No. 19-284

In the Supreme Court of the United States

JOSE JESUS MERCADO RAMIREZ, 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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QUESTIONS 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 he 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). The questions presented are:

1. Whether the phrase "crime involving moral turpitude" is unconstitutionally vague as applied to a conviction for felony endangerment in violation of Arizona law, which criminalizes recklessly exposing another person to a substantial risk of imminent death.

2. Whether non-retroactivity principles constrain the application of an administrative decision that does not effect a change in the law.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-3a) is not published in the Federal Reporter but is reprinted at 745 Fed. Appx. 677. The decision of the Board of Immigration Appeals (Pet. App. 7a-12a) and the order of the immigration judge (Pet. App. 13a-24a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 2018. A petition for rehearing was denied on April 1, 2019 (Pet. App. 25a). On June 21, 2019, Justice Kagan extended the time within which to file a petition for writ of certiorari to and including August 29, 2019, and the petition was filed on that date. 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 felony endangerment in violation of Arizona law. Pet. App. 20a. Petitioner then received a notice to appear charging him with inadmissibility as an alien present in the United States without being admitted or paroled. *Id.* at 14a; see 8 U.S.C. 1182(a)(6)(A)(i). Through counsel, petitioner conceded his removability, but sought cancellation of removal. Pet. App. 15a. An immigration judge determined that petitioner did not qualify for that discretionary form of relief because his felony endangerment conviction constituted a "crime involving moral turpitude." *Id.* at 20a-21a; see 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 a petition for review in an unpublished summary disposition, holding that petitioner's non-retroactivity and void for vagueness challenges to the Board's decision were foreclosed by circuit precedent. *Id.* at 2a (citing *Olivas-Motta* v. *Whitaker*, 910 F.3d 1271 (9th Cir. 2018), petition for cert. pending, No. 19-282 (filed Aug. 29, 2019)); see *id.* at 26a-54a.[1]

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). Additionally, an alien not lawfully present is inadmissible if, with exceptions not relevant here, the alien has been "convicted of * * * a crime involving moral turpitude (other than a purely political offense) or an attempt

[1] Citations to *Olivas-Motta* herein are to the opinion reprinted in the appendix (Pet. App. 26a-54a).

or conspiracy to commit such a crime." 8 U.S.C. 1182(a)(2)(A)(i)(I).

The Attorney General has discretion to cancel the removal of an alien who is inadmissible if the alien meets certain statutory eligibility criteria for 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).[2] 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 1994. Pet. App. 15a. In 2001, petitioner entered into a plea agreement to one count of driving under the influence in violation of Ariz. Rev. Stat. Ann. § 28-1381(A)(1) (2001), and one count of felony endangerment in violation of Ariz. Rev. Stat. Ann. § 13-1201 (2001). Administrative Record (A.R.) 134-135. For reasons that are not explained in the record, petitioner was not convicted until 2010, at

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

which point he was sentenced for both offenses. A.R. 100-104.

b. Shortly after the conviction was entered, petitioner was served with a notice to appear charging him with removability as an alien present in the United States without having been admitted or paroled, and as an alien convicted of a crime involving moral turpitude. Pet. App. 14a. Through counsel, petitioner conceded his removability on the first of those grounds, denied removability on the second, and sought relief in the form of cancellation of removal. *Id.* at 15a. In order to demonstrate his eligibility for that form of discretionary relief, petitioner had to establish, *inter alia*, that he had not been convicted of any disqualifying offense. See p. 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 show that his conviction for felony endangerment 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).

While petitioner's cancellation proceedings were pending before an immigration judge, the Board decided *In re Leal*, 26 I. & N. Dec. 20 (B.I.A. 2012). That precedential decision held that Arizona's felony endangerment offense—which covers "recklessly endangering another person with a substantial risk of imminent death," Ariz. Rev. Stat. Ann. § 13-1201(A) (2007)—is categorically a "crime involving moral turpitude." *Leal*, 26 I. & N. Dec. at 20.

In deciding petitioner's request for cancellation of removal, the immigration judge applied *Leal* and held that 2010 conviction for felony endangerment qualified

as crime involving moral turpitude. Pet. App. 20a. Petitioner was "therefore disqualified from cancellation of removal." *Ibid.*; see 8 U.S.C. 1229c.

c. Petitioner filed an administrative appeal with the Board. See A.R. 56-59 (notice of appeal). Petitioner contended only that Ninth Circuit precedent foreclosed the application of *Leal*, *supra*. A.R. 24-25. The Board dismissed the appeal, Pet. App. 7a-12a, finding that *Leal* was "dispositive," *id.* at 11a.

3. Petitioner filed a petition for review in the Ninth Circuit, which denied his petition in an unpublished memorandum decision. Pet. App. 1a-3a. Petitioner advanced three arguments: First, he asserted that the Board erred under retroactivity principles by applying *Leal* to his case. *Id.* at 2a. Second, he argued that the Ninth Circuit similarly should not have applied its own precedent upholding *Leal* to his case. *Ibid.* (citing *Leal* v. *Holder*, 771 F.3d 1140, 1146 (9th Cir. 2014)). Third, he contended that "the definition of 'crime involving moral turpitude' is unconstitutionally vague as applied to non-fraudulent crimes." *Ibid.*

The court of appeals held that petitioner's first and third arguments were foreclosed by its recent decision in *Olivas-Motta*, *supra.* In *Olivas Motta*, the Ninth Circuit had held that the Board's application of *Leal* to the alien's conviction under the Arizona felony endangerment statute was permissible under retroactivity analysis because the Board's decision did not represent a "change in [the] law." Pet. App. 34a. The court of appeals explained that *Leal* merely clarified the application of the phrase "crime involving moral turpitude" to the specific offense of Arizona felony endangerment. *Id.* at 34a-37a. The *Olivas-Motta* court also rejected the

alien's assertion that the term "crime involving moral turpitude" was unconstitutionally vague. *Id.* at 41a-43a.

The court of appeals in this case found that the *Olivas-Motta* retroactivity and vagueness holdings were directly applicable to petitioner's appeal. Pet. App. 2a. It also held that it did not need to reach petitioner's remaining argument regarding the application of the Ninth Circuit precedent affirming *Leal*, in part because that argument was predicated on the mistaken assumption that *Leal* represented a change in the law. *Ibid.*

4. While petitioner's Ninth Circuit appeal was pending, his state court conviction for felony endangerment was apparently set aside by the state court. Pet. 10 n.1. Petitioner attempted to present evidence to that effect for the first time in his opening brief before the court of appeals. Pet. C.A. Br. 13. In response, the government observed that petitioner did not appear to contend that his conviction could no longer serve as a basis for his removal under immigration laws. Gov't C.A. Br. 29 n.11. The court of appeals did not comment on the issue in its decision, and BIA records do not indicate that he has filed a motion to reopen.

ARGUMENT

Petitioner first contends (Pet. 12-29) that the term "crime involving moral turpitude," 8 U.S.C. 1182(a)(2)(A)(i)(I), is unconstitutionally vague. That contention fails as a threshold matter because petitioner has no liberty interest in discretionary relief from removal that would implicate the Due Process Clause. Moreover, this Court long ago rejected a vagueness challenge to the application of the phrase "crime involving moral turpitude." See *Jordan* v. *De George*, 341 U.S. 223 (1951). There is no reason for a

different result in this case, particularly because petitioner does not contest the Board's holding that felony endangerment qualifies as a "crime involving moral turpitude," and because the courts of appeals have uniformly found that analogous offenses qualify. The courts of appeals are similarly uniform in their rejection of vagueness challenges to the term "crime involving moral turpitude," and this Court has recently denied a petition for a writ of certiorari presenting this issue. See *Martinez-de Ryan* v. *Barr*, 140 S. Ct. 134 (2019) (No. 18-1085). The same result is warranted here.

Petitioner also contends (Pet. 29-40) that principles of non-retroactivity bar the application of *In re Leal*, 26 I. & N. Dec. 20 (B.I.A. 2012), to petitioner's case. But the Ninth Circuit correctly resolved that question based on the proposition that a change in the law is required to trigger retroactivity analysis, and the reasonable conclusion that *Leal* did not represent a qualifying change. That determination does not conflict with decisions of other courts of appeals and does not warrant this Court's review. That is particularly so because the idiosyncratic facts of this case make it a poor vehicle for consideration of either of the questions presented.

1. Petitioner first contends (Pet. 12-29) that the denial of his request for discretionary cancellation of removal under 8 U.S.C. 1229b and 1182(a)(2)(A)(i)(I) was unconstitutional because the phrase "crime involving moral turpitude" is void for vagueness. For the reasons discussed below, see pp. 9-15, *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 on this issue should be denied for the threshold reason that because petitioner has conceded his removability but

seeks discretionary cancellation of removal, he fails to present the vagueness question in a context that implicates the constitutional issue.

a. 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 statutory provision 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 the 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 he is removable as an alien unlawfully present in the United States. Pet. App. 14a-15a; see 8 U.S.C. 1182(a)(6)(A)(i). His petition, therefore, is necessarily limited to challenging the basis for the denial of his request for 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 has no basis for arguing that the statutory term "crime involving moral turpitude," 8 U.S.C. 1182(a)(2)(A)(i)(I), as applied in denying his request for cancellation of removal, is unconstitutionally vague under 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.").

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

This Court already has rejected a constitutional vagueness challenge to the term "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 of the Immigration Act of 1917, ch. 29, 39 Stat. 889. 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; 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 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 peti-

tioner's fraud offense was covered and that he was sufficiently "forewarned" of the consequences of his crimes. *Id.* at 232.

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). Thus, the Court in *Jordan* considered whether the phrase "crime involving moral turpitude" was unconstitutionally vague in the context of the fraud offenses 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.").

That mode of analysis demonstrates that petitioner's vagueness challenge must fail. As was true of the fraud offenses in *Jordan*, there is a judicial consensus that felony endangerment offenses like petitioner's—which penalize "recklessly endangering another person with a substantial risk of death," Ariz. Rev. Stat. Ann. § 13-1201 (2001)—constitute "crime[s] involving moral turpitude." Indeed, the Board pointed to and relied on that consensus in holding that the Arizona statute qualifies. *Leal*, 26 I. & N. Dec. at 25 (citing *Idy* v. *Holder*, 674 F.3d 111, 118-119 (1st Cir. 2012) (recklessly engaging in conduct that places or may place another in danger of serious bodily injury under New Hampshire law

is a crime involving moral turpitude); *Hernandez-Perez* v. *Holder*, 569 F.3d 345, 348 (8th Cir. 2009) (reckless child endangerment under Iowa law is a crime involving moral turpitude); *Keungne* v. *U.S. Att'y Gen.*, 561 F.3d 1281, 1286-1287 (11th Cir. 2009) (per curiam) (recklessly endangering the bodily safety of another under Georgia law is a crime involving moral turpitude); *Knapik* v. *Ashcroft*, 384 F.3d 84, 90 (3d Cir. 2004)).

Petitioner does not point to any judicial decision to the contrary. Nor does he offer any reason to reject the Board's commonsense conclusion that recklessly engaging in conduct that imperils the life of another exhibits "a base contempt for the well-being of the community, which is the essence of moral turpitude." *Leal*, 26 I. & N. Dec. at 25.

Indeed, before this Court, petitioner does not contest that felony endangerment qualifies as a "crime involving moral turpitude," and he does not allege that the phrase is unconstitutionally vague as applied to his offense. Instead, he seeks to advance a "facial challenge to the statute that does not turn on the particular facts," Pet. 14, and he offers generalized arguments about the difficulties the phrase may pose in other, unrelated cases. But a vagueness challenge like this one must be rooted in the circumstances of petitioner's case and particular offense, and cannot be predicated on broad speculation regarding the statute's application to offenses in "marginal" cases. *Jordan*, 341 U.S. at 231.

Further, even if petitioner could raise a vagueness challenge reaching beyond his own crime of conviction, there would be no merit to his contention that the term "crime involving moral turpitude" is unconstitutionally vague. In the now more than 125 years that the term has "been part of the immigration laws," *Jordan*,

341 U.S. at 229, the Board has issued numerous decisions, as have courts on judicial review, that provide substantial 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). And the Board has recently succinctly encapsulated the crimes that qualify, defining "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).

c. Petitioner also errs in asserting (Pet. 20-21) that this Court should "reconsider[ ]" *Jordan* and in contending (Pet. 25-29) that the Court's more recent vagueness precedents support his constitutional challenge. This Court has recently invalidated several entirely distinct statutory provisions on facial vagueness grounds. *United States* v. *Davis*, 139 S. Ct. 2319 (2019); *Sessions* v. *Dimaya*, 138 S. Ct. 1204 (2018); *Johnson*, *supra*. But, as this Court explained in *Davis*, the relevant statute in each of the Court's recent vagueness decisions asked 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. That "ordinary case" analysis introduced "grave uncertainty" into the statute because different judges might "imagine" an "idealized ordinary case" of a crime very differently, *Johnson*, 135 S. Ct. at 2557-2558, and there was no way for any judge to "really

know" if his version was correct, *Dimaya*, 138 S. Ct. at 1214. It was this uncertainty that made the 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*, 135 S. Ct. at 2561).

Unlike in the statutes in *Davis*, *Dimaya*, and *Johnson*, the statutory provision here does not call for the Board or a reviewing court to decide whether a particular offense constitutes a "'crime of moral turpitude'" by imagining some hypothetical "ordinary case" of the crime. To the contrary, it simply calls for the Board or court to consider whether the "elements of the [criminal statute]" in question meet the Board's definition of "crime involving moral turpitude." *Leal* v. *Holder*, 771 F.3d 1140, 1144 (9th Cir. 2014) (citation omitted). The statutory provision here therefore does not contain the feature that rendered the statutes in *Davis*, *Dimaya*, and *Johnson* unconstitutional.

Moreover, in *Dimaya*, the Court cited and relied on *Jordan*, observing that in *Jordan* the Court "chose to test (and ultimately uphold)" the moral-turpitude provision "'under the established criteria of the "void for vagueness" doctrine' applicable to criminal laws." 138 S. Ct. at 1213 (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.*

The other cases on which petitioner relies are even further afield. Petitioner points, for example, to two de-

cisions discussing instances in which state courts misapplied statutes employing phrases similar to "crime involving moral turpitude" to carry out illegitimate policies of discrimination and sterilization. Pet. 22-23 (citing *Hunter* v. *Underwood*, 471 U.S. 222, 226 (1985); *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942)). But the discriminatory misapplication of the statute discussed in *Hunter* occurred 120 years ago; and *Skinner* is 80 years old. The absence of more recent examples is telling, as is the fact that both scenarios involved the improper extension of statutes and arose outside the immigration context. They therefore offer no support for the proposition that the phrase "crime involving moral turpitude" is inherently vague as incorporated into federal immigration law.

d. Review is also unwarranted because, following *Jordan*, the courts of appeals that addressed the question 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* and *Dimaya* has reaffirmed that the term is not unconstitutionally vague. See *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); *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 nonetheless suggests (Pet. 3-4, 12-13) that this Court should grant certiorari because, he maintains, the courts of appeals disagree as to other issues concerning "crime[s] involving moral turpitude." For example, petitioner suggests (Pet. 13) that the courts of appeals disagree as to whether and how principles of deference apply in the context of crimes involving moral turpitude. 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 the BIA's determination of whether a particular crime meets th[at] definition"—a methodology he contends is "the exact inverse of how it works in the Fifth Circuit." But 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, 911-912 (2009) (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 contends (Pet. 3) that the Board and courts have, at times, reached different determinations regarding whether particular federal or state offenses qualify as "crime[s] involving moral turpitude." But pe-

titioner's sole example—misusing a social security number, *ibid.*—is not illustrative of any general confusion regarding the the meaning of "crime involving moral turpitude." Rather, the difference between *Beltran-Tirado* v. *INS*, 213 F.3d 1179 (9th Cir. 2000), and *Hyder* v. *Keisler*, 506 F.3d 388 (5th Cir. 2007), is attributable to the Ninth Circuit's unique interpretation of 42 U.S.C. 408, the federal statute that punishes the misuse of a social security number. In the Ninth Circuit's view, the legislative history of Section 408 makes clear that Congress did not intend for the crime to qualify as one "involving moral turpitude." *Beltran-Tirado*, 213 F.3d at 1185. The Fifth Circuit (and other circuits to consider the issue) have declined to adopt that understanding of the criminal statute. *Hyder*, 506 F.3d 392; accord *Serrato-Soto* v. *Holder*, 570 F.3d 686, 692 (6th Cir. 2009); *Marin-Rodriguez* v. *Holder*, 710 F.3d 734, 740 (7th Cir. 2013); *Guardado-Garcia* v. *Holder*, 615 F.3d 900, 903 (8th Cir. 2010), cert. denied, 563 U.S. 987 (2011). But that dispute with respect to the meaning of Section 408 obviously is not presented in this case. And petitioner does not point to any other conflict in the circuits that would warrant review of the court of appeals' uniform conclusion that the phrase "crime involving moral turpitude" is not unconstitutionally vague.

2. Petitioner's second question presented is also unworthy of this Court's review. Petitioner asserts (Pet. 29-40) that the court of appeals erred in rejecting his challenge to the Board's application of its precedential decision in *Leal* to his case. That assertion lacks merit and does not implicate any conflict among the courts of appeals.

a. The court of appeals correctly rejected petitioner's retroactivity challenge to the Board's application of *Leal*, *supra*. When an administrative agency announces a "new standard" through an adjudication, retroactivity concerns about the application of that standard "must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947). But it is not necessary to perform that assessment every time an administrative board issues an opinion. This Court has long recognized that "[i]t is only when the law changes in some respect that an assertion of nonretroactivity may be entertained." *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529, 534 (1991) (plurality opinion); *Chenery*, 332 U.S. at 203 (considering retroactivity in the context of a "*new* principle" or a "*new* standard") (emphases added). Retroactivity analysis is generally inappropriate where a court—or an administrative agency—merely applies "settled principles and precedents of law to the disputes that come to bar." *James B. Beam Distilling*, 501 U.S. at 534.

That is what happened here. As the court of appeals explained in *Olivas-Motta* v. *Whitaker*, 910 F.3d 1271 (9th Cir. 2018), petition for cert. pending, No. 19-282 (filed Aug. 29, 2019), the Board's decision in *Leal* did not represent a "change in law," because the Board simply applied 8 U.S.C. 1227(a)(2)(A)(ii) to the dispute in Leal's case and concluded that Arizona felony endangerment qualified as a "crime involving moral turpitude." Pet. App. 34a-35a. That holding was no more retroactive than a judicial opinion applying a statute to the facts of a particular litigant's suit. *Id.* at 35a.

Moreover, *Leal* does not resemble the sort of judicial opinions that have been held to "establish a new principle of law." *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106 (1971). *Leal* did not "overrul[e] clear past precedent on which litigants may have relied" or "decid[e] an issue of first impression whose resolution was not clearly foreshadowed." *Ibid.* Before *Leal*, the Board had only addressed Arizona felony endangerment in non-precedential decisions that "do not bind future parties." Pet. App. 34a (citation omitted). But *Leal*'s resolution was "clearly foreshadowed" by multiple precedential opinions of the circuit courts holding that analogous endangerment statutes from other States qualified as "crime[s] involving moral turpitude." For example, eight years before *Leal* and six years before the Arizona State court accepted petitioner's guilty plea, the Third Circuit held that New York's felony endangerment offense constituted a "crime involving moral turpitude" because "moral turpitude inheres in the conscious disregard of a substantial and unjustifiable risk of severe harm or death." *Knapik*, 384 F.3d at 90 n.5.

In *Leal*, the Board cited and quoted *Knapik* and subsequent decisions from other court of appeals supporting the conclusion that a felony endangerment offense like Arizona's—which covers "recklessly endangering another person with a substantial risk of imminent death"—qualifies as a "crime involving moral turpitude. 26 I. & N. Dec. at 25 (citing *Idy*, 674 F.3d at 118-119; *Hernandez-Perez*, 569 F.3d at 348; *Keungne*, 561 F.3d at 1286-1287; *Knapik*, 384 F.3d at 90); see also, pp. 11-12, *supra*. *Leal* was therefore a natural and predictable application of existing precedent.

Indeed, petitioner barely challenges the Ninth Circuit's holding that there was no change in the law. Petitioner briefly asserts (Pet. 5, 33) that he structured his plea deal in 2001 based on published Board decisions suggesting that "crimes with a mens rea of recklessness would not involve moral turpitude." But as the court of appeals observed in *Olivas-Motta*, the only published Board opinions that petitioner has pointed to concern the entirely distinct offense of assault. Pet. App. 36a-37a. And petitioner was not convicted until 2010, by which point three courts of appeals had found that analogous endangerment statutes qualified as "crime[s] involving moral turpitude." See *Hernandez-Perez*, 569 F.3d at 348; *Keungne*, 561 F.3d at 1286-1287; *Knapik*, 384 F.3d at 90. Petitioner offers no reason why he could not have altered his plea in light of those precedents.[3]

Petitioner's main argument (Pet. 37) is instead that the court of appeals should have applied a "bright-line rule: if a statute is so ambiguous that its interpretation triggers *Chevron* deference, [the agency's] interpretation cannot apply retroactively." As a general matter, that proposed rule would be difficult to square with *Chenery*, which held that retroactivity concerns with respect to

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[3] In the certiorari petition's statement, but not in the argument section, petitioner suggests (Pet. 8-9) that, until 2012, the Board held that Arizona felony endangerment did not constitute a "crime involving moral turpitude." But petitioner's account is predicated on unpublished, non-precedential Board decisions that mistakenly treated felony endangerment as akin to assault. See Pet. App. 34a-37a. Other unpublished, nonprecedential Board decisions correctly held the Arizona's felony endangerment offense qualified. See, *e.g.*, *In re Jorge Lopez-Orosco*, Axxx xx2 251, 2010 WL 5635156 (B.I.A. 2010). And none of those opinions purported to bind future parties. Pet. App. 34a.

agency adjudications should be balanced against the "mischief[s]" that might occur if a "new principle" is only applied prospectively. 332 U.S. at 203. But whatever the merits of petitioner's proposed approach in cases where an agency decision represents a change in the law, it would not apply where—as here—that threshold condition for retroactivity analysis is unmet. To apply the rule in such circumstances would upend the principle that a retroactivity challenge may proceed "only when the law changes in some respect." *James B. Beam Distilling*, 501 U.S. at 534 (plurality opinion).

b. Petitioner is also mistaken in his assertion (Pet. 29-32) that this case implicates confusion in the lower courts regarding retroactivity principles. Petitioner asserts that the circuits vary in the way they apply *Chenery*'s command to balance retroactivity concerns against the "mischief[s]" of nonretroactivity. Pet. 29 (quoting 332 U.S. at 203). But petitioner does not point to *any* court of appeals that would allow a retroactivity challenge to move forward where there has been no change in the law.

Petitioner suggests (Pet. 29-31; 34-39) that the Tenth and Fifth Circuits have adopted his favored approach. But neither court has suggested that application of a Board decision should be deemed impermissibly retroactive in the absence of a change in the law. To the contrary, in one of the decisions on which petitioner principally relies, the Tenth Circuit held that a stringent retroactivity analysis was necessary because the Board had issued a "new agency rule" that was contrary to the interpretation of the relevant statutory provisions in a binding court of appeals decision. *De Niz Robles* v. *Lynch*, 803 F.3d 1165, 1173 (2015) (Gorsuch, J.). And,

in the Fifth Circuit precedent petitioner cites, the court similarly emphasized that it was denying retroactive effect to a Board decision that had "drastically chang[ed] the landscape." *Monteon-Camargo* v. *Barr*, 918 F.3d 423, 431 (2019). Both cases are therefore very far from this one, in which the Board decision in question expressly relied on existing court of appeals precedents in applying the federal statute to a particular state offense.

Moreover, petitioner exaggerates the alleged conflict regarding the appropriate retroactivity analysis even where (unlike here) a change in the law has occurred. Petitioner contends (Pet. 29-32) that while other circuits apply a multi-factor balancing test to decide when a Board decision should be applied under retroactivity analysis, the Fifth and Tenth Circuit have rejected that approach in favor of a flat bar on the retroactive application of Board decisions that have been afforded *Chevron* deference. That is incorrect. In *De Niz Robles*, the Tenth Circuit held that courts should deny retroactive effect to a Board opinion announcing a new rule under step two of the *Chevron* analysis, that is contrary to a prior court of appeals decision, as permitted by *National Cable & Telecommunications Ass'n* v. *Brand X Internet Services*, 545 U.S. 967 (2005). The court reasoned that that form of administrative decision is the functional equivalent of a legislative rule that emerges from notice and comment. *De Niz Robles*, 803 F.3d at 1173. But the court of appeals specifically observed that this approach was compatible with the multi-factor test that the Tenth Circuit itself generally applies when considering the retroactive effect of an agency decision. *Id.* at 1177. And while the Fifth Circuit has declined to apply a rigid set of factors when it

performs retroactivity balancing, it has never attempted to announce a bright-line rule of any kind. Instead, like every other court of appeals, it has appropriately recognized that *Chenery* requires balancing the harms and benefits of retroactivity when an agency announces a "new standard" in an adjudication. *Monteon-Camargo*, 918 F.3d at 430 (quoting *Chenery*, 332 U.S. at 203).

Further, as petitioner himself acknowledges (Pet. 40), to the extent there is uncertainty regarding the retroactivity of Board decisions, it is primarily with respect to cases that implicate *Brand X* because they involve a Board decision that interpreted a statute differently than a prior judicial decision. That circumstance is not presented here, and so any confusion on that issue would not warrant review of this case.

3. Finally, even if this Court were inclined to review a vagueness or retroactivity challenge predicated on the application of the phrase "crime involving moral turpitude," this case would be an exceedingly poor vehicle to do so. As noted, because the question arises here in the context of the denial of a request for the discretionary relief of cancellation of removal, it does not implicate the constitutional vagueness concerns raised in other contexts. See pp. 8-9, *supra*. And the idiosyncratic and uncertain facts of petitioner's case would further complicate review in at least two ways.

First, petitioner asserts (Pet. 10 n. 1) that the state conviction that makes him ineligible for cancellation of removal has now been set aside by the state court. While the government has no basis for assessing whether any state court action would affect petitioner's immigration proceedings, petitioner's invocation of the status of

his state court conviction in his certiorari petition suggests that he may intend to pursue relief on that basis. And, regardless, it would be preferable to consider a vagueness challenge in the context of a conviction that is undisputedly valid for immigration purposes.

Second, nine years passed between petitioner's initial plea agreement in 2001 and his conviction in 2010. A.R. 100-104; 134-135. The record does not reveal the cause of this extensive delay, which may cloud review of petitioner's retroactivity challenge. That challenge depends in part on the assertion (Pet. 5, 33) that petitioner relied on the state of the law at the time he entered his plea. Petitioner claims the relevant year for that plea is 2001, but the date of conviction was 2010, and there is no obvious way on the present record to determine which date would be the appropriate one for present purposes.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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