No. 19-282

In the Supreme Court of the United States

MANUEL OLIVAS-MOTTA, PETITIONER

v.

WILLIAM P. BARR, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether non-retroactivity principles constrain the application of an administrative decision that does not effect a change in the law.

2. Whether the phrase "crime[] involving moral turpitude" in 8 U.S.C. 1227(a)(2)(A)(ii) is unconstitutionally vague as applied to a conviction for felony endangerment in violation of Arizona law, which criminalizes recklessly exposing another person to a substantial risk of imminent death.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-28a) is reported at 910 F.3d 1271. A prior decision of the court of appeals is reported at 746 F.3d 907. The decision of the Board of Immigration Appeals (Pet. App. 29a-33a) is unreported. A prior decision of the Board is unreported. A prior decision of the immigration judge is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 2018. A petition for rehearing was denied on April 1, 2019 (Pet. App. 34a-35a). On June 13, 2019, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including August 29, 2019, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is a citizen of Mexico and a permanent resident of the United States. Pet. App. 2a. In 2010, an immigration judge determined that he was removable under 8 U.S.C. 1227(a)(2)(A)(ii) (2006), a provision of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, that makes an alien removable if "at any time after admission" he is "convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct." 8 U.S.C. 1227(a)(2)(A)(ii) (2006). The immigration judge found that petitioner had two qualifying Arizona state convictions: a drug conviction and a conviction for felony endangerment. Pet. App. 30a; Administrative Record (A.R.) 598-600. The Board affirmed, but the Ninth Circuit remanded because the immigration judge and Board had improperly considered evidence beyond the record of conviction in holding that petitioner's felony endangerment offense qualified as a "crime[] involving moral turpitude." Pet. App. 30a. On remand, the Board again found that petitioner was removable, relying on its recent decision in *In re Leal*, 26 I. & N. Dec. 20 (B.I.A. 2012) (*Leal*), in which it had determined that Arizona felony endangerment is categorically a "crime involving moral turpitude" because it involves recklessly endangering another person with a substantial risk of imminent death. Pet. App. 32a-33a (citing *Leal*, *supra*). The Ninth Circuit affirmed, finding that the Board permissibly applied *Leal* to petitioner's case, and rejecting a vagueness challenge to the term "crime involving moral turpitude." *Id.* at 1a-28a.

1. a. Under the INA, "[a]ny 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, * * * is deportable." 8 U.S.C. 1227(a)(2)(A)(ii).

Petitioner is a citizen of Mexico who was admitted to the United States as a lawful permanent resident. Pet. App. 2a. In 2009, he was charged with being removable under Section 1227(a)(2)(A)(ii). *Id.* The government pointed to two convictions that qualified as "crimes involving moral turpitude." *Id.*

First, in 2003, petitioner and his wife were charged in Arizona state court with one count of conspiracy to unlawfully import, transport, possess, sell, and/or transfer 221.3 pounds of marijuana, and one count of unlawful possession of marijuana for sale. A.R. 541-543. To resolve those charges, petitioner pleaded guilty to facilitating the unlawful possession of 221.3 pounds of marijuana for sale in violation of Arizona Revised Statutes Annotated §§ 13-1004, 13-3405 (2001). A.R. 545; see A.R. 545-559; Pet. App. 2a.

Second, in 2007, petitioner was charged with attempted murder and with committing an aggravated assault on his wife with a hunting rifle. A.R. 598-600. Petitioner pleaded guilty to one count of felony endangerment, A.R. 602-614, an Arizona criminal offense that consists of "recklessly endangering another person with a substantial risk of imminent death." Ariz. Rev. Stat. Ann. § 13-1201 (2001). Petitioner was sentenced to two years' imprisonment. A.R. 664.

b. The immigration judge found that both offenses of conviction qualified as "crimes involving moral turpitude" under 8 U.S.C. 1227(a)(2)(A)(ii) (2006) and therefore determined that petitioner was removable as charged. Pet. App. 2a-3a. The immigration judge also denied petitioner's request for cancellation of removal under 8 U.S.C. 1229b (2006), ruling that his case did not

warrant a favorable exercise of discretion. A.R. 109-114. The Board of Immigration Appeals dismissed petitioner's administrative appeal. Pet. App. 3a.

c. On appeal before the Ninth Circuit, petitioner conceded that his drug offense was a "crime[] involving moral turpitude." 746 F.3d at 908. He asserted, however, that the immigration judge and the Board erred in finding that his Arizona felony endangerment conviction qualified as a "crime[] involving moral turpitude" because they impermissibly looked to evidence outside his record of conviction. *Id.* at 916. The court of appeals agreed that the administrative decisions had inappropriately relied on evidence beyond the record of conviction and remanded to the Board. *Id.* at 917.

In its opinion returning the case to the Board, the court of appeals observed that while petitioner's appeal was pending, the Board had issued a precedential opinion in another case holding that Arizona felony endangerment is categorically a "crime involving moral turpitude." 746 F.3d at 917 (citing *Leal*, 26 I. & N. Dec. at 27). The Ninth Circuit declined to decide the relevance of *Leal* in the first instance. *Ibid.*; see Pet. App. 3a.

2. a. In its remand opinion, the Board applied *Leal*, which had been affirmed by the Ninth Circuit in the interim. Pet. App. 3a (citing *Leal* v. *Holder*, 771 F.3d 1140 (9th Cir. 2014)). Because *Leal* held that Arizona felony endangerment is categorically a crime involving moral turpitude, and because petitioner conceded that his drug offense was also a crime involving moral turpitude, the Board again held petitioner removable as charged. *Ibid.*

b. The court of appeals denied a second petition for review. Pet. App. 1a-28a. As relevant here, the court

rejected petitioner's assertion that the Board's application of *Leal* to his conviction was impermissibly retroactive. *Id.* at 4a-12a. It also rejected petitioner's assertion that the phrase "crime involving moral turpitude" is unconstitutionally vague. *Id.* at 16a-17a.

First, the court determined that a retroactivity analysis was inappropriate because "there was no change in law." Pet. App. 9a. The court stated that the retroactivity of a new administrative rule created through an adjudicatory action is generally evaluated through an interest balancing test. *Ibid.* (citing *Montgomery Ward & Co., Inc.* v. *FTC*, 691 F.2d 1322, 1333 (9th Cir. 1982)). But it also observed that "a change in law" is a prerequisite to any retroactivity analysis, and in this case there was none. *Ibid.*

The court of appeals explained that *Leal* did not represent a change in the law because, when petitioner entered his guilty plea to felony endangerment, Section 1227(a)(2)(A)(ii) "had already created the legal consequences" of that plea. Pet. App. 9a. While the Board had not yet addressed the application of the statute to Arizona felony endangerment in a precedential opinion, its holding that the offense qualifies as a "crime[] involving moral turpitude" "did not change the law any more than 'a judicial determination construing and applying a statute to a case.'" *Id.* at 10a (quoting *Manhattan Gen. Equip. Co.* v. *Commissioner*, 297 U.S. 129, 135 (1936)).

The court of appeals also rejected the contention that *Leal* should not apply because in the Board's initial, pre-*Leal* opinion, it had not found that petitioner's felony endangerment offense was categorically a crime involving moral turpitude and had instead looked at the particular facts of petitioner's case. Pet. App. 12a-16a. The court concluded that nothing precluded the Board from

revisiting that determination and "considering the import of *Leal*" after its initial opinion was vacated. *Id.* at 16a.

Finally, the court of appeals held that petitioner's vagueness challenge to the phrase "crime involving moral turpitude" was foreclosed by the precedent of this Court and the Ninth Circuit. Pet. App. 16a-17a (citing *Jordan* v. *De George*, 341 U.S. 223, 232 (1951); *Martinez-de Ryan* v. *Sessions*, 895 F.3d 1191 (9th Cir.), amended and superseded, 909 F.3d 247 (2018), cert. denied, 140 S. Ct. 134 (2019)).

c. Judge Watford dissented. Pet. App. 18a-28a. In his view, *Leal* should not have been applied to petitioner's case because petitioner might have relied on a "predict[ion]" that endangerment "would *not* be regarded as a crime involving moral turpitude" when he pleaded guilty to that offense to resolve charges of "attempted murder and aggravated assault with a deadly weapon." Pet. App. 21a-23a. Judge Watford acknowledged that it is not "100% clear" that petitioner would have prevailed pre-*Leal*, *id.* at 27a, and he cited a 2004 Third Circuit case holding that New York's analogous felony endangerment offense qualified as a crime involving moral turpitude, *id.* at 23a (citing *Knapik* v. *Ashcroft*, 384 F.3d 84, 90 (3d Cir. 2004)). But, he believed that two non-precedential BIA opinions were sufficient to establish at least "a realistic chance" that the Board might have found that petitioner's offense was not a "crime involving moral turpitude," and he would have held that was enough to foreclose the retroactive application of *Leal*. *Id.* at 28a.

ARGUMENT

Petitioner renews his contention (Pet. 10-22) that principles of non-retroactivity preclude the application

of *Leal* to his case. But the Ninth Circuit correctly resolved the retroactivity question based on the proposition that a change in the law is required to trigger retroactivity analysis. That holding does not conflict with decisions of other courts of appeals and does not warrant this Court's review. Petitioner also contends (Pet. 22-35) that the statutory term "crime involving moral turpitude" is unconstitutionally vague. But this Court long ago rejected a vagueness challenge to that term. See *Jordan* v. *De George*, 341 U.S. 223 (1951). There is no reason for a different result in this case, particularly because petitioner does not contest the Board's holding that felony endangerment qualifies as a "crime involving moral turpitude," and because the courts of appeals have uniformly found that analogous offenses qualify. Moreover, the courts of appeals are similarly uniform in their rejection of vagueness challenges to the term "crime involving moral turpitude," and this Court has recently denied a petition for certiorari presenting the vagueness issue. See *Martinez-de Ryan* v. *Barr*, 140 S. Ct. 134 (2019) (No. 18-1085). The same result is warranted here.

1. a. The court of appeals correctly rejected petitioner's retroactivity challenge to the Board's application of *In re Leal*, 26 I. & N. Dec. (B.I.A. 2012).

When an administrative agency announces a "new standard" through an adjudication, retroactivity concerns about the application of that standard "must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles." *SEC.* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947). But it is not necessary to perform that assessment every time an administrative board issues an opinion. This Court has long recognized that "[i]t is

only when the law changes in some respect that an assertion of nonretroactivity may be entertained." *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529, 534 (1991) (plurality opinion); *Chenery*, 332 U.S. at 203 (considering retroactivity in the context of a "*new* principle" or a "*new* standard") (emphases added). Retroactivity analysis is generally inappropriate where a court—or an administrative agency—merely applies "settled principles and precedents of law to the disputes that come to bar." *James B. Beam Distilling*, 501 U.S. at 534.

The court of appeals reasonably concluded that petitioner could not meet the threshold requirement for a retroactivity challenge in this case because *Leal* did not represent a "change in law." Pet. App. 9a. Rather, the Board simply applied Section 1227(a)(2)(A)(ii) to the dispute in Leal's case and concluded that Arizona felony endangerment qualified as a "crime involving moral turpitude." *Id.* at 9a-10a. That holding was no more retroactive than a judicial opinion applying a statute to the facts of a particular litigant's suit. *Id.* at 10a.

Moreover, *Leal* does not resemble the sort of judicial opinions that have been held to "establish a new principle of law." *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106 (1971). *Leal* did not "overrul[e] clear past precedent on which litigants may have relied" or "decid[e] an issue of first impression whose resolution was not clearly foreshadowed." *Ibid.* Before *Leal*, the Board had only addressed Arizona felony endangerment in nonprecedential decisions that "do not bind future parties." Pet. App. 9a (citation omitted). But *Leal*'s resolution was "clearly foreshadowed," *Chevron Oil*, 404 U.S. at 106, by the Third Circuit's opinion in *Knapik* v. *Ashcroft*, 384 F.3d 84 (2004), which was issued two years be-

fore petitioner pleaded guilty to Arizona felony endangerment. The *Knapik* Court held that New York's felony endangerment offense constituted a "crime involving moral turpitude" because "moral turpitude inheres in the conscious disregard of a substantial and unjustifiable risk of severe harm or death." *Id.* at 90 n.5.

In *Leal*, the Board cited and quoted *Knapik*, as well as several decisions from other court of appeals supporting the conclusion that Arizona felony endangerment is a "crime involving moral turpitude" because it covers "recklessly endangering another person with a substantial risk of imminent death." 26 I. & N. Dec. at 24-25; see *id.* at 25 (citing *Idy* v. *Holder*, 674 F.3d 111, 118-119 (1st Cir. 2012) (recklessly engaging in conduct that places someone in danger of serious bodily injury under New Hampshire law is a crime involving moral turpitude); *Hernandez-Perez* v. *Holder*, 569 F.3d 345, 348 (8th Cir. 2009) (reckless child endangerment under Iowa law is a crime involving moral turpitude); *Keungne* v. *U.S. Att'y Gen.*, 561 F.3d 1281, 1286-1287 (11th Cir. 2009) (per curiam) (recklessly endangering the bodily safety of another under Georgia law is a crime involving moral turpitude); *Knapik*, 384 F.3d at 90).

Indeed, petitioner barely challenges the Ninth Circuit's holding that there was no change in the law. He briefly asserts (Pet. 15) that at the time of his plea, he justifiably relied on "published and unpublished" Board "declarations" about offenses with a mens rea of recklessness. But as the court of appeals observed, the unpublished decisions he references are non-precedential and may not be relied on by other parties, and the only published Board opinions that petitioner has pointed to concern the distinct offense of assault. Pet. App. 10a-

11a. Petitioner also ignores the more relevant, published Third Circuit opinion in *Knapik* that held a comparable endangerment offense qualified as a crime involving moral turpitude.

Petitioner's main argument (Pet. 12) is instead that the court of appeals should have applied a "bright-line rule: if a statute is so ambiguous that its interpretation triggers *Chevron* deference, [the agency's] interpretation cannot apply retroactively." As a general matter, that proposed rule would be difficult to square with *Chenery*, which held that retroactivity concerns with respect to agency adjudications should be balanced against the "mischief[s]" that might occur if a "new principle" is applied only prospectively. 332 U.S. at 203. But whatever the merits of petitioner's proposed approach in cases where an agency decision represents a change in the law, it would not apply where—as here—that threshold condition for retroactivity analysis is unmet. To apply that approach in such circumstances would upend the principle that a retroactivity challenge may proceed "only when the law changes in some respect." *James B. Beam Distilling*, 501 U.S. at 534 (plurality opinion).

b. Petitioner is also mistaken in his assertion (Pet. 10-13) that this case implicates supposed confusion in the circuits regarding the proper approach to retroactivity analysis. Petitioner claims that there is disagreement in the way that the circuits apply *Chenery*'s command to balance retroactivity concerns against the "mischiefs" of non-retroactivity. But petitioner does not point to any court of appeals decision allowing a retroactivity challenge to move forward in the absence of a change in the law.

Petitioner suggests (Pet. 16, 19) that the Tenth and Fifth Circuits have adopted his favored approach. But neither court has suggested that retroactivity analysis prevents application of an agency decision even in the absence of a change in the law. To the contrary, in one of the decisions on which petitioner principally relies, the Tenth Circuit held that a stringent retroactivity analysis was necessary because the Board had issued a "new agency rule" that was contrary to the interpretation of the relevant statutory provisions in a binding court of appeals decision. *De Niz Robles* v. *Lynch*, 803 F.3d 1165, 1173 (10th Cir. 2015) (Gorsuch, J.). And, in the Fifth Circuit precedent petitioner cites, the court similarly emphasized that it was denying retroactive effect to a Board decision that had "drastically chang[ed] the landscape." *Monteon-Camargo* v. *Barr*, 918 F.3d 423, 431 (5th Cir. 2019). Both cases are therefore very far from this one, in which the Board decision in question expressly relied on existing court of appeals precedents in applying the federal statute to a particular state offense.

Moreover, petitioner exaggerates the alleged conflict regarding the appropriate retroactivity analysis even where (unlike here) a change in the law has occurred. Petitioner contends (Pet. 10-13) that while other circuits apply a multi-factor balancing test to decide when a Board decision should be applied under retroactivity analysis, the Fifth and Tenth Circuit have rejected that approach in favor of a flat bar on the retroactive application of Board decisions that have been afforded *Chevron* deference. That is incorrect. In *De Niz Robles*, the Tenth Circuit held that courts should deny retroactive effect to a Board opinion announcing a new

rule under step two of the *Chevron* analysis that is contrary to a prior court of appeals decision, as permitted by *National Cable & Telecommunications Ass'n* v. *Brand X Internet Services*, 545 U.S. 967 (2005). The court reasoned that that form of administrative decision is the functional equivalent of a legislative rule that emerges from notice and comment. *De Niz Robles*, 803 F.3d at 1173. But the court of appeals specifically observed that this approach was compatible with the multi-factor test that the Tenth Circuit itself generally applies when considering the retroactive effect of an agency decision. *Id.* at 1177. And while the Fifth Circuit has declined to apply a rigid set of factors when it performs retroactivity analysis, it has never attempted to announce a bright-line rule of any kind. Instead, like every other court of appeals, it has appropriately recognized that *Chenery* requires balancing the benefits and harms of retroactivity when an agency announces a "new standard" in an adjudication. *Monteon-Camargo*, 918 F.3d at 430 (quoting *Chenery*, 332 U.S. at 203).

Further, as petitioner himself acknowledges (Pet. 21-22), to the extent there is uncertainty regarding the retroactivity of Board decisions, it is primarily with respect to cases that implicate *Brand X* because they involve a Board decision that interpreted a statute differently than a prior judicial decision. That circumstance is not presented here, and so any confusion on that issue would not warrant review of this case.

2. The court of appeals also correctly held that the statutory term "crime[] involving moral turpitude," 8 U.S.C. 1227(a)(2)(A)(ii), is not unconstitutionally vague.

a. This Court already has rejected a constitutional vagueness challenge to the term "crime involving moral

turpitude." In *Jordan*, *supra*, the Court held that an alien's prior convictions for conspiracy to defraud the United States of taxes on distilled spirits constituted "crime[s] involving moral turpitude," 341 U.S. at 229, that rendered him deportable under Section 19(a) of the Immigration Act of 1917, 8 U.S.C. 155(a) (1946). The Court explained that "[t]he term 'moral turpitude' has deep roots in the law" and "has been used as a test in a variety of situations." *Jordan*, 341 U.S. at 227. The Court further observed that, "[w]ithout exception, federal and state courts have held that a crime in which fraud is an ingredient involves moral turpitude." *Ibid.* In light of that precedent, the Court concluded that the alien's prior convictions for conspiring to defraud the United States qualified as "crime[s] involving moral turpitude." *Id.* at 229.

The Court then addressed the "suggest[ion] that the phrase 'crime involving moral turpitude' lacks sufficiently definite standards" and "is therefore unconstitutional for vagueness." *Jordan*, 341 U.S. at 229. Although the parties had not raised the issue, *ibid.*, the Court and the dissent considered it at length. *Id.* at 229-232 (majority opinion); see *id.* at 232-245 (Jackson, J., dissenting).

The Court held that the term "crime involving moral turpitude" is not unconstitutionally vague. *Jordan*, 341 U.S. at 229-232. The Court found it "significant" that as of 1951, "the phrase ha[d] been part of the immigration laws for more than sixty years," and "[n]o case ha[d] been decided holding that the phrase is vague." *Id.* at 229-230. The Court acknowledged that there might exist some "difficulty in determining whether certain marginal offenses are within the meaning" of the phrase. *Id.* at 231. But the Court explained that

any such difficulty "does not automatically render a statute unconstitutional for indefiniteness," because "[i]mpossible standards of specificity are not required," and "[t]he phrase 'crime involving moral turpitude' presents no greater uncertainty or difficulty than language found in many other statutes repeatedly sanctioned by the Court." *Id.* at 231 & n.15. "Whatever else the phrase 'crime involving moral turpitude' may mean in peripheral cases," the Court held that it was clear that petitioner's fraud offense was covered and that he was sufficiently "forewarned" of the consequences of his crimes. *Id.* at 232.

The same result obtains here. As *Jordan*'s analysis demonstrates, this Court will typically "consider whether a statute is vague as applied to the particular facts at issue, for '[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others,'" *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 18-19 (2010) (quoting *Village of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982)) (brackets in original). Thus, the Court in *Jordan* considered whether the phrase "crime involving moral turpitude" was unconstitutionally vague in the context of the fraud offenses of which the alien in that case had been convicted. 341 U.S. at 229-232; cf. *id.* at 226-227 ("[O]ur inquiry in this case is narrowed to determining whether this particular offense involves moral turpitude. Whether or not certain other offenses involve moral turpitude is irrelevant and beside the point.").

That mode of analysis demonstrates that petitioner's vagueness challenge must fail. As was true of the fraud offenses in *Jordan*, there is a judicial consensus that fel-

ony endangerment offenses like petitioner's—which involve "recklessly endangering another person with a substantial risk of death," Ariz. Rev. Stat. Ann. § 13-1201 (2001)—constitute "crimes involving moral turpitude." Indeed, the Board pointed to and relied on that consensus in holding that the Arizona statute qualifies. *Leal*, 26 I. & N. Dec. at 25 (citing *Idy*, 674 F.3d at 118-119; *Hernandez-Perez*, 569 F.3d at 348; *Keungne*, 561 F.3d at 1286-1287; *Knapik*, 384 F.3d at 90; see also p. 9, *supra*.

Petitioner does not point to any judicial decision to the contrary. Nor does he offer any reason to reject the Board's commonsense conclusion that recklessly engaging in conduct that imperils the life of another exhibits "a base contempt for the well-being of the community, which is the essence of moral turpitude." *Leal*, 26 I. & N. Dec. at 25. Indeed, before this Court, petitioner does not contest that felony endangerment qualifies as a "crime involving moral turpitude." Instead, he seeks to advance a "facial challenge to the statute that does not turn on the particular facts of his case." Pet. 25; but see Pet. 28 (suggesting that petitioner could not have known his crime involved moral turpitude because isolated, non-precedential BIA opinions suggested otherwise). But a vagueness challenge like this one must be rooted in the circumstances of petitioner's case and particular offense, and cannot be predicated on broad speculation regarding the statute's application to offenses in "marginal" cases. *Jordan*, 341 U.S. at 231.

Further, even if petitioner could raise a vagueness challenge reaching beyond his own crime of conviction, there would be no merit to his contention that the term "crime involving moral turpitude" is unconstitutionally vague. In the now more than 125 years that the term

has "been part of the immigration laws," *Jordan*, 341 U.S. at 229, the Board has issued numerous decisions, as have courts on judicial review, that provide substantial guidance as to what crimes do and do not qualify as "crime[s] involving moral turpitude." 8 U.S.C. 1182(a)(2)(A)(i)(I); see, *e.g.*, Ira J. Kurzban, *Kurzban's Immigration Law Sourcebook* 113-127 (16th ed. 2018-2019) (classifying many crimes based on Board and judicial interpretations). And the Board has recently succinctly encapsulated the crimes that qualify, defining "crime[s] involving moral turpitude" to include those that involve conduct that "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,'" and that involve "both a culpable mental state and reprehensible conduct." *In re Mendez*, 27 I. & N. Dec. 219, 221 (B.I.A. 2018) (citation omitted).

At bottom, then, petitioner's vagueness challenge is foreclosed by *Jordan*. Petitioner never asks this Court to reconsider that seventy-year-old precedent; in fact, he never cites it. And, while petitioner does suggest that the Court's more recent vagueness precedents support his constitutional challenge (Pet. 26, 33), that is incorrect. This Court has recently invalidated several entirely distinct statutory provisions on facial vagueness grounds. *United States* v. *Davis*, 139 S. Ct 2319 (2019); *Sessions* v. *Dimaya*, 138 S. Ct. 1204 (2018); *Johnson* v. *United States*, 135 S. Ct. 2551 (2015). But, as this Court explained in *Davis*, the relevant statute in each of the Court's recent vagueness precedents asked courts to determine whether a crime qualified as a "violent felony" or "crime of violence" by "estimat[ing] the degree of risk posed by a crime's imagined 'ordinary case.'"

139 S. Ct. at 2326. That "ordinary case" analysis introduced "grave uncertainty" into the statute because different judges might "imagine" an "idealized ordinary case" of a crime very differently, *Johnson*, 135 S. Ct. at 2557-2558, and there was no way for any judge to "really know" if his version was correct, *Dimaya*, 138 S. Ct. at 1214. It was this uncertainty that made the statutes unconstitutionally vague. *Ibid.* Indeed, in *Johnson* and *Dimaya*, the Court emphasized that the mere use of "'qualitative standard[s]'" or "imprecise terms" like "violent felony" is not enough, by itself, to render a statute void for vagueness. *Dimaya*, 138 S. Ct. at 1214 (quoting *Johnson*, 135 S. Ct. at 2561).

Unlike the statutes in *Davis*, *Dimaya*, and *Johnson*, the statutory provision here does not call for the Board or a reviewing court to decide whether a particular offense constitutes a "'crime of moral turpitude'" by imagining some hypothetical "ordinary case" of the crime. To the contrary, it simply calls for the Board or court to consider whether the "elements of the [criminal statute]" in question meet the Board's definition of "crime involving moral turpitude." *Leal* v. *Holder*, 771 F.3d 1140, 1144 (9th Cir. 2014) (citation omitted). The statutory provision here therefore does not contain the feature that rendered the statutes in *Davis*, *Dimaya*, and *Johnson* unconstitutional.

Moreover, in *Dimaya*, the Court cited and relied on *Jordan*, observing that in *Jordan* the Court "chose to test (and ultimately uphold)" the moral-turpitude provision "'under the established criteria of the "void for vagueness" doctrine' applicable to criminal laws." 138 S. Ct. at 1213 (citation omitted). In citing *Jordan* with approval, the Court did not suggest that its subsequent void-for-vagueness decisions, including *Dimaya*

itself, actually called into question *Jordan*'s holding. See *ibid.*

b. Nor does the decision below conflict with the decision of any other court of appeals. Following *Jordan*, the courts of appeals that addressed the question all held that the term "crime involving moral turpitude" is not unconstitutionally vague. See, *e.g.*, *Wyngaard* v. *Kennedy*, 295 F.2d 184, 185 (D.C. Cir.) (per curiam), cert. denied, 368 U.S. 926 (1961); *Hudson* v. *Esperdy*, 290 F.2d 879, 880 (2d Cir.) (per curiam), cert. denied, 368 U.S. 918 (1961); *Tseung Chu* v. *Cornell*, 247 F.2d 929, 938-939 (9th Cir.), cert. denied, 355 U.S. 892 (1957); *United States ex rel. Circella* v. *Sahli*, 216 F.2d 33, 40 (7th Cir. 1954), cert. denied, 348 U.S. 964 (1955). And every court of appeals to have considered the issue following *Johnson* and *Dimaya* has reaffirmed that the term is not unconstitutionally vague. See *Moreno* v. *Attorney Gen. of the U.S.*, 887 F.3d 160, 165-166 (3d Cir. 2018); *Boggala* v. *Sessions*, 866 F.3d 563, 569-570 (4th Cir. 2017), cert. denied, 138 S. Ct. 1296 (2018); *Dominguez-Pulido* v. *Lynch*, 821 F.3d 837, 842-843 (7th Cir. 2016); *Martinez-de Ryan* v. *Sessions*, 895 F.3d 1191 (9th Cir.), amended and superseded, 909 F.3d 247 (2018), cert. denied, 140 S. Ct. 134 (2019).

Petitioner nonetheless suggests (Pet. 23-24) that this Court should grant certiorari because, he maintains, the courts of appeals disagree as to *other* issues concerning "crimes involving moral turpitude." He suggests (Pet. 24), for example, that the courts of appeals disagree as to whether and how principles of deference apply in the context of crimes involving moral turpitude. In particular, petitioner contends (*ibid.*) that the Ninth Circuit gives no deference to the Board's definition of "moral turpitude," while "lend[ing] *Chevron* deference to * * *

whether a particular crime meets th[at] definition"—a methodology he contends is "the exact inverse" of how it works "in the Fifth Circuit." But the en banc Ninth Circuit has "join[ed] every other court of appeals to have considered the question"—including the Fifth Circuit—in holding that "the BIA's determination that [an] offense constitutes a 'crime involving moral turpitude' is governed by the same traditional principles of administrative deference [that] apply to the Board's interpretation of other ambiguous terms in the INA." *Marmolejo-Campos* v. *Holder*, 558 F.3d 903, 911 (citing, *inter alia*, *Hamdan* v. *INS*, 98 F.3d 183, 185 (5th Cir. 1996)), cert. denied, 558 U.S. 1092 (2009). The Board's decisions thereby have long served to give more detailed content to the term "crime involving moral turpitude."

Petitioner also contends (Pet. 23) that the courts have, at times, reached different determinations regarding whether a particular federal or state offense qualifies as a "crime involving moral turpitude." But petitioner's first example—misusing a social security number—is not illustrative of any general confusion regarding the meaning of "crime involving moral turpitude." Rather, the conflict between *Beltran-Tirado* v. *INS*, 213 F.3d 1179 (9th Cir. 2000), and *Hyder* v. *Keisler*, 506 F.3d 388 (5th Cir. 2007), is attributable to the Ninth Circuit's unique interpretation of 42 U.S.C. 408, the federal statute that punishes the misuse of a social security number. In the Ninth Circuit's view, the legislative history of Section 408 makes clear that Congress did not intend for the crime to qualify as one involving "moral turpitude." *Beltran-Tirado*, 213 F.3d at 1184. The Fifth Circuit (and other circuits to consider the issue) have declined to adopt that understanding of

that particular criminal statute. *Hyder*, 506 F.3d at 392; accord *Marin-Rodriguez* v. *Holder*, 710 F.3d 734, 740 (7th Cir. 2013); *Guardado-Garcia* v. *Holder*, 615 F.3d 900, 903 (8th Cir. 2010), cert. denied, 563 U.S. 987 (2011); *Serrato-Soto* v. *Holder*, 570 F.3d 686, 692 (6th Cir. 2009). That dispute with respect to the meaning of Section 408 obviously is not presented in this case.

Petitioner's only other example (Pet. 23) of asserted divergence with respect to what qualifies as a "crime[] involving moral turpitude" also fails to show confusion in the circuits. Instead, the Seventh and Ninth Circuit's supposedly conflicting views on whether conviction as an "accessory after the fact," *ibid.*, qualifies are a product of differences in the state offenses the circuits were considering. The Seventh Circuit considered a statute that had an element consisting of knowingly providing false information to police officers, whereas the statute considered by the Ninth Circuit encompassed "'*[a]ny* kind of overt or affirmative assistance to a known felon,'" including "providing food or shelter to someone who has committed a felony—even where that person is a family member." *Navarro-Lopez* v. *Gonzales*, 503 F.3d 1063, 1071 (9th Cir. 2007) (en banc) (citation omitted), overruled on other grounds by *United States* v. *Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (en banc); compare *Padilla* v. *Gonzales*, 397 F.3d 1016, 1020 (7th Cir. 2005).[*] And even if there were a conflict with respect to that particular type of offense, it would not be implicated here.

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[*] Petitioner incorrectly cites (Pet. 23) *Itani* v. *Ashcroft*, 298 F.3d 1213 (11th Cir. 2002) (per curiam), for the proposition that conviction on accessory after the fact is a crime involving moral turpitude. That case concerned the distinct crime of misprision of a felony. See *Id.* at 1215-1217.

Petitioner therefore has not pointed to any conflict in the circuits, even on the application of the term "crime involving moral turpitude," that would warrant this Court's review—much less warrant review of his sweeping contention that the term, which has been embedded in immigration law for more than a century, is unconstitutionally vague on its face.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2020