

No. 20-370

In the Supreme Court of the United States

KONSTANTIN BUGARENKO, AKA KOSTYANTYN
BUGARENKO, PETITIONER

v.

WILLIAM P. BARR, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

JEFFREY B. WALL
*Acting Solicitor General
Counsel of Record*

JEFFREY BOSSERT CLARK
*Acting Assistant Attorney
General*

DONALD E. KEENER

JOHN W. BLAKELEY

BRYAN S. BEIER

Attorneys

*Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217*

QUESTION PRESENTED

Whether the term “crime involving moral turpitude” in 8 U.S.C. 1227(a)(2)(A)(i) is unconstitutionally vague as applied to a conviction for aggravated assault with a deadly weapon in violation of Pennsylvania state law.

ADDITIONAL RELATED PROCEEDING

Supreme Court of the United States:

Bugarenko v. Barr, No. 19A1045 (June 29, 2020) (denying stay of removal)

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument.....	5
Conclusion	14

TABLE OF AUTHORITIES

Cases:

<i>Boggala v. Sessions</i> , 866 F.3d 563 (4th Cir. 2017), cert. denied, 138 S. Ct. 1296 (2018)	13
<i>Broadrick v. Oklahoma</i> , 413 U.S. 601 (1973).....	9
<i>Dominguez-Pulido v. Lynch</i> , 821 F.3d 837 (7th Cir. 2016).....	13
<i>G-R-, In re</i> , 2 I. & N. Dec. 733 (B.I.A. 1946, A.G. 1947).....	8
<i>Garcia-Martinez v. Barr</i> , 921 F.3d 674 (7th Cir. 2019).....	8
<i>Holder v. Humanitarian Law Project</i> , 561 U.S. 1 (2010)	9
<i>Hudson v. Esperdy</i> , 290 F.2d 879 (2d Cir.), cert. denied, 368 U.S. 918 (1961)	12
<i>Islas-Veloz v. Barr</i> , 140 S. Ct. 2704 (2020).....	6
<i>Jankowski-Burczyk v. INS</i> , 291 F.3d 172 (2d Cir. 2002)	3
<i>Johnson v. United States</i> , 135 S. Ct. 2551 (2015).....	9, 10, 11
<i>Jordan v. De George</i> , 341 U.S. 223 (1951).....	4, 5, 6, 7, 10
<i>Leal v. Holder</i> , 771 F.3d 1140 (9th Cir. 2014).....	12
<i>Martinez-de Ryan v. Barr</i> , 140 S. Ct. 134 (2019).....	6
<i>Martinez-de Ryan v. Sessions</i> , 895 F.3d 1191 (9th Cir.), amended and superseded, 909 F.3d 247 (9th Cir. 2018), cert. denied, 140 S. Ct. 134 (2019)	13

IV

Cases—Continued:	Page
<i>Mercado Ramirez v. Barr</i> , 140 S. Ct. 1105 (2020)	6
<i>Moreno v. Attorney Gen. of the U.S.</i> , 887 F.3d 160 (3d Cir. 2018)	4, 13
<i>Nunez v. Holder</i> , 594 F.3d 1124 (9th Cir. 2010)	13
<i>O-, In re</i> , 3 I. & N. Dec. 193 (B.I.A. 1948)	8
<i>Olivas Motta v. Barr</i> , 140 S. Ct. 1105 (2020)	6
<i>Pichardo v. INS</i> , 104 F.3d 756, 760 (5th Cir. 1997)	8
<i>Sessions v. Dimaya</i> , 138 S. Ct. 1204 (2018)	9, 10, 11, 12
<i>Silva-Trevino, In re</i> , 26 I. & N. Dec. 826 (B.I.A. 2018)	11
<i>Sosa-Martinez v. U.S. Att’y Gen.</i> , 420 F.3d 1338 (11th Cir. 2005)	8
<i>Tseung Chu v. Cornell</i> , 247 F.2d 929 (9th Cir.), cert. denied, 355 U.S. 892 (1957)	12
<i>United States v. Davis</i> , 139 S. Ct. 2319 (2019)	11
<i>United States ex rel. Circella v. Sahli</i> , 216 F.2d 33 (7th Cir. 1954), cert. denied, 348 U.S. 964 (1955)	12
<i>United States ex rel. Zaffarano v. Corsi</i> , 63 F.2d 757 (2d Cir. 1933)	9
<i>Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.</i> , 455 U.S. 489 (1982)	9
<i>Weedin v. Tayokichi Yamada</i> , 4 F. 2d 455 (9th Cir. 1925)	5, 8
<i>Wu, In re</i> , 27 I. & N. Dec. 8 (B.I.A. 2017)	8
<i>Wyngaard v. Kennedy</i> , 295 F.2d 184 (D.C. Cir.), cert. denied, 368 U.S. 926 (1961)	12
<i>Yousefi v. INS</i> , 260 F.3d 318 (4th Cir. 2001)	9
Statutes:	
Immigration Act of 1917, ch. 29, § 19, 39 Stat. 889	6
Immigration and Nationality Act, 8 U.S.C. 1101 <i>et seq.</i>	2

V

Statutes—Continued:	Page
8 U.S.C. 1182(a)(2)(A)(i)(I)	10
8 U.S.C. 1182(h)	3
8 U.S.C. 1227(a)(2)(A)(i)	2, 3
8 U.S.C. 1227(a)(2)(A)(i)(I)	5
8 U.S.C. 1255	3
18 Pa. Cons. Stat. Ann. (West Supp. 1997):	
§ 2702(a)(1)	2
§ 2702(a)(4)	2
§ 2702(b)	2
Miscellaneous:	
Ira J. Kurzban, <i>Kurzban’s Immigration Law</i> <i>Sourcebook</i> (16th ed. 2018-2019)	10

In the Supreme Court of the United States

No. 20-370

KONSTANTIN BUGARENKO, AKA KOSTYANTYN
BUGARENKO, PETITIONER

v.

WILLIAM P. BARR, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-9a) is not published in the Federal Reporter but is reprinted at 798 Fed. Appx. 741. The decisions of the Board of Immigration Appeals (Pet. App. 10a-12a and Pet. App. 13a-25a) are unreported. The decision of the immigration judge (Pet. App. 26a-37a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 2020. A petition for rehearing was denied on April 24, 2020 (Pet. App. 38a-39a). The petition was filed on September 18, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a citizen of the Ukraine, was convicted of aggravated assault with a deadly weapon in violation of

Pennsylvania state law two years after he entered the United States. Pet. App. 2a. An immigration judge subsequently determined that he was removable under 8 U.S.C. 1227(a)(2)(A)(i), a provision of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, that makes an alien removable if he is “convicted of a crime involving moral turpitude committed within five years” of his date of admission, 8 U.S.C. 1227(a)(2)(A)(i). Pet. App. 26a-37a. The Board of Immigration Appeals (Board) affirmed the immigration judge’s decision and denied a motion to reconsider. *Id.* at 10a-25a. The court of appeals denied petitioner’s consolidated petitions for judicial review, holding that precedent foreclosed petitioner’s claim that the phrase “crime involving moral turpitude,” in 8 U.S.C. 1227(a)(2)(A)(i), is unconstitutionally vague. Pet. App. 7a-9a.

1. a. Petitioner was admitted to the United States as a permanent resident alien in 1996. Pet. App. 2a. In 1998, he was convicted of multiple counts of aggravated assault with a deadly weapon under Pennsylvania law, 18 Pa. Cons. Stat. Ann. 2702(a)(4) (West Supp. 1997),¹ for “driving while intoxicated and causing bodily injury to six victims.” Pet. App. 2a; see Administrative Record (A.R.) 1297-1300; see also A.R. 1014-1015, 1034-1035,

¹ This statute defines aggravated assault to include assault with a deadly weapon as a second-degree felony and, as a first-degree felony, intentionally, knowingly or recklessly causing “serious bodily injury” to another “under circumstances manifesting extreme indifference to the value of human life.” See 18 Pa. Cons. Stat. Ann. § 2702(a)(1) and (4) (West Supp. 1997); see also *id.* § 2702(b) (setting forth grading of offenses). Below, petitioner claimed that he might have been convicted of the first-degree felony variant of this offense. That contention was rejected by the Board (Pet. App. 20a-22a) and the court of appeals (*id.* at 6a-7a), and petitioner does not renew it before this Court.

1036-1037, 1046-1047, 1056-1057 (aggravated-assault-with-a-deadly-weapon counts).² Based on the same incident, petitioner was also convicted of reckless endangerment, driving under the influence of alcohol or a controlled substance, aggravated assault by vehicle while driving under the influence, and failing to stop after causing an accident. A.R. 1297-1300.

Over the ensuing years, petitioner “was convicted of numerous additional DUI offenses.” Pet. App. 2a. For example, in 2004, petitioner pleaded guilty to two counts of driving with an alcohol concentration of 0.16% or higher based on two separate drunk driving incidents that year. A.R. 1077-1085, 1087-1098. In January 2017, petitioner again pleaded guilty to the same offense, stemming from a June 2016 incident for which he also pleaded guilty to driving on a suspended license. A.R. 1297.

b. This final incident brought petitioner to the attention of immigration authorities. A.R. 1009; see Pet. App. 2a. Based on his 1998 conviction for assault with a deadly weapon, petitioner was charged with being removable from the United States pursuant to 8 U.S.C. 1227(a)(2)(A)(i), which provides that an alien is removable if he has been “convicted of a crime involving moral turpitude committed within five years * * * after the date of admission * * * for which a sentence of one year or longer may be imposed.” Pet. App. 2a. Petitioner sought discretionary relief from removal, in the form of a waiver of inadmissibility pursuant to 8 U.S.C. 1182(h) coupled with an adjustment of status pursuant to 8 U.S.C. 1255. Pet. App. 2a; see *Jankowski-Burczyk v. INS*, 291 F.3d 172, 175 (2d Cir. 2002).

² References to the Administrative Record are to the record filed on May 9, 2019, in C.A. No. 19-1933.

The immigration judge (IJ) found petitioner removable as charged. Pet. App. 2a; see A.R. 135-138, 768-769. Following a hearing, the IJ also issued an opinion finding that petitioner’s case did not merit a grant of discretionary relief from removal. Pet. App. 36a. The IJ explained that the positive equities shown by petitioner were “outweighed by the seriousness of his extensive criminal history,” and that “the best interests of the United States would not be served by granting” petitioner’s request for relief. *Ibid.*³ The Board dismissed petitioner’s administrative appeal, *id.* at 13a-25a, and subsequently denied a motion to reconsider, *id.* at 10a-12a.

2. The court of appeals denied consolidated petitions for review of the Board’s decision and its denial of the motion to reconsider. Pet. App. 1a-9a. As relevant, the court found that petitioner’s claim that the phrase “crime involving moral turpitude” is unconstitutionally vague was foreclosed by *Jordan v. De George*, 341 U.S. 223 (1951), and *Moreno v. Attorney Gen. of the U.S.*, 887 F.3d 160 (3d Cir. 2018). Pet. App. 8a.

The court of appeals explained that, under *Jordan* and *Moreno*, “[v]agueness challenges are evaluated on

³ In particular, the IJ explained that that petitioner’s criminal history “involve[s] behavior that poses a serious danger to the residents of the [C]ommonwealth of Pennsylvania and beyond”; his “problems with alcohol had been habitual[;] and the repeated punishment he’s received for his criminal activities has not deterred him from further misconduct.” Pet. App. 34a. The IJ further declared that he was “not persuaded that [petitioner] will be willing or able to avoid dangerous and criminal behavior in light of his recidivism.” *Ibid.* He observed, for example, that petitioner’s convictions “also contain[ed] treatment provisions and classes from the [C]ommonwealth of Pennsylvania probation offices,” but petitioner “continued to reoffend even after going through” them. *Id.* at 35a.

a ‘case by case basis.’” Pet. App. 8a (citation omitted). It observed that, in *Jordan*, this Court determined that the phrase “crime involving moral turpitude” was “not void for vagueness as applied to a conviction for fraud because it gave ‘sufficiently definite warning as to the proscribed conduct.’” *Ibid.* (quoting *Jordan*, 341 U.S. at 231-232). The court of appeals found that, as in *Jordan*, petitioner was “‘sufficiently forewarned’” that the crime of assault with a deadly weapon was “‘morally turpitudinous.’” *Ibid.* (quoting *Jordan*, 341 U.S. at 232 and citing, *e.g.*, *Weedin v. Tayokichi Yamada*, 4 F. 2d 455, 457 (9th Cir. 1925) (holding that assault with a deadly weapon “involves moral turpitude beyond any question.”)). And the court rejected the assertion that it was not clear that petitioner’s particular offense was a crime of moral turpitude, explaining that courts “apply a categorical approach” in analyzing whether a crime involves moral turpitude. *Id.* at 9a.

ARGUMENT

Petitioner renews his contention (Pet. 1, 5-15) that the term “crime involving moral turpitude,” 8 U.S.C. 1227(a)(2)(A)(i)(I), is unconstitutionally vague. That contention is foreclosed by this Court’s decision in *Jordan v. De George*, 341 U.S. 223 (1951), in which the Court rejected a vagueness challenge to the application of the term “crime involving moral turpitude.” *Id.* at 232. Petitioner urges this Court to grant review in order to overrule or limit that almost 70-year-old precedent, but there is no reason to do so. Petitioner cannot point to any disagreement as to whether his particular offense qualifies as a “crime involving moral turpitude,” nor can he point to any court of appeals that has held that the term “crime involving moral turpitude” is unconstitutionally vague. To the contrary, the courts of

appeals that have considered that assertion have uniformly rejected it, and this Court has recently denied four petitions for certiorari presenting this issue. See *Islas-Veloz v. Barr*, 140 S. Ct. 2704 (2020) (No. 19-627); *Olivas Motta v. Barr*, 140 S. Ct. 1105 (2020) (No. 19-282); *Mercado Ramirez v. Barr*, 140 S. Ct. 1105 (2020) (No. 19-284); *Martinez-de Ryan v. Barr*, 140 S. Ct. 134 (2019) (No. 18-1085). The same result is warranted here.

1. a. As petitioner acknowledges (Pet. 6), 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. *Jordan*, 341 U.S. at 232. The Court explained that “[t]he term ‘moral turpitude’ has deep roots in the law” and “has been used as a test in a variety of situations.” *Id.* at 227. The Court further observed that, “[w]ithout exception, federal and state courts have held that a crime in which fraud is an ingredient involves moral turpitude.” *Ibid.* In light of that precedent, the Court concluded that the 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.*, both the Court and the dissent considered it at length, see *id.* at 229-232; *id.* at 232-245 (Jackson, J., dissenting), and

the Court ultimately held that the term “crime involving moral turpitude” is not unconstitutionally vague. *Id.* at 229-232.

In reaching the conclusion that the term is not void for vagueness, 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.” *Jordan*, 341 U.S. 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.

Further, the Court held that, “[w]hatever else the phrase ‘crime involving moral turpitude’ may mean in peripheral cases,” it was clear that petitioner’s fraud offense was covered and that he was “sufficiently forewarned” of the consequences of his crimes. *Jordan*, 341 U.S. at 232.

b. The same result obtains here. There is no question that petitioner was “sufficiently forewarned” that the crime of assault with a deadly weapon is “morally turpitudinous,” given the long-standing administrative and judicial consensus that such offenses constitute “crime[s] involving moral turpitude.” Pet. App. 8a (quoting *Jordan*, 341 U.S. at 232).

Even before the enactment of the INA in 1952, the Board and the Attorney General consistently held that

the offense of intentionally or knowingly assaulting another person using a deadly weapon qualified as a crime involving moral turpitude. See, *e.g.*, *In re O-*, 3 I. & N. Dec. 193, 197 (B.I.A. 1948) (explaining that assault with a deadly weapon “is inherently base * * * because an assault aggravated by the use of a dangerous or deadly weapon is contrary to accepted standards of morality in a civilized society,” and declaring that “it is quite obvious that an assault by use of a dangerous or deadly weapon always constituted conduct contrary to acceptable human behavior”); *In re G-R-*, 2 I. & N. Dec. 733, 734 & n.1 (B.I.A. 1946, A.G. 1947) (collecting authorities). And since the INA was enacted, the Board has continued to hold that assaults involving the non-negligent use of a deadly weapon qualify as “crimes involving moral turpitude.” See, *e.g.*, *In re Wu*, 27 I. & N. Dec. 8, 11 (2017) (explaining that assault with a deadly weapon is necessarily morally turpitudinous).

The courts of appeals have been similarly consistent in holding that assaults or batteries involving the non-negligent use of a deadly weapon constitute “crimes involving moral turpitude.” Almost a century ago, the Ninth Circuit observed that assault with a deadly weapon “involves moral turpitude beyond any question.” *Weedin v. Tayokichi Yamada*, 4 F. 2d 455, 457 (9th Cir. 1925). In 1997, the Fifth Circuit concluded that the very Pennsylvania state offense for which petitioner was convicted qualified as a crime involving moral turpitude under the INA. *Pichardo v. INS*, 104 F.3d 756, 760. And the other circuits that have addressed the issue have uniformly agreed that assault with a deadly weapon is a crime involving moral turpitude. See, *e.g.*, *Garcia-Martinez v. Barr*, 921 F.3d 674, 680 (7th Cir. 2019); *Sosa-Martinez v. U.S. Att’y Gen.*, 420 F.3d 1338,

1342 (11th Cir. 2005); *Yousefi v. INS*, 260 F.3d 318, 327 (4th Cir. 2001) (per curiam); *United States ex rel. Zafarano v. Corsi*, 63 F.2d 757, 758 (2d Cir. 1933).

Indeed, before this Court and the court of appeals, petitioner has not attempted to contend that assault with a deadly weapon does not qualify as a crime of moral turpitude. And even before the Board, petitioner did not “meaningfully dispute” that a conviction for that form of assault is “for a crime involving moral turpitude.” Pet. App. 20a. The absence of such an argument should be dispositive.

c. Petitioner contends (Pet. 7-9), however, that the Court’s more recent decisions in *Johnson v. United States*, 135 S. Ct. 2551 (2015,) and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), establish that the “proper test” for vagueness is a “facial” analysis that makes it irrelevant whether petitioner’s conduct clearly falls within the statute’s reach. Pet. 7. That is incorrect. As *Jordan*’s analysis demonstrates, this Court will typically begin by “consider[ing] 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). This approach is rooted in the fundamental principle that “a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others.” *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973).

Thus, the Court in *Jordan* considered whether the term “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.”). And neither *Dimaya* nor *Johnson* purported to overrule *Jordan*’s approach. To the contrary, in both of the more recent cases, the Court observed that the statutes in question were sufficiently vague that their application was uncertain even with respect to the petitioners. See *Johnson*, 135 S. Ct. at 2559–2560 (observing that application of the statute to petitioner was not “so easy after all”); see also *Dimaya*, 138 S. Ct. at 1214 n.3 (making the same observation).

In any event, even if petitioner could raise a vagueness challenge reaching beyond his own crime of conviction, there would be no merit to his contention (Pet. 11-14) 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 and 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 “reprehensible conduct and a culpable mental state.” *In re Silva-Trevino*, 26 I. & N. Dec. 826, 833-834 (2016) (citations omitted).

d. Petitioner also errs in contending (Pet. 7-11) that *Johnson* and *Dimaya* more generally suggest that *Jordan* should be overruled or limited to its facts. Both cases involved entirely distinct statutory provisions from the one at stake here. As this Court explained in *United States v. Davis*, 139 S. Ct. 2319 (2019), the relevant statute in each of the Court’s recent vagueness precedents required courts to determine whether a crime qualified as a “violent felony” or “crime of violence” by “estimat[ing] * * * the degree of risk posed by a crime’s imagined ‘ordinary case.’” *Id.* at 2326. That “ordinary case” analysis introduced “grave uncertainty” into the statutes 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 or her 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 the statutes in *Dimaya* and *Johnson*, the provision of the INA applicable here does not call for the Board or a reviewing court to decide whether a particular offense constitutes a “crime 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). That analysis does not require the Board to engage in any indeterminate task equivalent to imagining the “ordinary case” of a particular offense.

Moreover, as petitioner himself acknowledges (Pet. 6), *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 (citation omitted). In citing *Jordan* with approval, the Court did not suggest that its subsequent void-for-vagueness decisions, including *Dimaya* itself, actually require overruling or limiting *Jordan*’s holding or reasoning. See *ibid.*

2. Review is also unwarranted because, following *Jordan*, the courts of appeals that have addressed the question have all held that the term “crime involving moral turpitude” is not unconstitutionally vague. See, e.g., *Wyngaard v. Kennedy*, 295 F.2d 184, 185 (D.C. Cir.) (per curiam), cert. denied, 368 U.S. 926 (1961); *Hudson v. Esperdy*, 290 F.2d 879, 880 (2d Cir.) (per curiam), cert. denied, 368 U.S. 918 (1961); *Tseung Chu v. Cornell*, 247 F.2d 929, 938-939 (9th Cir.), cert. denied, 355 U.S. 892 (1957); *United States ex rel. Circella v. Sahli*, 216 F.2d 33, 40 (7th Cir. 1954), cert. denied, 348

U.S. 964 (1955). And every court of appeals to have considered the issue following *Johnson* or *Dimaya* has reaffirmed that the term is not unconstitutionally vague. See *Martinez-de Ryan v. Sessions*, 895 F.3d 1191 (9th Cir.), amended and superseded, 909 F.3d 247 (9th Cir. 2018), cert. denied, 140 S. Ct. 134 (2019); *Moreno v. Attorney Gen. of the U.S.*, 887 F.3d 160, 165-166 (3rd 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).⁴

Petitioner briefly suggests (Pet. 9-10) that, in applying the term “crime involving moral turpitude,” the courts of appeals have reached “legally inconsistent decisions.” But petitioner does not and cannot allege that there is any such disagreement with respect to the state felony for which he was convicted. See pp. 7-9, *supra*. Nor does he actually point to a circuit conflict with respect to whether some other particular state offense

⁴ Petitioner errs in asserting (Pet. 8) that the Ninth Circuit has recognized that courts are generally “at a loss to determine whether a conviction under a particular statute renders a noncitizen removable” as an alien convicted of a crime involving moral turpitude. The case cited by petitioner, *Nunez v. Holder*, 594 F.3d 1124 (9th Cir. 2010), states only that determining whether a crime is turpitudinous based on considerations *other than* “judicially established categories of criminal conduct” might well pose difficulties. *Id.* at 1127. That statement is irrelevant here because the judiciary has long recognized that assault with a deadly weapon falls into a “categor[y] of criminal conduct,” *ibid.*, that is readily identified as morally turpitudinous. See pp. 7-9, *supra*. In any event, petitioner overlooks the fact that the Ninth Circuit’s statement was made before that court conclusively rejected a void-for-vagueness challenge to the term “crime [involving] moral turpitude” in *Martinez-de Ryan*, *supra*.

constitutes a crime of moral turpitude. He cites administrative decisions holding some forms of a broad category of offense turpitudinous and others not—but that is a result to be expected from the application of a single standard to a variety of different state and federal statutes. And the circuit court decisions he cites mostly represent instances in which a court of appeals reversed or remanded a particular administrative decision, a familiar disposition on judicial review of agency action that in no way suggests disagreement among the courts themselves.

Petitioner therefore has not pointed to any conflict in the circuits, even on the application of the term “crime involving moral turpitude,” that would warrant this Court’s review—much less warrant review of his sweeping contention that the term, which has been embedded in immigration law for more than a century, is unconstitutionally vague on its face.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General
 JEFFREY BOSSERT CLARK
*Acting Assistant Attorney
 General*
 DONALD E. KEENER
 JOHN W. BLAKELEY
 BRYAN S. BEIER
Attorneys

DECEMBER 2020