happenstance would likely come as a surprise to most Americans, who believe—as John Jay put it in the Federalist Papers—that 'we have uniformly been one people; each individual citizen everywhere enjoying the same national rights, privileges, protection.'" *Id.* at 1138 (quoting THE FEDERALIST NO. 2, at 38–39 (John Jay)).

should be maintained in an analysis of crimes in the immigration context. To that end, the decision in *Bakor* was erroneous and should be vacated.

First, this Note will review the relevant immigration statutory provisions and enforcement authority, and their current interpretation in federal law. Next, it will examine the relevant precedent and subsequent circuit opinions leading up to the decision in *Bakor*. Finally, it will analyze how the Eighth Circuit's analysis and interpretation in *Bakor* was inappropriate—as well as whether and to what extent the decision in *Bakor* should be remedied by action from the Supreme Court.

I. HISTORY

A. The Immigration and Nationality Act

The contemporary iteration of federal immigration law is the Immigration and Nationality Act (INA).[16] The long and complex statute governs the federal regulation of immigration law and policy, covering, among other things, the issuance of nonimmigrant and immigrant visas,[17] admission procedures,[18] and removability.[19]

1. Enforcement Authority

The INA is enforced by a number of federal agencies who are tasked with administering and enforcing the statute's many provisions.[20] This

16. *See generally* INA 8 U.S.C. § 1101 *et seq.* The first comprehensive piece of legislation regulating immigration to the United States was the Immigration Act of 1891. *Overview of INS History*, USCIS HIST. OFF. AND LIBR., https://www.uscis.gov/sites/default/files/document/fact-sheets/INSHistory.pdf (last visited Feb. 6, 2022).The most recent iteration, the INA, was enacted in 1952. *Immigration and Nationality Act*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, https://www.uscis.gov/laws-and-policy/legislation/immigration-and-nationality-act [https://perma.cc/M2UB-QVFB]. Since then, it has undergone a series of significant changes throughout the years. For a thorough explanation, see *Current Immigration Laws*, AMERICAN IMMIGRATION LAWYERS ASS'N (Sept. 21, 2001), https://www.aila.org/infonet/current-immigration-laws [https://perma.cc/6QDB-BJUV].

17. *See generally* 8 U.S.C. § 1101(a)–(h).

18. *See generally* 8 U.S.C. §§ 1181–1188.

19. "Removability" refers to both "inadmissibility"—the inability to initially enter the United States, INA § 212—as well as "deportability"—being removed from the United States after already being there. § 1182; § 1227.

20. These include, but are not limited to, the Department of Homeland Security, the Department of Justice, the Department of Labor, and the Department of State—as well as the various offices within

includes—as is relevant to this analysis—the Board of Immigration Appeals (BIA), which provides written responses to appeals made by individuals or businesses seeking immigration benefits from decisions made by certain immigration departments and agencies.[21] To the extent that their decisions adjudicate individuals' substantive legal rights, the BIA's decisions are subject to judicial review,[22] meaning that a federal court of appeals, for example, could overturn a decision of the BIA. However, where the BIA has issued a decision interpreting an ambiguous provision of the INA, the BIA's decisions are typically owed *Chevron* deference.[23]

2. Relevant Statutory Provisions

An ambiguous term used throughout the INA is "crimes involving moral turpitude."[24] Generally speaking, the term can refer to the criminalization of conduct that is "base, vile, depraved, or morally

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each department. *See Who Does What in U.S. Immigration*, MIGRATION POL'Y INST. (Dec. 1, 2005), https://www.migrationpolicy.org/article/who-does-what-us-immigration [https://perma.cc/R9NX-YADC].

21. *Board of Immigration Appeals*, U.S. DEP'T OF JUST., https://www.justice.gov/eoir/board-of-immigration-appeals [https://perma.cc/SDJ9-H9QR] ("The BIA has been given nationwide jurisdiction to hear appeals from certain decisions rendered by Immigration Judges and by district directors of the Department of Homeland Security (DHS) in a wide variety of proceedings in which the Government of the United States is one party and the other party is an alien, a citizen, or a business firm.").

22. *Id.* ("Most BIA decisions are subject to judicial review in the federal courts.").

23. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has spoken to the precise question at issue. . . . If . . . the court determines that Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id.

24. *See* 8 U.S.C. § 1227; § 1255. Notably, "moral turpitude" has been included in immigration statutes throughout U.S. immigration law's 143-year history. For a thorough description of the origin and history of the phrase and its development in legal doctrine, see Lindsay M. Kornegay & Evan Tsen Lee, *Why Deporting Immigrants for "Crimes Involving Moral Turpitude" is Now Unconstitutional*, 13 DUKE J. CONST. LAW & PUB. POL'Y 48, 48–82 (2017). More recently, the term is being challenged at the circuit court level for being unconstitutionally vague. *See, e.g.*, Brief for Petitioner, Zaragoza v. Barr (7th Cir. 2021) (Nos. 19-3437 & 20-1591); *see also* Brief for Petitioner, Silva v. Garland (9th Cir. 2021) (Nos. 16-70130 & 17-73272).

reprehensible."[25] However, because the term is not explicitly defined in the statute, it has been judicially interpreted and defined in each circuit, each of which defines it slightly differently.[26] For the most part, to be a CIMT, one's particular conduct must have met the requisite *mens rea* degree of "knowingly"[27] and should be considered morally depraved.[28]

Though sometimes relevant in other areas of the law,[29] "moral turpitude" is most notably used in immigration for determining an individual's ability to enter or remain in the United States. A CIMT conviction can have serious consequences on an individual's immigration status because it triggers removability grounds.[30] For example, being convicted of a CIMT within five years of last admission makes an individual deportable.[31] Similarly, being convicted of two or more CIMTs at any time after admission makes an individual deportable.[32]

Notably, "crimes involving moral turpitude" include violations of both federal and *state* criminal statutes. Therefore, to determine whether an individual's state law conviction is considered a CIMT for federal

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25. Bakor v. Barr, 958 F.3d 732, 740 (8th Cir. 2020) (citing Gomez-Gutierrez v. Lynch, 811 F.3d 1053, 1058 (8th Cir. 2016)) (Kelly, J., dissenting).

26. *Immigration Review*, *Ep. 2 – Precedential Decisions from 5/1/20-5/10/20* (May 10, 2020) https://www.kktplaw.com/immigration-review-podcast/cases-discussed-on-the-immigration-review-podcast/ [https://perma.cc/G8TT-6PZH].

27. *Bakor*, 958 F.3d at 737.

28. *Id.*

29. *See* Petition for Writ of Certiorari, *Bakor*, 958 F.3d 732 (No. 20-837).

30. *See supra* note 20.

31. *See* 8 U.S.C. § 1227(a)(2)(A)(i)(emphasis added), which reads, in relevant part:

> **(i) Crimes of moral turpitude**
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> Any alien who-
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> (I) is convicted of a *crime involving moral turpitude* committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and
>
> (II) is convicted of a crime for which a sentence of one year or longer may be imposed,
>
> is deportable.

32. *See* 8 U.S.C. § 1227(a)(2)(A)(ii) (emphasis added), which reads, in relevant part:

> **(ii) Multiple criminal convictions**
>
> Any alien who at any time after admission is convicted of two or more *crimes involving moral turpitude*, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

immigration purposes, courts apply either the categorical approach[33] or the modified categorical approach,[34] where appropriate.

A categorical approach is used to determine whether a state crime is a CIMT for federal immigration purposes.[35] If the minimum conduct criminalized by the state statute is not a CIMT, the statute is said to be "overbroad," and therefore not a CIMT.[36] The question essentially becomes whether "every violation of the state statute necessarily . . . fall[s] within the federal category [of CIMTs]?"[37]

To determine this, courts begin with the language of the state statute itself—not the defendant's conviction[38]—and compare it to the federal definition being interpreted. For example, in *Descamps v. United States*, a California burglary statute was determined to be overbroad because the state criminal statute criminalized even legal entry onto a premise—whereas the entry element of the federal statute required the entry to be unlawful.[39] Therefore, in that case, the court determined that the defendant's state criminal conviction was not a categorical match for the federal crime of burglary.[40]

Rather than listing elements of a crime, some criminal statutes describe particular alternative methods for committing a crime.[41] In such a case, a court is called on to apply the modified categorical approach.[42] This approach requires the court to determine which alternative mean was the basis of the conviction, and to determine whether that particular offense was a categorical match for the federal definition of the crime.[43]

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33. *See infra* notes 40–47 and accompanying text.
34. *See infra* notes 47–49 and accompanying text.
35. Maureen Sweeney, *Categorical Analysis of Immigration Consequences 7 28 14*, YOUTUBE (July 28, 2014) https://www.youtube.com/watch?v=eDA-wVIedT0&feature=youtu.be [https://perma.cc/9382-ATNP].
36. *Id.*
37. *Id.*
38. Descamps v. United States, 570 U.S. 254, 261 (2013) ("The key . . . is elements, not facts.").
39. *Id.* at 264–65.
40. *Id.*
41. Maureen Sweeney, *Divisibility of Criminal Statutes and the Modified Categorical Analysis of Immigration Consequences*, YOUTUBE (Apr. 7, 2015), https://www.youtube.com/watch?v=9nlloIrsU0o&feature=youtu.be [https://perma.cc/ZHE9-STFM].
42. *Id.*
43. *Id.* The modified categorical approach is not undertaken by any of the courts in the cases that follow in the below analysis, and this explanation is therefore intentionally truncated. However, it is included to highlight the complexity of the categorical approach adjudicative bodies (both the BIA and federal courts) are called on to employ. There are conflicting critical opinions regarding whether the

B. The BIA's Decision in Tobar-Lobo

The first time an adjudicative body considered whether failure to register as a sex offender was a CIMT was *In re Tobar-Lobo* in 2007,[44] where the Board of Immigration Appeals concluded that it was.[45] The panel conceded that typically, registration crimes are not CIMTs;[46] however, in the case of failing to register as a sex offender, there exists both the requisite culpable mental state (knowingly) as well as the requisite reprehensible conduct, constituting a CIMT.[47] The court compared this failing to register with incest, spousal abuse, and statutory rape.[48] The panel wrote that the process of determining whether conduct is morally reprehensible can be somewhat subjective and malleable, but that the recent passage of sex offender registration statutes in all fifty states should be seen as more objective evidence that society finds the failure to register morally reprehensible.[49] Satisfying both elements of a CIMT (*mens rea* and moral reprehensibility), the panel concluded that failing to register was a CIMT.[50]

A dissenting opinion disagreed, noting that failing to register is not *itself* depraved conduct—that, rather, failing to register is simply the failure to meet a legal duty (whereas, the underlying sexual misconduct leading to the requirement that the individual register as a sex offender may be seen as moral turpitude).[51] Particularly, the dissenting opinion took umbrage with the majority's comparison of failing to register as being similar to incest or statutory rape.[52] The dissenting opinion noted the disparity between the two

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framework should be eliminated, *see generally* Rosa Nielsen, *Deportation and Depravity: Does Failure to Register as a Sex Offender Involve Moral Turpitude?*, 78 WASH. & LEE L. REV. 1157 (2021) (arguing that the *Bakor* case illustrates why the framework ought to be eliminated), kept, *see* Craig S. Lerner, *"Crimes Involving Moral Turpitude": The Constitutional and Persistent Immigration Law Doctrine*, 44 HARV. J.L. & PUB. POL'Y 71 (2021) (defending the continued use of the categorical approach), or simply cleaned, *see* Evan F. McCarthy, *Justices, Justices, Look Through Your Books, and Make Me a Perfect Match: An Argument for the Realistic Probability Test in CIMT Removal Proceedings*, 104 IOWA L. REV. 2269 (2019).

44. 24 I. & N. Dec. 143, 144 (B.I.A. 2007).
45. *Id.* at 146–47.
46. *Id.* at 147.
47. *Id.* at 146–147.
48. *Id.* at 145.
49. *Id.* at 145–46.
50. *Id.* at 147.
51. 24 I. & N. Dec. 143, 149 (B.I.A. 2007) (Filppu, Bd. Member, dissenting).
52. *Id.*

types of crimes, and concluded that the two were not equivalent because punishing crimes like incest and statutory rape are an attempt to protect particularly vulnerable groups in society.[53]

In fact, the dissent pointed out that, at the point that failing to register is seen as morally reprehensible on the theory that it is the violation of a duty owed to society, all crimes could therefore be seen as morally turpitudinous.[54] Rather, the dissent characterized a failure to register as a simple "regulatory offense,"[55] which, as the majority itself pointed out,[56] is not traditionally a CIMT—the majority simply created an exception to its own general rule for the purpose of deciding this case. Therefore, the dissenting opinion concluded that failing to register as a sex offender should not depart from prior BIA precedent: the statute should therefore not be seen as a CIMT.

C. Response to Tobar-Lobo *in Other Circuits*

1. The Ninth Circuit[57]

Shortly after the BIA decided *Tobar-Lobo*, the Ninth Circuit heard *Plasencia-Ayala v. Mukasey* in 2008.[58] The defendant in that case had been charged with open or gross lewdness, which imposed upon the defendant a requirement to register as a sex offender. Two years later, he was convicted for failing to register as a sex offender under Nevada law. This second conviction triggered the relevant deportability grounds, and, following his removal hearing, the defendant was found deportable.[59]

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53. *Id.* ("But the offenses cited by the majority as categorically turpitudinous all have the goal of protecting vulnerable classes of citizens who are both directly and personally the victims of those crimes . . . . No persons are directly and personally victimized solely through the simple forgetfulness of a sex offender who is a few days late in updating a prior registration.").

54. *Id.* ("In one sense, the breach of any and every law can be said to violate the duties owed between persons or to society in general.").

55. *Id.*

56. *Id.* at 147.

57. For a detailed description of the development of the failure-to-register doctrine in the Ninth Circuit, see Shane E. Strong, *What did Mork say to Mindy When He Forgot to Register? Pannu, Pannu! What* Pannu v. Holder *Reveals About Crimes Involving Moral Turpitude And Failure-to-Register Statutes*, 45 CREIGHTON L. REV. 617 (2012).

58. Plasencia-Ayala v. Mukasey, 516 F.3d 738 (9th Cir. 2008).

59. *Id.* at 741–42.

In a series of appeals, the BIA argued it should be granted agency deference for its decision in *Tobar-Lobo*.[60] However, the Ninth Circuit pointed out that the BIA was not entitled to *Chevron* deference[61] in the interpretation of a state statute. Therefore, in this case, where the underlying conviction was a failure to register in Nevada—not in California, where Tobar-Lobo was convicted—the Ninth Circuit held that the BIA's decision was not controlling.[62]

Rather, the Ninth Circuit held that failing to register was not a CIMT because the underlying offense in the relevant state statute was a strict liability offense.[63] Because the defendant lacked the requisite degree of willful intent required for a finding of a CIMT, the court held that the defendant had not committed a CIMT when he failed to register as a sex offender. Moreover, the Court noted the inappropriateness of categorizing a failing-to-register crime as sufficiently depraved to be considered a CIMT.[64] Therefore, echoing *Tobar-Lobo*'s dissent,[65] the Ninth Circuit rejected the government's argument that failing to register should be categorized as a CIMT for immigration purposes.[66]

60. *Id.* at 743.

61. *See supra* note 28 and accompanying text.

62. *Plasencia*, 516 F.3d at 743–44.

63. *Id.* at 747–48.

64. *Id.*

65. *In re* Tobar-Lobo, 24 I. & N. Dec. 143, 147–150 (B.I.A. 2007) (Filppu, Bd. Member, dissenting).

66. *Plasencia*, 516 F.3d at 748. Notably, however, Plasencia was not the end of the story in the Ninth Circuit. The Ninth Circuit was called on again to determine whether failing to register as a sex offender qualified as a CIMT again in *Pannu v. Holder*, 639 F.3d 1225 (9th Cir. 2011). In *Pannu*, the Ninth Circuit wrote that the law governing the use of the categorical approach had changed significantly since the holding in *Plasencia*, and that *Plasencia*'s decision not to defer to *Tobar-Lobo* should therefore be reconsidered. The case was remanded to the BIA. This led to uncertainty in the state of the law for a time. *See* Strong, *supra* note 57. However, because *Plasencia* was not entirely overruled—at least, not on the merits—it is still cited as "good" law. *See, e.g.*, Bakor v. Barr, 958 F.3d 732, 738 (8th Cir. 2020) (stating *Plasencia* was "overruled on other grounds").

2. The Tenth Circuit

Next, the Tenth Circuit was called on to review *Tobar-Lobo* in its 2011 decision in *Efagene v. Holder*.[67] In that case, the Tenth Circuit reviewed the case of a defendant who was first charged with sexual misconduct, then was convicted of failing to register as a sex offender two years later.[68] Ultimately, the Tenth Circuit held that failing to register should not be deemed a CIMT, in another split from *Tobar-Lobo*.[69]

First, the Tenth Circuit reasoned that *Tobar-Lobo* was not entitled to *Chevron* deference because *Chevron* only applies to an agency's interpretation of a federal statute it administers—here, the INA—and not to the interpretation of state statutes, like the Colorado failure-to-register statute at issue in the case.[70] Because the decision of the case in *Efagene* turned on the interpretation of a Colorado statute, which had not been at issue in *Tobar-Lobo*, the court rejected the government's argument that *Tobar-Lobo* should be deferred to in the Tenth Circuit's decision in *Efagene*.[71] Moreover, the Tenth Circuit concluded that the BIA's interpretation in *Tobar-Lobo* was simply wrong, and therefore not entitled to *Chevron* deference.[72] Part of the decision in *Tobar-Lobo* was based on the creation of an exception to the general rule that regulatory offenses do not rise to the level of CIMTs.[73] Considering that the BIA was inconsistent with its own precedent, the Tenth Circuit found less reason to defer to the BIA's insight on the case.[74]

Next, the Tenth Circuit extended support to the reasoning of *Tobar-Lobo*'s dissent,[75] concluding that, were they to agree that failing to register is a CIMT because it is the breach of a legal duty to society, all crimes would rise to the level of CIMTs—an absurd result.[76]

67. Efagene v. Holder, 642 F.3d 918 (10th Cir. 2011).
68. *Id.* at 920.
69. *Id.*
70. *Id.* at 920–21.
71. *Id.*
72. *Id.*
73. *Id.* at 922.
74. *Id* at 925.
75. *In re* Tobar-Lobo, 24 I. & N. Dec. 143, 147–150, Interim Decision 3562, 2007 WL 1201717, at *5 (B.I.A. 2007) (Filppu, Bd. Member, dissenting).
76. *Efagene*, 642 F.3d at 925.

Finally, the court noted that the modified categorical approach was not needed as a way to analyze the case because no element of the statute constitutes a CIMT.[77] At the point that the statute included neither willful nor depraved action, the court found no reason to employ the modified categorical approach.[78]

3. The Third Circuit

A short time later, the Third Circuit in 2012 also rejected *Tobar-Lobo* when deciding whether a state registration requirement constituted a CIMT. Like its sister circuits, the Third Circuit in *Totimeh v. Attorney General of the United States*[79] rejected the BIA's approach in *Tobar-Lobo*. The defendant in *Totimeh* was convicted of sexual misconduct under a Minnesota state statute, then convicted of failing to register as a sex offender ten years later, a decision which ultimately triggered the defendant's notice to appear for deportability proceedings on account of his having been convicted of two crimes involving moral turpitude.[80] Initially the Immigration Judge (IJ) and BIA ruled that Totimeh was deportable, relying on the BIA's decision in *Tobar-Lobo*, and the defendant appealed.[81]

On appeal, the Third Circuit determined that not only was the BIA's underlying decision—that Totimeh was deportable—not entitled to deference; the Third Circuit wrote that *Tobar-Lobo* itself is not entitled to *Chevron* deference.[82] Instead, the Third Circuit agreed with the Ninth and Tenth Circuits' decisions, concluding that failing to register as a sex offender is not categorically a CIMT for immigration purposes.[83]

The court explained its reasoning in two parts: First, the statute under which Totimeh was convicted could theoretically impose criminal conduct for forgetfulness.[84] The court noted that forgetfulness is not knowingly intentional—therefore, the state statute encompassed conduct that went

77. *Id.* at 926.
78. *Id.*
79. 666 F.3d 109 (3d Cir. 2012).
80. *Id.* at 111–12.
81. *Id.*
82. *Id.* at 113–15.
83. *Id.* at 115.
84. *Id.*

beyond the requisite *mens rea* to categorically qualify as a CIMT and was therefore overbroad.[85]

Second, the court wrote that the statute does not regulate inherently vile or depraved conduct.[86] Echoing the Tenth Circuit's analysis in *Efagene*, the Third Circuit wrote that the BIA contradicted itself in *Tobar-Lobo*, because the majority itself indicated that it was going against precedent by calling the registration statute violation a CIMT.[87] Rather, the court wrote, the exception the BIA purported to create does not and should not exist.[88]

4. The Fourth Circuit

Finally, the Fourth Circuit's 2014 opinion in *Mohamed v. Holder*[89] yet again mirrored the decisions of its fellow federal courts of appeals, concluding that failing to register as a sex offender is not categorically a CIMT on the grounds that the defendant's behavior leading to the state criminal conviction lacked both the requisite level of moral depravity and requisite *mens rea*.[90]

In *Mohamed*, the defendant was first convicted of sexual battery, and one year later, he was charged with failing to register as a sex offender.[91] In the defendant's removal proceedings, the IJ and BIA deferred to *Tobar-Lobo*, and Mohamed therefore was convicted of two CIMTs and was deportable.[92]

Primarily, the Fourth Circuit's decision highlighted the fact that failing to register should be seen only as an administrative crime, not rising to the level of reprehensible moral misconduct required for a crime to be deemed categorically a CIMT.[93] Pushing back against the BIA's categorization of failing to register as a violation of obvious social moral norms,[94] the Fourth Circuit compared failing to register as a sex offender as morally similar to

85. *Id.* at 116.
86. *Id.* ("The statute does not regulate a crime that of itself is inherently vile or intentionally malicious.")
87. *Id.*
88. *Id.*
89. 769 F.3d 885 (4th Cir. 2014).
90. *Id.*
91. *Id.*
92. *Id.* at 887.
93. *Id.* at 889.
94. *Id.* at 888.

failing to register for the draft.[95] Finally, the Fourth Circuit's opinion echoed earlier courts' arguments that failing to register is simply the violation of a legal duty, not the violation of a social moral norm.[96]

D. The Most Recent Decision: Bakor v. Barr

After more than a decade of circuit agreement, the Eighth Circuit's decision in *Bakor v. Barr*[97]—which sided with the BIA's reasoning in *Tobar-Lobo* that failing to register as a sex offender is categorically a CIMT—created a circuit split.[98]

In this case, the defendant was convicted of sexual misconduct shortly after becoming a lawful permanent resident, then was convicted fourteen years later for failing to register as a sex offender[99]—under the same Minnesota statute weighed by the Third Circuit in *Totimeh*.[100] Bakor was charged with conviction of two CIMTs and found deportable under INA § 237(a)(2)(A)(ii).[101] Bakor appealed that decision in the Eighth Circuit.

However, the Eighth Circuit—unlike its sister circuits—found that failing to register was indeed a CIMT, relying on the BIA's decision in *Tobar-Lobo* as well as its own analysis of the state statute.[102] The Court first determined that, while an existing federal opinion had already analyzed whether the relevant Minnesota statute was a CIMT—the Third Circuit's

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95. *Id.*

96. *Id.* at 889–90. ("Laws of this nature simply do not implicate any moral value beyond the duty to obey the law. At bottom, violating a registration law . . . is categorically not a crime involving moral turpitude, and the BIA's contrary conclusion, which was based on the statute's purpose, is an unreasonable construction of the statutory language. For this reason, we do not defer to *Tobar-Lobo*." (internal citation omitted)).

97. 958 F.3d 732 (8th Cir. 2020).

98. For policy reasons, divergent opinions from one federal circuit court of appeals to another is typically seen as undesirable. *See, e.g.*, Jonathan M. Cohen & Daniel S. Cohen, *Iron-ing Out Circuit Splits: A Proposal for the Use of the Irons Procedure to Prevent and Resolve Circuit Splits Among the United States Courts of Appeals*, 108 CALIF. L. REV. 989, 990 (2020). In fact, some have advocated for an expansion of the Supreme Court docket to remedy the ever-increasing number of significant circuit splits that have formed. *See, e.g.*, Evan D. Bernick, *The Circuit Splits are Out There—and the Court Should Resolve Them*, 16 ENGAGE 2 (Aug. 13, 2015), https://fedsoc.org/commentary/publications/the-circuit-splits-are-out-there-and-the-court-should-resolve-them [https://perma.cc/63MJ-383K].

99. Bakor v. Barr, 958 F.3d 732, 734 (8th Cir. 2020).

100. *Id.* at 738.

101. *Id.* at 734–35.

102. *Id.* at 737–38.

opinion in *Totimeh*, which rejected the BIA's decision in *Tobar-Lobo*[103]—*Totimeh* itself had been "superseded" by a more recent Minnesota *state* case interpreting the very fail-to-register statute both Bakor and Totimeh were charged with.[104] In *Mikulak*, the Minnesota Supreme Court ruled that the "knowing" intent had to occur at the same time as the failure to register, meaning that one could not be convicted of the crime without knowing of the failure.[105] On the other hand, *Totimeh* had held that the state crime could encompass even a forgetful failure to register.[106] Therefore, the Eighth Circuit concluded that *Totimeh*'s reasoning was superseded, and, on this fresh slate, it determined that *Tobar-Lobo* was still good law as applied to the Minnesota statute.[107] Equipped only with the remaining persuasive[108] precedent of *Tobar-Lobo*, the Eighth Circuit deferred to the BIA's decision in that case. Therefore, the court concluded that failure to register as a sex offender is analogous to other regulatory crimes like statutory rape. The Eighth Circuit ultimately held that Bakor had been convicted of two CIMTs and was therefore deportable.[109]

E. The Dissent

However, *Bakor*'s dissenting opinion disagreed with the majority's conclusion, citing what it saw as both an incorrect interpretation of the Minnesota statute as well as the undesirability of the circuit split being created by the majority's decision.[110] First, rather than conceding that *Mikulak* "superseded" *Totimeh*, the dissent pointed out that the categorical approach was the proper starting point for the Court's inquiry, and that the first issue should be determining the minimum conduct criminalized by the statute.[111] More than just forgetting to register, as addressed in *Mikulak*, the

103. Totimeh v. Att'y Gen., 666 F.3d 109, 115 (3d Cir. 2012).

104. *Bakor*, 958 F.3d at 738.

105. State v. Mikulak, 903 N.W.2d 600 (Minn. 2017).

106. *Bakor*, 958 F.3d at 738.

107. *Id.* Moreover, *Bakor*'s majority conceded that there might be something to the argument that the statute under which Bakor was charged may be overbroad; however, it noted, because Bakor did not exhaust this argument at the BIA, they were not in a position to weigh in. *Id.* at 739.

108. To clarify, "persuasive" in this instance refers to the fact that the precedent is not binding on the *Bakor* court—not that it "has the power of persuading" or is "capable of or skilled in persuasion," *Persuasive*, OXFORD ENG. DICTIONARY (3d ed. 2005).

109. *Bakor*, 958 F.3d at 738.

110. *Id.* at 739–42 (Kelly, J., dissenting).

111. *Id.* at 739–40.

dissent pointed out that the Minnesota statute criminalized even "failing to 'immediately' update the authorities about the color of a car they 'regularly' drive."[112] Because "such conduct is hardly morally reprehensible or shocking to the public conscience,"[113] the dissent thought that the inquiry should fail at the first prong of the analysis.

Rather, the dissent noted, the Minnesota state courts themselves categorized the registration statute as "regulatory—not punitive—in nature";[114] therefore, the dissent wrote, the failure to register statute could not rise to the level of a CIMT because, as *Tobar-Lobo* itself pointed out, "regulatory offenses 'are not generally considered' CIMTs."[115] This argument echoed the consensus of multiple other federal appellate courts: that *Tobar-Lobo*'s analysis should be rejected and not afforded deference as a binding opinion.[116]

To that end, the dissent finally concluded that the neighboring circuit opinions were more appropriate: that failing to register as a sex offender should not rise to the level of a CIMT.[117] It pushed back against the majority's illustration of *Totimeh* as "superseded," because *Totimeh* was decided on multiple grounds.[118] The other factors weighed in the Third Circuit's reasoning, then, are still good law.[119] Therefore, the dissent felt that Bakor should not have been seen as having been convicted of two CIMTs and, therefore not be deportable.[120]

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112. *Id.* at 740.

113. *Id.*

114. *Id.* at 741.

115. *Id.*

116. *Id.* (citing Mohamed v. Holder, 769 F.3d 885, 889 (4th Cir. 2014); Totimeh v. Att'y Gen., 666 F.3d 109, 116 (3d Cir. 2012); Efagene v. Holder, 642 F.3d 918, 926 (10th Cir. 2011); and Plasencia-Ayala v. Mukasey, 516 F.3d 738, 747 (9th Cir. 2008)).

117. *Id.* at 742.

118. *Id.* In addition to the determination that the Minnesota state failure-to-register statute could be "committed without intent," Totimeh v. Att'y Gen., 666 F.3d 109, 115 (3d Cir. 2012), the Third Circuit also held that "the statute does not regulate a crime that of itself is inherently vile or intentionally malicious." *Id.* at 116.

119. *Bakor*, 958 F.3d at 742 (Kelly, J., dissenting).

120. *Id.*

II. ANALYSIS

A. Bakor *Failed to Properly Employ the Categorical Approach In Its Analysis*

The Eighth Circuit's analysis of the Minnesota state statute improperly failed to answer the essential threshold inquiry at the start of any analysis utilizing the categorical approach—whether the least of the acts criminalized constitute moral turpitude—because it analyzed only the requisite *mens rea* of the statute. In its analysis, the Eighth Circuit focused its argument on rebutting the contention that the least of the acts criminalized may have included a *mens rea* of forgetfulness.[121] This was likely inspired, at least in part, by the resulting opinions from neighboring circuits, which noted that statutes including a *mens rea* of forgetfulness could not rise to the level of CIMTs.[122] The opinion in *Bakor*, however, notes that the least of the acts criminalized in Minnesota's state statute could *not* include forgetfulness, per a more recent Minnesota state case, *State v. Mikulak*, which held that convictions for the registration crime in question resulted only from knowing—never forgetful— conduct.[123] However, *Mikulak* was decided in 2017,[124] whereas Bakor was convicted of violating the registration requirements in 2015[125]—meaning it would be possible that the same analysis employed in *Mikulak*, which ultimately found the defendant not guilty[126] could have saved the defendant in Bakor.

Moreover, even if its analysis regarding the *mens rea* was correct (i.e., that it was capable of categorization as a CIMT because it would never include a conviction for forgetfulness), the majority opinion failed to note that the statute also includes other less culpable *actus rei* which do not constitute moral turpitude. For example, as the *Bakor* dissent points out, this

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121. *Id.* at 738.

122. *See, e.g.*, *Totimeh*, 666 F.3d at 115–16. The Third Circuit, who ruled on the same Minnesota statute in question in *Bakor*, wrote that "[T]he statute prescribes an offense that can be committed without intent, indeed simply by forgetfulness." *Id.* at 115.

123. *Bakor*, 958 F.3d at 738 (citing State v. Mikulak, 903 N.W.2d 600, 604 (Minn. 2017)).

124. State v. Mikulak, 903 N.W.2d 600, 604 (Minn. 2017).

125. *Bakor*, 958 F.3d at 734.

126. The defendant in *Mikulak* was found not guilty because it was clear to the Court that, despite signing a paper at the time he became a registered sex offender acknowledging that he understood the requirements, he was not fully aware of the requirements at the time he was convicted. *Mikulak*, 903 N.W.2d at 605.

could even include "not 'immediately' updating the authorities about a change in color of a car that they 'regularly' drive."[127] As discussed below, this regulatory conduct does not rise to the level of moral turpitude, meaning that, at the outset, the subsection of the Minnesota statute under which Bakor was convicted should have been categorized as overbroad.

B. Bakor *Was Decided Incorrectly to the Extent It Deferred to and Relied Upon* Tobar-Lobo *in Its Analysis*

1. *Tobar-Lobo* Is an Instance in Which *Chevron* Deference Should Not Be Afforded

Chevron deference applies when an agency is interpreting an ambiguous federal statute.[128] In this case that is the definition of CIMT, as Congress left it undefined in the relevant provisions of the INA.[129] The majority opinion in *Bakor* found that the BIA is owed deference to its interpretation of CIMT, as applied to a particular state failure-to-register crime.

However, *Chevron* deference is not absolute: there are limits to its doctrine. For example, agency deference is not owed where the interpretation is, for example, "unreasonable."[130] That is the case here, where the BIA erroneously interpreted the degree of turpitude involved in failing to register as a sex offender.[131] Moreover, to the extent it announced (without sufficient explanation) an exception to the longstanding BIA interpretation that regulatory offenses do not rise to the level of CIMTs,[132] courts had less of a need to afford agency deference to the BIA's decision in *Tobar-Lobo*.[133]

127. *Bakor*, 958 F.3d at 740 (Kelly, J., dissenting).

128. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

129. *See supra* note 32 (citing 8 U.S.C. § 1227(a)(2)(A)(i)).

130. *See, e.g.*, Efagene v. Holder, 642 F.3d 918, 921 (10th Cir. 2011) (quoting *Chevron*, 467 U.S. at 845) ("[T]he BIA's interpretation of moral turpitude to reach so far as to encompass the Colorado misdemeanor offense of failure to register is not a 'reasonable policy choice for the agency to make.'").

131. *See infra* Section II.B.2.

132. *See infra* note 159 and accompanying text.

133. Totimeh v. Att'y Gen. of U.S., 666 F.3d 109, 115 (3d Cir. 2012) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view.").

An additional view notes that *Chevron* deference is not owed where the BIA is interpreting state, rather than federal, statutes,[134] as is the case here. Regardless of the BIA's interpretation of the definition of CIMT in the federal INA, the BIA is less capable of determining the scope of the moral turpitude that inheres in Minnesota's sex offender registry statute. Though the categorical approach is used in other areas of the law to determine whether violations of state criminal statutes will have federal consequences,[135] those interpretations occur when an Article III judge is the arbiter; in the BIA context, no Article III oversight is provided.[136]

2. *Tobar-Lobo* and Its Progeny Are Not Compatible with Existing Law

Despite conflicting conclusions, all adjudicative bodies[137] who have weighed the issue of whether violating the terms of sex offender registration constitutes a CIMT have conceded one point: typically, violations of mere registration statutes do not rise to the level of CIMTs.[138] However, the BIA carved out an exception to this rule in *Tobar-Lobo* when it said there are some obligations of this type which, once imposed, are "too important not to heed."[139] The BIA even compared failing to register with neglecting to feed a child.[140] The BIA relied on the fact that all fifty states have passed sex registration statutes[141] to ultimately conclude that, to the extent that

134. Plasencia-Ayala v. Mukasey, 516 F.3d 738, 744 (9th Cir. 2008) (quoting Garcia–Lopez v. Ashcroft, 334 F.3d 840, 843 (9th Cir. 2003)) ("The BIA's construction of a state statute is likewise due no deference because it is 'not a statute which the BIA administers or has any particular expertise in interpreting.'").

135. Descamps v. United States, 570 U.S. 254 (2013) (analyzing whether a state burglary conviction would result in federal consequences under the Armed Career Criminal Act).

136. BIA judges and IJs who initially adjudicate removal hearings and issue decisions are not Article III judges; instead, they are administrative law judges within the Executive Office for Immigration Review within the Department of Justice. *Executive Office for Immigration Review: About the Office*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/eoir/about-office (last visited Mar. 13, 2022).

137. *See supra* Section I.

138. *Compare, e.g.*, *In re* Tobar-Lobo, 24 I. & N. Dec. 143, 147 (B.I.A. 2007) ("We further note that regulatory offenses, of which the instant crime is one, are not generally considered turpitudinous"), *with Plasencia*, 516 F.3d at 747 ("Where an act is only statutorily prohibited, rather than inherently wrong, the act generally will not involve moral turpitude.").

139. *Tobar-Lobo*, 24 I. & N. at 146.

140. *Id.* at 146 n.6 ("Analogous behavior might be a form of child abuse in which the offender forgot over a protracted period to feed or provide needed medicine to children entrusted to his sole care.").

141. *Id.* at 145–46.

"moral turpitude" depends on what society views as turpitudinous, the recent passage of these statutes is a clear reflection of a societal norm and duty imposed.[142]

Creating an exception to the general rule, however, was unreasonable. First, the crimes to which the opinion attempted to compare the registration statute[143] were simply false analogies.[144] While states created sex offender registration requirements for a reason,[145] failure to comply—even if knowingly—does not constitute an immediate, direct harm to a victim. Moreover, to the extent it begs precedential deference, the BIA should itself rely on its own binding precedent.[146]

More importantly, however, this decision not only contradicts existing law; it contradicts practical analysis—as some opinions noted, relying on this interpretation would, in effect, turn all crimes into crimes involving moral turpitude.[147] Relying on *Tobar-Lobo*, the Eighth Circuit in *Bakor* wrote that no bright-line rule exists to differentiate *malum in se* offenses—crimes that are wrong because the behavior is "morally reprehensible"—from *malum prohibitum* offenses–crimes wrong simply because they are prohibited by legislation.[148] However, that distinction is in fact imperative in determining whether a crime involves moral turpitude, because the hallmark of a CIMT is "baseness" or "depravity," something that is "contrary to the accepted rules of morality."[149] Rather, *Tobar-Lobo* (and its progeny, *Bakor*) relied on the "violation of the duty owed by this class of offenders to society."[150] The dissenting opinions—in both decisions—point

142. *Id.* at 147.

143. Including incest, spousal abuse, and statutory rape. *Id.* at 145.

144. *See* Efagene v. Holder, 642 F.3d 918, 923–925 (10th Cir. 2011) (rebutting the BIA's comparisons of the failure-to-register statute to other CIMTs in *Tobar-Lobo*).

145. Bakor v. Barr, 958 F.3d 732, 737 (8th Cir. 2020) (quoting *Tobar-Lobo*, 24 I. & N. at 144–46) ("[O]utrage over sexual crimes—particularly those targeting children—has led to the enactment of some form of sex offender registration statute in every state and at the Federal level.").

146. *See supra* note 145 and accompanying text.

147. *See, e.g.*, *Efagene*, 642 F.3d at 925 ("The BIA's interpretation of moral turpitude in *Tobar-Lobo* is unreasonable for the additional reason that the rationale for the decision could apply to any and every criminal infraction."); *see also* Plasencia-Ayala v. Mukasey, 516 F.3d 738, 748 (9th Cir. 2008) (quoting Navarro–Lopez v. Gonzalez, 503 F.3d 1063, 1070–71 (9th Cir. 2007)) ("However, commission of *any* crime, by definition, runs contrary to *some* duty owed to society. If this were the sole benchmark for a crime involving moral turpitude, every crime would involve moral turpitude.")

148. *Bakor*, 958 F.3d at 738.

149. *Id.* at 735.

150. *Id.* at 738.

out that *all* crimes are a violation of a duty to society.[151] The ultimate result—that all crimes are CIMTs—is absurd and only muddies the already-complex doctrine of determining what convictions constitute CIMTs. Therefore, to the extent that the Eighth Circuit relied on and deferred to *Tobar-Lobo* in its analysis in *Bakor*, it did so incorrectly.

III. PROPOSAL

Given the unfavorable implications of the Eighth Circuit's decision in *Bakor*, the Supreme Court ought to have resolved the matter by first granting certiorari on the defendant's appeal and subsequently vacating the Eighth Circuit's decision.

A. The Supreme Court Should Not Have Denied the Writ of Certiorari

Because *Bakor* was based on a faulty reliance on inappropriate precedent, the Supreme Court's decision to deny Bakor's writ of certiorari was equally incorrect. At a minimum, the Supreme Court should aim to resolve the fragmented landscape of the federal circuit courts of appeals that *Bakor* created.[152] As a matter of policy, circuit splits tend to "undermine the uniformity, consistency, and predictability of federal law,"[153] leading to unfavorable results.[154] This is especially apparent, as in this case, where different circuit court decisions analyzing the same question about the same statutes led to two different results. In fact, Chief Justice Roberts has previously indicated that a major factor the Court considers in determining whether to grant certiorari is whether a circuit split exists.[155]

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151. *See Bakor*, 958 F.3d at 740; *see also In re* Tobar-Lobo, 24 I. & N. Dec. 143, 147 (B.I.A. 2007).

152. *Bakor*, 958 F.3d at 741–42 (Kelly, J., dissenting).

153. Cohen & Cohen, *supra* note 98, at 990.

154. *Id.* The article identifies three discrete problems arising from the existence of circuit splits. They: (1) "create uncertain and disparate applications of federal rights"; (2) "cause the same federal law to impose different burdens or limitations on government actors based on those actors' location"; and (3) "endure well beyond the cases immediately at issue." *Id.* at 996. As addressed above, *see supra* notes 1–8, the most important problem with the *Bakor* split is the second: the same statute causing disparate burdens in different jurisdictions.

155. Bernick, *supra* note 108, at 37.

In fact, the Supreme Court's standard for granting certiorari is whether a lower court "has entered a decision in conflict with another such court on an important federal question."[156] To the extent that a conflicting decision has indeed been rendered, the question is simply whether the issue is an "important federal question"[157]—which multiple courts have answered with a resounding "yes." As each court that has analyzed the issue has pointed out, all fifty states currently have sex offender registration statutes, meaning this decision implicates an issue of significant law relevant throughout the country.[158] Given that the federal immigration laws, as well as other statutory schemes, regularly analyze the impact that these statutes have on offenders, it is imperative that federal courts provide consistent answers.

B. The Supreme Court Should Have Vacated the Eighth Circuit's Decision

Additionally, vacating the Eighth Circuit's decision in *Bakor* would have most naturally reflected the consensus opinion among federal appellate courts. Prior to *Bakor*, courts of appeals uniformly ruled that sex offender registration violations were not CIMTs.[159] Thus, despite following the decision of the BIA, the Eighth Circuit's decision departs from the "norm" to the extent that other circuits' opinions reflect the current state of the law in everyday practice throughout the country. Vacating *Bakor* therefore would have restored the state of the law to its previous state—rejecting *Tobar-Lobo*—and would have the effect of unifying the federal judiciary.

Moreover, vacating the Eighth Circuit's decision would have clarified the confusion created in *Tobar-Lobo* and perpetuated by *Bakor*—whether registration statute violations rise to the level of CIMTs. Vacating the Eighth Circuit's decision in *Bakor* would have reaffirmed that a distinction between regulatory and other crimes meaningfully exists, would have confirmed that

156. *Id.* (citing SUP. CT. R. 10).

157. *Id.*

158. *See* Bakor v. Barr, 958 F.3d 732, 737 (8th Cir. 2020). The importance of this federal question is only exacerbated by the disparate impact of having different federal jurisdictions rule in different ways about the same state statute, as in *Totimeh* and *Bakor*.

159. *Bakor*, 958 F.3d at 741–742 (Kelly, J., dissenting) ("Our court is not the first to consider whether a violation of a sex offender registration statute qualifies as a CIMT. Until today every circuit that has addressed the issue has rejected the BIA's conclusion and decided that such an offense is not a CIMT.").

this distinction is relevant to their categorical analysis, and would have clarified that no exception exists to that distinction.[160] Rather than rely on a series of false analogies to demonstrate that the failure to register statute is a CIMT, the Court should endeavor to categorize the statutes for what actions they really criminalize: *malum prohibitum*. Limiting the definition of "moral turpitude," at least in this context, would be helpful in an already-complex area of the law.

CONCLUSION

The defendants in *Bakor*[161] and *Totimeh*[162] represent two of the many individuals whose lives were shaped by the at-times unpredictable results of the categorical approach in determining whether the violation of a state statute qualifies as a crime that will have an impact on the defendant's federal immigration status. The Eighth Circuit's decision in *Bakor v. Barr* to defer to the previous BIA decision, *Tobar-Lobo*,[163] was inappropriate because violation of mere regulatory crimes should not be said to be morally turpitudinous. The fact that the decision's analysis rested on a decision by an agency not owed *Chevron* deference highlights the undesirability of the Eighth Circuit's decision. This undesirability is only amplified further by the fact that it was a departure from the decisions across multiple other federal circuits. Although changing the categorical approach entirely seems unlikely, at a minimum, granting certiorari at the Supreme Court level to resolve the conflicting decisions would alleviate some of the difficulty experienced by the individuals whose lives are shaped by the complex policy of federal immigration law.

160. *See Bakor*, 958 F.3d at 741 (Kelly, J., dissenting).
161. *Bakor*, 958 F.3d 732.
162. Totimeh v. Att'y Gen., 666 F.3d 109 (3d Cir. 2012).
163. *In re* Tobar-Lobo, 24 I. & N. Dec. 143 (B.I.A. 2007).