No.

IN THE

Supreme Court of the United States

MANUEL OLIVAS-MOTTA,

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Immigration and Nationality Act authorizes the Attorney General to deport noncitizens who have been convicted of certain "crimes involving moral turpitude." 8 U.S.C. § 1227(a)(2)(A)(ii). Because "there are no statutorily established elements for a crime involving moral turpitude," the phrase's meaning has been "left to the BIA and courts to develop through case-by-case adjudication." *Morales-Garcia v. Holder*, 567 F.3d 1058, 1062 (9th Cir. 2009) (citation omitted).

Twelve years ago, Mr. Olivas-Motta pleaded guilty to reckless endangerment under Arizona law. At that point in time, the BIA had repeatedly concluded that this offense did not categorically involve moral turpitude. But several years after Mr. Olivas-Motta pleaded guilty, the agency reversed course, holding that Arizona endangerment *did* categorically involve moral turpitude. The Ninth Circuit then deferred to this interpretation under *Chevron*, and the agency applied it retroactively to Mr. Olivas-Motta and ordered him removed.

This Petition presents two questions:

1. Whether an agency exercising its policymaking authority under *Chevron* may apply a new rule retroactively to a noncitizen who pleaded guilty in reliance on its previous rule.

2. Whether the phrase "crime involving moral turpitude" is void for vagueness.

PARTIES, RELATED PROCEEDINGS, AND RULE 29.6 STATEMENT

The parties to the proceeding below were Petitioner Manuel Olivas-Motta and Respondent William P. Barr,[1] in his official capacity as Acting Attorney General of the United States. There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

All proceedings directly related to the case, per Rule 14.1(b)(iii), are as follows:

- *In re Manuel Jesus Olivas-Motta*, U.S. Department of Justice Executive Office of Immigration Review, Immigration Court. Decision issued April 8, 2010.

- *Matter of Manuel Jesus Olivas-Motta*, U.S. Department of Justice Executive Office of Immigration Review, Board of Immigration Appeals. Decision issued August 9, 2010.

- *Olivas-Motta v. Holder*, No. 10-72459, U.S. Court of Appeals for the Ninth Circuit. Decision issued May 17, 2013.

- *Matter of Manuel Jesus Olivas-Motta*, U.S. Department of Justice Executive Office of

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[1] William P. Barr is substituted for Matthew Whitaker, who was substituted for former Attorney General Jefferson B. Sessions III, who was substituted for former Attorney General Loretta Lynch, who in turn was substituted for former Attorney General Eric H. Holder, Jr.

Immigration Review, Board of Immigration Appeals. Decision issued February 21, 2014.

- *Olivas-Motta v. Whitaker*, No. 14-70543, U.S. Court of Appeals for the Ninth Circuit. Decision issued December 19, 2019, and Order denying rehearing issued April 1, 2019.

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The order and opinion of the court of appeals (Pet. App. 1a-28a) is reported at 910 F.3d 1271. The opinion of the Board of Immigration Appeals (Pet. App. 29a-33a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 2018. The court of appeals then denied Mr. Olivas-Motta's petition for panel and en banc rehearing on April 1, 2019, and this Court granted a 60-day extension in which to file the petition for certiorari. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The relevant statutory provision states:

> 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.

8 U.S.C. § 1227(a)(2)(A)(ii).

INTRODUCTION

Imagine a board game where one player could win by changing the rules of the game after it ends. That's what the rule against retroactivity aims to prevent—the inherent repugnance of a bait-and-switch, the intuitive notion that a government of law cannot go around "branding as 'unfair' conduct stamped 'fair' at the time a party acted[.]" *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966) (Friendly, J.).

Though the principle is straightforward, it can be difficult to apply in practice. Often, it is impossible to know whether a government agency has subtly altered the law or simply "clarified" what the law always meant. So how can regulated parties rely on current precedent to make life-altering decisions without leaving themselves vulnerable to an agency's post-hoc "clarifications"?

These questions are far from academic for noncitizens facing permanent exile by the Board of Immigration Appeals. Just take the winding path of Mr. Olivas-Motta. At the time he pleaded guilty, the BIA had announced on several occasions that Arizona endangerment does not categorically involve moral turpitude. Several years later, however, the BIA changed its mind and reached the opposite conclusion. The BIA then applied its new rule retroactively to order Mr. Olivas-Motta deported. Put simply, Mr. Olivas-Motta was the victim of a bait and switch: when he pleaded guilty, his crime didn't trigger removal; several years later, it did. In other words, the BIA "exploit[ed] the power of retroactivity" by "punish[ing]" Mr. Olivas-Motta for doing "no more" than ordering his affairs "around existing law." *De Niz Robles v.*

Lynch, 803 F.3d 1165, 1174–75 (10th Cir. 2016) (Gorsuch, J.).

Had Mr. Olivas-Motta lived in the Tenth Circuit or the Fifth Circuit, he would not be facing a life in exile. Those Circuits apply a bright-line rule: if an agency interprets a statute deemed ambiguous under *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), then its interpretation should apply prospectively only. *See De Niz Robles*, 803 F.3d at 1170; *Monteon-Camargo v. Barr*, 918 F.3d 423, 431 (5th Cir. 2019) (adopting the same reasoning).

The rule adopted by the Fifth and Tenth Circuits can be stated as a syllogism: under an axiom that is "centuries older than our Republic," *Vartelas v. Holder*, 566 U.S. 257, 265 (2012), an exercise of legislative power is presumed to have no retroactive effect. And under *Chevron*, Congress delegates some of its legislative power to executive agencies. So if an agency exercises that delegated power by stepping into Congress's shoes, its decisions should have no retroactive effect.

But Mr. Olivas-Motta lives in the Ninth Circuit, which does not apply such clear-cut logic. Instead, that Circuit employs a "totality-of-the-circumstances" test to questions of retroactivity—which is "not a test at all but an invitation to make an ad hoc judgment regarding congressional intent." *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 307 (2013). In other words, it is a recipe for "chaos." *Id.*

Chaos indeed. Judges across the country have applied a bewildering set of factors to address this question of retroactivity. Take the Ninth Circuit's en banc

decision in *Garfias-Rodriguez v. Holder*, where one judge described the legal disarray:

> [S]ix of my colleagues pick one test while three others pick a different test. One judge believes that either test comes to the same result, and another agrees with the majority's conclusion while applying the test favored by the dissent.… By the time lawyers in this circuit get through reading all of our opinions, they'll be thoroughly confused.

702 F.3d 504, 532 (9th Cir. 2012) (Kozinski, C.J., disagreeing with everyone).

Garfias-Rodriguez's test proved so confusing that the judges in Mr. Olivas-Motta's case could not even agree on how to apply it. That's because the test asks judges to answer a question that is often unanswerable: whether the agency has "changed" the law, or whether it simply added "clarity" to what was previously legal murk. *Compare* Pet. App. at 7a-8a (majority drawing a distinction between "evaluating whether a change occurred" and "evaluating the character of a change in law") *with* Pet. App. at 19a (Judge Watford stating that the BIA had issued a new rule "under any definition of that term"). The Ninth Circuit's poorly-constructed test was able to provide no guidance—instead, it only deepened the confusion.

The perils of retroactivity are also heightened in cases like Mr. Olivas-Motta's, where the underlying law "has no intelligible meaning" and is predicated on "an undefined and undefinable standard." Pet. App. at 20a (Watford, J., dissenting) (citation omitted). Those words accurately describe 8 U.S.C. § 1227(a)(2)(A)(ii), which punishes noncitizens for committing certain

"crimes involving moral turpitude." Judges have described efforts to define this phrase as a "consistent failure," *Nuñez v. Holder*, 594 F.3d 1124, 1130 (9th Cir. 2010), "schizophrenic," *Hernandez-Martinez v. Ashcroft*, 329 F.3d 1117, 1119 (9th Cir. 2003) (Wardlaw, J., concurring), and "utterly illogical," and "defying common sense," *Marmolejo-Campos v. Holder*, 558 F.3d 903, 919 (9th Cir. 2009) (en banc) (Berzon, J., dissenting, joined by Pregerson, Fisher, and Paez, JJ.). Other judges have described the term as "notoriously baffling," *Garcia-Meza v. Mukasey*, 516 F.3d 535, 536 (7th Cir. 2008), and "meaningless," "rife with contradiction," and "an embarrassment to a modern legal system," *Arias v. Lynch*, 834 F.3d 823, 831, 835 (7th Cir. 2016) (Posner, J., concurring). Even the agency tasked with interpreting this statute has abandoned any hope of providing a concrete definition, describing the prospect as "unrealistic." *Matter of Ortega-Lopez*, 27 I. & N. Dec. 382, 386 (BIA 2018) (citation omitted).

At bottom, this Court's intervention is urgently needed on both the retroactivity and "crime involving moral turpitude" issues. The uncertainty invited by the phrase "moral turpitude" infects thousands of immigration cases every year. *See* Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1741 (2011) (from 1996 to 2006, immigration courts handled 136,896 "moral turpitude" cases). The same is true when it comes to the question of retroactivity. With administrative agencies "poking into every nook and cranny of daily life," *City of Arlington*, 569 U.S. at 315 (Roberts, C.J., dissenting), the scope of agency power must be carefully policed. That is particularly true when it comes to agencies' power to "single out disfavored persons and

groups and punish them for past conduct they cannot now alter." *De Niz Robles*, 803 F.3d at 1174–75.

STATEMENT OF THE CASE

Manuel Olivas-Motta is 43 years old and has been a lawful permanent resident of this country since he was ten days old. In 2003, he was convicted of facilitation to commit unlawful possession of marijuana for sale in violation of Arizona Revised Statutes § 13-1004 and § 13-3405 after unwittingly permitting a friend to store some boxes containing marijuana in his house. And in 2007, at a time when he was facing criminal charges for a gun accident, Mr. Olivas-Motta's criminal defense lawyer consulted an immigration attorney, who relied on both published and unpublished cases from the BIA to advise him that a conviction for reckless endangerment under Arizona Revised Statutes § 13-1201 was not categorically a crime involving moral turpitude.

Just the year before, the BIA had explained that Arizona's definition of reckless endangerment did not meet the requisite threshold for "turpitudinous" behavior:

> Just as the criminal law regularly draws distinctions between actions that yield bad outcomes such as death or bodily injury and those that do not, we have held that crimes involving a reckless mental state will not be deemed to involve moral turpitude absent the presence of some aggravating factors, such as the death of a person or the infliction of bodily injury.

Matter of Carlos Mario Almeraz-Hernandez, 2006 WL 3203649, at *2 (BIA Sept. 6, 2006) (citing *Matter of*

Fualaau, 21 I. & N. Dec. 475 (BIA 1996); *Matter of Wojtkow*, 18 I. & N. Dec. 111 (BIA 1981); and *Matter of Medina*, 15 I. & N. Dec. 611, 613 (BIA 1976)).

That same year, in *Matter of Valles-Moreno*, the BIA confirmed that "the crime of endangerment in Arizona includes a broad spectrum of misconduct such as recklessly discharging firearms in public, obstructing public highways, or abandoning life-threatening containers attractive to children." 2006 WL 3922279, at *2–3 (BIA Dec. 27, 2006) (citing *United States v. Hernandez-Castellanos*, 287 F.3d 876, 880 (9th Cir. 2002); *Matter of Navajo County Juvenile Delinquency Action No. 89-J-099*, 793 P.2d 146 (Ariz. Ct. App. 1990) (upholding a reckless endangerment conviction where a juvenile delinquent threw water balloons at passing vehicles)). Given that the statute lacked an "aggravating factor," the BIA again concluded that Arizona reckless endangerment was not a crime involving moral turpitude. *Id.*

Nevertheless, Immigration and Customs Enforcement placed Mr. Olivas-Motta in deportation proceedings and charged him with two "crimes involving moral turpitude." The immigration judge sustained the charge, rejecting Mr. Olivas-Motta's explanation that he had pleaded guilty in reliance on his attorney's assessment of BIA case law. And in its first decision in his case, the BIA agreed:

> We cannot conclude that the offense is categorically a crime involving moral turpitude … an offense involving a reckless state of mind will not be deemed a crime involving moral turpitude absent the presence of some aggravating factor such as the death of a person or the

> infliction of bodily injury. However, ARS § 13-1201 *does not have an element such aggravating factors*.

Matter of Manuel Olivas-Motta, Aug. 9, 2010, Board of Immigration Appeals (emphasis added) (citing *Matter of Fualaau*, 21 I. & N. Dec. 475; *Matter of Wojtkow*, 18 I. & N. Dec. 111; *Matter of Medina* 15 I. & N. Dec. 611).

But while Mr. Olivas-Motta's case was pending before the Ninth Circuit on different grounds, the BIA abruptly reversed course. In *Matter of Leal*, 26 I. & N. Dec. 20 (BIA 2012), the BIA exercised its *Chevron* deference to conclude that reckless endangerment under Arizona law *is* categorically a crime involving moral turpitude. That decision did not rely on any subsequent legal developments—it simply decided that a mere risk of harm, even one that did not involve an "aggravating factor" of actual death or bodily injury, involved moral turpitude. *See id.* at 26 (concluding that throwing water balloons at passing cars "appears relatively innocuous until one considers the fact that the balloons were thrown at vehicles that were moving at high speeds on a public highway").

On remand from the Ninth Circuit, Mr. Olivas-Motta argued that the BIA should not apply *Leal* retroactively to his case. The BIA disagreed, noting that while it had previously held that Mr. Olivas-Motta's endangerment conviction was not categorically a crime involving moral turpitude, "this does not mean that we cannot reconsider our decision in light of *Matter of Leal*." Pet. App. at 32a. Applying the new precedent retroactively, the BIA then ordered Mr. Olivas-Motta removed. Pet. App. at 33a.

Mr. Olivas-Motta filed a second petition for review. In this petition, he raised two challenges: first, that the BIA should not retroactively apply *Leal* to him, and second, that the "crime involving moral turpitude" statute was void for vagueness.

A divided panel of the Ninth Circuit rejected both arguments. Pet. App. at 1a-17a. The majority first determined that the BIA had not technically changed the law's meaning. Pet. App. at 5a-8a. Though the majority acknowledged that Mr. Olivas-Motta's view was supported by the BIA's earlier decisions (including its first decision in his own case), the majority stated that any reliance on those decisions was unjustified because those decisions were unpublished. Pet. App. at 9a. The majority also concluded that Mr. Olivas-Motta's void-for vagueness argument was foreclosed by *Martinez-De Ryan v. Sessions*, 895 F.3d 1191 (9th Cir. 2018). Pet. App. at 17a.[1]

Judge Watford dissented. He concluded that the BIA's about-face represented "a 'new rule' under any definition of that term." Pet. App. at 19a. Judge Watford explained that retroactivity is particularly dangerous in cases like Mr. Olivas-Motta's, where the underlying law "has no intelligible meaning" and is predicated on "an undefined and undefinable standard." Pet. App. at 20a (citation omitted).

The Ninth Circuit denied Mr. Olivas-Motta's petition for rehearing and petition for rehearing en banc,

[1] A petition for certiorari is currently pending in that case. *See* Case No. 18–1085.

though Judge Watford would have granted the petition. Pet. App. at 34a-35a.

REASONS FOR GRANTING THE WRIT

I. The retroactivity issue

A. Circuit courts employ different tests to determine whether an agency may apply its new precedent retroactively.

This Court has recognized that when executive agencies announce rules via adjudications, an agency's desire to apply those rules retroactively can cause "mischief" and "ill effect[s]." *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947). But this Court has never provided guidance on how to avoid those evils. Instead, it simply "gestured toward a vague balancing test without offering any specific standard." Peter Karanjia, *Hard Cases and Tough Choices: A Response to Professors Sunstein and Vermeule*, 132 HARV. L. REV. F. 106, 113 (2019). Subsequent efforts to craft a workable rule have "produced a great deal of confusion within the lower courts." Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 HARV. L. REV. 1924, 1946 (2018).

For example, the Ninth Circuit ordinarily utilizes a five-factor retroactivity test described in *Montgomery Ward & Co., Inc. v. FTC*, 691 F.2d 1322, 1333 (9th Cir. 1982) (adopting the non-exclusive factors listed in *Retail, Wholesale and Department Store Union v. NLRB*, 466 F.2d 380, 390–93 (D.C. Cir. 1972)). The Second Circuit, the Third Circuit, and the Seventh Circuit follow a similar approach. *See, e.g.*, *Matthews v. Barr*, 927 F.3d 606, 634 (2d Cir. 2019) (applying same factors); *Laborers' Int'l Union of N. Am., AFL-*

CIO v. Foster Wheeler Energy Corp., 26 F.3d 375, 392 (3d Cir. 1994) (same); *Velasquez-Garcia v. Holder*, 760 F.3d 571, 581 (7th Cir. 2014) (same). The Eighth Circuit, in contrast, applies a three-factor test that it deems "similar" to the *Retail, Wholesale* test. *Ryan Heating Co. v. NRLB*, 942 F.2d 1287, 1289 (8th Cir. 1991) (citations omitted). And the First Circuit applies no factors at all—it broadly asks whether retroactivity would create a "manifest injustice." *C.E.K. Indus. Mech. Contractors, Inc. v. NLRB*, 921 F.2d 350, 357 (1st Cir. 1990) (citing *NLRB v. New Columbus Nursing Home, Inc.*, 720 F.2d 726, 729 (1st Cir. 1983)).

The D.C. Circuit, which first invented the *Retail, Wholesale* test, later stated that its "formulation of the standard … has varied." *United Food & Commercial Workers Int'l Union, AFL-CIO, Local No. 150-A v. NRLB* 1 F.3d 24, 34 (D.C. Cir. 1993) (listing various standards it has applied over time). That circuit has since downplayed the five-factor test's usefulness, concluding that there was "no need to plow laboriously through" these factors because they ultimately "boil down ... to a question of concerns grounded in notions of equity and fairness." *Cassell v. FCC*, 154 F.3d 478, 486 (D.C. Cir. 1998) (citing *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1082 n.9 (D.C. Cir. 1987) (en banc).

The Fifth Circuit has explicitly rejected this five-factor test, concluding that its multiple factors "are of little practical use." *Microcomputer Tech. Inst. v. Riley*, 139 F.3d 1044, 1050 (5th Cir. 1998). Courts in that circuit simply "balance the ills of retroactivity against the disadvantages of prospectivity." *Id.* That circuit also recognizes that when the BIA "updates" its definition of moral turpitude, retroactivity would

"compromise the familiar due process considerations of fair notice, reasonable reliance, and settled expectations." *Monteon-Camargo*, 918 F.3d at 431 (citing, among other authorities, *De Niz Robles*, 803 F.3d at 1169) (cleaned up). And the Tenth Circuit has edged away from this multi-factor test as well, deeming the factors "elaborate," not "exclusive," and not "even always the most pertinent." *De Niz Robles*, 803 F.3d at 1177. Instead, the Tenth Circuit operates a bright-line rule: if a statute is so ambiguous that its interpretation triggers *Chevron* deference, that interpretation cannot apply retroactively. *Id.*

The Tenth Circuit's rule derives from a straightforward axiom: "To regulate the past is judicial, to regulate the future is legislative." *Livingston's Lessee v. Moore*, 32 U.S. 469, 491 (1833). For centuries, that was the dividing line. Judges were deemed "the discoverers, not the creators, of the Law." 1 William Blackstone, Commentaries *69-70. Accordingly, judicial rulings were presumed to have retrospective effect, as the judicial role was not "to pronounce a new law, but to maintain and expound the old one." *Id.*; *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting) (noting that this rule has been in operation "for near a thousand years").

The opposite is true for legislation: the presumption against retroactive laws "embodies a legal doctrine centuries older than our Republic." *Vartelas*, 566 U.S. at 265 (citation omitted); *see also Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855–56 (1990) (Scalia, J., concurring) (describing this presumption as a "timeless and universal rule" and tracing its development from ancient Greece to the time of the Founders).

So for executive agencies, any question about retroactivity turns on the character of the agency's function. The more an agency acts like an adjudicator—applying existing law to cases and controversies—"the stronger the case may be for retroactive application of the agency's decision." *De Niz Robles*, 803 F.3d at 1172. But the more an agency acts like a legislator—announcing new rules that apply to all—"the stronger the case becomes for limiting application of the agency's decision to future conduct." *Id.*

The Tenth Circuit also recognized that Congress can delegate its legislative powers to executive agencies—and when agencies exercise that power, courts must defer under *Chevron*. So where agencies "seek to exercise delegated legislative policymaking authority, their rules too should be presumed prospective in operation unless Congress has clearly authorized retroactive application." *Id.*

Ultimately, these diverging legal tests generate meaningfully different outcomes. If the government had commenced these proceedings in New Mexico, Mr. Olivas-Motta would be free to stay in the only country he has ever called home. But since the government commenced these proceedings in neighboring Arizona, Mr. Olivas-Motta now faces a life in exile.

B. The retroactivity question implicates serious concerns about the scope of agency power.

The rule against retroactivity is designed to prevent creative bureaucrats from "exploit[ing] the power of retroactivity" by using creative legal interpretations in "worrisome" ways—by "punish[ing] those

who have done no more than order their affairs around existing law." *Id.* at 1174–75.

Noncitizens have ample reason for concern when it comes to the BIA. To be clear, the BIA is a tribunal nestled within the Executive branch; its decisionmakers are not "insulated from politics and policymaking in the way Article III judges are." *Id.* at 1175. And that perhaps explains the BIA's mission creep: in the past, its definition of "moral turpitude" was restricted to "serious" crimes, like "homicide, burglary, robbery, abduction, kidnapping, [and] rape." *Matter of E–*, 2 I. & N. Dec. 134, 140 (BIA 1944). But in just the past decade, the BIA has decided whether an offense is a "crime involving moral turpitude" in 20 different cases—and in all 20, it concluded the answer was yes.[2]

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[2] *See Matter of Velasquez-Rios*, 27 I. & N. Dec. 470 (BIA 2018) (forgery); *Matter of Ortega-Lopez*, 27 I&N Dec. 382 (BIA 2018) (sponsoring or exhibiting an animal fight); *Matter of Mendez*, 27 I. & N. Dec. 219 (BIA 2018) (misprision of a felony); *Matter of J–G–D–F–,* 27 I. & N. Dec. 82 (BIA 2017) (burglary of an unoccupied dwelling); *Matter of Wu*, 27 I. & N. Dec. 8 (BIA 2017) (assault with a deadly weapon or great bodily injury); *Matter of Jimenez-Cedillo*, 27 I. & N. Dec. 1 (BIA 2017) (sexual solicitation of a minor); *Matter of Obeya*, 26 I. & N. Dec. 856 (BIA 2016) (petty larceny); *Matter of Diaz-Lizarraga*, 26 I. & N. Dec. 847 (BIA 2016) (shoplifting); *Matter of Silva-Trevino*, 26 I. & N. 826 (BIA 2016) (indecency with a child); *Matter of Zaragoza-Vaquero*, 26 I. & N. Dec. 814 (BIA 2016) (criminal copyright infringement); *Matter of O.A. Hernandez*, 26 I. & N. Dec. 464 (BIA 2015) (Texas reckless endangerment); *Matter of Hernandez*, 26 I. & N. Dec. 397 (BIA 2014) (malicious vandalism with gang

Far from the "serious" crimes the phrase was originally intended to reach, these decisions now sweep within its definition non-dangerous and non-fraudulent crimes like shoplifting, vandalism, and copyright infringement.

Here, Mr. Olivas-Motta specifically structured his plea deal to avoid the risk of deportation. His defense lawyer consulted an immigration attorney, who relied on the BIA's repeated declarations—published and unpublished—that an offense with a mens rea of recklessness must have an "aggravating factor" before it rises to the level of moral turpitude. As Judge Watford recognized, Mr. Olivas-Motta's actions were "eminently reasonable." Pet. App. at 27a (Watford, J., dissenting). So in cases like this one, retroactive application of the BIA's abrupt volte-face would generate a "trap for the unwary and paradoxically encourage those who bother to consult the law to disregard what they find." *De Niz Robles*, 803 F.3d at 1178–79.

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enhancement); *Matter of Pinzon*, 26 I. & N. Dec. 189 (BIA 2013) (false statement to government official); *Matter of Cortes Medina*, 26 I. & N. Dec. 79 (BIA 2013) (indecent exposure); *Matter of Leal*, 26 I. & N. Dec. 20 (BIA 2012) (Arizona reckless endangerment); *Matter of Rivens*, 25 I. & N. Dec. 623 (BIA 2011) (accessory after the fact); *Matter of Ruiz-Lopez*, 25 I. & N. Dec. 551 (BIA 2011) (unlawful flight); *Matter of Guevara Alfaro*, 25 I. & N. Dec. 417 (BIA 2011) (any intentional sexual conduct by an adult with a minor under 16); *Matter of Cortez*, 25 I. & N. Dec. 301 (BIA 2010) (welfare fraud); *Matter of Louissaint*, 24 I. & N. Dec. 754 (BIA 2009) (burglary of an occupied dwelling).

C. This case is an ideal vehicle to decide the retroactivity question.

Mr. Olivas-Motta fully presented his retroactivity argument to both the Ninth Circuit panel and the en banc court. The retroactivity question turns on a bright-line rule of law that sidesteps any messy factual disputes: if *Chevron* deference applies, then the result cannot be retroactive. Furthermore, the "crime involving moral turpitude" statute was the only basis for his removal. So if the Tenth Circuit's rule applied, Mr. Olivas-Motta's removal proceedings would be terminated, and he would remain in the United States with his family as a lawful permanent resident.

D. The retroactivity test used by the Tenth Circuit and the Fifth Circuit is superior to the Ninth Circuit's test.

1. The Tenth and Fifth Circuits recognize that retroactivity turns on whether the agency is fulfilling a legislative or a judicial function.

As noted above, many circuits adjudicate questions of retroactivity by applying a loose jumble of factors designed to address concerns about "equity and fairness." *Cassell*, 154 F.3d at 486. But few have announced any limits or principles that animate such broad, freewheeling inquiries.

The Tenth Circuit was perhaps the first court to anchor its reasoning in a solid doctrinal rule. That court recognized a link between two seminal administrative law cases: the first being *Chenery II*, 332 U.S. at 202, which predicted that retroactive application of executive agencies' decisions could cause "ill effect[s]"

and "mischief"; the second being *Chevron,* which sheds light on the nature of agency power. Then-Judge Gorsuch's opinion in *De Niz Robles* explained that the "more an agency acts like a judge" by applying law to facts, "the closer it comes to the norm of adjudication and the stronger the case may be for retroactive application of the agency's decision." 803 F.3d at 1172. But *De Niz Robles* also warned:

> [T]he more an agency acts like a legislator—announcing new rules of general applicability—the closer it comes to the norm of legislation and the stronger the case becomes for limiting application of the agency's decision to future conduct.

Id.

On the surface, an immigration adjudication may appear to fall on the "judicial" side of the line. After all, it resembles a "quasi-judicial proceeding with lawyers and administrative law judges and briefs and arguments and many of the other usual trappings of a judicial proceeding." *Id.* But "substance doesn't always follow form," *id.*, and *Chevron* helps reveal the true character of an agency's exercise of power.

The Tenth Circuit reasoned that Congress can delegate its legislative powers to executive agencies—and when agencies exercise that power, courts must defer under *Chevron*. So where "Congress's delegates seek to exercise delegated legislative policymaking authority, their rules too should be presumed prospective in operation unless Congress has clearly authorized retroactive application." *Id.*

It follows that "an agency exercising its *Chevron* step two … powers acts in substance a lot less like a

judicial actor interpreting existing law and a good deal more like a legislative actor making new policy." *Id. See also id.* ("[A]n agency operating under the aegis of *Chevron* step two … comes perhaps as close to exercising legislative power as it might ever get."). So if an agency steps into Congress's shoes under *Chevron* step two, its actions must be "subject to the same presumption of prospectivity" that accompanies congressional legislation. *Id.*

2. The Tenth Circuit rule is easier to administer.

For retroactivity questions, the Ninth Circuit effectively employs a "totality-of-the-circumstances test—which is really, of course, not a test at all but an invitation to make an ad hoc judgment regarding congressional intent." *City of Arlington*, 569 U.S. at 307. In other words, it is an invitation to decisional "chaos." *Id.*; *accord* Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1182 (1989) (opaque, multifactor rules impair equality, destroy predictability, and tempt judges to tailor the law to fit the case).

In contrast, the Tenth Circuit has accurately described the Ninth Circuit's factors as a "judicial chore" that "isn't made any easier when the number of factors we're asked to juggle proliferates." *De Niz Robles*, 803 F.3d at 1180. Moreover, the Ninth Circuit's multifactor muddle asks courts to "commensurate incommensurable legal factors." *Id.* at 1175. As the Tenth Circuit described it, this task resembles asking judges to "compare the weight of a stone to the length of a line." *Id.*

The last time the Ninth Circuit took up the retroactivity question en banc, it left those judges so

divided that one judge wrote: "By the time lawyers in this circuit get through reading all of our opinions, they'll be thoroughly confused." *Garfias-Rodriguez*, 702 F.3d at 532 (Kozinski, C.J., disagreeing with everyone). In contrast, the Tenth Circuit test provides a bright-line rule: if an agency exercises its legislative powers under *Chevron* step two, its actions should be prospective only.

The decision below illustrates the danger of employing a mishmash of imprecise factors. The divided panel's attempt to apply this test stumbled out of the gate: the majority reasoned that "a change in law must have occurred before *Montgomery Ward* is implicated," Pet. App. at 6a, whereas the dissent concluded that the BIA's new rule "plainly constitutes the 'change in law' that the majority identifies as necessary to trigger retroactivity analysis." Pet. App. at 20a. Strangely, the majority below grappled with this question as a threshold inquiry, even though it recognized that the second *Montgomery Ward* factor then repeats this analysis by asking whether the agency departed from a "former rule" or "old standard." Pet. App. at 7a.

This confusion would never have occurred in the Fifth Circuit or the Tenth Circuit, which prevents judges from answering such unanswerable questions. *Cf. Garfias-Rodriguez*, 702 F.3d at 529 (Kozinski, C.J., disagreeing with everyone) (urging courts to shortcut this analysis because "retroactivity issues lurk in many, perhaps all cases"). Instead, the Tenth Circuit and the Fifth Circuit would have held that the presence of *Chevron* deference provides a clear answer: retroactivity was impermissible.

3. The Tenth Circuit rule promotes fair notice.

When a statute is ambiguous, "binding citizens to one reading over another may be akin to asking them to obey a law of which they could not know." Abner S. Greene, *Adjudicative Retroactivity in Administrative Law*, 1991 SUP. CT. REV. 261, 265. And if a case reaches *Chevron* step two, then "the interpretive question is resolvable not from examining sources of congressional intent"—rather, the "law has stopped," and "discretion takes over." *Id.* at 276, 278; *accord Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (concluding that a similar form of deference is warranted only when the "legal toolkit is empty and the interpretive question still has no single right answer," such that the answer is "more [one] of policy than of law.") (citation omitted).

In those circumstances, "citizens are not on notice of the source of law that governs until the agency announces its policy choice." Greene, *Adjudicative Retroactivity*, 1991 SUP. CT. REV. at 276; *accord Garfias-Rodriguez*, 702 F.3d at 515–16 (noting that an agency's *Chevron* step two decision is "not a once-and-for-always definition of what the statute means, but an act of interpretation in light of its policymaking responsibilities") (citing *Chevron*, 467 U.S. at 864).

The Tenth Circuit's rule prevents immigrants from being caught in a Catch-22. In other contexts involving agency deference, this Court has refused to place regulated parties in a similar bind:

> It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is

> quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding.

Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 158–59 (2012). And in other contexts, courts consistently refuse to fault litigants for "relying on … precedent" and not "prophesying" an intervening change in law. *United States v. Chittenden*, 896 F.3d 633, 640 (4th Cir. 2018). A contrary rule would "require a party to be clairvoyant." *Phillips v. Cameron Tool Corp.*, 950 F.2d 488, 491 (7th Cir. 1991).

4. The Tenth Circuit rule respects the separation of powers.

In recent years, several members of this Court have expressed concern that *Chevron* and *National Cable and Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005), accommodate a vision of Executive power that is inconsistent with the constitution's design. In particular, *Brand X* has raised the hackles of those who believe it allows agencies to "revis[e]" a "judicial declaration of the law's meaning." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1150 (10th Cir. 2016) (Gorsuch, J., concurring). The late Justice Scalia, a former administrative law professor and one of *Chevron*'s staunchest defenders, thought *Brand X* introduced a "breathtaking novelty: judicial decisions subject to reversal by executive officers." 545 U.S. at 1016. Or as Justice Thomas recently lamented, *Brand X* "wrests from Courts" the ultimate authority to interpret the law and "hands it over to the Executive." *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., dissenting).

The Tenth Circuit's rule presents a modest opportunity to wrest some of that power back and return it to the Judicial branch. If an agency's *Chevron*-step-two decisions are prospective only, then the agency will not have the power to "revise" the work of Article III judges under *Brand X*. Instead, it will enjoy a more limited power: the power to announce *new* rules with *prospective* effect. Article III judges will then be able to review those rules. So as a formal matter, the Judiciary will reclaim the power to say, once and for all, "what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

II. The void-for-vagueness issue

A. Courts remain hopelessly divided on the meaning of "moral turpitude."

The defining trait of the phrase "crime involving moral turpitude" is its invocation of morality—a subjective term that invites judges to decide cases by rummaging through an undefined mixture of ethical, social, and religious beliefs. In effect, it requires judges to "play the role of a Rorschach psychologist." *Romo v. Barr*, — F.3d —, No. 16–71559, 2019 WL 3808515, at *7 (9th Cir. Aug. 14, 2019) (Owens, J., concurring).

That is why judges have described "crime involving moral turpitude" as the "quintessential example of an ambiguous phrase," *Marmolejo-Campos*, 558 F.3d at 909, and an "amorphous morass," *Partyka v. Attorney Gen. of U.S.*, 417 F.3d 408, 409 (3d Cir. 2005). Efforts to define the phrase have been deemed a "consistent failure." *Nuñez*, 594 F.3d at 1130. Other judges have described the term as "meaningless," "a fossil," and "an embarrassment to a modern legal system,"

Arias, 834 F.3d at 831, 835 (Posner, J., concurring), and "a black hole for judicial resources," *Romo*, 2019 WL 3808515, at *6 (Owens, J., concurring).

Ultimately, this statute's textual indeterminacy leaves judges unmoored and adrift. One judge recently questioned how *any* of the key terms could be given meaning:

> What does "inherently base, vile, or depraved"—words that have virtually dropped from the vocabulary of modern Americans—mean and how do any of these terms differ from "contrary to the accepted rules of morality"? How for that matter do the "accepted rules of morality" differ from "the duties owed between persons or to society in general"? And—urgently—what is "depravity"?

Arias, 834 F.3d at 831 (Posner, J., concurring).

Given this term's definitional hollowness, it should come as no surprise that courts frequently treat federal crimes differently: for example, the Fifth Circuit holds that misusing a Social Security number involves moral turpitude. *Hyder v. Keisler*, 506 F.3d 388 (5th Cir. 2007). The Ninth Circuit does not. *Beltran-Tirado v. INS*, 213 F.3d 1179 (9th Cir. 2000). In the Seventh Circuit and the Eleventh Circuit, accessory after the fact is a crime involving moral turpitude. *Padilla v. Gonzales*, 397 F.3d 1016 (7th Cir. 2005), *overruled on other grounds*, *Ali v. Mukasey*, 521 F.3d 737, 743 (7th Cir. 2008); *Itani v. Ashcroft*, 298 F.3d 1213 (11th Cir. 2002). In the Ninth Circuit, it is not. *Navarro-Lopez v. Gonzalez*, 503 F.3d 1063 (9th Cir. 2007) (en banc) *overruled for other reasons*,

United States v. Aguila-Montes de Oca, 655 F.3d 915 (9th Cir. 2011) (en banc).

But courts don't just disagree on how to label specific crimes; they also disagree on the foundational nature of the inquiry. When it comes to the question of who gets to define "crime involving moral turpitude"—the courts or the BIA—the circuits are divided. The Ninth Circuit reserves the right to define "moral turpitude" for itself but lends *Chevron* deference to the BIA's determination of whether a particular crime meets the definition. *Marmolejo-Campos*, 558 F.3d at 910. This is the exact inverse of the Fifth Circuit, which gives *Chevron* deference to the BIA's definition of "moral turpitude" but reviews *de novo* whether a crime fits that definition. *See Mercado v. Lynch*, 823 F.3d 276, 278 (5th Cir. 2016).

Put simply, courts disagree on which branch of government should step in to fix Congress's failure to define this term. This Court has described lesser disagreements "about the nature of the inquiry" as the "most telling" symptom of a statute's underlying vagueness. *Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015). And a representative democracy has no room for this game of inter-branch hot potato.

B. The void-for-vagueness question affects our immigration system, as well as wide swaths of our criminal justice system.

For many noncitizens in our criminal justice system, preserving the right to remain in the United States is "more important … than any potential jail sentence." *Padilla v. Kentucky*, 559 U.S. 356, 368 (2010). Analyzing and advising noncitizens whether a potential offense involves moral turpitude falls within

the "ambit of the Sixth Amendment right to counsel." *Id*. at 366. *Accord Lee v. United States*, 137 S. Ct. 1958, 1966 (2017) ("The decision whether to plead guilty also involves assessing the respective consequences of a conviction after trial and by plea.").

But the unpredictability of "moral turpitude" makes it impossible for criminal defense attorneys to accurately advise their noncitizen clients of immigration consequences during plea negotiations, and equally impossible for those clients to make informed decisions. This continued uncertainty invites a flood of ineffective-assistance claims and habeas challenges—collateral lawsuits that threaten to deluge an already-overburdened criminal justice system.

If a defense attorney cannot accurately predict whether an offense will be deemed to involve moral turpitude, thousands of lawful permanent residents, like Mr. Olivas-Motta, will face the "drastic measure" of deportation, akin to lifelong "banishment or exile." *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) (citations omitted). Mr. Olivas-Motta has lived in this country since he was ten days old; deportation will rip him from his family, his home, and "all that makes life worth living." *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

C. This case is the right vehicle for the void-for-vagueness question.

Mr. Olivas-Motta fully presented his void-for-vagueness argument before both the Ninth Circuit panel and the en banc court. The void-for-vagueness question involves a facial challenge to the statute that does not turn on the particular facts of his case. And

without this statute, there would be no basis to remove Mr. Olivas from this country.

D. The decision below is incorrect.

There are at least two reasons why the "moral turpitude" statute is unconstitutional. First, the statute contravenes the "first essential of due process of law": that statutes must give people "of common intelligence" fair notice of what the law demands of them. *United States v. Davis*, 139 S. Ct. 2319, 2325 (2019) (citations omitted). Second, the statute offends the separation of powers by "hand[ing] responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide." *Davis*, 139 S. Ct. at 2325 (citation omitted).

1. The Executive branch's shifting definitions of "moral turpitude" rob noncitizens of fair notice.

The Executive branch's definition of the phrase "crime involving moral turpitude" has historically been a moving target. For example, the BIA used to describe the term as a classification aimed primarily at "serious" and "dangerous" crimes. *Matter of E–*, 2 I. & N. Dec. at 139–40. But the BIA now cautions that "[n]either the seriousness of a criminal offense nor the severity of the sentence … is determinative." *Matter of Serna*, 20 I. & N. Dec. 579, 581 (BIA 1992). And in practice, the definition has been stretched to include minor offenses like shoplifting, illegal downloads of online music, and turnstile jumping. *See Matter of Diaz-Lizarraga*, 26 I. & N. Dec. 847, 849, 852 (BIA 2016) (shoplifting); *Hashish v. Gonzales*, 442 F. 3d 572, 576 (7th Cir. 2006) (illegally downloading music);

Yesil v. Reno, 973 F. Supp. 372, 376 n.2 (S.D.N.Y. 1997) (turnstile jumping).

The BIA has also stated that an " 'evil intent' is a requisite element for a crime involving moral turpitude." *Matter of Serna*, 20 I. & N. Dec. at 582. But there, too, the BIA has waffled, qualifying that "[t]he presence or absence of a corrupt or vicious mind is not controlling." *Matter of Medina*, 15 I. & N. Dec. 611, 614 (BIA 1976). It has backtracked on this rule so thoroughly that even "forgetfulness" may cross the threshold. *Matter of Tobar–Lobo,* 24 I. & N. Dec. 143, 145 (BIA 2007).

The BIA has also defined "moral turpitude" by invoking Latin phrases: "Moral turpitude has been defined as an act which is per se morally reprehensible and intrinsically wrong, or malum in se, so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude." *Matter of Franklin*, 20 I. & N. Dec. 867, 868 (BIA 1994) (quotation omitted). But "[i]n application," the distinction between these esoteric terms "turns out to be paper thin." *Mei v. Ashcroft*, 393 F.3d 737, 741 (7th Cir. 2004); *see also* LaFave, *Malum in Se and Malum Prohibitum*, 1 Subst. Crim. L. § 1.6(b) (3d ed.) ("The trouble is that 'moral turpitude' is just as vague an expression as 'malum in se,' so it helps very little to define one term by reference to the other.").

As a final example, the BIA has stated that the "presence of an aggravating factor," such as "serious physical injury or the use of a deadly weapon," "can be important." *Ceron v. Holder*, 747 F.3d 773, 783 (9th Cir. 2014) (en banc) (Bea, J., dissenting, joined by Gould, J.) (quoting *Matter of Solon*, 24 I. & N. Dec.

239, 245 (BIA 2007)). But in practice, that factor is "important" until it isn't. *Id.* (citing *Matter of Sejas*, 24 I. & N. Dec. 236, 238 (BIA 2007) (holding that a Virginia assault statute did not categorically involve moral turpitude despite the presence of an aggravating factor)).

These about-faces have real consequences for noncitizens like Mr. Olivas-Motta. Just take the BIA's sometimes-it-matters-but-sometimes-it-doesn't position on "aggravating factors." Three times the BIA applied this rule to Arizona's reckless endangerment statute, and three times it concluded that the lack of an aggravating factor meant that this crime did not involve moral turpitude. So Mr. Olivas-Motta's plea wasn't just a roll of the dice—it was based on the BIA's repeated explanation of its own rules. How could he have known that the fourth time, years after his conviction and plea, the BIA would change its mind?

In recent years, the BIA has argued that when Congress wrote the phrase "crime involving moral turpitude," it probably meant 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." *Matter of Mendez*, 27 I. & N. Dec. 219, 221 (BIA 2018) (citation omitted).

But where did *this* definition come from? Not a single word of it can be found in the statutory text. So in effect, the Executive is "writing a new law rather than applying the one Congress adopted." *Davis*, 139 S. Ct. at 2324.

What's worse, the government's proposed definition is so elastic that it is difficult to imagine what crimes *couldn't* be squeezed to fit within it.[3] That is a serious problem: if Congress wanted to refer to *all* crimes, Congress "would have said so." *Navarro-Lopez*, 503 F.3d at 1070–71. And if the phrase "crime involving moral turpitude" were revised to mean "crime ~~involving moral turpitude~~," then several provisions of the Immigration and Nationality Act would become "mere surplusage." *Id.* (noting that 8 U.S.C. § 1182(a)(2)(A)(i) references both "crimes involving moral turpitude" and controlled substance offenses, and that if the former included all crimes, it would subsume the latter).

So there must be some dividing line. Some guiding principle that allows noncitizens in our criminal justice system to "plea bargain creatively … [to] reduce the likelihood of deportation." *Padilla*, 559 U.S. at 373. But if that line exists, it cannot be found anywhere in the BIA's erratic decrees.

A recent example demonstrates the BIA's unwillingness to infuse standards or predictability into the definition of "crime involving moral turpitude." In *Ortega-Lopez v. Lynch*, 834 F.3d 1015 (9th Cir. 2016), the Ninth Circuit remanded for the BIA to explain why the offense of cockfighting fit into the definition of a "crime involving moral turpitude." *Id.* at 1018. On remand, the BIA again rattled off several of its preferred legal standards for "moral turpitude" but chided the

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[3] Indeed, the government's proposed definition could extend to noncriminal acts like adultery, disrespecting one's elders, or cheating on a grade-school geography test.

court of appeals for trying to identify which one controlled:

> While we recognize that these principles may serve as useful guideposts, we have never considered our determination whether a crime involves moral turpitude to be strictly limited to the foregoing categories…. In other words, offenses that fall into these categories are crimes involving moral turpitude, but the definition of moral turpitude is broader.

Matter of Ortega-Lopez, 27 I. & N. Dec. at 386. And any hope for additional clarity was met with a shrug: the BIA simply stated that any attempt to define the phrase would be "unrealistic." *Id.* (citation omitted).

2. The "crime involving moral turpitude" statute impermissibly delegates a Legislative function to the Executive and Judicial branches.

Our Constitution assigns "[a]ll legislative Powers" to Congress. U.S. Const., Art. I, § 1. This means "legislators may not abdicate their responsibilities for setting the standards of the criminal law by leaving to judges the power to decide the various crimes includable in a vague phrase." *Dimaya*, 138 S. Ct. at 1227 (Gorsuch, J., concurring) (cleaned up).

In *Gundy v. United States*, several members of this Court explained how the void-for-vagueness doctrine and the non-delegation doctrine are two sides of the same coin:

> A statute that does not contain "sufficiently definite and precise" standards "to enable

> Congress, the courts, and the public to ascertain" whether Congress's guidance has been followed at once presents a delegation problem and provides impermissibly vague guidance to affected citizens.

139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972) ("A vague law impermissibly delegates basic policy matters.")). The dissenting judge in Mr. Olivas-Motta's case implicitly recognized this link, describing the "crime involving moral turpitude" law's vagueness in terms that are ordinarily reserved for non-delegation challenges. Pet. App. at 20a (Watford, J.) (stating that moral turpitude has "no *intelligible* meaning") (emphasis added).

Judge Watford was right. The lack of an intelligible principle is evident when one compares this case to *Gundy*; there, the plurality found that an intelligible principle could be derived from four features: (1) the statute's statement of purpose, which cabined the law's scope, *id.* at 2126; (2) the statute's definition of key terms, like "sex offender," 139 S. Ct. at 2127; (3) the "legislative history" that reveals what was "front and center in Congress's thinking," *id.* at 2127; and (4) the fact that the Attorney General had eschewed an "expansive" view of his statutory powers, *id.* at 2128.

The "moral turpitude" statute contains none of these features. It contains no statement of purpose, nor any definition of key terms. The legislative history also reveals that Congress was divided on the term's meaning. For example, in 1916, during a discussion by the House Committee on Immigration, an Illinois Representative admitted: "No one can really say what is meant by saying a crime involving moral turpitude."

Restriction of Immigration: Hearing on H.R. 10384 Before the Comm. on Immigration & Naturalization, 64th Cong. 8 (1916) (statement of Rep. Adolph J. Sabath). And the Attorney General, through his appointees on the Board of Immigration Appeals, has asserted an expansive view of his power to define the term—in fact, those appointees have described any limits on his power as "unrealistic." *Matter of Ortega-Lopez*, 27 I. & N. Dec. at 386.

Functionally, the lack of an intelligible principle is lying in plain sight: because Congress has never defined the phrase, its meaning has been "left to the BIA and courts to develop through case-by-case adjudication." *Morales-Garcia*, 567 F.3d at 1062. This abdication of legislative responsibility crosses the constitutional line.

The "moral turpitude statute also fails the legal test set forth by the *Gundy* dissenters. Those Justices concluded that Congress may authorize the Executive to "fill up the details"—but only if Congress first "makes the policy decisions." 139 S. Ct. at 2136 (Gorsuch, J., dissenting). To determine whether Congress has done so, the *Gundy* dissenters set forth three questions:

- Does the statute assign to the executive only the responsibility to make factual findings?

- Does it set forth the facts the executive must consider and the criteria against which to measure them?

- [D]id Congress, and not the Executive Branch, make the policy judgments?

Id. Answers in the negative are more likely to render the statute constitutionally suspect. *See id.*

Here, the answer to all three questions is no. First, the "crime involving moral turpitude" statute hands *all* of the policy analysis to the Executive—not just the fact-finding function. Indeed, a Senate report recognized how the term's definition effectively "depends on what the individual officer considers to be baseness, vileness, or depravity." S. Rep. No. 1515, 81st Cong., 2d Sess. 351 (1950).

Second, the statute does not describe what facts the Executive should consider, nor does it list any relevant criteria. This places the "crime involving moral turpitude" statute on a shakier foundation than even the "crime of violence" statute struck down in *Johnson*, where the threshold for a "crime of violence" was dimly illuminated by a "confusing list" of enumerated offenses. *Dimaya*, 138 S. Ct. at 1221 (discussing *Johnson*, 135 S. Ct. at 2561). Here, there are no enumerated offenses at all, nor is there even a baseline guiding principle such as "violence." This "textual indeterminacy" leaves judges to chart their course with fewer guiding stars than other statutes already deemed unconstitutional. *See id.*

Third, the statute does not reflect a congressional policy judgment—rather, it reflects the intentional abandonment of that judgment. Compare the "crime involving moral turpitude" statute to the provision that defines "aggravated felonies," which are also grounds for removal. When Congress enacted the aggravated felony law, it did not leave that term's meaning to be developed over decades of guesswork; instead, it provided a list of concrete examples. *See* 8

U.S.C. § 1101(a)(43)(A)–(U). Congress could easily amend the moral turpitude statute to mirror this approach. *See, e.g.*, Brian C. Harms, *Redefining "Crimes of Moral Turpitude": A Proposal to Congress*, 15 GEO. IMMIGR. L.J. 259, 284 (2001) (providing a draft "moral turpitude" statute that lists predicate crimes, just like the "aggravated felony" statute does). Congress could also say that "a conviction for any felony carrying a prison sentence of a specified length opens an alien to removal," as it has done with other laws. *Dimaya*, 138 S. Ct. at 1233 (Gorsuch, J., concurring) (citing 18 U.S.C. § 922(g)); *accord Romo*, 2019 WL 3808515, at *7 (Owens, J., concurring) (proposing a similar approach).

But Congress never did that. Instead, it contrived a statutory catch-all that prevents ordinary people from knowing the law's meaning. The 1917 Act's legislative history shows that members of Congress were sharply divided as to "which crimes were serious enough to warrant deportation." *See* Angela M. Banks, *The Normative and Historical Cases for Proportional Deportation*, 62 EMORY L.J. 1243, 1270 (2013). Congress eventually settled on the mutable phrase "moral turpitude," but "only after Congress agreed to authorize criminal trial judges to prevent deportation … by issuing a judicial recommendation against deportation (JRAD)." *Id.* at 1272.

Put simply, the statute's vagueness wasn't a legislative blunder—it was a deliberate abdication of duty: as in *Gundy*, "members of Congress could not reach consensus" so they "found it expedient to hand off the job to the executive and direct there the blame for any later problems that might emerge." 139 S. Ct. at 2143 (Gorsuch, J., dissenting). Because Congress

"could not achieve the consensus necessary to resolve the hard problems" associated with the term, it simply "passed the potato to the Attorney General." *Id.* at 2144.

At bottom, this legislative misadventure is inconsistent with our constitutional design. The "crime involving moral turpitude" statute threatens to "giv[e] the executive *carte blanche* to write laws"; this concentration of Executive power may "mark the end of any meaningful enforcement of our separation of powers and invite the tyranny of the majority that follows when lawmaking and law enforcement responsibilities are united in the same hands." *Id.* at 2145.

This constitutional imbalance is exacerbated by the *Chevron* doctrine, which requires the Judiciary to defer to the Executive's interpretation of ambiguous statutes. *See Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 845 (1984). This means that the Executive branch wields the power to "set and revise policy (legislative), override adverse judicial determinations (judicial), and exercise enforcement discretion (executive)." *See Gutierrez-Brizuela*, 834 F.3d at 1155 (Gorsuch, J., concurring). This arrangement would be foreign to the Founders, who believed that the concentration of these three powers "in the same hands … may justly be pronounced the very definition of tyranny." The Federalist No. 47 (James Madison).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 29, 2019

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED DECEMBER 19, 2018

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14-70543

Agency No. A021-179-705.

MANUEL JESUS OLIVAS-MOTTA,
AKA MANUEL JESUS OLIVAS-NOTTA,

Petitioner,

v.

MATTHEW G. WHITAKER,
ACTING ATTORNEY GENERAL,

Respondent.

September 10, 2018, Argued and Submitted
San Francisco, California
December 19, 2018, Filed

On Petition for Review of an Order of
the Board of Immigration Appeals.

Before: J. Clifford Wallace, Johnnie B. Rawlinson,
and Paul J. Watford, Circuit Judges.

Appendix A

Opinion by Judge Wallace;

Dissent by Judge Watford

WALLACE, Circuit Judge:

An immigration judge (IJ) ordered Manuel Jesus Olivas-Motta's removal because he had been convicted of two crimes involving moral turpitude (CIMTs). The Board of Immigration Appeals (Board) dismissed Olivas-Motta's appeal from the IJ's order. Olivas-Motta now petitions for review of the Board's dismissal. We have jurisdiction under 8 U.S.C. § 1252, and we deny the petition.

I.

Olivas-Motta is a citizen of Mexico who was admitted to the United States of America as a lawful permanent resident on or about October 12, 1976. He has since been convicted of two felonies. On August 11, 2003, he was convicted of facilitation to commit unlawful possession of marijuana for sale in violation of Arizona Revised Statutes §§ 13-1004, 13-3405. On November 26, 2007, he was convicted of felony endangerment under Arizona Revised Statutes § 13-1201.

On April 2, 2009, the Department of Homeland Security initiated removal proceedings against Olivas-Motta under 8 U.S.C. § 1227(a)(2)(A)(ii) as an alien convicted of two CIMTs. The IJ determined, and the parties no longer dispute, that the facilitation offense was a CIMT. As to the endangerment offense, the IJ

determined that it was neither categorically a CIMT nor a CIMT under the modified categorical approach. However, the IJ examined evidence beyond the record of conviction, including police reports, and determined that the offense involved moral turpitude. The IJ then sustained the charge of removal. The Board relied on the same grounds to conclude that the endangerment offense was a CIMT and dismissed Olivas-Motta's appeal.

Olivas-Motta petitioned for review of the Board's decision. While the petition was pending, the Board published an opinion holding that felony endangerment under Arizona Revised Statutes § 13-1201 was categorically a CIMT. *In re Leal*, 26 I. & N. Dec. 20, 27 (B.I.A. 2012) (*Leal I*). We upheld that determination. *Leal v. Holder*, 771 F.3d 1140, 1148-49 (9th Cir. 2014) (*Leal II*). But we declined to consider *Leal I*'s relevance to Olivas-Motta in his first petition because the Board had not originally decided his appeal on the ground that felony endangerment was categorically a CIMT. *Olivas-Motta v. Holder*, 746 F.3d 907, 917 (9th Cir. 2013), *as amended* (April 1, 2014); *see also Ali v. Holder*, 637 F.3d 1025, 1029 (9th Cir. 2011) (confining our review to grounds relied upon by the Board). Instead, we granted the petition and remanded because "an IJ and the [Board] are confined to the record of conviction in determining whether an alien has been convicted of a CIMT." *Olivas-Motta*, 746 F.3d at 908. On remand, the Board applied *Leal I* to conclude that felony endangerment was categorically a CIMT and dismissed Olivas-Motta's appeal.

Olivas-Motta again petitions for review of the Board's dismissal. He argues that the Board's application of *Leal I* was impermissibly retroactive, that preclusion bars the Board from reconsidering whether felony endangerment was categorically a CIMT, and that the phrase CIMT is unconstitutionally vague.

Olivas-Motta also argues that we are not bound by *Leal II* because it was wrongly decided. But this panel has no power to overrule circuit precedent. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) (holding that circuit precedent may be overturned only en banc, subject to exceptions not applicable here).

II.

We review constitutional claims and questions of law *de novo*. *Latter-Singh v. Holder*, 668 F.3d 1156, 1159 (9th Cir. 2012); *see also* 8 U.S.C. § 1252(a)(2)(C), (D). Whether a new agency interpretation may be applied retroactively is a question of law. *See Garfias-Rodriguez v. Holder*, 702 F.3d 504, 514-15 (9th Cir. 2012) (en banc). Whether preclusion is available is also a question of law. *Oyeniran v. Holder*, 672 F.3d 800, 806 (9th Cir. 2012), *as amended* (May 3, 2012).

III.

When an agency decides to create a new rule through adjudicatory action, that new rule may apply retroactively to regulated entities. *SEC v. Chenery Corp.*, 332 U.S. 194, 203, 67 S. Ct. 1575, 91 L. Ed. 1995 (1947). "[R]etroactivity

must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles." *Id.* "If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law." *Id.*

We have applied this rule in the immigration context to determine whether Board decisions may apply retroactively. *See, e.g.*, *Garfias-Rodriguez*, 702 F.3d at 515-23; *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 950-53 (9th Cir. 2007). In such cases, we have relied on the five-factor test set forth in *Montgomery Ward & Co., Inc. v. FTC*, 691 F.2d 1322, 1333 (9th Cir. 1982). Olivas-Motta argues that, in this case, the *Montgomery Ward* factors strongly counsel against retroactively applying *Leal I* to his case, and that the Board accordingly erred in concluding that Arizona felony endangerment is categorically a CIMT.

A.

As a threshold matter, we must address whether retroactivity is implicated by *Leal I*. The government argues that a change in law is a prerequisite to *Montgomery Ward* balancing, and that we should not conduct a retroactivity analysis because no change in law occurred. Olivas-Motta argues that the *Montgomery Ward* factors themselves account for whether a change in law has occurred, and that *Montgomery Ward* balancing is therefore appropriate because *Leal I* was decided after his guilty plea.

We conclude that a change in law must have occurred before *Montgomery Ward* is implicated. The requirement that the law have changed in some way is generally a settled principle of retroactivity analysis. *See James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 534, 111 S. Ct. 2439, 115 L. Ed. 2d 481 (1991) ("It is only when the law changes in some respect that an assertion of nonretroactivity may be entertained"); *Morales-Izquierdo v. Dep't of Homeland Sec.*, 600 F.3d 1076, 1090 (9th Cir. 2010), *overruled in part on other grounds by Garfias-Rodriguez*, 702 F.3d at 516 ("*Montgomery Ward* and its progeny deal with the problems of retroactivity created when an agency, acting in an adjudicative capacity, so alters an existing agency-promulgated rule that it deprives a regulated party of the advance notice to conform its conduct to the rule"). It would be incongruous to apply a different rule here because the principles animating a statute's retroactivity — "fair notice, reasonable reliance, and settled expectations" — are equally animating in Olivas-Motta's immigration proceedings. *See Vartelas v. Holder*, 566 U.S. 257, 273, 132 S. Ct. 1479, 182 L. Ed. 2d 473 (2012) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994)). Moreover, were we to adopt the rule that *Montgomery Ward* balancing is required regardless of whether a change in law has occurred, the mere existence of a new published decision on an issue would always trigger retroactivity analysis. This too is contrary to settled law on this issue. *See Manhattan Gen. Equip. Co. v. Comm'r of Internal Revenue*, 297 U.S. 129, 135, 56 S. Ct. 397, 80 L. Ed. 528, 1936-1 C.B. 280 (1936) (holding that a tax regulation elaborating on a standard governed by statute

"is no more retroactive in its operation than is a judicial determination construing and applying a statute to a case in hand"). We therefore hold that *Montgomery Ward* retroactivity analysis is only applicable when "an agency consciously overrules or otherwise alters its own rule or regulation," or "expressly considers and openly departs from a circuit court decision."[1] *Garfias-Rodriguez*, 702 F.3d at 518-19.

Olivas-Motta's primary argument against this conclusion is the language of the *Montgomery Ward* factors. It is true that the second *Montgomery Ward* factor is "whether the new rule represents an abrupt departure from well established practice or *merely attempts to fill a void in an unsettled area of law*." *Montgomery Ward*, 691 F.2d at 1333 (emphasis added) (quoting *Retail, Wholesale and Dep't Store Union v. NLRB*, 466 F.2d 380, 390, 151 U.S. App. D.C. 209 (D.C. Cir. 1972)). This language suggests that a change in law can occur when the rule was previously unclear, and an adjudicatory decision brings clarity to the issue. But we

1. Judge Watford disagrees with our analysis and would conclude that a change in law occurs when the Board's decision was not "clearly foreshadowed." Diss. at 22. It is true that the Supreme Court has stated that a new principle of law can be established by "deciding an issue whose resolution was not clearly foreshadowed." *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1991). But "agency decisions are not analogous to court decisions." *Garfias-Rodriguez*, 702 F.3d at 520. *Chevron Oil*, which dealt with court decisions, is not apposite when an agency makes an adjudicatory decision that clarifies the scope of a statute it is charged with executing.

must consider the *Montgomery Ward* factors in light of the general rules of retroactivity, which require a change of law. In addition, the other *Montgomery Ward* factors themselves contemplate a change from a "former rule" or "old standard." *See Montgomery Ward*, 691 F.2d at 1333 (quoting *Retail*, 466 F.2d at 390). We therefore distinguish between cases where a rule, such as 8 U.S.C. § 1227(a)(2)(A)(ii), already exists, and an administrative decision simply clarifies the rule's application, and cases where the decision itself would "take away or impair vested rights acquired under existing laws, or create a new obligation, impose a new duty, or attach a new disability, in respect to transactions or considerations already past." *Vartelas*, 566 U.S. at 266 (alterations omitted) (quoting *Soc'y for Propagation of Gospel v. Wheeler*, 22 F. Cas. 756, 767, F. Cas. No. 13156 (No. 13,156) (CCNH 1814)). In the latter cases, the administrative decision has altered the legal consequences flowing from events and "considerations already past," and thus changed the law. *See id.* (quoting *Soc'y for Propagation of Gospel*, 22 F. Cas. at 767). But in the former, where the adjudicatory decision does not trigger a new obligation, impair a previously vested right, or attach new harm, no new legal consequences flow from the decision, and retroactivity is not implicated. The second *Montgomery Ward* factor is therefore better understood as evaluating the character of a change in law, once such a change has occurred, rather than evaluating whether the change occurred in the first instance.

Olivas-Motta points to language in *Garfias-Rodriguez* suggesting that a change in law is not a prerequisite to *Montgomery Ward* balancing. *See Garfias-Rodriguez*, 702

F.3d at 516 ("Chief Judge Kozinski . . . applies retroactivity principles to conclude that retroactivity analysis does not apply, effectively resolving the retroactivity question against *Garfias*"). We do not think *Garfias-Rodriguez* stands for the proposition Olivas-Motta believes it does. There was no dispute in that case that the law had changed; rather, the issue was how we should treat the unquestionable change of law of *this circuit* when it was prompted by a decision of the Board. *See id.* at 515-20. *Garfias-Rodriguez* did not hold that *Montgomery Ward* balancing is required when no change in law has taken place.

B

Applying this standard to this case, there was no change in law. Before Olivas-Motta's 2007 guilty plea, the Board had never determined in a precedential opinion whether felony endangerment in Arizona was a CIMT. The Board had only issued unpublished decisions on the issue. *See, e.g, In Re Carlos Mario Almeraz-Hernandez*, 2006 WL 3203649, at *2 (B.I.A. Sept. 6, 2006) (holding § 13-1201 is not categorically a CIMT). Unpublished decisions are not precedential and "do not bind future parties." *Marmolejo-Campos v. Holder*, 558 F.3d 903, 909 (9th Cir. 2009). Olivas-Motta therefore cannot argue that *Leal I* "attach[ed] a new disability" to his guilty plea that did not exist at the time he entered it. *See Vartelas*, 566 U.S. at 266 (quoting *Soc'y for Propagation*, 22 F. Cas. at 767). Rather, 8 U.S.C. § 1227(a)(2)(A)(ii) had already created the legal consequences of his plea, and it was merely unclear whether it would apply. *Leal I*'s settling of

that ambiguity did not change the law any more than "a judicial determination construing and applying a statute to a case in hand" would have. *See Manhattan Gen. Equip.*, 297 U.S. at 135.

Olivas-Motta counters that, notwithstanding the lack of a precedential opinion on Arizona felony endangerment, *Leal I* still constituted a change in law because of broader changes in the law of CIMTs. According to Olivas-Motta, the law before 2008 was that a crime with a mens rea of recklessness could not constitute a CIMT unless the offense presented an "aggravating factor," thus preventing Arizona endangerment from qualifying. But after the Attorney General's decision in *In re Silva-Trevino*, 24 I. & N. Dec. 687 (A.G. 2008), argues Olivas-Motta, the aggravating-factor requirement was abolished, thus leading to the decision in *Leal I*.

We are not persuaded that *Silva-Trevino* created the change in law identified by Olivas-Motta. As we explained in *Leal II*, the aggravating-factor requirement "[wa]s not due to the reckless mens rea involved, but rather because of the underlying conduct; both this court and the Board have repeatedly stated that simple assault is, in general, not a CIMT." 771 F.3d at 1148. Thus, in Olivas-Motta's cited cases, the aggravating-factor analysis is harmonious with the Attorney General's later approach in *Silva-Trevino*. *Compare In re Fualaau*, 21 I. & N. Dec. 475, 478 (B.I.A. 1996) ("In order for an assault *of the nature at issue in this case* to be deemed a crime involving moral turpitude, the element of a reckless state of mind must be coupled with an offense involving the infliction

of serious bodily injury" (emphasis added)), *with Silva-Trevino*, 24 I. & N. Dec. at 689 n.1 ("a crime must involve both *reprehensible conduct* and some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness" (emphasis added)). The earlier Board cases and *Silva-Trevino* did not apply the aggravating-factor requirement to all recklessness crimes, and *Silva-Trevino* did not purport to overrule decisions holding that simple assault is not a CIMT. *See Leal II*, 771 F.3d at 1148 (stating after *Silva-Trevino*: "It thus follows that, in order for an assault to be considered a CIMT, there must be some additional factor involved in the specific offense to distinguish it from generic simple assault"). As to Arizona felony endangerment then, *Silva-Trevino* did not change the law.

Olivas-Motta's argument to the contrary relies on unpublished Board decisions on this matter. Olivas-Motta is correct that unpublished Board decisions predating *Silva-Trevino* relied on *Fualaau* to conclude that Arizona endangerment was not a CIMT. *See, e.g., Almeraz-Hernandez*, 2006 WL 3203649, at *2. Olivas-Motta is also correct that *Leal I* cited *Silva-Trevino* as the controlling framework before concluding that Arizona felony endangerment *was* categorically a CIMT. 26 I. & N. Dec. at 21, 27. But once more, unpublished decisions "do not bind future parties." *Marmolejo-Campos*, 558 F.3d at 909. Olivas-Motta's attorney may have made a calculation that Arizona felony endangerment would not be considered a CIMT based on unpublished decisions, but *Fualaau* did not foreclose the conclusion that it was a CIMT before *Silva-Trevino*, nor did *Silva-Trevino* require the Board to

conclude that it was a CIMT afterwards. The application of the statute was simply unclear until *Leal I*, at which point the published Board opinion resolved the issue. Put differently, when Olivas-Motta pleaded guilty in 2007, it was possible that his conviction would not be adjudicated a CIMT, but no law guaranteed that. *Leal I*'s conclusive resolution of this uncertainty did not create a new legal harm to Olivas-Motta that did not already exist.

Because there was no change in the law raising retroactivity concerns, the Board did not err by applying *Leal I* to conclude that Arizona endangerment is a CIMT.

IV.

Preclusion prevents parties "from contesting matters that they have had a full and fair opportunity to litigate," thus protecting "against 'the expense and vexation attending multiple lawsuits, conserv[ing] judicial resources, and foster[ing] reliance on judicial action by minimizing the possibility of inconsistent decisions.'" *Taylor v. Sturgell*, 553 U.S. 880, 892, 128 S. Ct. 2161, 171 L. Ed. 2d 155 (2008) (quoting *Montana v. United States*, 440 U.S. 147, 153-54, 99 S. Ct. 970, 59 L. Ed. 2d 210 (1979)). "Under the doctrine of claim preclusion, a final judgment forecloses 'successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit.'" *Id.* (quoting *New Hampshire v. Maine*, 532 U.S. 742, 748, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)). Under the doctrine of issue preclusion, parties may not relitigate "'an issue of fact or law actually litigated and resolved in a valid court determination essential to

the prior judgment,' even if the issue recurs in the context of a different claim." *Id.* (quoting *New Hampshire*, 532 U.S. at 748-49). Olivas-Motta contends that, due to both types of preclusion, the Board could not revisit on remand whether felony endangerment was categorically a CIMT, after determining initially that it was not.

A.

Before we can evaluate Olivas-Motta's argument, we must address whether we have jurisdiction to consider it. The government argues that Olivas-Motta failed to exhaust his administrative remedies because he did not argue preclusion before the Board. Olivas-Motta responds that he could not raise preclusion because it was not implicated until the Board applied *Leal I* to his appeal.

We conclude that we have jurisdiction. 8 U.S.C. § 1252(d)(1) provides that a court may review a final order of removal only if "the alien has exhausted all administrative remedies available to the alien as of right." We have held that "1252(d)(1) mandates exhaustion and therefore generally bars us, for lack of subject-matter jurisdiction, from reaching the merits of a legal claim not presented in administrative proceedings below." *Barron v. Ashcroft*, 358 F.3d 674, 678 (9th Cir. 2004). But section 1252(d)(1) by its terms limits the petitioner's duty to "remedies available to the alien as of right." We have thus held that we retain jurisdiction over petitions where the challenged agency action was committed by the Board after briefing was completed, because the only remaining administrative remedies for such an action

were not available "as of right." *Alcaraz v. INS*, 384 F.3d 1150, 1159-60 (9th Cir. 2004).

In this case, after we granted Olivas-Motta's first petition and remanded to the Board, Olivas-Motta was never provided an opportunity to argue preclusion until the Board issued its second decision. At that point, his only remedies were discretionary, and there was no higher administrative authority to correct the supposed error. *See id.* A petition for review to this court was therefore proper, and section 1252(d)(1) does not divest us of jurisdiction.

B.

On the merits of Olivas-Motta's preclusion argument, we hold there was no error. Claim preclusion requires a final judgment on the merits in a separate action. *Valencia-Alvarez v. Gonzales*, 469 F.3d 1319, 1323-24 (9th Cir. 2006). By granting Olivas-Motta's petition for review in 2013, his original action continued, and no separate action commenced. *See id.* at 1324. Similarly, issue preclusion only applies when issues are "litigated and decided in the *prior proceedings*." *Oyeniran*, 672 F.3d at 806 (emphasis added). Multiple proceedings are a prerequisite before issue preclusion can apply. *See id.* Because the Board on remand was acting within the same proceedings as in Olivas-Motta's original appeal, preclusion does not apply.

Olivas-Motta counters this argument by citing an unpublished decision of this court relating to the rule of mandate and making preclusion arguments by analogy. This was also the argument that Olivas-Motta made to the

Board on remand. We consider this argument to be a rule of mandate argument, rather than one of claim preclusion or issue preclusion. Olivas-Motta has not argued that the Board could not reconsider this issue because of law of the case.

The rule of mandate is related to, but distinct from, claim preclusion and issue preclusion. Under the rule of mandate, an administrative agency may not deviate from a supervising court's remand order, and the reviewing court may review the agency's decision on remand "to assure that its prior mandate is effectuated." *Sullivan v. Hudson*, 490 U.S. 877, 886, 109 S. Ct. 2248, 104 L. Ed. 2d 941 (1989); *see also Mendez-Gutierrez v. Gonzales*, 444 F.3d 1168, 1172-73 (9th Cir. 2006) (holding that the rule of mandate applies to decisions of the Board on remand from this court). Thus, as with claim preclusion and issue preclusion, the rule of mandate can prevent parties from relitigating issues already decided. But the scope of the rule is limited to that which is before the court "and disposed of by its decree." *United States v. Thrasher*, 483 F.3d 977, 981 (9th Cir. 2007) (quoting *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255, 16 S. Ct. 291, 40 L. Ed. 414 (1895)). An administrative agency may therefore consider on remand "any issue not expressly or impliedly disposed of on appeal." *Stacy v. Colvin*, 825 F.3d 563, 568 (9th Cir. 2016) (quoting *Odima v. Westin Tucscon Hotel*, 53 F.3d 1484, 1497 (9th Cir. 1995)).

Our mandate in Olivas-Motta's first petition did not conclude that felony endangerment was not a CIMT, or that *Leal I* was wrongly decided. 746 F.3d at 916-17. Instead,

we "h[e]ld only that that we [could] not deny Olivas-Motta's petition based on a conclusion reached by the [Board] in a separate case decided two years after it decided the appeal now before us." *Id.* at 917. Nothing in our remand restricted the Board from considering the import of *Leal I* on Olivas-Motta's appeal. Accordingly, the rule of mandate did not foreclose the Board's reconsideration of the issue.

V.

The void-for-vagueness doctrine stems from the Fifth Amendment's guarantee of due process. *Johnson v. United States*, 135 S. Ct. 2551, 2556, 192 L. Ed. 2d 569 (2015). "[T]he Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Id.* Because "deportation is 'a particularly severe penalty,' which may be of greater concern to a convicted alien than 'any potential jail sentence,'" a provision of immigration law making an alien deportable is subject to the void-for-vagueness doctrine. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1213, 200 L. Ed. 2d 549 (2018) (quoting *Jae Lee v. United States*, 137 S. Ct. 1958, 1968, 198 L. Ed. 2d 476 (2017)).

Olivas-Motta argues that, even if applying *Leal I* to his appeal was not impermissibly retroactive or precluded, we should nonetheless grant the petition because 8 U.S.C. § 1227(a)(2)(A)(ii) *itself* is unconstitutionally vague. While he recognizes that both the Supreme Court and this court have repeatedly rejected that argument, *see Jordan v.*

De George, 341 U.S. 223, 232, 71 S. Ct. 703, 95 L. Ed. 886 (1951); *Martinez-De Ryan v. Sessions*, 895 F.3d 1191, 1194 (9th Cir. 2018), Olivas-Motta contends that the Board's interpretation of the statute has expanded the meaning of "moral turpitude" to the point that there is no meaningful standard guiding aliens' conduct.

We are not persuaded that this argument is distinguishable from those rejected in past cases. As we explained in *Leal II*, a crime is morally turpitudinous if it involves a conscious decision and a resulting harm, where "more serious resulting harm is required" "as the level of conscious behavior decreases, i.e., from intentional to reckless conduct." 771 F.3d at 1146 (quoting *Ceron v. Holder*, 747 F.3d 773, 783 (9th Cir. 2014) (en banc)). That is the standard the Board applied to evaluate Arizona felony endangerment, *id.* at 1147, and that standard is sufficiently meaningful to provide fair notice under our precedent. *Martinez-De Ryan*, 895 F.3d at 1193-94. To the extent Olivas-Motta asks us to reconsider those decisions, that is beyond this panel's authority. *Miller*, 335 F.3d at 900.

VI.

The Board did not commit any of the raised legal errors by concluding that Olivas-Motta's conviction for reckless endangerment was a crime involving moral turpitude. We therefore deny the petition.

PETITION DENIED.

Appendix A

WATFORD, Circuit Judge, dissenting:

When a non-citizen is charged with a crime and deciding whether to plead guilty, the immigration consequences of a conviction are often a major consideration. For some defendants, preserving the chance to remain in the United States is more important than the length of any prison sentence that might be imposed. *Padilla v. Kentucky*, 559 U.S. 356, 368, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010). With that in mind, competent defense counsel "may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence." *Id.* at 373. Such plea bargains are mutually beneficial for the prosecution: A defendant who might otherwise have proceeded to trial may be persuaded to forgo that right in exchange for a deal that allows him to plead guilty to an offense that reduces the risk of removal. *Id.*

An assessment of the immigration consequences attending a guilty plea must, of course, be based on the law as it exists at the time of the plea. If the law on that subject changes after a defendant pleads guilty, he usually cannot go back and undo his conviction, even if the conviction now carries far more serious immigration consequences than before. For that reason, when there is an intervening change in the law, we are required to assess whether the new rule may be applied retroactively in subsequent removal proceedings.

The majority refuses to engage in that analysis because it concludes that no "new rule" was adopted after Manuel Olivas-Motta pleaded guilty. I respectfully disagree.

The sole issue in Olivas-Motta's removal proceedings is whether reckless endangerment under Arizona Revised Statutes § 13-1201 constitutes a crime involving moral turpitude. When Olivas-Motta pleaded guilty to that offense in 2007, the Board of Immigration Appeals (BIA) had not decided in a precedential opinion whether reckless endangerment should be classified as a crime involving moral turpitude. But in 2012, long after Olivas-Motta pleaded guilty, the BIA held for the first time that reckless endangerment under § 13-1201 *is* a crime involving moral turpitude. *Matter of Leal*, 26 I. & N. Dec. 20, 27 (BIA 2012), *aff'd sub nom. Leal v. Holder*, 771 F.3d 1140 (9th Cir. 2014).

The holding in *Matter of Leal* represents a "new rule" under any definition of that term. The Supreme Court has said that a decision can establish a new rule "either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971) (citations omitted). The BIA did not overrule past precedent in *Matter of Leal*, but it did resolve an issue of first impression—whether reckless endangerment qualifies as a crime involving moral turpitude. The BIA's resolution of that issue was not clearly foreshadowed by precedent existing at the time Olivas-Motta pleaded guilty. In fact, as discussed below, the BIA's precedent in

2007 suggested that reckless endangerment under § 13-1201 would *not* be classified as a crime involving moral turpitude. Thus, *Matter of Leal* plainly constitutes the "change in law" that the majority identifies as necessary to trigger retroactivity analysis. Maj. op. at 9.

The majority suggests that our case is analogous to one in which a statutory provision is on the books when a defendant pleads guilty, and a court later does nothing more than construe and apply that statute in the case at hand. Maj. op. at 12. In that scenario, the majority asserts, we would not regard the judicial interpretation as a "new rule" subject to retroactivity analysis.

The majority's assertion would be correct if the court's decision were "dictate[d] by the plain language of the statute." *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 111, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993) (Kennedy, J., concurring in part and concurring in the judgment) (internal quotation marks omitted). But that is certainly not the case here. The governing statutory standard is supplied by 8 U.S.C. § 1227(a)(2)(A)(ii), which renders a non-citizen removable if he's been convicted of two or more "crimes involving moral turpitude." The quoted phrase has no intelligible meaning; it creates what Justice Jackson rightly labeled "an undefined and undefinable standard." *Jordan v. De George*, 341 U.S. 223, 235, 71 S. Ct. 703, 95 L. Ed. 886 (1951) (Jackson, J., dissenting). Neither our court nor the BIA has been able to come up with "any coherent criteria for determining which crimes fall within that classification and which crimes do not." *Nunez v. Holder*, 594 F.3d 1124, 1130 (9th

Cir. 2010). The BIA has been able to give the statutory standard concrete meaning mainly by declaring, through case-by-case adjudications, which specific offenses are covered and which are not. *See Marmolejo-Campos v. Holder*, 558 F.3d 903, 910-11 (9th Cir. 2009) (en banc).

Against that backdrop, each BIA decision that designates a new offense (or class of offenses) as a crime involving moral turpitude potentially creates a "new rule" for retroactivity purposes—at least where, as here, the decision was not clearly foreshadowed by prior precedent. That does not mean retroactive application of all such decisions is prohibited; it just means that the decisions must be analyzed under the framework we've established for assessing whether retroactive application is permissible.

This case is a prime example of one in which retroactive application of a new rule is impermissible. Olivas-Motta was originally charged in 2007 with attempted murder and aggravated assault with a deadly weapon, offenses that would clearly render him removable if he were convicted. He had already been convicted of one crime involving moral turpitude; he would be subject to removal if convicted of a second, and the BIA had already classified attempted murder and aggravated assault with a deadly weapon as crimes involving moral turpitude. *See Matter of Sanchez-Linn*, 20 I. & N. Dec. 362, 366 (BIA 1991); *Matter of Medina*, 15 I. & N. Dec. 611, 614 (BIA 1976).

Minimizing the likelihood of removal was of paramount concern to Olivas-Motta. He was born in Mexico, but his

parents brought him to the United States in 1976 when he was only ten days old. He has lived his entire life in this country as a lawful permanent resident. He is married to a U.S. citizen, and both of his children are U.S. citizens. Most of his family members are also either U.S. citizens or lawful permanent residents. For him, being removed to Mexico would truly be "the equivalent of banishment or exile." *Padilla*, 559 U.S. at 373 (quoting *Delgadillo v. Carmichael*, 332 U.S. 388, 390-91, 68 S. Ct. 10, 92 L. Ed. 17 (1947)).

Although Olivas-Motta believed himself innocent of the charges he faced, he was no doubt "acutely aware" of the severe immigration consequences a conviction would trigger. *INS v. St. Cyr*, 533 U.S. 289, 322, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001). He therefore had his attorney explore the possibility of pleading guilty to a lesser offense. Olivas-Motta's defense counsel consulted with an experienced immigration lawyer, who surveyed the law as it then stood. She advised that having Olivas-Motta plead guilty to reckless endangerment under § 13-1201 would minimize the risk of deportation because that offense in all likelihood would *not* be regarded as a crime involving moral turpitude. Olivas-Motta relied on that advice in deciding to plead guilty and forgo his right to a trial.

The advice Olivas-Motta received was sound at the time. The BIA had long held that crimes involving moral turpitude require some form of corrupt or evil intent. *See, e.g., Matter of P—*, 3 I. & N. Dec. 56, 59 (BIA 1947). The BIA retreated from that position in 1976, when it held that certain offenses committed with a *mens rea*

of recklessness could qualify as well. *Medina*, 15 I. & N. Dec. at 614. But the Board also made clear that a crime involving reckless conduct is not *per se* a crime involving moral turpitude. *In re Fualaau*, 21 I. & N. Dec. 475, 478 (BIA 1996). Something more was required, although exactly what that something more consisted of remained open to debate. In predicting the likely classification of reckless endangerment, the best guidance came from a series of cases involving manslaughter and assault offenses, which held that a crime committed with a *mens rea* of recklessness had to include as an element some sort of aggravating circumstance, such as the infliction of death or serious bodily injury. *See id.* (serious bodily injury); *Matter of Wojtkow*, 18 I. & N. Dec. 111, 113 (BIA 1981) (death); *Medina*, 15 I. & N. Dec. at 614 (use of a deadly weapon).

As of 2007, the BIA had not issued a precedential decision involving a reckless endangerment offense. Nonetheless, reckless endangerment under Arizona law did not appear to qualify as a crime involving moral turpitude, for although it requires a *mens rea* of recklessness, it does not require proof of any of the aggravating circumstances found in past cases. The felony version of the offense, to which Olivas-Motta pleaded guilty, simply requires "recklessly endangering another person with a substantial risk of imminent death." Ariz. Rev. Stat. § 13-1201(A). To be sure, there was ongoing debate about whether placing someone in grave risk of death or serious bodily injury could itself be deemed an aggravating circumstance, *see Knapik v. Ashcroft*, 384 F.3d 84, 90 (3d Cir. 2004); *In re Braimllari*, 2006 WL

729794, at *1 (BIA Feb. 14, 2006), but the BIA had rejected that view in two non-precedential decisions, both of which expressly held that reckless endangerment under § 13-1201 did *not* qualify as a crime involving moral turpitude. *In re Almeraz-Hernandez*, 2006 WL 3203649, at *2-3 (BIA Sept. 6, 2006); *In re Valles-Moreno*, 2006 WL 3922279, at *2-3 (BIA Dec. 27, 2006).

In 2008, however, the Attorney General replaced the BIA's former standard for determining which recklessness offenses qualify as crimes involving moral turpitude with a new standard. In *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (A.G. 2008), the Attorney General declared that, to qualify as a crime involving moral turpitude, an offense need involve only "reprehensible conduct and some degree of scienter." *Id.* at 689 n.1. The effect of this change was to eliminate the aggravating-circumstance requirement for offenses with a *mens rea* of recklessness.[1] Under the new standard, it was now far more likely that reckless

1. The government argues, and the majority appears to agree, that the aggravating-circumstance requirement was limited to assault offenses, and thus did not apply to offenses like reckless endangerment. Maj. op. at 13-14. But none of the BIA's cases in this area held that the aggravating-circumstance requirement was limited to assault offenses alone, and there is no logical reason why it would not extend to a comparably serious offense such as reckless endangerment. Indeed, in each of the pre-*Silva-Trevino* cases in which the BIA held that a reckless endangerment offense qualified as a crime involving moral turpitude, no one disputed that the aggravating-circumstance requirement applied. The BIA simply concluded in those cases, involving statutes from other States, that the requirement was satisfied. *See Knapik*, 384 F.3d at 90; *Braimllari*, 2006 WL 729794, at *1.

endangerment under § 13-1201 would be classified as a crime involving moral turpitude. After all, placing someone in "substantial risk of imminent death" would certainly seem to qualify as reprehensible conduct. And indeed, in 2012, that is exactly what the BIA concluded in *Matter of Leal*, where the agency held for the first time that reckless endangerment under § 13-1201 constitutes a crime involving moral turpitude. 26 I. & N. Dec. at 27.

The question thus becomes whether *Matter of Leal* may be applied retroactively to Olivas-Motta's case—in other words, whether the immigration consequences of his conviction should be assessed under the law as it stood in 2007, when he pleaded guilty, or under the law as it stood in 2014, when the BIA adjudicated his appeal. To answer that question, we apply the test from *Montgomery Ward & Co. v. FTC*, 691 F.2d 1322 (9th Cir. 1982), which requires us to balance five factors: "(1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard." *Id.* at 1333 (internal quotation marks omitted).

The weight to be accorded the first, fourth, and fifth factors has already been settled. We have held that the first factor does not favor either party in the immigration context. *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 520-21

(9th Cir. 2012) (en banc). The fourth factor strongly favors Olivas-Motta, as the burden imposed by retroactively applying the law in effect in 2014 is severe: Under the rule adopted in *Matter of Leal*, his conviction for reckless endangerment would be regarded as a crime involving moral turpitude, subjecting him to removal from the United States and separation from his family. *See id.* at 523. The fifth factor points in the government's favor, since "non-retroactivity impairs the uniformity of a statutory scheme, and the importance of uniformity in immigration law is well established." *Id.*

The second and third factors, then, are dispositive, and they tip the balance in Olivas-Motta's favor. When he pleaded guilty to reckless endangerment in 2007, the BIA had an established standard for determining which recklessness offenses constitute crimes involving moral turpitude. The Attorney General's subsequent decision in *Silva-Trevino* represented an "abrupt departure" from that standard, *Montgomery Ward*, 691 F.2d at 1333 (internal quotation marks omitted), in the sense that it replaced the aggravating-circumstance requirement with a new, more expansive standard. That change in the governing standard was outcome determinative with respect to certain offenses, as we know from the way the BIA classified § 13-1201 before and after *Silva-Trevino*. Before the Attorney General's decision, the BIA had held (in non-precedential decisions) that reckless endangerment under § 13-1201 does not constitute a crime involving moral turpitude; afterward the BIA definitively held exactly the opposite. Because Olivas-Motta had no reason to anticipate elimination of the aggravating-circumstance requirement,

his reliance on the pre-*Silva-Trevino* standard when deciding to plead guilty was eminently reasonable. *Cf. Garfias-Rodriguez*, 702 F.3d at 521 (second and third factors weigh in favor of retroactive application when the petitioner "could reasonably have anticipated the change in the law such that the new 'requirement would not be a complete surprise'") (quoting *Montgomery Ward*, 691 F.2d at 1333-34).

It's true, as the government argues, that the status of § 13-1201 had not been settled definitively in Olivas-Motta's favor prior to 2008. So this is not a case in which it is 100% clear that Olivas-Motta would have prevailed under the pre-*Silva-Trevino* standard. But, contrary to the majority's apparent assumption, *see* Maj. op. at 14, that is far from fatal under the second and third *Montgomery Ward* factors.

In *Miguel-Miguel v. Gonzales*, 500 F.3d 941 (9th Cir. 2007), we ruled for the petitioner in circumstances quite similar to those present here. When the petitioner in that case pleaded guilty to selling a small amount of cocaine, a relatively minor drug-trafficking offense like his would be classified as a "particularly serious crime" on a case-by-case basis using a multi-factor test. *Id.* at 945-46, 950. After he pleaded guilty, the Attorney General created a new standard that presumed all drug-trafficking offenses to be particularly serious crimes, with the presumption rebuttable only in very narrow circumstances. *Id.* at 946-47. We held that the second and third factors favored the petitioner because at the time he pleaded guilty, there was a "realistic chance" that the BIA would find that his

crime was not particularly serious, whereas under the Attorney General's new standard there was "a near (if not total) certainty" that his crime would be classified as particularly serious, thereby resulting in his removal. *Id.* at 952; *see also St. Cyr*, 533 U.S. at 321.

Olivas-Motta's situation is no different. At the time he pleaded guilty, there was *at least* a realistic chance that his reckless endangerment offense would not be classified as a crime involving moral turpitude; the BIA had already so held in two non-precedential decisions. After the Attorney General's decision in *Silva-Trevino*, however, it was nearly certain that his offense would be classified as a crime involving moral turpitude, and the BIA's decision in *Matter of Leal* soon eliminated what little uncertainty remained on that score. To the same extent as in *Miguel-Miguel*, the change in the governing standard "attaches new legal consequences to events completed before its enactment," *Vartelas v. Holder*, 566 U.S. 257, 273, 132 S. Ct. 1479, 182 L. Ed. 2d 473 (2012) (internal quotation marks omitted), and therefore may not be applied retroactively.

Under the *Montgomery Ward* test, the balance of factors weighs in favor of Olivas-Motta. Three of the factors favor him—one strongly so—while only one of the factors points in the government's favor. That means the status of his conviction for reckless endangerment should be analyzed under the law as it stood in 2007, applying the standard that prevailed before the Attorney General's decision in *Silva-Trevino*. *See id.* at 261. I would grant Olivas-Motta's petition for review and remand so that the agency can conduct that analysis in the first instance.

APPENDIX B — OPINION OF THE UNITED STATES DEPARTMENT OF JUSTICE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, DATED FEBRUARY 21, 2014

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

DECISION OF THE BOARD OF IMMIGRATION APPEALS

File: A021 179 705 - Eloy, AZ

Date: FEB 21 2014

In re: MANUEL JESUS OLIVAS-MOTTA a.k.a. Manuel Jesus Olivas-Notta

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:	Kara Hartzler, Esquire
ON BEHALF OF DHS:	Jennifer M. Wiles Senior Attorney

CHARGE:

Notice: Sec. 237(a)(2)(A)(ii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(ii)] - Convicted of two or more crimes involving moral turpitude

Appendix B

APPLICATION: Termination

This case is presently before us pursuant to a May 17, 2013, decision of the United States Court of Appeals for the Ninth Circuit, which granted the respondent's petition for review from the Board's decision of August 9, 2010, and remanded for further proceedings. *See Olivas-Motta v. Holder,* 716 F.3d 1199 (9th Cir. 2013). For the reasons set forth below, the appeal is dismissed.

In the Board's August 9, 2010, decision, we dismissed the respondent's appeal from an Immigration Judge's April 8, 2010, decision, finding the respondent was removable as an alien convicted of two or more crimes involving moral turpitude (CIMT) under section 237(a)(2)(A)(ii) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1227(a)(2)(A)(ii), and denying his application for cancellation of removal. The respondent did not dispute that his conviction for facilitation, in violation of Arizona Revised Statute (ARS) § 13-1004, 3405(B)(6) (Exh. 4-C) was a CIMT (Exh. 4). The respondent disputes the Immigration Judge's determination that his conviction for endangerment, in violation of ARS § 13-1201 (Exh. 4-D), is a CIMT. The conviction records show that the respondent pled guilty to endangerment by recklessly endangering another person with a substantial risk of imminent death (Exh. 4-D). The Ninth Circuit held that the Immigration Judge and the Board improperly considered evidence beyond the record of conviction in holding that the respondent's conviction for endangerment was for a CIMT, and remanded the record for further proceedings.

Appendix B

The respondent requests that proceedings be terminated since his endangerment conviction was improperly found to have been a CIMT conviction, and he is thus not removable as an alien convicted of two or more CIMTs. The Department of Homeland Security (the "DHS") requests that the Board still find the respondent removable for committing two CIMTs because during the pendency of the respondent's appeal, the Board issued a decision, *Matter of Leal,* 26 I&N Dec. 20, 27 (BIA 2012), which held that recklessly endangering another person with substantial risk of imminent death in violation of ARS § 1201(A) is categorically a CIMT. Thus, according to the DHS, the respondent's conviction for endangerment is categorically a CIMT pursuant to *Matter of Leal.*

The Ninth Circuit noted that the DHS did not request a remand to allow the Board to apply *Matter of Leal. Olivas-Motta v. Holder, supra,* at 1209. The Court held that it could not deny the respondent's petition based on a conclusion reached by the Board in a separate case, i.e., *Matter of Leal,* decided two years after it decided the appeal currently before it. *Id.* It noted that in the current case, the Board had not decided the respondent's appeal based on a conclusion that the Arizona endangerment statute was categorically a CIMT, and in fact, had specifically held that the Arizona endangerment statute was not a CIMT. *Id.*

The respondent asserts that the Ninth Circuit's language proscribed the Board from applying *Matter of Leal* to his case. However, we disagree. The Ninth Circuit did not limit its remand in a way that prevents us from

applying *Matter of Leal* to his case. In discussing *Matter of Leal,* the Ninth Circuit's focus was on whether it would apply *Matter of Leal* to the respondent's case, especially where the Board had not determined that the respondent's conviction for endangerment was categorically a CIMT. *Olivas-Motta v. Holder, supra,* at 1209. It is true that the Ninth Circuit noted that the DHS had not requested a remand to allow the Board to apply *Matter of Leal. id.* However, this is not the same as saying the Board is now prohibited from applying *Matter of Leal* to the respondent's case. The respondent's case was remanded from the Court with no specific directions or limitations regarding applying *Matter of Leal.* The respondent is still charged with being removable as an alien convicted of two or more CIMTs. It is true that when the case was before us in August 2010, we stated of the respondent's endangerment conviction, "[w]e cannot conclude that the offense is categorically a crime involving moral turpitude ....." However, this does not mean that we cannot reconsider our decision in light of *Matter of Leal,* a precedent decision issued after our original decision in the respondent's case.

Under A.R.S. § 13-1201(A), a person commits endangerment by recklessly endangering another person with a substantial risk of imminent death or physical injury. Under A.R.S. § 13-1201(B), endangerment involving a substantial risk of imminent death is a class 6 felony, and in all other cases, it is a class 1 misdemeanor. Inasmuch as the respondent's conviction for endangerment was a Class 6 felony, it follows that his conviction was for recklessly endangering another person with a substantial

risk of imminent death under A.R.S. § 13-1201. We agree with the Immigration Judge's finding that the respondent's conviction for endangerment is a CIMT, and that he is thus removable as having been convicted of two or more CIMTs (I.J. at 5-6). As noted, we have issued a precedent decision on this matter in which we determined that the offense of "recklessly endangering another person with a substantial risk of imminent death" in violation of A.R.S. § 13-1201 is categorically a crime involving moral turpitude. *See Matter of Leal, supra.*

Accordingly, the following order is entered.

ORDER: The appeal is dismissed.

/s/_____
FOR THE BOARD

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED APRIL 1, 2019

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14-70543

Agency No. A021-179-705

MANUEL JESUS OLIVAS-MOTTA,
AKA MANUEL JESUS OLIVAS-NOTTA,

Petitioner,

v.

WILLIAM P. BARR, ATTORNEY GENERAL,

Respondent.

ORDER

Before: WALLACE, RAWLINSON, and WATFORD, Circuit Judges.

The court has voted to deny the petition for panel rehearing. Judge Rawlinson votes against rehearing *en banc* and Judge Wallace so recommends. The petition was circulated to all active members of the court and no judge has requested a vote on *en banc* rehearing. Therefore, Petitioner's Petition For Panel Rehearing And Suggestion Of Rehearing *En Banc* is **DENIED**.

Appendix C

Judge Watford would grant the petition for panel rehearing and rehearing *en banc*.