No. 22-356

In the Supreme Court of the United States

EVERTON DAYE, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the term "crime[] involving moral turpitude" in 8 U.S.C. 1227(a)(2)(A)(i) and (ii) is unconstitutionally vague as applied to convictions for drug trafficking and conspiring to engage in drug trafficking in violation of Va. Code Ann. §§ 18.2-248.01 and 18.2-256 (West 2013).

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OPINIONS BELOW

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

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2022. On September 15, 2022, Justice Thomas extended the time for filing a petition to November 3, 2022. The petition for a writ of certiorari was filed on October 10, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is a lawful permanent resident with two separate convictions for drug trafficking in violation of Va. Code Ann. § 18.2-248.01 (West 2013), and a third conviction for conspiring to traffic drugs in violation of

Va. Code Ann. §§ 18.2-248.01 and 18.2-256 (West 2013). Pet. App. 2a. In 2020, an immigration judge (IJ) found petitioner removable under 8 U.S.C. 1227(a)(2)(A)(i) and (ii) on the basis of convictions for crimes "involving moral turpitude." Pet. App. 41a-45a. Petitioner appealed to the Board of Immigration Appeals (Board), *id.* at 15a-22a, arguing that his drug-trafficking offenses did not qualify as crimes involving moral turpitude. The Board affirmed, *ibid.*, and the court of appeals denied a petition for review, *id.* at 1a-14a. The court explained that the relevant offenses categorically qualify as crimes involving moral turpitude because drug trafficking necessarily involves "moral[ly] reprehensib[le]" conduct. *Id.* at 11a.

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, a noncitizen is removable if he "is convicted of a crime involving moral turpitude committed within five years * * * after" being admitted to the United States "for which a sentence of at least one year may be imposed," 8 U.S.C. 1227(a)(2)(A)(i), or if he is, "at any time after admission," "convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct," 8 U.S.C. 1227(a)(2)(A)(ii).*

Petitioner is a citizen of Jamaica who entered the United States on a B-2 visitor's visa on May 22, 2008. Pet. App. 2a; Administrative Record (A.R.) 532. Petitioner adjusted his status to that of a lawful permanent resident in 2009 after marrying a United States citizen. Pet. App. 2a; A.R. 329, 376.

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* This brief uses the term "noncitizen" as equivalent to the statutory term "alien." See *Barton* v. *Barr*, 140 S. Ct. 1442, 1446 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)).

In July 2013, and again in August 2013, petitioner was charged with violating Va. Code Ann. § 18.2-248.01 in connection with two separate incidents of drug trafficking. Pet. App. 16a; A.R. 496, 501-502, 506. In November 2013, in connection with yet a third incident of drug trafficking, Petitioner was charged with conspiring to distribute five pounds of marijuana in violation of Va. Code Ann. §§ 18.2-248.01 and 18.2-256. Pet. App. 16a; A.R. 490, 495. Petitioner was convicted on all three counts and was sentenced to consecutive terms of seven years for the two trafficking offenses, and five years for the conspiracy offense. Pet. App. 2a-3a.

2. In 2018, the Department of Homeland Security (DHS) charged petitioner, as relevant here, with being removable under 8 U.S.C. 1227(a)(2)(A)(i) and (ii) on account of his convictions for crimes involving moral turpitude. Pet. App. 3a, 24a. Petitioner attempted to terminate the removal proceedings, asserting that his drug-trafficking offenses did not qualify as crimes involving moral turpitude. *Id.* at 3a-4a; A.R. 439-451. The IJ rejected petitioner's argument, Pet. App. 41a-45a, and found him removable. *Id.* at 45a-47a.

The Board affirmed. Pet. App. 15a-22a. It observed that, as petitioner himself had "concede[d]," the Board has "long held that evil intent is inherent in the illegal distribution of drugs," and that "participation in illicit drug trafficking is a [crime involving moral turpitude]." *Id.* at 19a. The Board then determined that the Virginia drug-trafficking statute under which petitioner was convicted punishes a crime involving moral turpitude because the offense involves "'reprehensible conduct' committed with a culpable mental state." *Ibid.* (citation omitted).

3. The court of appeals denied a petition for review, holding that the agency properly determined that petitioner's offenses qualify as crimes involving moral turpitude. Pet. App. 1a-14a. The court explained that "[t]o involve moral turpitude, a crime requires two essential elements: reprehensible conduct and a culpable mental state." *Id.* at 6a (quoting *In re Silva-Trevino*, 26 I. & N. Dec. 826, 833-834 (B.I.A. 2016)). It then found that Virginia's drug-trafficking offense satisfies both requirements, observing that the Board has long held that drug trafficking inherently involves "'evil intent,'" and that the Board, Congress, and the courts have consistently found that drug trafficking is reprehensible conduct. *Id.* at 7a-8a (citation omitted).

The court of appeals further rejected the contention that Virginia's drug-trafficking offense should not be deemed a crime involving moral turpitude because of the scope of the conduct it covers. Pet. App. 8a-14a. The court acknowledged that some States have now decriminalized the "possession of small amounts of marijuana," but it found that "irrelevant" because Virginia's drug-trafficking statute covers "transporting five or more pounds of marijuana with the intent to distribute," and petitioner had not established a "change in society's views" about trafficking large quantities of the drug. *Id.* at 12a. The court also rejected petitioner's assertion that some of the drugs that the Virginia law covers are not harmful enough to make trafficking them morally turpitudinous, stating that it would not "second guess Virginia's determination" about the harmfulness of the listed substances. *Id.* at 13a-14a.

Finally, the court of appeals rejected petitioner's contention that the term "'crime[] involving moral turpitude'" is "unconstitutionally vague," observing that

this Court's decision in *Jordan* v. *De George*, 341 U.S. 223 (1951), forecloses that argument. Pet. App. 14a.

ARGUMENT

Petitioner renews his contention (Pet. 14-26) that the term "crime involving moral turpitude" is unconstitutionally vague. That contention is foreclosed by this Court's decision in *Jordan* v. *De George*, 341 U.S. 223 (1951), in which the Court rejected a vagueness challenge to the application of the term "crime involving moral turpitude." Petitioner does not dispute that *Jordan* controls. Instead, he urges this Court to grant review in order to overrule or limit that more-than-70-year-old precedent. There is no reason to do so. Petitioner cannot point to any disagreement as to whether his drug-trafficking offenses qualify as crimes involving moral turpitude, nor can he point to any court of appeals that has held that the term "crime involving moral turpitude" is unconstitutionally vague. To the contrary, the courts of appeals that have considered that assertion have uniformly rejected it, and this Court has recently and repeatedly denied petitions for certiorari presenting the issue. See, *e.g.*, *Smith* v. *Garland*, 142 S. Ct. 782 (2022) (No. 21-5274); *Moran* v. *Garland*, 141 S. Ct. 2605 (2021) (No. 20-6664); *Bugarenko* v. *Rosen*, 141 S. Ct. 1053 (2021) (No. 20-370); *Islas-Veloz* v. *Barr*, 140 S. Ct. 2704 (2020) (No. 19-627); *Olivas Motta* v. *Barr*, 140 S. Ct. 1105 (2020) (No. 19-282); *Mercado-Ramirez* v. *Barr*, 140 S. Ct. 1105 (2020) (No. 19-284); *Martinez-de Ryan* v. *Barr*, 140 S. Ct. 134 (2019) (No. 18-1085). The same result is warranted here.

1. a. As petitioner acknowledges (Pet. 2), this Court long ago rejected a constitutional vagueness challenge to the term "crime involving moral turpitude." In *Jordan*, *supra*, the Court held that a noncitizen's prior con-

victions for conspiracy to defraud the United States of taxes on distilled spirits constituted "crime[s] involving moral turpitude" that rendered him deportable under Section 19(a) of the Immigration Act of 1917, ch. 29, 39 Stat. 889. *Jordan*, 341 U.S. at 230. The Court explained that "[t]he term 'moral turpitude' has deep roots in the law" and "has been used as a test in a variety of situations." *Id.* at 227. The Court further observed that, "[w]ithout exception, federal and state courts have held that a crime in which fraud is an ingredient involves moral turpitude." *Ibid.* In light of that precedent, the Court concluded that the petitioner's convictions for conspiring to defraud the United States qualified as crimes involving moral turpitude. *Id.* at 229.

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

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

phrase 'crime involving moral turpitude' presents no greater uncertainty or difficulty than language found in many other statutes repeatedly sanctioned by the Court." *Id.* at 231 & n.15. "Whatever else the phrase 'crime involving moral turpitude' may mean in peripheral cases," the Court held that it was clear that the petitioner's fraud offenses were covered and that he was sufficiently "forewarned" of the consequences of his crimes. *Id.* at 232.

b. The same result obtains here. As *Jordan*'s analysis demonstrates, this Court will typically "consider whether a statute is vague as applied to the particular facts at issue, for '[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others,'" *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 18-19 (2010) (quoting *Village of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982)) (brackets in original); see *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610 (1973) ("[A] person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others.").

That mode of analysis establishes that petitioner's vagueness challenge must fail. Petitioner was convicted of drug-trafficking offenses in violation of Va. Code Ann. §§ 18.2-248.01 and 18.2-256. As was true of the fraud offenses in *Jordan*, there is a longstanding administrative and judicial consensus that offenses like petitioner's—which involve transporting drugs for sale and distribution—constitute crimes involving moral turpitude. Indeed, six years before the INA was enacted, the Board found that drug trafficking constitutes a crime involving moral turpitude because it "creates human

misery, corruption, and moral ruin in the lives of individuals" and "is necessarily * * * base and shameful." *In re Y-*, 2 I. & N. Dec. 600, 602 (B.I.A. 1946). The Board has consistently maintained that position in the seven decades since. See, *e.g.*, *In re Khourn*, 21 I. & N. Dec. 1041, 1046-1047 (B.I.A. 1997).

The courts of appeals have been similarly consistent in holding that drug-trafficking offenses constitute crimes involving moral turpitude. In 1954, the Eighth Circuit held that "there can be nothing more depraved or morally indefensible than conscious participation in the illicit drug traffic." *United States ex rel. De Luca* v. *O'Rourke*, 213 F.2d 759, 762. Subsequent court of appeals decisions have all been to the same effect. See, *e.g.*, *Mota* v. *Barr*, 971 F.3d 96, 100 (2d Cir. 2020) (drug trafficking inherently involves reprehensible conduct); *Guevara-Solorzano* v. *Sessions*, 891 F.3d 125, 128 (4th Cir. 2018); *Barragan-Lopez* v. *Mukasey*, 508 F.3d 899, 903-904 (9th Cir. 2007); *Carmona* v. *Ward*, 576 F.2d 405, 411 (2d Cir. 1978), cert. denied, 439 U.S. 1091 (1979).

Indeed, petitioner does not even appear to contest that his Virginia drug-trafficking offense qualifies as a crime involving moral turpitude. He briefly suggests (Pet. 14-15) that "changing societal norms" have led to diverging views regarding whether "recreational marijuana use" is morally turpitudinous. But he does not suggest that there is any disagreement with respect to the conduct punished by the Virginia drug-trafficking statute under which he was convicted, which prohibits only those marijuana offenses that involve transporting more than five pounds of the drug for sale or distribution. Va. Code Ann. § 18.2-248.01 (West 2013).

2. Petitioner nonetheless contends (Pet. 19-24) that this Court should grant the petition for a writ of certio-

rari to overrule *Jordan* and hold that the term "crime involving moral turpitude" is vague on its face. Pet. 19 (citation omitted). That contention lacks merit, and petitioner has not come close to establishing the "special justification" required to overrule long-settled precedent. *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2422 (2019) (citation omitted).

a. *Jordan* is a thoroughly reasoned decision upholding the constitutionality of a term that has now been in the immigration laws for more than 130 years. See *Jordan*, 341 U.S. at 229. During that time, the Board has issued numerous decisions, as have courts engaged in judicial review, that provide substantial guidance about what crimes do and do not qualify as crimes involving moral turpitude. See, *e.g.*, Ira J. Kurzban, *Kurzban's Immigration Law Sourcebook* 113-127 (16th ed. 2018) (classifying many crimes based on Board and judicial interpretations). And the Board has recently and succinctly encapsulated the crimes that qualify, defining crimes involving moral turpitude to include those that involve conduct that "is 'inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general,'" and that involve both "reprehensible conduct and a culpable mental state." *In re Silva-Trevino*, 26 I. & N. Dec. 826, 833-834 (B.I.A. 2016) (citation omitted).

Petitioner's assertion (Pet. 20-22) that *Jordan*'s reasoning is incorrect rests primarily on two mischaracterizations of that decision.

First, petitioner erroneously contends (Pet. 21) that *Jordan* predicted "that offenses other than fraud would be nothing more than 'marginal' or 'peripheral.'" Rather, *Jordan* explained that fraud offenses do not present a "peripheral" case because crimes in which "fraud

was an ingredient have always been regarded as involving moral turpitude." 341 U.S. at 232. Nothing in that language suggests that fraud offenses are unique in that sense. They obviously are not, and the drug-trafficking offenses at stake in this case provide another ready example of a crime that has always been deemed turpitudinous. See pp. 7-8, *supra*.

Second, petitioner mistakenly asserts (Pet. 21) that *Jordan* rests on the "legal premise * * * that a statute is permissible because it contains some nonvague core." *Jordan* expressly stated that the "test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." 341 U.S. at 231-232. In explaining that a statute may survive a vagueness challenge despite the existence of "peripheral" cases, *Jordan* was simply recognizing that "[i]mpossible standards of specificity are not required." *Ibid.*; see, *e.g.*, *Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1214 (2018) ("Many perfectly constitutional statutes use imprecise terms.").

b. Petitioner is also mistaken in contending (Pet. 22-26) that *Jordan* has been undermined by this Court's recent discussions of vagueness in *Dimaya*, *supra*, *United States* v. *Davis*, 139 S. Ct. 2319 (2019), and *Johnson* v. *United States*, 576 U.S. 591 (2015).

As this Court explained in *Davis*, the statutes at issue in the Court's recent decisions required courts to determine whether a crime qualified as a "'violent felony'" or "'crime of violence'" by "estimat[ing] * * * the degree of risk posed by a crime's imagined 'ordinary case.'" 139 S. Ct. at 2326. The Court determined that the "ordinary case" analysis introduced "grave uncertainty" because different judges might "imagine" an "idealized ordinary case" of a crime very differently,

Johnson, 576 U.S. at 597, and there was no way for any judge to "really know" if the judge's version was correct, *Dimaya*, 138 S. Ct. at 1214. That was the uncertainty that made those statutes unconstitutionally vague. *Ibid.* Indeed, in *Johnson* and *Dimaya*, the Court emphasized that the mere use of "'qualitative standard[s]'" or "imprecise terms" like "'violent felony'" is not enough, by itself, to render a statute void for vagueness. *Ibid.* (quoting *Johnson*, 576 U.S. at 604). Instead, "[t]he problem came from layering such a standard on top of the requisite 'ordinary case' inquiry." *Id.* at 1208.

Unlike the statutes at issue in *Davis*, *Dimaya*, and *Johnson*, the provision of the INA applicable here does not call for the Board or a reviewing court to decide whether a particular offense constitutes a crime involving moral turpitude by imagining some hypothetical "ordinary case" of the crime. *Johnson*, 576 U.S. at 597. To the contrary, an adjudicator need only look to state law to determine whether the least culpable conduct necessary to sustain a conviction under the statute meets the standard of a crime involving moral turpitude. Pet. App. 9a-11a.

Petitioner asserts that this analysis is "at least as speculative and imaginative" as the ordinary-case approach, Pet. 24 (citation omitted), but that contention is belied by the nature of the categorical approach, as illustrated by the decisions in this very case. To determine the least culpable conduct punished by the Virginia statute, the adjudicators simply analyzed the text of the state law and the state-court precedents interpreting it. See Pet. App. 9a-14a; 20a-21a. Although petitioner is dissatisfied with the result, there is nothing speculative or imaginative about that traditional form of legal analysis.

Moreover, far from suggesting that *Jordan* should be overruled, *Dimaya* actually cited the case with approval. The Court observed that *Jordan* "chose to test (and ultimately uphold)" the moral-turpitude provision of the immigration laws "under the established criteria of the 'void for vagueness' doctrine applicable to criminal laws," and *Dimaya* then adopted the same approach to the immigration statute at stake in that case. 138 S. Ct. at 1213 (citation omitted).

c. Petitioner's additional suggestion (Pet. 26-28) that Congress's use of the term "crime involving moral turpitude" constitutes an impermissible delegation is neither properly presented nor correct. Petitioner did not raise a nondelegation challenge before the court of appeals or the agency, and this Court generally will not review constitutional challenges raised for the first time on certiorari because the Court is "a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (declining to consider constitutional claims not raised before the lower courts). In any event, the challenge lacks merit because the term "crime involving moral turpitude" is "clearer and more definite" than many of the provisions this Court has previously upheld against vagueness challenges. *Granados* v. *Garland*, 17 F.4th 475, 480 (4th Cir. 2021).

3. Review is also unwarranted because, following *Jordan*, the courts of appeals that have addressed the question have all held that the term "crime involving moral turpitude" is not unconstitutionally vague. See, *e.g.*, *Wyngaard* v. *Kennedy*, 295 F.2d 184, 185 (D.C. Cir.) (per curiam), cert. denied, 368 U.S. 926 (1961); *Hudson* v. *Esperdy*, 290 F.2d 879, 880 (2d Cir.) (per curiam), cert. denied, 368 U.S. 918 (1961); *Tseung Chu* v. *Cornell*, 247 F.2d 929, 938-939 (9th Cir.), cert. denied,

355 U.S. 892 (1957); *United States ex rel. Circella* v. *Sahli*, 216 F.2d 33, 40 (7th Cir. 1954), cert. denied, 348 U.S. 964 (1955). And every court of appeals to have considered the issue following *Johnson*, *Dimaya*, and *Davis* has reaffirmed its prior holding. See, *e.g.*, *Zaragoza* v. *Garland*, 52 F.4th 1006, 1012 (4th Cir. 2022); *Granados*, 17 F.4th at 480; *Moreno* v. *Attorney Gen.*, 887 F.3d 160, 165-166 (3d Cir. 2018); *Boggala* v. *Sessions*, 866 F.3d 563, 569-570 (4th Cir. 2017), cert. denied, 138 S. Ct. 1296 (2018); *Dominguez-Pulido* v. *Lynch*, 821 F.3d 837, 842-843 (7th Cir. 2016); *Martinez-de Ryan* v. *Sessions*, 895 F.3d 1191 (9th Cir.), amended and superseded, 909 F.3d 247 (2018), cert. denied, 140 S. Ct. 134 (2019).

Petitioner therefore has not pointed to any conflict in the circuits that would warrant this Court's review—much less warrant review of his sweeping contention that a term that has been embedded in immigration law for more than a century is sufficiently vague on its face that this Court should overrule a precedent that has been on the books for more than 70 years.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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