No. 22-356

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Court should revisit—and ultimately overturn—its decision in *Jordan* v. *De George*, 341 U.S. 223 (1951). Judges around the country have called for the Court to address whether the statutory phrase "crime involving moral turpitude" is unconstitutionally vague. Pet. 12-14. This nebulous term has led to a patchwork of inconsistent—and often puzzling—outcomes. Pet. 14-17. Former immigration judges describe application of this phrase as vexingly difficult. Former IJ Am. Br. 5-10. This case cleanly presents this exceedingly important issue, which controls whether thousands of individuals are to be deported. Pet. 17-18. And *De George* is squarely wrong: It was wrong when it was decided, as Justice Robert Jackson's forceful dissent detailed at the time, and the errors underpinning *De George* have become all the more apparent. Pet. 19-26.

Deep institutional interests counsel in favor of review. At present, lower courts are affirming removal orders—yet simultaneously lodging their criticism of *De George*. From the vantage of a noncitizen subject to deportation, that is a bewildering result. Whatever it may decide, this Court should answer the repeated calls to revisit *De George*, bringing to rest whether a "crime involving moral turpitude" is unconstitutionally vague.

Against all this, the government offers no meritorious ground to deny review. Tellingly, the government focuses almost exclusively on the merits. See BIO 5-12. But, in the circumstances here, that is no basis to deny review.

A. *De George* warrants reconsideration—and this case is a suitable vehicle.

On the factors governing whether the Court should grant certiorari, the government has little to say. Petitioner plainly pressed this issue below (Pet. App. 14a), this case cleanly presents the question (Pet. 17), and the issue is undoubtedly important (Pet. 18). What is more, the government does not even attempt to contest the sustained criticism lower courts have trained on *De George*. Pet. 12-14.

This last point warrants emphasis. One recent opinion—while recognizing itself bound by *De George*—affirmatively stated that, "[i]n our view, Justice Jackson got it right." *Zarate* v. *U.S. Att'y Gen.*, 26 F.4th 1196, 1200 n.2 (11th Cir. 2022). And, as that court further observed, "several of our colleagues in other circuits agree." *Ibid.*; see, *e.g.*, *Romo* v. *Barr*, 933 F.3d 1191, 1199 (9th Cir. 2019) (Owens, J., concurring) ("[T]he current moral turpitude jurisprudence makes no sense, and I am not a lone wolf in so thinking." (collecting cases)). This criticism creates an exceptional need for further review: The Eleventh Circuit, as just one example, has expressly told noncitizens that they should not be removed from this country on account of the vague statutory term "crime involving moral turpitude"—but that court is bound to affirm final orders of removal anyway. From the perspective of a noncitizen subject to deportation, this creates profound confusion and a lack of confidence in the result. It is institutionally important for the Court to address and resolve these criticisms.

1. In response, the government observes that there is no "conflict in the circuits." BIO 13. We never contended otherwise. We do not quarrel with the lower court's determination below that it was "bound

by *De George*," which governs until "the Supreme Court itself overrules that decision." Pet. App. 14a (quotation omitted).

The issue is not that *De George* is unclear—it is that it is *wrong*. At a minimum, its shoddy legal reasoning coupled with this Court's intervening jurisprudence have given rise to substantial questions regarding *De George*'s continued vitality.

2. The government observes that the Court has denied earlier petitions for certiorari addressing this issue. BIO 5. Those cases generally involved vehicle defects that are not present here. In any event, the continued criticism of *De George* in the lower courts confirms that the denial of earlier petitions has not quenched the need for review.

Some prior petitions did not squarely ask the Court to revisit and overrule *De George*. See*, e.g.*, *Smith* v. *Garland*, 142 S. Ct. 782 (2022) (No. 21-5274); BIO 16, *Olivas Motta* v. *Barr*, 140 S. Ct. 1105 (2020) (No. 19-282) ("Petitioner never asks this Court to reconsider that seventy-year-old precedent; in fact, he never cites it."); *Martinez-de Ryan* v. *Barr*, 140 S. Ct. 134 (2019) (No. 18-1085). But that is the express question posed here.

Some petitioners raised multiple questions, complicating the claimed grounds for review. *Islas-Veloz* v. *Barr*, 140 S. Ct. 2704 (2020) (No. 19-627); *Olivas Motta*, 140 S. Ct. 1105; *Mercado-Ramirez* v. *Barr*, 140 S. Ct. 1105 (2020) (No. 19-284). Here, by contrast, the sole issue presented is whether the Court should overturn *De George*.

The government has claimed that, when this question arises in the context of a request for discretionary relief from removal (such as cancellation of removal), the constitutional protections differ, under-

mining a void-for-vagueness claim. See*, e.g.*, BIO 8-9, *Mercado-Ramirez*, 140 S. Ct. 1105 (2020); BIO at 9-10, *Martinez-de Ryan*, 140 S. Ct. 134 (2019). But this case is a straightforward removal claim—the only question is whether petitioner is removable at all. See Pet. App. 2a.

Further, the government has asserted that the question is not cleanly presented when a petitioner's conviction is for a fraud-adjacent crime, and thus rests within the heartland of conduct addressed by *De George*. See*, e.g.*, BIO at 14-16, *Martinez-de Ryan*, 140 S. Ct. 134 (bribery). But the drug offense at issue here is not a fraud crime.

In short, none of the vehicle defects that the government has previously asserted apply here.

3. The government's claim (BIO 12) that we did not preserve a nondelegation argument is wholly insubstantial.

To start with, it is well established that, "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992).

Additionally, as the lower court expressly observed, petitioner asserted that this statutory provision "is unconstitutionally vague." Pet. App. 14a; see C.A. Br. 21-39. Because "the [vagueness] doctrine is a corollary of the separation of powers" (*Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1212 (2018)), these arguments are two sides of the same coin. As Justice Gorsuch's concurrence in *Dimaya* highlights, the nondelegation principle bears on the vagueness analysis itself, because "[v]ague laws * * * threaten to transfer legislative power to police and prosecutors, leaving to them the job of shaping a vague statute's contours through

their enforcement decisions." *Id.* at 1228 (Gorsuch, J., concurring). This consequence poses "structural worries," including "hand[ing] off the job of lawmaking" from "elected representatives" to "a mere handful of unelected judges and prosecutors free to 'condemn all that they personally disapprove and for no better reason than they disapprove it.'" *Ibid*. (quoting *De George*, 341 U.S. at 242 (Jackson, J. dissenting) (alterations incorporated)). Thus, a nondelegation challenge is not a distinct argument from a void-for-vagueness challenge.

B. The Court should overturn *De George*.

The government principally claims that *De George* was rightly decided. See BIO 5-12. But for all the reasons we have described (Pet. 12-18), it is important for the Court to address this issue, whatever it may ultimately decide. The government's merits contentions are thus no basis to deny review. The government is also wrong.

1. The government's attempts to defend *De George* highlight its infirmities. After canvassing *De George*'s limited reasoning (BIO 5-7), the government pivots. Rather than address our argument, the government sets up—and then attempts to knock down—an "as-applied" vagueness challenge. The government is wrong on both ends: Petitioner principally raises a facial vagueness challenge (not an as-applied one) and, in any event, vagueness concerns *do* plague application of the statute to petitioner.

While a vagueness claim concerning First Amendment speech rights may rely upon an as-applied framework (*Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 20 (2010)), the Court has explicitly rejected the assertion "that 'a statute is void for vagueness only if it is vague in all its applications.'" *Johnson* v. *United*

States, 576 U.S. 591, 603 (2015). 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." *Ibid*. See also *Dimaya*, 138 S. Ct. at 1214 n.3. Thus, the Court has already explicitly rejected—in *Johnson* and *Dimaya*—the government's insistence on using an as-applied framework. We made this point earlier (Pet. 21), but the government disregards these holdings.

The backend of the government's argument is wrong too. It is simply not the case that society broadly condemns *all* drug trafficking offenses as immoral.

As we argued earlier (Pet. 14-15), social views regarding certain drugs are rapidly changing. Twenty-one states have legalized recreational marijuana; 10 more have decriminalized its recreational use, and 37 states permit using marijuana for medical purposes. See *Legality of cannabis by U.S. jurisdiction*, Wikipedia, perma.cc/3RP9-5JNM; National Conference of State Legislatures, State Medical Cannabis Laws (Nov. 9, 2022), perma.cc/W6GM-VPPS.

Given this vast new market for marijuana—*legal* under the laws of many states—it is estimated that 10.2 million pounds of state-regulated cannabis were produced in the United States in 2021, with anticipated cultivation reaching 27 million pounds by 2030. See Dario Sabashi, *Report: Over 27 Million Pounds of U.S. Legal Marijuana Industry Will Be Cultivated By 2030*, Forbes (Sept. 21, 2022), perma.cc/38GC-4DKT. State-regulated businesses are openly transporting millions of pounds of marijuana to their store fronts, if not to purchaser's homes; indeed, many Americans earn their weekly paycheck by openly transporting

vast quantities of marijuana.[1] A quick search of major job boards lists several businesses seeking to hire a "Cannabis Delivery Driver."[2]

Where large, regulated businesses are earning billions of dollars by transporting millions of pounds of marijuana, it is far from clear that a conviction for "conspiring to distribute five pounds of marijuana" (BIO 3) is a crime that society, today, broadly deems as one deserving of moral reprobation. See, *e.g.*, *Walcott* v. *Garland*, 21 F.4th 590 (9th Cir. 2021) (concluding that "[c]ontemporary societal attitudes toward marijuana" justified holding that trafficking up to two pounds of marijuana "does not involve conduct that violates accepted moral standards").

To argue otherwise, the government points to a 1946 decision of the Board of Immigration Appeals, which declared that *any* drug distribution offense "is necessarily * * * base and shameful." BIO 8 (quoting *In re Y-*, 2 I. & N. Dec. 600, 602 (B.I.A. 1946)). As the government would have it, this history—a so-called "longstanding administrative and judicial consensus" (BIO 7)—governs here.

But this reliance on history creates more problems for the government than it solves. Setting aside the government's recognition that it is a *federal agency* that has done the difficult work of lawmaking, the government fails to explicate the import of the 76-year-old agency decision. If the social mores of the 1940s are hardwired into the INA, the infirmities are

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[1] See, *e.g.*, Luke Winkie, *Odd Job: She used to drive for Uber and Lyft. Now she delivers legal weed*, Vox (Nov. 8, 2019), perma.cc/BYH8-Q9F3.

[2] See, *e.g.*, Indeed, Cannabis Delivery Driver, https://www.indeed.com/viewjob?jk=16fdd0e096d4c797&q.

apparent, as history is an infamously difficult yardstick by which to assess current social morality.

Consider that in 1944, the Tenth Circuit, recognizing that marriage regards "the morals and civilization of a people," found it appropriate "to forbid marriages between persons of African descent and persons of other races or descents." *Stevens* v. *United States*, 146 F.2d 120, 123 (10th Cir. 1944). Society's views regarding the morality of interracial marriage have changed profoundly in the intervening decades.

How then is a court to assess what qualifies, *today*, as "moral turpitude"? "A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?" *Johnson*, 576 U.S. at 597 (quotation omitted). Nothing in the statute supplies a guide—leaving agencies and courts to their own devices. Bereft of any objective tool to assess current social morality, it is unsurprising that courts have regurgitated for decades an administrative agency's 1946 pronouncement. BIA 8. This result has been shunted on courts precisely because *De George* obligates them to do the impossible—decide, without any objective standard, whether a noncitizen's criminal offense is sufficiently immoral to warrant deportation.

2. The government's efforts (BIO 9-10) to rehabilitate *De George* fail. As we said earlier, *De George* employed a straightforward, albeit flawed, analysis: It concluded that fraud is a crime involving moral turpitude, and then declared that it need not decide whether the statute is unduly vague as to other categories of crimes, which the court labeled as "marginal" or "peripheral." Pet. 20.[3] But non-fraud cases have

[3] Notwithstanding this mode of analysis, lower courts have uniformly treated *De George* as upholding the constitutionality of the phrase regardless of the particular application, and not just

proven not to be "marginal" or "peripheral" at all, and the existence of an identifiable nonvague core to the statute does not preserve its constitutionality. Pet. 21.

On the first point, the government claims we misread *De George*. BIO 9-10. Not so: The Court's analysis was clear in segregating out the category of claim it identified (fraud claims) from those others that are "marginal" or "peripheral." *De George*, 341 U.S. at 231-232. The government's assertion that other offenses, like "drug-trafficking offenses," are categorically morally turpitudinous simply reframes the underlying vagueness problem: *Which* crimes have "always been deemed turpitudinous"? BIO 10. And, again, is history an inflexible command in determining whether certain conduct is immoral? The insoluble vagueness remains.

As to the second point, the government merely points to *De George*'s statement that a statute needs to convey "sufficiently definite warning." BIO 10 (quoting *De George*, 341 U.S. at 231-232). But that is just a distraction. The government never responds to our demonstration (Pet. 21) that the Court's analytical method in *De George*—upholding a statute because of an identifiable core of proscribed conduct, without even addressing whether its outer boundaries were too indeterminate—was expressly rejected by both *Johnson*, 576 U.S. at 603, and *Dimaya*, 138 S. Ct. at 1214 n.3.

3. As we further showed (Pet. 22-26), the results reached in *Johnson*, *Dimaya*, and *Davis* wholly undermine *De George*. The government does not respond to our showing that the concept of a "crime involving

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with respect to fraud offenses (see, *e.g.*, Pet. App. 14a), making the government's concocted as-applied challenge all the more inapposite.

moral turpitude" is even more amorphous than the concepts of a "serious potential risk" or a "substantial risk." Pet. 22-26. Aside from repeating the boilerplate invocation of the standard (BIO 9), the government never responds to the criticism that asking an agency or court to assess morality is inherently indeterminate. See Pet. 12-14, 25-26. Nor does the government have any response to the intolerable "arbitrariness of * * * results" the statute has produced when courts undertake this impossible task. *Romo*, 933 F.3d at 1199 (Owens, J., concurring) (collecting examples); see also Pet. 14-17.

Moreover, the government is wrong to assert (BIO 11) that the assessment of the "least culpable conduct" in this context is a mere mechanical act, where "an adjudicator need only look to state law." Courts turn to judicial "decisions in the convicting jurisdiction that interpret the meaning of the statutory language." Pet. App. 9a (quoting *Smith* v. *U.S. Att'y Gen.*, 983 F.3d 1206, 1210 (11th Cir. 2020)). And even that "general approach is not without exception," as courts will "instead apply the modified categorical approach when a state statute is 'divisible.'" *Gelin* v. *U.S. Att'y Gen.*, 837 F.3d 1236, 1241 (11th Cir. 2016). Far from simply reading the text of a statute, a court must canvass state law, undertake a divisibility analysis, and, if the law is divisible, determine the branch under which the noncitizen was convicted.

The government is also wrong to claim that *Dimaya* cited the vagueness analysis in *De George* "with approval." BIO 12. In fact, the Court in *Dimaya* cited *De George* only to reaffirm that "the most exacting vagueness standard should apply in removal cases"—as it does in criminal cases—due to the "'grave nature of deportation.'" *Dimaya*, 138 S. Ct. at 1213 (quoting *De George*, 341 U.S. at 231).

At bottom, the inquiry here—whether a noncitizen committed a crime that requires immoral conduct—is inherently standardless. As Justice Alito has recognized, "[d]etermining whether a particular crime is one involving moral turpitude is no easier" than applying the INA provision held unconstitutionally vague in *Dimaya*. *Padilla* v. *Kentucky*, 559 U.S. 356, 379 (2010) (Alito, J., concurring).

Contrary to the government's claim (BIO 9), the Board has not fixed the problem. While the Board may define "crime involving moral turpitude" as turning on 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" (BIO 9), all that does—beyond referring back to "accepted rules of morality"—is add equally vague synonyms. That is not a legal standard. This "indeterminacy" in the statutory term "produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Johnson*, 576 U.S. at 598.

4. As for the merits of our nondelegation argument (Pet. 20-21), the government has practically nothing to say. See BIO 12. It rests on a citation to a lower court case, which offers a back-of-the-envelope assessment as to whether the term "crime involving moral turpitude" supplies an intelligible principle. *Ibid*. But the government's brief proves our point: In arguing that a drug trafficking offense qualifies as a crime involving moral turpitude, the government engages in no legal analysis—it does not analyze the statutory text or apply any objective standard. Rather, the government claims that petitioner's crime qualifies by reference to an administrative agency's 76-year-old *ipse dixit*. BIO 7-8. This statute "has no intelligible meaning" and results in an impermissible transfer of the lawmaking function to agencies and

courts. *Olivas-Motta* v. *Whitaker*, 910 F.3d 1271, 1283 (9th Cir. 2018) (Watford, J., dissenting).

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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