22-356

No.

In the Supreme Court of the United States

EVERTON DAYE,

Petitioner,

v.

MERRICK GARLAND, U.S. ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court should overturn *Jordan* v. *De George*, 341 U.S. 223 (1951), and hold that the phrase "crime involving moral turpitude" is unconstitutionally vague as it is used in 8 U.S.C. § 1227(a)(2)(A).

RELATED PROCEEDINGS

Daye v. *U.S. Attorney General*, No. 20-14340 (11th Cir. July 6, 2022)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Everton Daye respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 38 F.4th 1355. The decision of the Board of Immigration Appeals (App., *infra*, 15a-22a) and the decision of the immigration judge (*id.* at 23a-47a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1). On September 15, 2022, Justice Thomas extended the time for the filing of a petition until November 3, 2022.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides in relevant part: "No person shall * * * be deprived of life, liberty, or property, without due process of law."

8 U.S.C. § 1227(a)(2)(A)(i) provides:

> Any alien who—(1) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and (2) is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable.

8 U.S.C. § 1227(a)(2)(A)(ii) provides:

> 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.

INTRODUCTION

Petitioner Everton Daye has lived in the United States for more than fourteen years. He became a lawful permanent resident after marrying his wife, a U.S. citizen, in 2009; together, they have raised a family and made a life in this country.

Petitioner was found removable because he has committed offenses that an immigration judge and the Board of Immigration Appeals concluded qualify as "crimes involving moral turpitude" (CIMTs). The court of appeals denied a petition for review, specifically rejecting petitioner's contention that this statutory term is unconstitutionally vague. App., *infra*, 14a. The court held that it could not "deviate" from *Jordan* v. *De George*, 341 U.S. 223 (1951)—which held that the phrase "crime involving moral turpitude" was not void for vagueness—"until the Supreme Court itself overrules that decision." App., *infra*, 14a.

This case presents an ideal opportunity for the Court to do just that—overrule *De George*.

Federal statute does not define "moral turpitude." Rather, that exceedingly impactful concept has been supplied content solely by the work of administrative agencies and courts; its "contours have been left to case-by-case adjudication by administrative and judicial tribunals for over a century." *Zarate* v. *U.S. Att'y Gen.*, 26 F.4th 1196, 1199 (11th Cir. 2022). But

executive officials and judges have failed to land on any remotely objective definition that can be fairly administered. The Board of Immigration Appeals (BIA) admits that the term "moral turpitude" is a "nebulous concept" (*In re Tran*, 21 I. & N. Dec. 2991, 2992 (BIA 1996)), which courts describe as a "kind characterization." *Zarate*, 26 F.4th at 1200. To the extent that definitions of "moral turpitude" exist, "[i]t's difficult to make sense of * * * them." *Arias* v. *Lynch*, 834 F.3d 823, 831 (7th Cir. 2016) (Posner, J., concurring in the judgment). As Judge Posner colorfully put it, these definitions "approach gibberish." *Ibid.* "Despite many years of trying, courts and administrators have not been able to establish coherent criteria." *Islas-Veloz* v. *Whitaker*, 914 F.3d 1249, 1258 (9th Cir. 2019) (Fletcher, J., concurring).

But *De George* was wrong when it was decided—and it is badly out of step with this Court's prevailing jurisprudence. Over a fierce dissent by Justice Robert Jackson, *De George* held that the statutory term "crime involving moral turpitude" was not unconstitutionally vague simply because there exists a category of CIMTs that are easily applied—crimes involving fraud. 341 U.S. at 232. *De George* dismissed all non-fraud crimes as "marginal offenses," expressly declaring it need not consider what the statute "may mean" in what it termed these "peripheral cases." *Ibid.* But time has shown that these so-called "marginal or peripheral" cases—that is, all non-fraud offenses—"now comprise the great bulk of CIMTs today." *Islas-Veloz*, 914 F.3d at 1256-1257 (Fletcher, J., concurring). What is more, the Court's decisions "squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." *Johnson* v. *United States*, 576 U.S. 591, 602 (2015).

As one court recently put it, it is time to recognize that "Justice Jackson got it right." *Zarate*, 26 F.4th at 1200 n.2. The statutory term "crime involving moral turpitude" fails to provide constitutionally required fair notice; it invites arbitrary enforcement; it produces inexplicably inconsistent results; and it offends the separation of powers by delegating vast law-making authority to agencies and courts. The Court should overturn *De George* and hold that the phrase "crime involving moral turpitude" is unconstitutionally vague.

STATEMENT

A. Legal Background

1. The Immigration and Nationality Act (INA) provides that a noncitizen is removable if convicted of a "crime involving moral turpitude" (CIMT) within five years after admission for which a sentence of one year or longer may be imposed, or if convicted of two or more CIMTs not arising out of a single scheme at any time after admission. 8 U.S.C. § 1227(a)(2)(A)(i)-(ii). The phrase "moral turpitude" is not defined in the INA.

In determining whether a conviction is a CIMT, courts employ the categorical approach (if the statute of conviction is not divisible and sets out alternative means of committing a single offense) or the modified categorical approach (if the statute of conviction is divisible and creates separate offenses). See *Pereida* v. *Wilkinson*, 141 S. Ct. 754, 762-763 (2021). This means that "[w]hether a crime involves the depravity or fraud necessary to be one of moral turpitude depends upon the inherent nature of the *offense*, as defined in the relevant statute, rather than the circumstances surrounding a defendant's *particular conduct*." *Itani* v. *Ashcroft*, 298 F.3d 1213, 1215-1216 (11th Cir. 2002)

(emphasis added). Courts thus ask whether the "least culpable conduct necessary to sustain a conviction under the statute meets the standard of a crime involving moral turpitude." *Gelin* v. *U.S. Att'y Gen.*, 837 F.3d 1236, 1241 (11th Cir. 2016) (internal quotation marks and citation omitted).[1]

Determining whether the conduct of an offense involves "moral turpitude" has proven elusive for decades. The court of appeals below defines moral turpitude as an "act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." *Cano* v. *U.S. Att'y Gen.*, 709 F.3d 1052, 1053 (11th Cir. 2013) (quotation marks omitted). In other words, a CIMT must involve conduct that not only violates some statute but also independently violates social norms. See *Zarate*, 26 F.4th at 1201.

This definition largely originates from the BIA. It defines "moral turpitude" to mean "conduct that is inherently base, vile or depraved," elaborating that "[t]o

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[1] Where the statute of conviction is divisible—i.e., where it sets out different offenses—and some of the crimes set out in the statute involve moral turpitude and others do not, the person must "prove that his actual, historical offense of conviction" is not a CIMT. See *Pereida* v. *Wilkinson*, 141 S. Ct. 754, 763 (2021). Here, the Eleventh Circuit did not address divisibility because the government's initial brief failed to raise the issue. App., *infra*, 9a. See *United States* v. *Nealy*, 232 F.3d 825, 830 (11th Cir. 2000). That is no matter here because the court of appeals held that even the least culpable acts under Va. Code Ann. § 18.2-248.01 categorically constitute a CIMT, rendering the divisibility question inapposite. App., *infra*, 9a. See *Gelin*, 837 F.3d at 1243 (declining to address the "divisibility question" where the least culpable conduct under the statute of conviction categorically constituted a CIMT "in any event").

involve moral turpitude, a crime requires two essential elements: reprehensible conduct and a culpable mental state." *In re Silva-Trevino*, 26 I. & N. Dec. 826, 833-834 (BIA 2016) (quotation marks omitted). See *Zarate*, 26 F.4th at 1200-1201.

2. The due process protections enshrined in the Fifth Amendment do not tolerate vague laws. A law that invites "the Government * * * [to] tak[e] away someone's life, liberty, or property" without giving "ordinary people fair notice of the conduct it punishes, or [is] so standardless that it invites arbitrary enforcement," is "void for vagueness." *Johnson*, 576 U.S. at 595, 603. The Court has recognized these twin purposes of the vagueness doctrine and held that the presence of either defect renders statutory text vague and thus unconstitutional.

First, the "void-for-vagueness doctrine * * * guarantees that ordinary people have 'fair notice' of the conduct a statute proscribes." *Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1212 (2018). The Court has repeatedly held that a statute failing to give notice that a particular act has been made criminal is an unconstitutional deprivation of due process of law. See, *e.g.*, *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 162 (1972); *Lanzetta* v. *State of N.J.*, 306 U.S. 451, 458 (1939); *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921). The same principle holds true when a removability provision fails to give notice that a particular act can result in deportation. See *Dimaya*, 138 S. Ct. at 1213. This is because "deportation is a drastic measure" with profound consequences, effectively "the equivalent of banishment or exile." *De George*, 341 U.S. at 231.

Second, the vagueness doctrine "guards against arbitrary or discriminatory law enforcement by

insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges." *Dimaya*, 138 S. Ct. at 1212. By requiring "a legislature [to] establish minimal guidelines to govern law enforcement," the doctrine protects against "a standardless sweep" enabling executive and judicial officials "to pursue their personal predilections." *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983) (quoting *Smith* v. *Goguen*, 415 U.S. 566, 574-575 (1974)). "In that sense, the doctrine is a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not." *Dimaya*, 138 S. Ct. at 1212.

3. This Court analyzed the removability provision for a "crime involving moral turpitude" over seventy years ago in *Jordan* v. *De George*, 341 U.S. 223 (1951), a case involving a federal conviction for conspiracy to commit tax fraud. Although "[t]he question of vagueness was not raised by the parties nor argued before this Court," the Court "nevertheless examine[d] the application of the vagueness doctrine." *Id.* at 229, 231.

The *De George* Court held that the phrase "crime involving moral turpitude" is not unconstitutionally vague. After surveying existing caselaw, the Court first determined that courts had consistently treated crimes in which fraud is an ingredient as involving moral turpitude. As to vagueness, the Court remarked that it was "significant" that the phrase had been used in "immigration laws for more than sixty years." 341 U.S. at 229. The Court then reasoned that "doubt as to the adequacy of a standard in less obvious cases does not render that standard unconstitutional for vagueness." *Id.* at 232. In other words, because CIMT had been construed to embrace fraudulent conduct,

the Court held that the statutory phrase itself was not unconstitutionally vague. *Ibid.*

Justice Jackson, joined by Justices Black and Frankfurter, dissented. In their view, Congress had failed to give any "intelligible definition of deportable conduct." 341 U.S. at 245 (Jackson, J., dissenting). It was "not a judicial function" for courts "to determine the various crimes includable in this vague phrase." *Id.* at 242 (Jackson, J., dissenting).

Courts have understood *De George* to differentiate between fraud and non-fraud crimes. Offenses involving fraudulent intent are a "*sui generis* category necessarily involving moral turpitude." *Zarate*, 26 F.4th at 1202. Non-fraud offenses, however, must satisfy the "inherently base, vile, or depraved" requirement to constitute CIMTs. *Ibid.* See also App., *infra*, 7a ("We have identified two classes of crimes involving moral turpitude: (1) fraud offenses, which based on Supreme Court precedent are 'categorically deemed to involve moral turpitude'; and (2) 'non-fraud offenses' that 'must also satisfy the 'inherently base, vile, or depraved' requirement to constitute CIMTs.'").

B. Factual Background and Proceedings Below

1. Petitioner Everton Daye is a native and citizen of Jamaica. He was admitted to the United States on a B-2 nonimmigrant visa on or about May 22, 2008. App., *infra*, 25a. After Daye married a U.S. citizen, he adjusted his status and became a lawful permanent resident in 2009. *Ibid.*

Daye received three drug convictions under Virginia law. He was convicted of two substantive counts of transportation of controlled substances into the Commonwealth of Virginia in violation of Va. Code Ann. § 18.2-248.01, which he committed in March 2013. App., *infra*, 16a. Daye was also convicted of

conspiracy to transport marijuana into the Commonwealth of Virginia in violation of Va. Code Ann. §§ 18.2-256 and 18.2-248.01, which he committed in August 2013. App., *infra*, 16a.

2. Based on these convictions, the Department of Homeland Security (DHS) charged Daye with removability under four INA provisions: (1) under 8 U.S.C. § 1227(a)(2)(A)(i) as an alien convicted of a CIMT committed within five years after the date of admission, for which a sentence of one year or longer may be imposed; (2) under 8 U.S.C. § 1227(a)(2)(A)(ii) as an alien convicted of two or more CIMTs not arising out of a single scheme of criminal misconduct; (3) under 8 U.S.C. § 1227(a)(2)(A)(iii), as an alien convicted of an "aggravated felony" as defined in 8 U.S.C. § 1101(a)(43)(B), (U); and (4) under 8 U.S.C. § 1227(a)(2)(B)(i) as an alien convicted of a controlled substance violation. App., *infra*, 16a-17a.

Daye moved the immigration judge (IJ) to terminate his removal proceedings, arguing that his convictions do not qualify as aggravated felony trafficking offenses, controlled substance violations, or CIMTs. C.A. App. 439-52. The IJ dismissed two of the charges. App., *infra*, 46a. While the IJ agreed with Daye that his convictions failed to qualify as aggravated felonies or controlled substance violations, as Va. Code Ann. § 18.2-248.01 was indivisible and overbroad, the IJ determined that Daye failed to establish that his convictions did not qualify as CIMTs. C.A. App. 412-423.

Applying the categorical approach, the IJ concluded that an offense under Va. Code Ann. § 18.2-248.01—although prohibiting substances that were not federal controlled substances—includes an intent to distribute and thus required a morally culpable mental state and morally reprehensible conduct. App.,

infra, 44a-45a. Therefore, in the IJ's view, Daye did not prove that the minimum conduct under Va. Code Ann. § 18.2-248.01 "is so benign and so free of adverse individual or societal effects that it[] * * * cannot be considered inherently base, vile, or depraved." App., *infra*, 44a. The IJ thus determined Daye was removable as a noncitizen convicted of a CIMT within five years of admission for which a sentence of one year or longer may be imposed, and as a noncitizen convicted of two or more CIMTs not arising out of a single scheme of criminal misconduct. App., *infra*, 44a-47a.

DHS moved the IJ to reconsider her decision on the aggravated felony and controlled substance charges of removability, arguing that the IJ erred in concluding that Va. Code Ann. § 18.2-248.01 was not divisible as to the particular substance transported. App., *infra*, 5a. The IJ denied DHS's motion in another written decision and ordered Daye removed to Jamaica. *Ibid.*

3. Daye timely filed a Notice of Appeal with the BIA, challenging the denial of his motion to terminate removal proceedings. C.A. App. 124. In his brief to the Board, Daye argued that he had not been convicted of a CIMT and that the IJ held him to an improper standard to prove his convictions failed to qualify as CIMTs. C.A. App. 11-21.

The BIA affirmed the IJ's removal order, agreeing that Daye was removable on CIMT grounds under both 8 U.S.C. § 1227(a)(2)(A)(i) and (ii). App., *infra*, 21a. At the outset, the Board stated without further analysis that it has "long held that evil intent is inherent in the illegal distribution of drugs," and thus "participation in illicit drug trafficking is a CIMT." App., *infra*, 19a. The Board then reasoned that Daye had failed to establish there was "a realistic

probability" that the state would apply the statute to conduct outside the generic definition of a CIMT, such as prosecuting someone for any of the non-federally controlled substances encompassed by Va. Code Ann. § 18.2-248.01. App., *infra*, 20a (quoting *Gonzalez* v. *Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). The Board thus "agree[d] with the Immigration Judge that Va. Code Ann. § 18.2-248.01 is categorically a CIMT." App., *infra*, 21a.

4. Daye petitioned the court of appeals for review of the BIA's decision. App., *infra*, 2a. The court found that the BIA did not err in concluding that Daye was removable because his state drug convictions categorically constitute CIMTs within the meaning of 8 U.S.C. § 1227(a)(2)(A)(i)-(ii). *Ibid.*

Daye also argued that the statutory phrase "crime involving moral turpitude" in the INA is unconstitutionally vague, but the court of appeals held that this Court's decision in *Jordan* v. *De George*, 341 U.S. 223 (1951), foreclosed that argument. The court stated it was "bound by *De George*." App., *infra*, 14a. Accordingly, the court of appeals denied the petition. *Ibid.*

REASONS FOR GRANTING THE PETITION

This Court's review of *De George* is imperative. Courts have directed intense and sustained criticism at *De George*: As courts have repeatedly acknowledged, the prevailing administrative and judicial constructions of the term "crime involving moral turpitude" simply reduce to a determination whether an administrator or judge deems the conduct at issue immoral. The result is widespread inconsistency in the application of this statutory term; and, ultimately, whether tens of thousands of individuals are to be deported hangs in the balance. Meanwhile, *De George* is

almost surely wrong: Its cursory analysis cannot withstand even the faintest scrutiny; it is irreconcilable with the Court's recent decisions applying the vagueness doctrine; and it deeply offends core separation-of-power principles by transferring to an administrative agency what can only be described as law-making authority.

I. *DE GEORGE* WARRANTS RECONSIDERATION.

A. The sustained criticism of *De George* requires attention.

Courts have repeatedly described that the phrase "moral turpitude" fails to provide the certainty and notice that should be required of a statute that carries such enormous practical implications. The phrase has been called "stale, antiquated, and, worse, meaningless" (*Arias*, 834 F.3d at 830 (Posner, J., concurring)); "rife with contradiction, a fossil, an embarrassment to a modern legal system" (*id.* at 835); "notoriously baffling" (*Garcia-Meza* v. *Mukasey*, 516 F.3d 535, 536 (7th Cir. 2008)); an "amorphous morass" (*Partyka* v. *Att'y Gen.*, 417 F.3d 408, 409 (3d Cir. 2005)); and "perhaps the quintessential example of an ambiguous phrase" (*Marmolejo-Campos* v. *Holder*, 558 F.3d 903, 909 (9th Cir. 2009)).

Courts frequently bemoan the inherent vagueness of the phrase and the difficulty in applying it without clear definition. "There is no useful definition for the term" (*Zaranska* v. *U.S. Dep't of Homeland Sec.*, 400 F. Supp. 2d 500, 513 (E.D.N.Y. 2005)); "[t]he meaning of the term falls well short of clarity" (*Marmolejo-Campos*, 559 F.3d at 909). Nor has any useful definition been developed by the Board of Immigration Appeals. Judge Posner has criticized the definitions provided by the BIA and Black's Law Dictionary as "approach[ing] gibberish." *Arias*, 834 F.3d at 831 (Posner,

J., concurring). Though, as the Seventh Circuit has acknowledged, "[t]he Board should not be blamed too harshly; courts have equally failed to impart a clear meaning to 'moral turpitude,'" *Mei* v. *Ashcroft*, 393 F.3d 737, 741 (7th Cir. 2004).

Even the BIA itself has expressed frustration with applying the term, decrying that it is "nebulous" and "vague." See, *e.g.*, *In re Tobar-Lobo*, 24 I. & N. Dec. 143, 144 (BIA 2007) ("We have observed that the definition of crime involving moral turpitude is nebulous." (citing *In re Lopez-Meza*, 22 I. & N. Dec. 1188, 1191 (BIA 1999); *In re Ajami*, 22 I. & N. Dec. 949, 950 (BIA 1999))); *In re D-*, 1 I. & N. Dec. 190, 193 (BIA 1943) ("Moral turpitude is a vague term. Its meaning depends to some extent upon the state of public morals."). This criticism has indeed long persisted. See *United States ex rel. Manzella* v. *Zimmerman*, 71 F. Supp. 534, 537 (E.D. Pa. 1947) ("I agree with those who regard it as most unfortunate that Congress has chosen to base the right of a [noncitizen] to remain in this country upon the application of a phrase so lacking in legal precision and, therefore, so likely to result in a judge applying to the case before him his own personal views as to the mores of the community.").

Notably, members of this Court have joined this chorus. In *Padilla* v. *Kentucky*, Justice Alito explained that "determining whether a particular crime is * * * a 'crime involving moral turpitude [(CIMT)]' is not an easy task." 559 U.S. 356, 378 (Alito, J., concurring) (citing Robert James McWhirter, *The Criminal Lawyer's Guide to Immigration Law: Questions and Answers* 134 (2d ed. 2006)). As Justice Alito acknowledges, writing bad checks could maybe be a CIMT; so, too, a misdemeanor driving under the influence, but only if it results in injury; and child abuse may be a CIMT depending on the statute, but probably not if

committed with criminal negligence. *Id.* at 379. Trying to determine whether a crime constitutes a CIMT is a head-spinning task. *Ibid.* At bottom, the "term 'moral turpitude' evades precise definition." *Id.* at 378 (quoting ABA Guidebook § 4.67, at 130).

B. The malleability of "crime involving moral turpitude" has produced intolerable inconsistencies.

This prevailing confusion has led to manifest inconsistencies among courts about the definition and application of the statutory phrase. Whether an offense is morally turpitudinous is not based on discrete and objective factors; it instead turns on societal mores. "The nature of a crime is measured against *contemporary moral standards* and may be susceptible to change based on the prevailing views in society. * * * A determination that an offense is base, vile, or depraved, or contrary to accepted moral standards depends on the accepted moral standards or prevailing views at the time." *Walcott* v. *Garland*, 21 F.4th 590, 601 (9th Cir. 2021) (citations omitted). *Cf. In the Matter of G-*, 1 I. & N. Dec. 59, 60 (BIA 1941) (noting that, in determining whether an offense is a CIMT, the standard "is that prevailing in the United States as a whole, regarding the common view of our people concerning its character").

Because the phrase is subject to the vagaries of social morality, what constitutes a crime of moral turpitude is an area of law marked with inconsistency and disagreement, thwarting an even-handed administration of justice. Consider just a sampling of examples:

1. Narcotics offenses. Changing societal norms regarding marijuana use have created an active disagreement among the circuits with respect to certain

narcotics transfer offenses. The Ninth Circuit reasoned that, because of society's growing acceptance of recreational marijuana use, a noncitizen's conviction for offering to transport less than two pounds of marijuana was not a CIMT. *Walcott*, 21 F.4th at 599-601. The Second Circuit, by contrast, deems the amount of marijuana involved in a transfer crime immaterial to the CIMT determination. See *Mota* v. *Barr*, 971 F.3d 96, 101 (2d Cir. 2020) ("[T]he fact that the statute [in question] may cover scenarios in which a defendant 'offered,' 'exchanged,' or 'gifted' a narcotic substance, even a small amount, to a friend for no or little remuneration does not foreclose our conclusion [that the offense is a CIMT].").

2. Misprision of a felony. In the Eleventh Circuit, a conviction of misprision of a felony under 18 U.S.C. § 4 is a CIMT. *Itani* v. *Ashcroft*, 298 F.3d 1213, 1216 (11th Cir. 2002) (reasoning that misprision "necessarily involves an affirmative act of concealment * * * , behavior that runs contrary to accepted societal duties and involves dishonest or fraudulent activity"). In the Ninth Circuit, it is not. *Robles-Urrea* v. *Holder*, 678 F.3d 701, 708 (9th Cir. 2012) (criticizing the Eleventh Circuit for failing "to explain why misprision of a felony is 'inherently base, vile or depraved'").

3. Sodomy and homosexuality. Courts once held sodomy and homosexuality to be CIMTs worthy of deportation. See Shannon Minter, *Sodomy and Public Morality Offenses Under U.S. Immigration Law: Penalizing Lesbian and Gay Identity*, 26 Cornell Int'l L.J. 771, 787-791 (1993). In a 1959 case, for example, the Second Circuit upheld the deportation of a man convicted of homosexual solicitation under a New York disorderly conduct statute. *Babouris* v. *Esperdy*, 269 F.2d 621, 621-622 (2d Cir. 1959); see also *United States* v. *Flores-Rodriguez*, 237 F.2d 405, 409-410 (2d

Cir. 1956) (holding loitering in a public place for the purpose of soliciting men to be a crime of moral turpitude); *Matter of S.*, 8 I. & N. Dec. 409, 410 (BIA 1959) (concluding a lawful permanent resident was deportable for a CIMT after he solicited a male police officer). Courts have only recently concluded that sodomy is not a removal-worthy CIMT. See *Chavez-Alvarez* v. *Att'y Gen. U.S.*, 850 F.3d 583, 590 (3d Cir. 2017) (reversing the BIA's determination that a 2000 conviction for sodomy was a CIMT).

* * *

These examples, which are just the tip of the veritable iceberg, demonstrate the slipperiness of the term "moral turpitude." And the practical consequences of such applications, lacking any objective standard, are head scratching.

"Manslaughter, fraud, sex offenses against children, child abandonment and abuse, indecent exposure, assault, misprision of felony, false statements, and driving under the influence"—all these offenses "may or may not be" crimes involving moral turpitude, depending on the jurisdiction and various obscure facts. Lindsay M. Kornegay & Evan Tsen Lee, *Why Deporting Immigrants for "Crimes Involving Moral Turpitude" Is Now Unconstitutional*, 13 Duke J. Const. L. & Pub. Pol'y 47, 61-63 (2017); accord *Padilla*, 559 U.S. at 378 (Alito, J., concurring). A hit-and-run? Could be a CIMT, depending on the state and on whether someone ended up injured. See *Islas-Veloz*, 914 F.3d at 1257 (Fletcher, J., concurring) (collecting cases). Drunk driving? Only a CIMT if one has a suspended license. Julia Ann Simon-Kerr, *Moral Turpitude*, 2012 Utah L. Rev. 1001, 1005; see also *Islas-Veloz*, 914 F.3d at 1257 (Fletcher, J., concurring)

(collecting cases). Petty theft? Potentially a CIMT.[2] Assaulting a police officer? Not necessarily, but maybe. See Simon-Kerr, *Moral Turpitude*, *supra*, at 1005; see also *Islas-Veloz*, 914 F.3d at 1257 (Fletcher, J., concurring) (collecting cases).

It is no wonder that judges find the statutory phrase to be "incapable of precise definition in a legal sense." *Zarate*, 26 F.4th at 1200. Yet this imprecision and the inconsistencies that follow produce enormously grave consequences for noncitizens in removal proceedings.

C. This case is a suitable vehicle for resolving this important question.

1. This petition presents a purely legal question that was preserved below. The Eleventh Circuit, in addressing the vagueness challenge, noted that it was "bound by *De George*." App., *infra*, 14a. Therefore, it was "bound to follow Supreme Court precedent 'until the Supreme Court itself overrules that decision.'" *Ibid.* (quoting *United States* v. *Thomas*, 242 F.3d 1028, 1035 (11th Cir. 2001)). And the conclusion that petitioner's convictions qualify as crimes involving moral turpitude was the sole basis on which the court below found him "removable." App., *infra*, 14a. The question whether to overrule *De George* is thus squarely presented here.

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[2] The BIA holds that most theft offenses "qualif[y] as a categorical crime involving moral turpitude," even where the offense "does not require the accused to intend a literally permanent taking;" what matters, the BIA holds, is whether "the owner's property rights are substantially eroded." *Matter of Obeya*, 26 I. & N. Dec. 856, 859 (BIA 2016). But the Fourth Circuit holds that "de minimis, temporary takings like joyriding * * * do[] not categorically qualify as a CIMT." *Martinez* v. *Sessions*, 892 F.3d 655, 662 (4th Cir. 2018).

2. The importance of resolving this issue cannot be overstated. Thousands of noncitizens each year face deportation on the basis of CIMT charges. See *Padilla*, 559 U.S. at 360 (calling deportation a "harsh consequence[]" and "drastic measure"). In the last five years, nearly 18,000 noncitizens have entered removal proceedings based on CIMT charges. See Transactional Records Access Clearinghouse, *Criminal Grounds for Deportation*, Syracuse Univ. (July 29, 2022), perma.cc/EA3Q-ELKA. And in a recent twenty-year span, that number grows substantially—to at least 174,000 noncitizens. See Transactional Records Access Clearinghouse, *Individuals Charged with Moral Turpitude in Immigration Court*, Syracuse Univ. (2008), perma.cc/KP52-FEMZ (collecting data from 1996-2006 showing that over 135,000 noncitizens faced CIMT charges); Transactional Records Access Clearinghouse, *Immigration Court Post-Trump Cases: Latest Data*, Syracuse Univ. tbl.6 (Mar. 21, 2017), perma.cc/LXZ3-B9RC (collecting data from 2012-2017 showing that nearly 40,000 noncitizens faced deportation on the basis of CIMT charges).

The question presented thus determines whether tens of thousands of individuals each year should face deportation at the whims of executive branch officials because of a vague statutory phrase, inconsistently applied from one court to the next. "[T]he most basic of due process's customary protections is the demand of fair notice." *Dimaya*, 138 S. Ct. at 1225 (Gorsuch, J., concurring). Yet the statutory phrase lacks any objective foundation; it is certainly "not an easy task" to predict the conduct one official or judge may conclude it encompasses. *Padilla*, 559 U.S. at 378 (Alito, J., concurring). Whether the phrase is unconstitutionally vague is a question that requires resolution.

II. THE COURT SHOULD OVERTURN *DE GEORGE*.

De George was wrong when it was decided—and its erroneous result has become only more apparent in the years since. Without briefing on the core issue, *De George* concluded as an apparent factual matter that nonfraud cases would only be "peripheral" to the CIMT statute and, as a legal matter, that the presence of a nonvague core was enough to save the statute's constitutionality. These factual and legal conclusions are both deeply mistaken. On top of that, this Court's recent decisions applying the void for vagueness doctrine have eroded any value *De George* may have held. More, *De George* ceded vast discretion to unelected "administrative officers and courts to decree deportation" without "an intelligible definition of deportable conduct"—offending essential separation of powers principles. *De George*, 341 U.S. at 245 (Jackson, J., dissenting).

A. *De George* lacks the hallmarks of a decision worthy of precedential value.

As Justice Robert Jackson explained in dissent, joined by Justices Black and Frankfurter, the Court's vagueness analysis in *De George* was fatally flawed—it never reconciled the statutory language with "an intelligible definition of deportable conduct." *De George*, 341 U.S. at 245 (Jackson, J., dissenting). Justice Jackson explained that "there appears to be universal recognition that" the term "crime involving moral turpitude" is "an undefined and undefinable standard." *Id.* at 235. As he put it, "[h]ow should we ascertain the moral sentiments of masses of persons on any better basis than a guess?" *Id.* at 238. While "Congress expected the courts to determine the crimes includable in this vague phrase," this is simply "not a judicial

function." *Id.* at 242. At bottom, this statute "requires even judges to guess and permits them to differ" in their application of it. *Id.* at 245. Justice Jackson's analysis was right then—and it should be vindicated now.

By contrast, the Court's "thesis" in upholding the constitutionality of the statutory phrase "crime involving moral turpitude" was a dubious one: "(1) that the statute is sixty years old, (2) that state courts have used the same concept for various purposes and (3) that fraud imports turpitude into any offense." *De George*, 341 U.S. at 238 (Jackson, J., dissenting). Setting aside the factual support for those premises, which Justice Jackson challenged in dissent (*id.* at 238-241), it does not logically follow that, added together, those premises absolve the statute of constitutional vagueness deficiencies.

At bottom, the Court's analysis boils down to two paragraphs, reasoning that

> difficulty in determining whether certain *marginal* offenses are within the meaning of the language under attack as vague does not automatically render a statute unconstitutional for indefiniteness. * * * Whatever else the phrase 'crime involving moral turpitude' may mean in *peripheral* cases, the decided cases make it plain that crimes in which fraud was an ingredient have always been regarded as involving moral turpitude.

De George, 341 U.S. at 231–232 (emphasis added). Because "[t]he phrase 'crime involving moral turpitude' has without exception been construed to embrace fraudulent conduct," the Court concluded the statute "sufficiently forewarned respondent" of the

consequences of his conduct, which involved a fraud offense. *Id.* at 232.

This analysis is profoundly wrong, for at least two reasons. *First*, *De George*'s apparent prediction—that offenses other than fraud would be nothing more than "marginal" or "peripheral" to the application of the statute—has been proven over time to be flatly wrong. It is well documented that "[f]ar from being marginal or peripheral, non-fraud cases now comprise the great bulk of CIMTs today." *Islas-Veloz*, 914 F.3d at 1256-1257 (Fletcher, J., concurring). Thus the central premise to the Court's analysis simply no longer holds. Indeed, continued adherence to it produces "inherent confusion" and is simply "unworkable." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 173 (1989).

Second, the legal premise at work—that a statute is permissible because it contains some nonvague core—is flatly wrong. The Court resoundingly rejected this same reasoning in *Johnson*, noting that the Court's holdings "squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." 576 U.S. at 602 (citing *Coates* v. *Cincinnati*, 402 U.S. 611 (1971); *L. Cohen Grocery Co.*, 255 U.S. at 89).

What is more, *De George* failed to analyze one of the core aspects of the vagueness doctrine—whether a statute "authorizes or even encourages arbitrary and discriminatory enforcement." See *Hill* v. *Colorado*, 530 U.S. 703, 705 (2000); Jennifer Lee Koh, *Crimmigration and the Void for Vagueness Doctrine*, 2016 Wisc. L. Rev 1127, 1135-1137. That element was never considered in *De George*, even though it is "the more important aspect of the vagueness doctrine."

Kolender, 461 U.S. at 358 (quoting *Smith*, 415 U.S. at 574).

That *De George* was so "badly reasoned" is confirmation that it should be reconsidered. *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991). And "[t]his is particularly true in constitutional cases, because in such cases 'correction through legislative action is practically impossible.'" *Ibid.*

This Court is even "less constrained to follow" *De George* as precedent because it "opined about vagueness without full briefing or argument on that issue." *Johnson*, 576 U.S. at 606. It is well established that "the crucible of adversarial testing is crucial to sound judicial decisionmaking." *Dimaya*, 138 S. Ct. at 1232 (Gorsuch, J., concurring). The Court should consider these serious constitutional issues with the benefit of full briefing on the merits.

B. The phrase "crime involving moral turpitude" is unconstitutionally vague under the Court's recent holdings.

This Court's recent decisions have plainly eroded whatever precedential value *De George* did have. Under *Johnson*, *Dimaya*, and *Davis*, the statutory phrase "crime involving moral turpitude" is unconstitutionally vague when used as the basis for a noncitizen's removal. Yet the lower courts have remained hamstrung by *De George* (see, *e.g.*, App., *infra*, 14a), concluding uniformly that it remains binding. See also *Islas-Veloz*, 914 F.3d at 1251.

1. In 2015, this Court held in *Johnson* that the statutory term "violent felony" in the Armed Career Criminal Act's residual clause was unconstitutionally vague. 576 U.S. at 593. The term was defined by statute to authorize longer prison sentences for defendants who had been convicted of any felony that

"involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). This Court held "that the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges." *Johnson*, 576 U.S. at 597. Thus, "the clause denies due process of law." *Ibid.*

In 2018, this Court held in *Dimaya* that a similarly worded residual clause in the INA's definition of "crime of violence" was impermissibly vague. 138 S. Ct. at 1213-1216. The definition made deportable any noncitizen convicted of a felony that "involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16(b), as incorporated in 8 U.S.C. § 1227(a)(2)(A)(iii) and § 1101(a)(43)(F).

Finally, in 2019, this Court affirmed the unconstitutionality of a residual clause that authorized longer prison sentences when a firearm was used "in connection with certain other federal crimes," defined as "felonies 'that by [their] nature, involv[e] a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.'" *United States* v. *Davis*, 139 S. Ct. 2319, 2323-2324 (2019); 18 U.S.C. § 924(c)(3)(B).

The Court emphasized in all three cases that the statutory language at issue had "[t]wo features" that "conspire[d] to make [them] unconstitutionally vague." *Dimaya*, 138 S. Ct. at 1216 (quoting *Johnson*, 576 U.S. at 591-592); see also *Davis*, 139 S. Ct. at 2326-2327.

First, the clauses required courts to "imagine" an "idealized ordinary case of the crime" in order to estimate "the risk posed by a crime." *Johnson*, 576 U.S. at

597. The resulting judicially imagined "ordinary cases" were "wholly 'speculative'" (*Dimaya*, 138 S. Ct. at 1214), because the residual clauses "'offer[ed] no reliable way' to discern what the ordinary version of any offense looked like." (*Ibid.* (quoting *Johnson*, 576 U.S. at 598)). This subjective analysis created "grave uncertainty about how to estimate the risk posed by a crime." *Johnson*, 576 U.S. at 597.

Second, this uncertainty was "compund[ed]" by the unclear threshold for how much risk it takes for a crime to present a "serious potential risk" or a "substantial risk." *Dimaya*, 138 S. Ct. at 1214.

"By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify, the residual clause[s]" in these three statutes "produce[d] more unpredictability and arbitrariness than the Due Process Clause tolerates." *Johnson*, 576 U.S. at 598.

2. The phrase "crime involving moral turpitude" in 8 U.S.C. § 1227(a)(2)(A) is likewise unconstitutional because it couples the categorical approach with an amorphous "moral turpitude" standard.

Like the clauses at issue in *Johnson*, *Dimaya*, and *Davis*, the phrase "crime involving moral turpitude" requires subjective judicial imagination. In applying the categorical approach, a judge must imagine the "least culpable conduct necessary to sustain a conviction under the statute." App., *infra*, 9a. The least culpable conduct analysis "is at least as speculative and imaginative—and therefore as unpredictable—as the typical commission analysis in the residual clause cases." Kornegay & Lee, *Why Deporting Immigrants for "Crimes Involving Moral Turpitude" Is Now Unconstitutional*, *supra*, at 104-106 ("There is no purely

logical, non-arbitrary way to determine what conduct is less culpable than other conduct; it is an inherently subjective question."). The analysis depends on what activities a particular judge happens to think are less morally culpable than others.

The statutory phrase "crime involving moral turpitude" also contains the "second fatal feature": uncertainty about what constitutes a "crime involving moral turpitude" itself. *Dimaya*, 138 S. Ct. at 1215. Here, the statutory language is far more standardless than the clauses in *Johnson*, *Dimaya*, and *Davis*, which required assessing the level of risk inherent in a particular crime. As the Court acknowledged, "[m]any perfectly constitutional statutes use imprecise terms like 'serious potential risk' (as in ACCA's residual clause) or 'substantial risk' (as in § 16's). The problem came from layering such a standard on top of the requisite 'ordinary case' inquiry." *Dimaya*, 138 S. Ct. at 1214. By contrast, the phrase "crime involving moral turpitude" is so lacking in objective benchmarks that it offends the constitution independent of the categorical approach.

The BIA has defined "moral turpitude" to involve "conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general." *In re Perez-Contreras*, 20 I. & N. Dec. 615, 618 (BIA 1992). "In other words, there is no useful definition for the term." *Zaranska*, 400 F. Supp. 2d at 513-514; see also *Arias*, 834 F.3d at 831 (Posner, J., concurring) (writing that this definition "approach[es] gibberish yet [is] quoted deferentially in countless modern opinions"); *Marmolejo-Campos*, 558 F.3d at 910 (9th Cir. 2009) (noting that this definition "fails to particularize

the term in any meaningful way" (internal quotation marks omitted)).

Courts have been left to grapple with a wholly subjective inquiry into "contemporary moral standards," which are "susceptible to change based on the prevailing views in society." *Matter of Ortega-Lopez*, 27 I. & N. Dec. 382, 385 (BIA 2018) (internal quotation marks omitted). Judges are not in a position to ascertain such standards. And this moving target likely differs depending on where in the nation a judge presides. How does one resolve which crimes society would deem "inherently base, vile, or depraved?" *In re Perez-Contreras*, 20 I. & N. Dec. at 618. A "statistical analysis?" *Johnson*, 576 U.S. at 597. "A survey? Expert evidence? Google? Gut instinct?" *Ibid.* (quoting *United States* v. *Mayer*, 560 F.3d 948, 952 (9th Cir. 2009) (Kozinski, C.J., dissenting from denial of rehearing en banc)).

This "morality" inquiry creates at least as much unpredictability and arbitrariness as the residual clauses in this Court's recent cases. It follows that "crime involving moral turpitude," as used in Section 1227(a)(2)(A), is so "hopelessly and irredeemably vague" that it violates the Due Process Clause. *Islas-Veloz*, 914 F.3d at 1257 (Fletcher, J., concurring).

C. Allowing agencies to decree removal without an intelligible principle offends the separation of powers.

It should be noncontroversial that "[m]orality is not a concept that courts can define by judicial decrees." *Nunez* v. *Holder*, 594 F.3d 1124, 1127 (9th Cir. 2010), overruled on other grounds in *Betanos* v. *Barr*, 928 F.3d 1133 (9th Cir. 2019). But Congress itself did not define the concept. Rather, it "hand[ed] off the job of lawmaking" so that "a mere handful of unelected

judges and prosecutors [are] free to 'condem[n] all that [they] personally disapprove and for no better reason that [they] disapprove it.'" *Dimaya*, 138 S. Ct. at 1228 (Gorsuch, J., concurring) (quoting *De George*, 341 U.S. at 242 (Jackson, J., dissenting)).

This abdication of legislative duty was no accident. Before landing on the phrase "crime involving moral turpitude," Congress had considered subjecting noncitizens to removal simply if they had committed a "felony." Angela M. Banks, *The Normative and Historical Cases for Proportional Deportation*, 62 Emory L.J. 1243, 1270 (2013). Congress decided against that standard. In choosing a different approach, legislators acknowledged at the time that "[n]o one can really say what is meant by * * * crime involving moral turpitude." Restriction on Immigration: Hearing on H.R. 10384, 64th Cong. 8 (1916) (statement of Rep. Adolph J. Sabath). Yet Congress nonetheless failed to supply any content to provide meaning to the phrase.

In 1950, when Congress debated the INA, immigration inspectors and consular officers criticized the resulting discretion that was given to the BIA and the judiciary. They argued that the term "crime involving moral turpitude" was "too broad;" rather, "a listing of crimes and circumstances comprehended within the meaning of moral turpitude" would be helpful, because the meaning "often depends on what the individual officer considers to be baseness, vileness, or depravity." S. Rep. No. 81-1515, at 353 (1950). Congress resisted such clarity. Instead, the malleability of the term was apparently deemed a virtue: "[A]lthough it might be desirable to have the crimes specifically set forth, difficulties might be encountered in getting a phrase that would be broad enough to cover the various crimes contemplated with the law and yet easier to comprehend than the present phrase." *Ibid.*

But therein lies the problem. Congress cannot "set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully" deported. *Kolender*, 461 U.S. at 358 n.7 (quoting *United States* v. *Reese*, 92 U.S. 214, 221 (1875)). "[T]his would * * * substitute the judicial for the legislative department of government," and also "transfer legislative power to police and prosecutors, leaving to them the job of shaping a vague statute's contours through their enforcement decisions." *Dimaya*, 138 S. Ct. at 1227-1228 (Gorsuch, J., concurring) (citations omitted).

Such a practice cannot be sustained under the Constitution, which vested "All legislative Powers" in Congress. U.S. Const. Art. I, § 1.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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