No. 18-1085

In the Supreme Court of the United States

ROCIO AURORA MARTINEZ-DE RYAN, PETITIONER

v.

WILLIAM P. BARR, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

To be eligible for cancellation of removal under the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, an alien who has not been admitted for permanent residence must establish, *inter alia*, that she has not been convicted of a "crime involving moral turpitude (other than a purely political offense)." 8 U.S.C. 1182(a)(2)(A)(i)(I); see 8 U.S.C. 1229b(b)(1)(c). The question presented is:

Whether the phrase "crime involving moral turpitude," 8 U.S.C. 1182(a)(2)(A)(i)(I), is unconstitutionally vague as applied to petitioner's prior conviction for bribery concerning programs receiving federal funds, in violation of 18 U.S.C. 666(a)(2).

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OPINIONS BELOW

The order and amended opinion of the court of appeals (Pet. App. 1a-8a) is reported at 909 F.3d 247. An earlier opinion of the court of appeals is reported at 895 F.3d 1191. The decisions of the Board of Immigration Appeals (Pet. App. 11a-12a) and the immigration judge (Pet. App. 13a-17a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 2018. A petition for rehearing was denied on November 16, 2018. See Pet. App. 2a. The petition for a writ of certiorari was filed on February 14, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After unlawfully entering the United States, petitioner was convicted on one count of bribery concerning

programs receiving federal funds, in violation of 18 U.S.C. 666(a)(2). Pet. App. 3a. Petitioner then received a notice to appear charging her with inadmissibility as an alien present in the United States without being admitted or paroled. Administrative Record (A.R.) 387; see 8 U.S.C. 1182(a)(6)(A)(i). Through counsel, petitioner conceded her removability, but sought cancellation of removal. Pet. App. 3a; see *id.* at 14a. An immigration judge determined that petitioner did not qualify for that discretionary form of relief because her federal bribery conviction constituted a "crime involving moral turpitude." *Id.* at 15a; see *id.* at 13a-17a; see also 8 U.S.C. 1182(a)(2)(A)(i)(I) and 1229b(b)(1)(C). The Board of Immigration Appeals (Board) affirmed. Pet. App. 11a-12a. The Ninth Circuit denied petitioner's petition for review, holding that petitioner's crime of conviction was categorically a crime involving moral turpitude, and that the phrase "crime involving moral turpitude," 8 U.S.C. 1182(a)(2)(A)(i)(I), is not unconstitutionally vague. Pet. App. 1a-8a.

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, an alien who is not lawfully present in the United States pursuant to a prior admission is inadmissible. 8 U.S.C. 1182(a)(6)(A)(i); see 8 U.S.C. 1229a(c)(2)(B) (removal proceedings). The Attorney General has discretion to cancel the removal of an alien who is inadmissible if the alien meets certain statutory criteria for such relief. 8 U.S.C. 1229b. To be statutorily eligible for cancellation of removal, an alien who is not a lawful permanent resident must: (1) have been "physically present in the United States for a continuous period" of at least ten years; (2) have been "a person of good moral character" during that period;

(3) have not been convicted of any of the offenses described in Sections 1182(a)(2), 1227(a)(2), or 1227(a)(3) of the INA; and (4) establish that removal would result in "exceptional and extremely unusual hardship to the alien's spouse, parent, or child," who is either a citizen of the United States or a lawful permanent resident. 8 U.S.C. 1229b(b)(1)(A)-(D).[1] An alien seeking cancellation of removal, or any other form of relief from removal, "has the burden of proof to establish" that she "satisfies the applicable eligibility requirements." 8 U.S.C. 1229a(c)(4)(A)(i); see 8 C.F.R. 1240.8(d).

2. a. Petitioner, a native and citizen of Mexico, unlawfully entered the United States in 1999. Pet. App. 2a-3a; A.R. 91, 112. Over the course of several months in 2007, petitioner engaged in a bribery scheme in which "she provided cash payments to an employee at the Nevada Department of Motor Vehicles to influence and reward the employee for issuing identification documents to non-citizens illegally present in the United States." Pet. App. 3a; see generally A.R. 270-288 (Presentence Investigation Report). Petitioner paid the employee a total of approximately $8000, and the employee issued identification documents to approximately 16 individuals. A.R. 275-276.

Petitioner was charged by information with one count of bribery concerning programs receiving federal funds, in violation of 18 U.S.C. 666(a)(2), A.R. 333-334, which is punishable by up to ten years of imprisonment, Pet. App. 3a, 15a.[2] In 2010, petitioner pleaded guilty to

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[1] Different criteria apply to aliens admitted as lawful permanent residents who seek cancellation of removal. 8 U.S.C. 1229b(a).

[2] 18 U.S.C. 666 provides in relevant part:

> (a) Whoever, if the circumstance described in subsection (b) of this section exists—

that charge. *Id.* at 3a; see A.R. 336-348, 350. She was sentenced to six months of imprisonment, to be followed by one year of supervised release. A.R. 351-352.

b. Shortly thereafter, petitioner was served with a notice to appear charging her with removability as an alien present in the United States without having been admitted or paroled. A.R. 387-388; see 8 U.S.C. 1182(a)(6)(A)(i).[3] Through counsel, petitioner conceded her removability, but sought relief in the form of cancellation of removal. Pet. App. 3a, 14a; A.R. 38. In order to establish eligibility for that form of discretionary relief, petitioner had to establish, *inter alia*, that she had not been convicted of any disqualifying offense. See pp. 2-3, *supra*; 8 U.S.C. 1229b(b)(1)(C) (requiring that alien "has not been convicted of an offense under section 1182(a)(2) * * * of this title"). As relevant here, petitioner was required to demonstrate that her conviction

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* * *

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

[3] The opinion of the court of appeals incorrectly states that the notice to appear "charg[ed petitioner] with inadmissibility under § 1182(a)(2)(A)(i)." Pet. App. 3a.

for federal-programs bribery was not a disqualifying conviction for a "crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime." 8 U.S.C. 1182(a)(2)(A)(i)(I).

An immigration judge denied petitioner's application for relief on the ground that her conviction for federal-programs bribery "constitutes [a conviction for] a crime involving moral turpitude, which disqualifies her from receiving cancellation of removal." Pet. App. 15a. The immigration judge explained that the statute of conviction, 18 U.S.C. 666(a)(2), "categorically constitutes a crime involving moral turpitude" because it requires the defendant to have acted with a "'corrupt' motive." Pet. App. 16a. The immigration judge further observed that the Board had "quoted with approval" a Second Circuit decision stating that "'there can be no question that any crime of bribery involves moral turpitude.'" *Ibid.* (quoting *In re Gruenangerl*, 25 I. & N. Dec. 351, 358 n.8 (B.I.A. 2010)). Having found that petitioner's conviction "bars her from establishing eligibility for cancellation of removal," *ibid.*, the immigration judge ordered that petitioner be removed to Mexico on the conceded charge of removability, *id.* at 17a.

c. Petitioner filed an administrative appeal with the Board, but failed to file a brief in support of her appeal and raised no argument as to why her bribery conviction did not qualify as a disqualifying conviction for a crime involving moral turpitude. See A.R. 16-18 (notice of appeal); 895 F.3d 1191, 1192 n.1 (noting petitioner's failure to administratively exhaust any challenge to the categorization of her offense). Petitioner's sole contention on appeal was that her conviction did not bar cancellation of removal because it did not occur within ten years of her entry into the United States. A.R. 17. That

argument mistakenly relied on the provision governing deportability, see 8 U.S.C. 1227(a)(2)(A)(i), rather than the provision regarding inadmissibility, see 8 U.S.C. 1182(a)(2).[4]

The Board dismissed the appeal. Pet. App. 11a-12a. The Board "agree[d] with the Immigration Judge's determination that [petitioner] is ineligible for cancellation of removal." *Id.* at 12a. The Board explained that while petitioner's notice of appeal "argue[d] that her conviction is not a crime involving moral turpitude that would bar her from cancellation of removal" under 8 U.S.C. 1227(a)(2)(A)(i)(I), her conviction "falls within" Section 1182(a)(2)(A)(i), which governs inadmissibility, "and thus precludes her from [obtaining] cancellation of removal." Pet. App. 12a.

3. The court of appeals denied petitioner's petition for review. 895 F.3d 1191, amended and superseded, 909 F.3d 247 (Pet. App. 1a-8a).

a. In its initial opinion, the court of appeals declined to consider petitioner's argument that her conviction for federal-programs bribery did not qualify as a crime involving moral turpitude, on the ground that petitioner had failed to exhaust the issue administratively. 895 F.3d at 1192 n.1. The court also rejected petitioner's contention that the phrase "crime involving moral turpitude" is unconstitutionally vague. *Id.* at 1193; see *id.* at 1193-1194.

b. Petitioner sought rehearing, and the court of appeals issued an amended opinion, again denying the petition for review. Pet. App. 1a-8a.

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[4] With respect to the deportability provision, petitioner also incorrectly relied on the ten-year period governing "alien[s] provided lawful permanent resident status under" 8 U.S.C. 1255(j), rather than the five-year period governing most aliens. 8 U.S.C. 1227(a)(2)(A)(i).

The court of appeals first held that federal-programs bribery in violation of Section 666(a)(2) is categorically a crime of moral turpitude. Pet. App. 3a-5a. The court explained that under Board and Ninth Circuit precedent, "[o]ne test to determine if a crime involves moral turpitude is whether the act is accompanied by a vicious motive or a corrupt mind." *Id.* at 4a (citation and internal quotation marks omitted). The court observed that Section 666(a)(2) by its terms requires that a defendant "*corruptly* give[], offer[], or agree[] to give" a bribe. *Ibid.* (quoting 18 U.S.C. 666(a)(2)). Thus, the court recounted that, "[a]long with other circuits," it previously had held that Section 666 contains a corrupt-intent requirement. *Ibid.* In light of that requirement, the court continued, "a bribery conviction under § 666(a)(2) categorically qualifies as a crime involving moral turpitude." *Ibid.* The court further noted that its "holding" "comports with decades-old decisions by the [Board] and the Second, Fourth, and Fifth Circuits that bribery involves moral turpitude." *Id.* at 4a-5a (citing *Villegas-Sarabia* v. *Sessions*, 874 F.3d 871, 878 n.25 (5th Cir. 2017), cert. denied, 139 S. Ct. 320 (2018); *United States* v. *Zacher*, 586 F.2d 912, 915 (2d Cir. 1978); *United States* v. *Pomponio*, 511 F.2d 953, 956 (4th Cir.), cert. denied, 423 U.S. 874 (1975); *In re Gruenangerl*, 25 I. & N. Dec. at 358 n.8; *In re H-*, 6 I. & N. Dec. 358, 361 (B.I.A. 1954)).

The court of appeals then determined that the phrase "crime involving moral turpitude" is not unconstitutionally vague. Pet. App. 5a-8a. The court observed that in *Jordan* v. *De George*, 341 U.S. 223 (1951), this Court had rejected a vagueness challenge to the same phrase, holding "on the merits that the phrase in

question was not so vague or meaningless as to be a deprivation of due process." Pet. App. 6a; see *id.* at 5a-6a. The court noted that it had followed *Jordan* in *Tseung Chu* v. *Cornell*, 247 F.2d 929 (9th Cir.), cert. denied, 355 U.S. 892 (1957), which had similarly held that the phrase "crime involving moral turpitude" is not unconstitutionally vague. Pet. App. 6a.

The court of appeals rejected petitioner's argument that this Court's recent decisions in *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), and *Sessions* v. *Dimaya*, 138 S. Ct. 1204 (2018), "eviscerate[d]" the holdings in *Jordan* and *Tseung Chu*. Pet. App. 7a. The court explained that *Johnson* and *Dimaya* "interpret[ed] statutory 'residual' clauses whose wording does not include the phrase 'moral turpitude' and which are not tethered to recognized common law principles." *Id.* at 8a. And the court further noted that "[a]t least three of [its] sister circuits ha[d] held, in cases post-dating *Johnson*, that the Supreme Court's holding in *Jordan* remains good law: the phrase 'crime involving moral turpitude' is not unconstitutionally vague." *Id.* at 8a n.2 (citing *Moreno* v. *Attorney Gen. of the U.S.*, 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)).

c. With entry of the amended opinion, the court of appeals denied the petition for rehearing. Pet. App. 2a. No judge requested a vote on the petition for rehearing en banc. *Ibid.*

ARGUMENT

Petitioner renews (Pet. 13-36) her contention that the phrase "crime involving moral turpitude," 8 U.S.C. 1182(a)(2)(A)(i)(I), is unconstitutionally vague. The

court of appeals correctly rejected that argument, and further review is not warranted. As a threshold matter, petitioner has no liberty interest in discretionary relief from removal that would implicate the Due Process Clause. In addition, this Court already has held that the phrase "crime involving moral turpitude" is not unconstitutionally vague as applied to crimes involving fraud, see *Jordan* v. *De George*, 341 U.S. 223 (1951), and the same logic applies to bribery offenses. Because the court of appeals correctly determined that petitioner's conviction for federal-programs bribery is a "crime involving moral turpitude"—a holding she does not contest in this Court—petitioner cannot raise a facial vagueness challenge to the statute, which would fail in any event. Every court of appeals to consider the question has held that the phrase "crime involving moral turpitude" is not unconstitutionally vague. The petition for a writ of certiorari should be denied.

1. Petitioner contends that her case presents an "[i]deal [v]ehicle," Pet. 34 (emphasis omitted), to consider the contention (Pet. 13-33) that the statutory phrase "crime involving moral turpitude" is unconstitutionally vague. For the reasons discussed below, see pp. 11-20, *infra*, the court of appeals correctly rejected petitioner's vagueness argument, and further review of that determination is unwarranted. But the petition for a writ of certiorari should be denied for the threshold reason that because petitioner has conceded her removability and seeks only discretionary cancellation of removal, the petition fails to present the vagueness question in a context that implicates the constitutional issue.[5]

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[5] The government made this argument in the court of appeals, but the court did not expressly address it. See Gov't Opp. to Pet. for Reh'g 16-19; Pet. App. 5a-8a.

The void-for-vagueness doctrine is rooted in the Fifth Amendment's provision that "[n]o person shall * * * be deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. V; see *Beckles* v. *United States*, 137 S. Ct. 886, 892 (2017); *Johnson* v. *United States*, 135 S. Ct. 2551, 2556 (2015). Accordingly, an individual seeking to challenge a statute as unconstitutionally vague under the Due Process Clause must "establish that she has been deprived of a life, liberty, or property interest sufficient to trigger protection of the Due Process Clause in the first place." *Ashki* v. *INS*, 233 F.3d 913, 921 (6th Cir. 2000); see, *e.g.*, *Board of Regents of State Colls.* v. *Roth*, 408 U.S. 564, 569 (1972).

Petitioner cannot make that showing. Petitioner has conceded that she is removable as an alien unlawfully present in the United States. Pet. App. 3a; see 8 U.S.C. 1182(a)(6)(A)(i). Rather than contest removability, petitioner seeks cancellation of removal, a form of discretionary relief that rests in the "unfettered discretion" of the Attorney General. *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996) (citation omitted) (discussing suspension of deportation). As several courts of appeals have recognized, a petitioner who is otherwise removable has "no constitutionally-protected liberty interest in obtaining discretionary relief from [removal]." *Ashki*, 233 F.3d at 921 (discussing deportation); accord *Tomaszczuk* v. *Whitaker*, 909 F.3d 159, 164 (6th Cir. 2018) ("Petitioner 'has no constitutionally-protected liberty interest in obtaining discretionary relief from deportation.'") (citation omitted); *Munoz* v. *Ashcroft*, 339 F.3d 950, 954 (9th Cir. 2003) ("Since discretionary relief is a privilege created by Congress, denial of such relief cannot violate a substantive interest protected by the Due

Process clause."); *Mohammed* v. *Ashcroft*, 261 F.3d 1244, 1250 (11th Cir. 2001) ("The critical flaw in [petitioner's] argument is that, under our precedent, an alien does not have a constitutionally protected interest in receiving discretionary relief from removal or deportation."); *Escudero-Corona* v. *INS*, 244 F.3d 608, 615 (8th Cir. 2001) (similar). Petitioner therefore is foreclosed from arguing that the statutory phrase "crime involving moral turpitude," 8 U.S.C. 1182(a)(2)(A)(i)(I), is so vague as to violate the Due Process Clause. See, *e.g.*, *Tomaszczuk*, 909 F.3d at 164 ("Because Petitioner is a deportable alien with an interest only in discretionary relief, he may not bring this void-for-vagueness challenge under the Due Process Clause.").

2. In any event, the court of appeals correctly held that the statutory phrase "crime involving moral turpitude," 8 U.S.C. 1182(a)(2)(A)(i)(I), is not unconstitutionally vague.

a. This Court already has rejected a constitutional vagueness challenge to the phrase "crime involving moral turpitude." In *Jordan*, *supra*, the Court held that an alien's prior convictions 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, 8 U.S.C. 155(a) (1940). 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." *Jordan*, 341 U.S. 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 alien's prior convictions for conspiring to defraud the United States

qualified as "crime[s] 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. *Id.* at 229-232 (majority opinion); see *id.* at 232-245 (Jackson, J., dissenting).

The Court held that the phrase "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 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 continued, "crimes in which fraud was an ingredient have always been regarded as involving moral turpitude." *Id.* at 232. The Court therefore concluded that "Congress sufficiently forewarned [the alien] that the statutory consequence

of twice conspiring to defraud the United States is deportation." *Ibid.*

b. *Jordan*'s analysis comports with the "traditional" understanding, *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610 (1973), that this Court will "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). Thus, the Court in *Jordan* considered whether the phrase "crime involving moral turpitude" is unconstitutionally vague with respect to fraud offenses like those of which the alien in that case had been convicted. 341 U.S. at 229-232; cf. *id.* at 226-227 ("[O]ur inquiry in this case is narrowed to determining whether this particular offense involves moral turpitude. Whether or not certain other offenses involve moral turpitude is irrelevant and beside the point."). So too here. Assuming petitioner may raise a constitutional vagueness challenge to the statutory phrase "crime involving moral turpitude," 8 U.S.C. 1182(a)(2)(A)(i)(I); but see pp. 9-11, *supra*, the proper analysis considers whether that phrase is vague as to petitioner's conviction for federal-programs bribery.[6]

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[6] Petitioner briefly suggests that this Court's decision in *Johnson*, *supra*, "repudiated the 'theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp.'" Pet. 32 (quoting *Johnson*, 135 S. Ct. at 2561). But *Johnson* did not purport to abrogate the general rule that if a litigant's own conduct is plainly proscribed by a statute, he

Although petitioner does not directly address that question, see Pet. 13-33; but see Pet. 32-33 (arguing in the alternative that fraud offenses are the "core" of "crimes" involving "moral turpitude"), the court of appeals correctly held that the phrase "crime involving moral turpitude" is not unconstitutionally vague with respect to petitioner's federal-programs bribery offense. See Pet. App. 5a-8a. The phrase "crime involving moral turpitude" has been part of the immigration laws for more than 125 years. See *Jordan*, 341 U.S. at 229 n.14 ("The term 'moral turpitude' first appeared in the Act of March 3, 1891, 26 Stat. 1084, which directed the exclusion of 'persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude.'"). And the Board and courts consistently have held that bribery offenses like petitioner's constitute crimes involving moral turpitude.

In 1950, the Board upheld the exclusion of an alien convicted of attempted bribery under German law, holding that such an offense "has always been considered malum in se in both Anglo-American and Continental law and, therefore, involves moral turpitude." *In re V-*, 4 I. & N. Dec. 100, 102 (footnote omitted). The Board reached the same conclusion four years later, holding that "the offense of bribery is a base and vile act which involves moral turpitude." *In re H-*, 6 I. & N. Dec. 358, 361 (1954). The Board emphasized that "[t]he offense in question * * * is one whereby the Government has been cheated out of services the community is rightfully entitled to and it involves the obstruction of lawful governmental functions by deceit, graft, trickery and dishonest means." *Ibid.* "Such an offense," the

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cannot raise a vagueness challenge to the statute's application to others' acts. See 135 S. Ct. at 2561.

Board concluded, "clearly involves moral turpitude." *Ibid.* The Board has continued to reaffirm that interpretation in more recent years. See *In re Gruenangerl*, 25 I. & N. Dec. 351, 358 n.8 (2010) ("If the only question * * * were whether the respondent's offense"—bribery of a public official in violation of 18 U.S.C. 201(b)(1)(A) (2006)—"was a crime involving moral turpitude, we would * * * simply answer the question affirmatively").

The courts likewise consistently have held that bribery is a crime involving moral turpitude. As early as 1924, "bribery" was held to be a crime involving moral turpitude for purposes of exclusion. *Ex parte Tozier*, 2 F.2d 268, 269 (D. Me. 1924), aff'd, *Howes* v. *Tozer*, 3 F.2d 849 (1st Cir. 1925). Since then, the courts of appeals uniformly have determined that "[t]here can be no question but that any crime of bribery involves moral turpitude." *United States ex rel. Sollazzo* v. *Esperdy*, 285 F.2d 341, 342 (2d Cir.), cert. denied, 366 U.S. 905 (1961); see *Okabe* v. *INS*, 671 F.2d 863, 865 (5th Cir. 1982); *United States* v. *Pomponio*, 511 F.2d 953, 956 (4th Cir.), cert. denied, 423 U.S. 874 (1975); cf. Pet. App. 5a n.1 ("Perhaps because bribery is so commonly understood to involve moral turpitude, petitioners in other cases have declined to challenge the proposition.").

Petitioner's conviction for federal-programs bribery clearly qualifies as a "crime involving moral turpitude" consistent with these precedents. Section 666(a)(2) requires intentional, affirmative acts to prompt wrongdoing in a government official, undertaken with a "corrupt[]" mind. 18 U.S.C. 666(a)(2). That culpable mental state easily falls within Board and court holdings characterizing corrupt intent as "the essence of moral turpitude." *Latter-Singh* v. *Holder*, 668 F.3d 1156, 1161 (9th Cir. 2012) (quoting *In re Flores*, 17 I. & N. Dec. 225,

227 (B.I.A. 1980)). And the act of bribing a public official has long been viewed as reprehensible and contrary to public morality, see, *e.g.*, *Esperdy*, 285 F.2d at 342; *United States* v. *Labovitz*, 251 F.2d 393, 394 (3d Cir. 1958).[7]

In light of that history, there is no merit to petitioner's alternative contention (Pet. 33) that the phrase "crime involving moral turpitude" should be "confin[ed] * * * to its" purported "core" of "crimes with a fraud element." See Pet. 32-33. Although *Jordan* considered only such crimes, application of its methodology establishes that bribery offenses also fall within the "core" of the statutory term. In *Jordan*, decades of case law revealed that fraud offenses plainly were "crime[s] of moral turpitude," see 341 U.S. 227-229 & n.13; here, decades of case law likewise confirm that bribery offenses—especially those involving the bribery of public officials—categorically constitute "crimes involving moral turpitude." Moreover, there exists a close relationship between fraud offenses and bribery, which "involves the obstruction of lawful governmental functions by deceit, graft, trickery and dishonest means." *In re H-*, 6 I. & N. Dec. at 361.

c. Even if petitioner could raise a vagueness challenge reaching beyond her own crime of conviction, there would be no merit to her contention that the

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[7] Indeed, this Court expressed similar views of bribery in rejecting a constitutional challenge to Congress's enactment of Section 666(a)(2). In *Sabri* v. *United States*, 541 U.S. 600 (2004), the Court explained that Congress has the authority "to see to it that taxpayer dollars appropriated under [the Spending Clause] are in fact spent for the general welfare, and not frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars." *Id.* at 605.

phrase "crime involving moral turpitude" is unconstitutionally vague. The Board has defined "crime[s] 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 a culpable mental state and reprehensible conduct." *In re Mendez*, 27 I. & N. Dec. 219, 221 (B.I.A. 2018) (citation omitted). In the more than 125 years that the phrase "has been part of the immigration laws," *Jordan*, 341 U.S. at 229, the law has developed to provide constitutionally sufficient guidance as to what crimes do and do not qualify as "crime[s] involving moral turpitude." 8 U.S.C. 1182(a)(2)(A)(i)(I); see, *e.g.*, Ira J. Kurzban, *Kurzban's Immigration Law Sourcebook* 113-127 (16th ed. 2018-2019) (classifying many crimes based on Board and judicial interpretations).

3. Petitioner's other arguments lack merit.

a. Petitioner primarily contends (Pet. 13-27) that the decision below conflicts with *Johnson*, *supra*, and *Sessions* v. *Dimaya*, 138 S. Ct. 1204 (2018), and she urges (Pet. 29-33) that this Court reconsider *Jordan* in light of those decisions. As the court of appeals explained, however, *Johnson* and *Dimaya* do not undermine *Jordan*'s holding that the phrase "crime involving moral turpitude" is not unconstitutionally vague.

In *Johnson*, the Court invalidated on vagueness grounds the residual clause in the sentence-enhancement provisions of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), which classifies a prior conviction as a "violent felony" if it was for a crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another." See

135 S. Ct. at 2560. The Court determined that the residual clause was unconstitutionally vague for two interrelated reasons. First, the Court already had held that "[d]eciding whether the residual clause covers a crime * * * requires a court to picture the kind of conduct that the crime involves in 'the ordinary case,' and to judge whether that abstraction presents a serious potential risk of physical injury." *Id.* at 2557 (quoting *James* v. *United States*, 550 U.S. 192, 208 (2007)). But by tying "the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements," "the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime." *Ibid.* Second, "the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id.* at 2558. The Court determined that "[b]y 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 as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Ibid.* At the same time, the Court made clear that it did not "doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct," and it explained that "'the law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree.'" *Id.* at 2561 (quoting *Nash* v. *United States*, 229 U.S. 373, 377 (1913)).

Three years after *Johnson*, this Court held in *Dimaya* that the definition of a "crime of violence" in 18 U.S.C. 16(b), as incorporated into the INA's removability provisions, is unconstitutionally vague. See 138 S. Ct. at 1210, 1213. Section 16(b) defines a "crime

of violence" to include "any other offense that is a felony and that, by its nature, 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). The Court explained that Section 16(b), as incorporated into the INA, suffered from "the same two features, * * * combined in the same constitutionally problematic way," that had led the Court to find the ACCA's residual clause unconstitutionally vague in *Johnson*—the need to imagine the "'ordinary case'" of a crime, combined with uncertainty about the risk threshold. *Dimaya*, 138 S. Ct. at 1213, 1215.

Contrary to petitioner's suggestion (Pet. 13-27), *Johnson* and *Dimaya* do not undermine this Court's decision in *Jordan*. *Dimaya* expressly relied on *Jordan* to reject the argument that "a less searching form of void-for-vagueness doctrine" applies in "removal cases" than in criminal ones. *Dimaya*, 138 S. Ct. at 1212-1213. The Court's opinion in *Dimaya* explained that *Jordan* "chose to test (*and ultimately uphold*)" the moral-turpitude provision "'under the established criteria of the "void for vagueness" doctrine' applicable to criminal laws." *Id.* at 1213 (emphasis added; citation omitted). In citing *Jordan* with approval, the Court did not suggest that its subsequent void-for-vagueness decisions, including *Dimaya* itself, actually called into question *Jordan*'s holding. See *ibid.*

Nor do *Johnson* and *Dimaya* undermine *Jordan*'s reasoning *sub silentio*. Petitioner appears to acknowledge (Pet. 13-20) that to determine whether a conviction was for a "crime involving moral turpitude," courts do not apply the "ordinary case" categorical approach that was determined to be constitutionally problematic

in *Johnson* and *Dimaya*. Petitioner nonetheless observes (Pet. 14-17) that courts and the Board sometimes ask whether a particular offense "offends 'contemporary moral standards,'" and she contends that such an inquiry "requires just as much judicial imagination as *Dimaya*'s 'ordinary case' test." Pet. 14 (emphasis omitted). Petitioner ignores that none of the decisions below applied a "contemporary moral standards" test to her case, see Pet. App. 4a, 12a, 16a, and that bribery offenses like petitioner's conviction under Section 666(a)(2) have long and consistently been considered "crimes involving moral turpitude." See pp. 13-17, *supra*.

Turning to the second factor at issue in *Johnson* and *Dimaya*, petitioner contends (Pet. 18-19) that the "base, vile, or depraved" test sometimes used in moral-turpitude cases "is even less quantifiable" than the "substantial risk" inquiries invalidated in this Court's cases. This Court made clear in *Johnson* and *Dimaya* that it was not casting doubt on all "qualitative standard[s]," *Johnson*, 135 S. Ct. at 2561, but was rather focused on the particular combination of such standards and the ordinary-case categorical approach, see *Dimaya*, 138 S. Ct. at 1214-1216; *Johnson*, 135 S. Ct. at 2561, which does not apply here. In any event, petitioner's case presents no question regarding the "base, vile, or depraved" test, which was not applied to determine that her prior conviction was for a "crime involving moral turpitude." See Pet. App. 4a, 12a, 16a.

b. Nor does the decision below conflict with any decision of any other court of appeals. Petitioner concedes (Pet. 28) that "there is no circuit split on the issue of vagueness." Following *Jordan*, the courts of appeals uniformly held that the phrase "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 following *Johnson* and *Dimaya*, every court of appeals to have considered the issue has reaffirmed its prior precedent holding that the phrase "crime involving moral turpitude" is not unconstitutionally vague. See Pet. App. 1a-8a; *Moreno* v. *Attorney Gen. of the U.S.*, 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).

Petitioner nonetheless suggests (Pet. 28) that this Court should grant the petition for a writ of certiorari on the theory that the courts of appeals disagree as to *other* issues concerning "crimes involving moral turpitude." She first contends (*ibid.*) that the courts are divided as to whether and how principles of deference apply in the context of such crimes. In particular, petitioner contends (*ibid.*) that the Ninth Circuit gives no deference to the Board's definition of "moral turpitude," while "lend[ing] *Chevron* deference to whether a particular crime meets th[at] definition"—a methodology she contends is "the exact inverse of how it works in the Fifth Circuit." But any such methodological disagreement would not be implicated in this case, because the court of appeals addressed petitioner's prior conviction without discussing deference to the Board. See Pet. App. 1a-8a. And in any event, the en banc Ninth Circuit has "join[ed] every other court of appeals to

have considered the question"—including the Fifth Circuit—in holding that "the BIA's determination that [an] offense constitutes a 'crime involving moral turpitude' is governed by the same traditional principles of administrative deference [that] apply to the Board's interpretation of other ambiguous terms in the INA." *Marmolejo-Campos* v. *Holder*, 558 F.3d 903, 911 (citing, *inter alia*, *Hamdan* v. *INS*, 98 F.3d 183, 185 (5th Cir. 1996)), cert. denied, 558 U.S. 1092 (2009). The Board's decisions thereby have long served to give more detailed content to the term "crime involving moral turpitude."

Petitioner also briefly suggests (Pet. 28) that review is warranted on the theory that the circuits differ as to whether, in order to demonstrate that a prior conviction was not for a "crime involving moral turpitude," an alien must show a "realistic probability" that conduct not involving moral turpitude would be prosecuted under the relevant provision. See *Jean-Louis* v. *Attorney Gen. of the U.S.*, 582 F.3d 462, 481-482 (3d Cir. 2009). But that issue is not specific to the question whether a particular offense constitutes a "crime involving moral turpitude," and again, any such division is not implicated in this case. The court of appeals (like the immigration judge and the Board) determined that petitioner's offense of conviction categorically constituted a crime involving moral turpitude, without any discussion of the "realistic probability" analysis. See Pet. App. 4a, 12a, 16a. And petitioner does not contend that there exists a "realistic probability" that non-turpitudinous conduct would be prosecuted under Section 666(a)(2). See generally Pet. 13-33.

Finally, petitioner suggests (*e.g.*, Pet. 3-4) that the Board and courts have, at times, reached different determinations regarding whether particular federal or state offenses qualify as "crimes involving moral turpitude." Again, petitioner does not suggest any such disagreement with respect to the federal-programs bribery offense of which she was convicted. And petitioner acknowledges (Pet. 29) that "[w]hen circuits disagree about a statute's label, the split can be resolved by the [Board]." In any event, the purported divergent results on which petitioner relies often reflect application of a single standard to different state offenses. For example, petitioner observes (Pet. 3 & nn.2-3) that "in Arkansas, writing bad checks is a crime involving moral turpitude," while "in Kansas, it is not." But that is because the Arkansas statute requires intent to defraud, while the Kansas provision does not. Compare *In re Logan*, 17 I. & N. Dec. 367, 368 (B.I.A. 1980) (Arkansas conviction), with *In re Bailie*, 10 I. & N. Dec. 679, 680-682 (B.I.A. 1964) (Kansas conviction).[8]

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[8] Petitioner's other examples are similar. Regarding third degree burglary (Pet. 3-4), compare *In re M-*, 2 I. & N. Dec. 721 (B.I.A. 1946) (conviction under burglary statute encompassing structures and buildings, as opposed to dwellings, was not categorically a crime involving moral turpitude), with *Uribe* v. *Sessions*, 855 F.3d 622 (4th Cir. 2017) (holding that residential burglary constitutes a crime involving moral turpitude); see *Uribe*, 855 F.3d at 626-627 n.5 (distinguishing *In re M-* on this basis). Regarding the offense of "[c]ontributing to the delinquency of a minor" (Pet. 4 & nn.6-7), compare *In re P-*, 2 I. & N. Dec. 117 (B.I.A. 1944) (offense did not qualify where statute did not require specific intent and record of conviction did not disclose "evil intent"), with *In re F-*, 2 I. & N. Dec. 610, 612 (B.I.A. 1946) (contributing to the delinquency of a child was a crime involving moral turpitude where "information charge[d]" that alien "contributed to the delinquency of a child by encouraging a child to be guilty of indecent or lascivious conduct"). Regarding "giving

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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false information to the police" (Pet. 4 & nn. 8-9), compare *Blanco* v. *Mukasey*, 518 F.3d 714, 720 (9th Cir. 2008) (holding that California offense is not a crime involving moral turpitude because it "does not require fraudulent intent"), with *Padilla* v. *Gonzales*, 397 F.3d 1016, 1021 (7th Cir. 2005) (upholding categorization of Illinois offense as a crime involving moral turpitude, where offense "require[d] the specific intent to conceal criminal activity"), overruled on other grounds by *Ali* v. *Mukasey*, 521 F.3d 737, 743 (7th Cir. 2008).