No. 19-284

In The

Supreme Court of the United States

JOSE JESUS MERCADO-RAMIREZ,

Petitioner,

v.

WILLIAM P. BARR, ATTORNEY GENERAL,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The questions presented in this case go to the heart of our constitutional separation of powers. The first question asks whether the statutory term "moral turpitude" is unconstitutionally vague. But that is just another way of asking whether Congress can enact a law so opaque that it delegates the hard work of law-making to unelected prosecutors and judges.

And that leads to the retroactivity question. The more interpretive latitude that is delegated to the Attorney General, the more his revisions can "punish those who have done no more than order their affairs around existing law." *De Niz Robles v. Lynch*, 803 F.3d 1165, 1174–75 (10th Cir. 2015). That arrangement doesn't just jeopardize regulated parties' core due process interests of fair notice and reasonable reliance—it also threatens to "blur the line between the Legislative and Executive functions assigned to separate departments by our Constitution." *See United States v. Baldwin*, 745 F.3d 1027, 1030 (10th Cir. 2014).

This case offers an opportunity to bring this line back into focus. Put simply: if executive agents can revise the meaning of the same law they're enforcing, should those officials be treated like Article III judges, who are structurally "insulated from partisan influence and retribution"? *De Niz Robles*, 803 F.3d at 1171. Or should these executive agents be allowed to revise the law "with full view of who will stand to flourish or flounder," such that officials may "single out disfavored

persons and groups and punish them for past conduct they cannot now alter"? *Id.* at 1175.

The government does not even try to address these exceptionally important separation-of-powers concerns.

Instead, when it comes to the void-for-vagueness question, the government newly contends that the Attorney General's decisions in this arena are "unfettered" by due process. But the Court has never embraced this theory—likely because it is a recipe for lawlessness. The government also argues that Mr. Mercado-Ramirez may not facially challenge the law's constitutionality—but the Court squarely rejected this argument in *Johnson v. United States*, 135 S. Ct. 2551 (2015), and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

The government's arguments on the retroactivity question fare no better. The government downplays the circuit split below, but the circuits themselves have candidly recognized the "contrast" between the Tenth Circuit and the Fifth Circuit, which apply an analysis that is anchored to the constitution's structure, and other circuits, which apply a loose assortment of "variously articulated factors." *Monteon-Camargo v. Barr*, 918 F.3d 423, 430 n.12 (5th Cir. 2019), *as revised* (Apr. 26, 2019).

The government also denies that the agency meaningfully revised the law's meaning. But the government denies that in almost every case: while the executive branch has every incentive to "interpret statutes aggressively," *Gutierrez-Brizuela v. Lynch*, 834

F.3d 1142, 1157 (10th Cir. 2016) (Gorsuch, J., concurring), the executive has no incentive to *admit* that it is siphoning powers from the other branches.

If the Judiciary is to counter this encroachment, it must be equipped with a legal test that relies less heavily on the Executive's self-serving denials. The Tenth Circuit's test provides that legal armature; the Ninth Circuit's test doesn't.

Finally, the government observes that the dangers of retroactivity are most prominent in cases where judges interpret a statute, and then the agency revises the judicial decision under *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005).

Perhaps inadvertently, the government underscores the need for this Court's intervention. Unlike the Ninth Circuit, the Fifth Circuit and the Tenth Circuit employ an analysis that tames some of *Brand X*'s more "exuberant consequences." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1150 (10th Cir. 2016) (Gorsuch, J., concurring); *see* Pet.40. This case presents a modest opportunity to continue that trend.

ARGUMENT

I. The Court should grant certiorari on the void-for-vagueness question.

A. The Attorney General's decisions must comport with due process.

The government begins by observing that Mr. Mercado-Ramirez seeks a form of discretionary relief. BIO.8. The government then goes on to assert that the Attorney General enjoys such "unfettered discretion" that his decisions in this arena need not comport with due process. BIO.8 (citation omitted).

This theory has two problems. First, Mr. Mercado-Ramirez doesn't argue that due process *compels a grant* of relief. Instead, he simply argues Congress has given him the *statutory right to seek* that relief. 8 U.S.C. § 1229b(b)(1)(C). By arbitrarily taking away that right, the Attorney General violated due process. *Dimaya*, 138 S. Ct. at 1230 (Gorsuch, J., concurring) ("Congress is surely free to extend existing forms of liberty to new classes of persons—liberty that the government may then take only after affording due process.").

Second, this Court has never endorsed the government's theory. The government characterizes its assertion (BIO.8–9) as a uniformly accepted rule below, but in truth it finds support in only one side of an intra- and inter-circuit split. *Compare Tomaszczuk v. Whitaker*, 909 F.3d 159, 164 (6th Cir. 2018) *with Montanez-Gonzalez v. Holder*, 780 F.3d 720, 723–24 (6th Cir. 2015) ("The discretionary nature of certain forms of relief does not eliminate the constitutional requirement

of a fair hearing for all aliens facing removal."); *cf. United States v. Lopez-Velasquez*, 629 F.3d 894, 897 (9th Cir. 2010) (en banc) (arbitrary barriers to noncitizens' ability to seek cancellation of removal are a violation of due process).[1]

B. A facial challenge is appropriate here because the "moral turpitude" statute contains no intelligible standard.

The government argues (BIO.11–12) that Mr. Mercado-Ramirez must bring an as-applied challenge to the statute (as opposed to a facial challenge). But this theory is "squarely contradict[ed]" by the Court's precedent. *Dimaya*, 138 S. Ct. at 1214 n.3.

By way of background, many statutes contain an intelligible standard, though difficult cases may lurk at the margins. *See Johnson*, 135 S. Ct. at 2560 ("[E]ven clear laws produce close cases."). Individuals who violate the "hard core" of these statutes can't complain about hypothetical edge cases. *See Smith v. Goguen*, 415 U.S. 566, 578 (1974). But a second "category" of statute exists: those statutes that aren't just "imprecise but comprehensible"—they specify "no standard of conduct . . . at all." *Id.* (citation omitted). "Such a provision simply has no core." *Id.*

If a statute falls into the second category, it is unconstitutional in *all* cases. *Johnson*, 135 S. Ct. at 2560. *Dimaya* recently reaffirmed this holding. There, a

[1] What's more, the government never raised this argument in any of the proceedings below.

single dissenting Justice embraced the view put forward by the government here. *See* 138 S. Ct. at 1250 (Thomas, J., dissenting). But the plurality opinion explained that *Johnson* had "anticipated and rejected" this view. *Id.* at 1214 n.3.

Here, the underlying statute doesn't prescribe some imprecise-but-comprehensible standard; as Judge Watford recognized in his dissent, it contains "no intelligible meaning." App.46a. Accordingly, the statute is invalid in all its applications.

C. The statutory phrase "moral turpitude" is even more vague than the statutory phrase "crime of violence."

The government recognizes (BIO.13) that this Court reinvigorated the void-for-vagueness doctrine in *Johnson*, *Dimaya*, and *United States v. Davis*, 139 S. Ct. 2319 (2019). The government insists, however, that those cases involved statutes that generated more "grave uncertainty" than the "moral turpitude" statute does. BIO.13.

That argument seems more suited for the merits stage, but it deserves a brief rebuttal here. If "grave uncertainty" is the benchmark for a void-for-vagueness challenge, *see* BIO.13, then the BIA's "schizophrenic" decrees in this area ought to meet that threshold. *Hernandez-Martinez v. Ashcroft*, 329 F.3d 1117, 1119 (9th Cir. 2003) (Wardlaw, J., concurring). And if the test for vagueness is whether a statute makes it difficult for "any judge to 'really know' if his version was correct,"

BIO.14 (citation omitted), then surely that test is met when the statute requires judges to "play the role of a Rorschach psychologist." *Romo*, 933 F.3d at 1199 (Owens, J., concurring).

The government also minimizes the Court's holdings in *Johnson*, *Sessions*, and *Davis*. In particular, *Davis* clarified the dividing line in void-for-vagueness cases: if a statute allows an individual to be punished after a *jury* assesses a criminal defendant's *actual conduct*, that procedure comports with due process. 139 S. Ct. at 2329. But if a statute allows an individual to be punished after a *judge* retroactively assesses a crime's "*basic or inherent features*," then that abstract, subjective inquiry offends due process. *Id.* (emphasis added).

Here, the government admits that the "moral turpitude" statute requires judges to retroactively assess whether prior convictions involved "conduct that is *inherently* base, vile, or depraved[.]" BIO 13. And when judging whether a crime is turpitudinous, courts "may not consider the particular conduct for which the alien has been convicted." *U.S. ex rel. Guarino v. Uhl*, 107 F.2d 399, 400 (2d Cir. 1939) (L. Hand, J.); *accord Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1072 (9th Cir. 2007) (en banc) ("[T]he question before us is whether [petitioner's crime] describes a crime that *by its nature* involves moral turpitude.") (emphasis added). This inquiry—which requires judges to ascertain a crime's *inherent* morality—is every bit as subjective, unpredictable, and arbitrary as the inquiry *Davis* condemned.

D. *Jordan v. De George* should be reconsidered.

The government recognizes that the circuits below are compelled to follow *Jordan v. De George*, 341 U.S. 223 (1951), a case where the Court rejected a similar vagueness challenge even though "the parties had not raised the issue." BIO.15.

Since *Jordan* reached this conclusion *sua sponte*, however, the Court is now "less constrained to follow" that decision as precedent. *Johnson*, 135 S. Ct. at 2562–63 (citation omitted). Moreover, *Jordan*'s precedential weight is diminished further because "experience with its application reveals that it is unworkable." *Id.* at 2562 (citation omitted).

Judicial experience has undermined *Jordan*'s forecast of smooth sailing ahead—specifically, the Court's long-ago observation that "[n]o case has been decided holding that the phrase is vague, nor are we able to find any trace of judicial expression which hints that the phrase is so meaningless as to be a deprivation of due process." 341 U.S. at 230.

Nowadays, the Federal Reporter contains more than a few hints of judicial dissatisfaction. *E.g.*, *Partyka v. Attorney Gen.*, 417 F.3d 408, 409 (3d Cir. 2005) (calling this body of law an "amorphous morass"); *Arias v. Lynch*, 834 F.3d 823, 831, 835 (7th Cir. 2016) (Posner, J., concurring) (calling the resulting confusion "an embarrassment to a modern legal system").

Additional decades of "persistent efforts" will not bring courts any closer to comprehending this vexing statute's meaning. *Jauregui-Cardenas v. Barr*, ___ F.3d ___, No. 16-71309, 2020 WL 131352, at *5 (9th Cir. Jan. 13, 2020) (Berzon, J., concurring) (citation omitted). Accordingly, the Court should intervene and put an end to this "failed enterprise." *Id.* (citation omitted).

E. Allowing the Executive and Judicial branches to define "moral turpitude" offends the separation of powers.

The government provides a 41-word definition of the term "moral turpitude" that cannot be found anywhere in the United States Code. *See* BIO.13 (citing *Matter of Mendez*, 27 I. & N. Dec. 219, 221 (BIA 2018)). If executive administrators can improvise the law's meaning, though, how can regulated parties ever have fair notice of their legal obligations? Not to worry, the government insists: "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." BIO.13.

Even if that were true, it would solve a statutory-interpretation problem by creating a constitutional separation-of-powers problem. The void-for-vagueness doctrine is a corollary of the "requir[ement] that Congress, rather than the Executive or Judicial Branch, define what conduct is sanctionable and what is not." *Dimaya*, 138 S. Ct. at 1212; *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972) ("A vague law

impermissibly delegates basic policy matters."). In other words, the void-for-vagueness doctrine and the non-delegation doctrine are just "different names" for the Court's efforts to "rein in Congress." *Gundy v. United States*, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting). Here, Congress's failure to define "moral turpitude" wasn't some mere oversight—it was a deliberate decision to kick the can to the other branches. Pet.27–28.

The government's response? Silence.

II. The Court should grant certiorari on the retroactivity question.

A. The circuits are split.

After the petition was filed, the BIA recognized that different circuits employ "different test[s]." *See Matter of Cordero-Garcia*, 27 I. & N. Dec. 652, 657 & n.4 (BIA 2019). The government tries to deny this fact (BIO.10–12), but the circuits themselves have openly acknowledged their differences. *See*, *e.g.*, *Microcomputer Tech. Inst. v. Riley*, 139 F.3d 1044, 1050 (5th Cir. 1998) ("The most oft-cited approach is the [five-factor test], but that formulation has not been adopted by this court."); *Monteon-Camargo*, 918 F.3d at 430 n.12 (describing the "contrast" with other circuits that apply "variously articulated factors"); *De Niz Robles*, 803 F.3d at 1175 (criticizing the five-factor test as "little more than a metaphor").

The government nevertheless insists (BIO.22) that the Tenth Circuit's analysis in *De Niz Robles* is "compatible with the multi-factor test." That isn't entirely accurate: *De Niz Robles* assessed the five-factor approach, recognized that those factors were not "exclusive or even always the most pertinent," and dismissed several aspects of that inquiry as "irrelevant." 803 F.3d at 1177. And it concluded that its analysis—which was rooted in "second-order constitutional protections"—was "suffic[ient] to resolve [the] case." *Id.* at 1172.

If anything, the government's effort to paper over the split only highlights the underlying problem. The totality-of-the-circumstances test is probably the most capacious legal standard in the judicial compendium. It's so open-ended and ill-defined that it's hard to envision any mode of analysis that *couldn't* fit within that wide-open playing field. The relevant conflict, therefore, is that the Fifth and Tenth Circuits meaningfully "constrain" the inquiry. *See id.* at 1171–72. The Ninth Circuit doesn't.

B. The government's change-in-law argument demonstrates why this Court's intervention is needed.

The government insists (BIO.18) that the BIA's decision in *Matter of Leal*, 26 I. & N. Dec. 20 (BIA 2012) "did not represent a 'change in law.'" The problem with this argument, however, is that it fails to recognize the underlying power dynamic: the Executive branch will

always seek to aggrandize its powers at the expense of its counterparts. That is why our constitution sets forth a tripartite system in which each branch's ambition may be countered with the ambition of its rivals. *See* Federalist No. 51 (Madison).

So while the executive branch has every reason to *assert* its powers broadly, it has no desire to *admit* that it is doing so. That is why the BIA consistently characterizes its policy revisions—no matter how drastic—as mere "clarifications" of previous legal murk. *Compare Matter of Valenzuela Gallardo*, 25 I. & N. Dec. 838, 841 (BIA 2012) (asserting that its decision only "clarif[ied]" a prior interpretation) *with Valenzuela Gallardo v. Lynch*, 818 F.3d 808, 813 (9th Cir. 2016) ("The BIA's most recent interpretation departs from its prior interpretations.").

The Tenth and the Fifth Circuits have constructed a test that recognizes agencies' role in our constitutional system of separated powers. Instead of employing the Ninth Circuit's subjective totality-of-the-circumstances test, these circuits employ an objective benchmark: Is the agency acting in Congress's stead? If so, then its actions are presumed to have prospective effect only.

In any event, when it comes to the government's no-change-in-law argument, Judge Watford's dissent was correct: "The holding in *Matter of Leal* represents a 'new rule' under any definition of that term." App.45a. When Mr. Mercado-Ramirez pleaded guilty, the agency had long held that crimes "committed with a *mens rea* of recklessness" required "some sort of

aggravating circumstance." *Id.* (collecting decades of BIA decisions). In *Matter of Leal*, the BIA substantively revised this line of decisions by scrapping the aggravated-circumstance requirement. *Id.* Mr. Mercado-Ramirez should not be faulted for relying on this longstanding precedent.

C. This case is a clean vehicle.

The government claims (BIO.23–24) that Mr. Mercado-Ramirez may seek some alternative form of relief. But the government freely admits that it has "no basis" to believe that this alternative relief exists. BIO.23. The government additionally cites (BIO.24) the nine-year period between Mr. Mercado-Ramirez's plea and conviction, but does not explain how this timing would "cloud" this Court's ability to resolve either question presented.

D. This case presents the same constitutional concerns that surround *Brand X*.

The government suggests that the Tenth and the Fifth Circuits' approach should be limited to cases where the agency overrules the court's decision under *Brand X.* BIO.22.

That particular sequence of events certainly highlights how *Brand X* allows agencies to "intrud[e] on the judicial function." *De Niz Robles*, 803 F.3d at 1171. But there is no principled reason why the events here should raise any less concern. *See id.* at 1175

(suggesting that "the same rule should apply" whenever the "primary legislative actor in our legal order (Congress)" has exercised its "presumptively prospective" power). If an executive agency flexes its legislative clout under *Chevron*, why should the agency simultaneously be allowed to don the judicial robe and make its decisions retroactive?

In any event, the government makes a salient point: the *De Niz Robles* rule presents a modest opportunity to tame some of *Brand X*'s more "exuberant consequences." *Gutierrez-Brizuela*, 834 F.3d at 1150 (Gorsuch, J., concurring). And though this case wouldn't "fully resolve the problem," *see id.*, it would provide a modest opportunity to reaffirm our constitutional separation of powers: if *Chevron* permits an agency to act as lawmaker, the agency should not simultaneously presume to act as prosecutor and judge.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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