No. _____

In The
Supreme Court of the United States

JOSE JESUS MERCADO-RAMIREZ,

Petitioner,

v.

WILLIAM P. BARR, ATTORNEY GENERAL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Immigration and Nationality Act authorizes the Attorney General to deport noncitizens who have been convicted of certain "crime[s] involving moral turpitude." 8 U.S.C. § 1182(a)(2)(A)(i)(I) (CIMT). Because "there are no statutorily established elements for a crime involving moral turpitude," this phrase's meaning has been "left to the BIA and courts to develop through case-by-case adjudication." *Morales-Garcia v. Holder*, 567 F.3d 1058, 1062 (9th Cir. 2009).

Eighteen years ago, Mr. Mercado pleaded guilty to reckless endangerment under Arizona law. At that point in time, the BIA had repeatedly held that this crime did *not* involve moral turpitude. More than a decade after Mr. Mercado's plea, however, the agency reversed course. The agency initiated removal proceedings against Mr. Mercado, applied its new interpretation retroactively, and ordered him removed. His conviction was ultimately set aside.

This Petition presents two questions:

1. Whether the phrase "crime involving moral turpitude" is void for vagueness.

2. Whether an agency may apply its new rule retroactively to a noncitizen who pleaded guilty relying on the agency's previous rule.

PARTIES, RULE 29.6 STATEMENT, AND RELATED PROCEEDINGS

The parties to the proceeding below were Petitioner Jose Jesus Mercado-Ramirez, and Respondent William P. Barr,[1] in his official capacity as Acting Attorney General of the United States.

There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

All proceedings directly related to the case, per Rule 14.1(b)(iii), are as follows:

- *In the Matter of Jose Jesus Mercado-Ramirez*, U.S. Department of Justice Executive Office of Immigration Review, Immigration Court. Decision issued March 26, 2013.
- *In re Jose Jesus Mercado-Ramirez*, U.S. Department of Justice Executive Office of Immigration Review, Board of Immigration Appeals. Decision issued July 21, 2014.
- *Mercado-Ramirez v. Whitaker*, No. 14-72415, U.S. Court of Appeals for the Ninth Circuit. Panel decision issued September 10, 2018, and Order denying rehearing issued April 1, 2019.

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[1] William P. Barr is substituted for Matthew Whitaker, who was substituted for former Attorney General Jefferson B. Sessions III, who was substituted for former Attorney General Loretta Lynch, who in turn was substituted for former Attorney General Eric H. Holder, Jr.

PARTIES, RULE 29.6 STATEMENT, AND RELATED PROCEEDINGS—Continued

- *Olivas-Motta v. Whitaker*, No. 14-70543, U.S. Court of Appeals for the Ninth Circuit. Decision issued September 10, 2019, and Order denying rehearing issued April 1, 2019.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The court of appeals' decision (App.1a–3a) is unreported. 745 Fed. App'x 677. The lower court relied on its contemporaneous published decision in *Olivas-Motta v. Whitaker* (App.26a–54a). The opinion of the Board of Immigration Appeals (App.7a–12a) and the immigration judge's order (App.13a–24a) are unreported.

JURISDICTION

The order and amended judgment of the court of appeals was entered on December 19, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions—Ariz. Rev. Stat. ("A.R.S.") §§ 13-1201, 28-1381, 8 U.S.C. §§ 1182, 1229b(b)—are reproduced at App.55a–59a.

INTRODUCTION

If Congress criminalized "immorality," courts would swiftly declare that law unconstitutional—and for good reason. That law would "leave people with no

sure way to know what consequences w[ould] attach to their conduct." *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019). It would also permit Congress to "hand off" the "difficult business" of legislation to the courts and the administrative bureaucracy. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1228 (2018) (Gorsuch, J., concurring). Worse, it would "impermissibly delegate[] basic policy matters" to other branches of government "for resolution on an ad hoc and subjective basis." *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972); *accord Gundy v. United States*, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting) (citing same). Invoking morality would invite "unelected judges and prosecutors" to "condemn all that they personally disapprove and for no better reason than they disapprove it." *Dimaya*, 138 S. Ct. at 1228 (Gorsuch, J., concurring) (cleaned up).

Efforts to define this phrase have been a "consistent failure," *Nuñez v. Holder*, 594 F.3d 1124, 1130 (9th Cir. 2010), "schizophrenic," *Hernandez-Martinez v. Ashcroft*, 329 F.3d 1117, 1119 (9th Cir. 2003) (Wardlaw, J., concurring), "utterly illogical," and "defying common sense," *Marmolejo-Campos v. Holder*, 558 F.3d 903, 919 (9th Cir. 2009) (en banc) (Berzon, J., dissenting, joined by Pregerson, Fisher, and Paez, JJ.). Other judges have described the term as "notoriously baffling," *Garcia-Meza v. Mukasey*, 516 F.3d 535, 536 (7th Cir. 2008), "meaningless," "rife with contradiction," and "an embarrassment to a modern legal system," *Arias v. Lynch*, 834 F.3d 823, 831, 835 (7th Cir. 2016) (Posner, J., concurring). Even the agency tasked with interpreting

this statute has given up on providing a concrete definition, describing the task as "unrealistic." *Matter of Ortega-Lopez*, 27 I&N Dec. 382, 386 (BIA 2018) (citation omitted).

The CIMT phrase's defining trait is its invocation of morality—a subjective notion that invites judges to decide cases by rummaging through an undefined mix of ethical, social, and religious beliefs. In effect, it requires judges to "play the role of a Rorschach psychologist." *Romo v. Barr*, ___ F.3d ___, 2019 WL 3808515, at *7 (9th Cir. Aug. 14, 2019) (Owens, J., concurring). So long as the standard remains "undefined and undefinable," *Mei v. Ashcroft*, 393 F.3d 737, 741 (7th Cir. 2004) (Posner, J.) (cleaned up), this statute will continue to leave courts in disarray.

This disarray has taken the form of circuit splits: for example, the Fifth Circuit holds that misusing a Social Security number involves moral turpitude. *Hyder v. Keisler*, 506 F.3d 388 (5th Cir. 2007). The Ninth Circuit does not. *Beltran-Tirado v. INS*, 213 F.3d 1179 (9th Cir. 2000).

But the discord below isn't limited to disagreements over the taxonomy of particular crimes—rather, it extends to the very nature of the inquiry. Since Congress has never supplied the CIMT phrase with any intelligible meaning, the executive and judicial branches have stepped in to fill the legislative vacuum. And that has led to confusion over which branch of government is responsible for defining "moral turpitude"—the judiciary or the executive. *Compare*

Marmolejo-Campos, 558 F.3d at 910 (Ninth Circuit) (judiciary) *with Mercado v. Lynch*, 823 F.3d 276, 278 (5th Cir. 2016) (executive). Of course, this game of inter-branch hot potato has no place in our constitutional order.

Since "courts and administrators have not been able to establish coherent criteria" to define a CIMT, "despite many years of trying," this Court should put an end to this "failed enterprise." *Barbosa v. Barr*, 926 F.3d 1053, 1060 (9th Cir. 2019) (Berzon, J., concurring) (cleaned up). Until this Court steps in, "the present regime will continue to be a black hole for judicial resources." *Romo*, 2019 WL 3808515, at *7 (Owens, J., concurring).

The CIMT statute's due-process problems are compounded in cases like this one, where an executive agency interprets an ambiguous law, demands deference under *Chevron*, then applies that decision retroactively. *See Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

The rule against retroactivity is designed to combat the repugnant notion that a government of laws could go around "branding as 'unfair' conduct stamped 'fair' at the time a party acted." *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966) (Friendly, J.).

Though the principle is straightforward, it can be difficult to apply in practice. Often, it's impossible to know whether a government agency has changed the law, or whether it has "clarified" what the law has always meant. So how can regulated parties arrange

their affairs around the various "clarifications" that future bureaucrats might conjure?

These questions aren't academic for noncitizens who have been exiled by the BIA. Just take Mr. Mercado's immigration case—a winding path. Mr. Mercado pleaded guilty to reckless endangerment under Arizona law in 2001; at the time he pleaded guilty, the BIA had issued several published decisions indicating that crimes with a mens rea of recklessness would not involve moral turpitude. A decade later, however, the BIA changed its mind and reached the opposite conclusion. The BIA then applied this new rule retroactively to order Mr. Mercado deported.

Had Mr. Mercado lived in the Tenth Circuit or the Fifth Circuit, he would not face a life in exile. Those Circuits apply a bright-line rule: if an agency interprets a statute deemed ambiguous under *Chevron*, then its interpretation should apply prospectively only. *De Niz Robles v. Lynch*, 803 F.3d 1165, 1170 (10th Cir. 2015) (Gorsuch, J.); *Monteon-Camargo v. Barr*, 918 F.3d 423, 431 (5th Cir. 2019) (adopting the same reasoning).

The rule adopted by the Fifth and Tenth Circuits can be stated as a syllogism: under a rule that is "centuries older than our Republic," *Vartelas v. Holder*, 566 U.S. 257, 265 (2012), an exercise of legislative power is presumed to have no retroactive effect. And under *Chevron*, Congress delegates some of its legislative power to executive agencies. So if an agency exercises that delegated power and steps into Congress's shoes,

such that it deserves *Chevron* deference, then its decisions should have no retroactive effect.

The court below failed to apply this clear-cut logic, for Mr. Mercado has the misfortune of living in the Ninth Circuit. It employs a "totality-of-the-circumstances" test to questions of retroactivity—which is "not a test at all but an invitation to make an ad hoc judgment regarding congressional intent." *City of Arlington v. FCC*, 569 U.S. 290, 307 (2013). In other words, it is a recipe for "chaos." *Id.*

Chaos indeed. Judges across the country have applied a bewildering set of factors to address this question of retroactivity. As an example, take the Ninth Circuit's en banc decision in *Garfias-Rodriguez v. Holder*, 702 F.3d 504 (9th Cir. 2012), where there was a four-way split among the judges. *Id.* at 532 (Kozinski, C.J., "disagreeing with everyone").

Here, the legal test proved so confusing that the judges below did not even agree how to apply it. The test asks judges to answer a question that is often unanswerable: whether the agency had "changed" the law, or whether it had added "clarity" to what previously was legal murk. *Compare* App.33a (drawing a distinction between "evaluating whether a change occurred" and "evaluating the character of a change in law") *with* App.45a (Watford, J., dissenting) (BIA had issued a new rule "under any definition of that term"). The Ninth Circuit's poorly-constructed test provided no guidance on this point—instead, it deepened the confusion.

At bottom, this Court should intervene on both the retroactivity issue and the void-for-vagueness issue. The uncertainty invited by the phrase "moral turpitude" infects thousands upon thousands of immigration cases every year. *See* Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. Rev. 1669, 1741 (2011) (from 1996 to 2006, immigration courts handled 136,896 "moral turpitude" cases). And since thousands of state and federal crimes could be labeled "turpitudinous," the phrase's irreducible vagueness creates ripple effects across wide swaths of our criminal justice system.

The same is true of the retroactivity question. With administrative agencies "poking into every nook and cranny of daily life," *City of Arlington*, 569 U.S. at 315 (Roberts, C.J., dissenting), the scope of agency power must be policed. That is particularly true when it comes to agencies' power to "single out disfavored persons and groups and punish them for past conduct they cannot now alter." *De Niz Robles*, 803 F.3d at 1174–75.

For Mr. Mercado, none of this amounts to an abstract question. Removal is a "drastic measure," often amounting to lifelong "banishment or exile." *Dimaya*, 138 S. Ct. at 1213. Especially here because Mr. Mercado is the sole breadwinner for his family. His wife suffers from end stage renal disease, and his two children are American citizens. All this for a conviction that was ultimately set aside. In real terms, removal

would deprive him of "all that makes life worth living." *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

STATEMENT OF THE CASE

Arrest and conviction. Mr. Mercado was born in Mexico but has lived in the United States for more than 25 years. App.15a. Mr. Mercado has two children, both United States citizens. App.21a. His wife, also a U.S. citizen, suffers from end-stage renal disease. *Id*. Mr. Mercado has been the sole breadwinner for the family and needs to attend to his wife's chronic medical needs.

In 2001, Mr. Mercado was apprehended by local police in an apparently intoxicated condition. CA9 Case No. 14-72415, Doc. No. 9216788, Cert. Admin. Rec. ("CAR") 000043, 000100–000101. The State brought charges against Mr. Mercado for the crimes of driving or actual physical control while under the influence under A.R.S. § 28-1381(A)(1), and endangerment under A.R.S. § 13-1201.

In 2001, Mr. Mercado pleaded guilty to both counts. CAR.134–136. And for years afterwards, the BIA stated that this crime did *not* involve turpitude. For example, in *Matter of Almeraz-Hernandez*, the BIA explained that this was because the statute sets a low bar when it comes to the government's burden of proof regarding intent: "[W]e have held that crimes involving a reckless mental state will not be deemed to involve moral turpitude absent the presence of some

aggravating factors, such as the death of a person or the infliction of bodily injury." 2006 WL 3203649, at *2 (BIA Sept. 6, 2006). And in *Matter of Valles-Moreno*, the BIA explained that "the crime of endangerment in Arizona includes a broad spectrum of misconduct such as recklessly discharging firearms in public, obstructing public highways, or abandoning life-threatening containers attractive to children." 2006 WL 3922279, at *2–3 (BIA Dec. 27, 2006) (citing *United States v. Hernandez-Castellanos*, 287 F.3d 876, 880 (9th Cir. 2002); *Matter of Navajo County Juvenile Delinquency Action No. 89-J-099*, 793 P.2d 146 (Ariz. Ct. App. 1990) (upholding endangerment conviction where juvenile delinquent threw water balloons at passing vehicles)). "As such," the BIA concluded, "we are not persuaded that the full range of conduct encompassed by the statute would constitute a [CIMT]." *Id.*

BIA changes the law. Eleven years after Mr. Mercado's plea, the Board of Immigration Appeals held for the first time that A.R.S. § 13-1201 was a CIMT. *See Matter of Leal*, 26 I&N Dec. 20, 20 (BIA 2012). The BIA recognized that courts were split, but that the "majority view" supported such a finding. *Id.* at 24. Two years later, the Ninth Circuit lent *Chevron* deference to the BIA's decision. *Leal v. Holder*, 771 F.3d 1140 (9th Cir. 2014).

Immigration proceedings. A decade after Mr. Mercado pleaded guilty, the Department of Homeland Security initiated removal proceedings. App.14a. The Immigration Court applied *Matter of Leal* retroactively, concluding that his conviction under Arizona's

endangerment statute, A.R.S. § 13-1201, was categorically a CIMT. App.20a–21a.[1] The BIA affirmed in an unsigned opinion. App.7a–12a.

Mr. Mercado appealed to the Ninth Circuit, arguing that the BIA's about-face could not be applied retroactively, and that "moral turpitude" was unconstitutionally vague.

A divided panel rejected Mr. Mercado's petition for review. App.2a. The majority adopted the reasoning of its contemporaneous decision in *Olivas-Motta v. Whitaker*, 910 F.3d 1271 (9th Cir. 2018). App.2a. *Olivas-Motta* concluded that the BIA had not changed the law's meaning. App.32a–33a. Though the majority acknowledged that Mr. Mercado's view was supported by the BIA's earlier decisions, the majority stated that any reliance on those decisions was unjustified because those decisions were unpublished. App.34a.[2] The majority then concluded that Mr. Mercado's void-for-vagueness argument was foreclosed by earlier

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[1] While Mr. Mercado's appeal was winding its way through the courts, Arizona set aside his conviction that had formed the basis of the CIMT charge of removability under INA § 212(a)(2)(A)(i)(I) (order entered October 14, 2014). CA9 Case No. 14-72415, Doc. No. 9469746, Pet'rs Addendum p. 6 (*Arizona v. Mercado-Ramirez*, No. CR2001-007132-A, Order Setting Aside Judgment of Guilt (Oct. 8, 2014)).

[2] The majority never discussed, however, that the unpublished cases had simply applied the principles that the BIA articulated in published cases.

decisions like *Martinez-De Ryan v. Sessions*, 895 F.3d 1191 (9th Cir. 2018). App.42a.[3]

Judge Watford dissented. App.43a. He concluded that the BIA's about-face represented "a 'new rule' under any definition of that term." App.45a. Judge Watford explained that retroactivity is dangerous in cases like this one, where the underlying law "has no intelligible meaning" and is predicated on "an undefined and undefinable standard." App.46a.

Mr. Mercado's petition for rehearing and petition for rehearing en banc were denied, though Judge Watford would have granted the petition. App.25a.

Soon, another judge concluded that the CIMT phrase "is unconstitutionally vague." *Islas-Veloz v. Whitaker*, 914 F.3d 1249, 1251 (9th Cir. 2019) (Fletcher, J., concurring). A second judge "join[ed] the chorus of voices" agreeing "the time is ripe for reconsideration of this issue." *Barbosa*, 926 F.3d at 1060 (Berzon, J., concurring). Another judge wrote: "I continue to believe that the current moral turpitude jurisprudence makes no sense, and I am not a lone wolf in so thinking." *Romo*, 2019 WL 3808515, at *6 (Owens, J., concurring).

[3] A certiorari petition is pending in that case. *See* Case No. 18-1085.

REASONS FOR GRANTING THE WRIT

I. The void-for-vagueness issue

A. Courts remain hopelessly divided on the meaning of "moral turpitude."

A statute that turns on judges' subjective moral views is bound to divide the courts of appeals. It requires judges to address questions of morality—issues that have perplexed philosophers, policymakers, and theologians for millennia.

Judges have described CIMT as the "quintessential example of an ambiguous phrase," *Marmolejo-Campos*, 558 F.3d at 909, and an "amorphous morass," *Partyka v. Attorney General*, 417 F.3d 408, 409 (3d Cir. 2005). Efforts to define the phrase have been deemed a "consistent failure," *Nuñez*, 594 F.3d at 1130. Other judges have described the term as "meaningless," "a fossil," and "an embarrassment to a modern legal system," *Arias*, 834 F.3d at 831, 835 (Posner, J., concurring). It has become "a black hole for judicial resources." *Romo*, 2019 WL 3808515, at *6 (Owens, J., concurring).

This statute's textual indeterminacy leaves judges unmoored and adrift. One judge questioned how *any* of its key terms could be given any meaning:

> What does 'inherently base, vile, or depraved' . . . mean and how do any of these terms differ from 'contrary to the accepted rules of morality'? How for that matter do the "accepted rules of morality" differ from 'the duties owed

> between persons or to society in general"? And—urgently—what is 'depravity'?

Arias, 834 F.3d at 831 (Posner, J., concurring).

Given this term's definitional hollowness, it should be no surprise that multiple federal crimes are treated differently by region. But courts don't just disagree on how to label specific crimes; they also disagree on the foundational nature of the inquiry. When it comes to the question of who gets to define "moral turpitude"—the courts or the BIA—the circuits are divided. The Ninth Circuit reserves the right to define "moral turpitude" for itself, but it lends *Chevron* deference to the BIA's determination of whether a particular crime meets the definition. *Marmolejo-Campos*, 558 F.3d at 910. This is the exact inverse of how it works in the Fifth Circuit. *See Mercado*, 823 F.3d at 278 (5th Cir.) (giving *Chevron* deference to the BIA's definition of "moral turpitude" but reviewing *de novo* whether a crime fits the definition).

Courts disagree on which branch of government should be responsible for defining the statute. This Court has described lesser disagreements "about the nature of the inquiry" as the "most telling" symptom of a statute's underlying vagueness. *Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015). And a representative democracy has no room for such inter-branch bewilderment.

B. The void-for-vagueness question affects our immigration system, as well as wide swaths of our criminal-justice system.

For many noncitizens in our criminal-justice system, preserving the chance to remain in the United States is more important than the length of any prison sentence. *See Padilla v. Kentucky*, 559 U.S. 356, 368 (2010). So in every criminal case against a noncitizen, defense and immigration counsel must analyze whether the potential crime involves moral turpitude. Every year, this uncertainty infects thousands of immigration cases. *See* Das, *Immigration Penalties*, 86 N.Y.U. L. Rev. at 1741.

This unpredictability makes it impossible for noncitizens to make informed decisions during plea negotiations in criminal cases, and it makes it impossible for defense attorneys to accurately advise their clients. This continued uncertainty invites a flood of ineffective-assistance claims and habeas challenges—collateral lawsuits that threaten to deluge an already-overburdened criminal-justice system.

C. This case is the right vehicle for the void-for-vagueness question.

Mr. Mercado fully presented his void-for-vagueness argument before both the Ninth Circuit panel and the en banc court. The void-for-vagueness question involves a facial challenge to the statute that does not turn on the particular facts of the case. Absent

this statute, Mr. Mercado likely won't be removed from this country.

D. The decision below is incorrect.

The void-for-vagueness doctrine rests on "twin constitutional pillars": due process and separation of powers. *Davis*, 139 S. Ct. at 2325. Vague laws contravene the "first essential of due process of law"—that statutes must give people "of common intelligence" fair notice of what the law demands of them. *Id.* Vague laws also offend the separation of powers by "hand[ing] responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide." *Id.*

The CIMT statute destabilizes these constitutional pillars. Since Congress has never defined the phrase, the Executive branch has stepped in to fill the legislative vacuum. But the Executive's definitions have shifted so frequently that it is difficult to know what legal rule will apply to any individual case. This game of three-card Monte deprives noncitizens of their constitutional right to fair notice.

Moreover, the statute's vagueness invites arbitrary and discriminatory enforcement: targeting homosexual behavior, and discriminating against racial minorities.

The CIMT statute offends the separation of powers. When Congress enacted the law, it chose not to

define the term—instead, it left those difficult decisions for the Executive and the Judiciary. Our constitutional design does not allow this form of legislative outsourcing.

1. The Executive branch's shifting definitions of "moral turpitude" rob noncitizens of fair notice.

The Executive branch's definition of "moral turpitude" has been a moving target. The BIA has described the term as a classification aimed at "serious" and "dangerous" crimes. *Matter of E-*, 2 I&N Dec. 134, 139–40 (BIA 1944). But it has also cautioned that "[n]either the seriousness of a criminal offense nor the severity of the sentence . . . is determinative." *Matter of Serna*, 20 I&N Dec. 579, 581 (BIA 1992). In practice, the definition has been stretched to include minor offenses like shoplifting, illegal downloads of online music, and turnstile jumping. *See Matter of Diaz-Lizarraga*, 26 I&N Dec. 847, 849, 852 (BIA 2016) (shoplifting); *Hashish v. Gonzales*, 442 F.3d 572, 576 (7th Cir. 2006) (illegally downloading music); *Yesil v. Reno*, 973 F. Supp. 372, 376 n.2 (S.D.N.Y. 1997) (turnstile jumping).

The BIA has also stated that an "'evil intent' is a requisite element" for a CIMT. *Matter of Serna*, 20 I&N Dec. at 582. But there, too, the BIA has waffled: "The presence or absence of a corrupt or vicious mind is not controlling." *Matter of Medina*, 15 I&N Dec. 611, 614 (BIA 1976). It has thoroughly backtracked on this rule. Even "forgetfulness" crosses the threshold. *Matter of Tobar–Lobo*, 24 I&N Dec. 143, 145 (BIA 2007).

A final example: the BIA has stated that the "presence of an aggravating factor," such as "serious physical injury or the use of a deadly weapon," "can be important." *Ceron v. Holder*, 747 F.3d 773, 783 (9th Cir. 2014) (en banc) (Bea, J., dissenting, joined by Gould, J.). But in practice, that factor is "important" until it isn't. *Id.*

In sum, the BIA's bobbing and weaving makes it impossible to know the law's meaning.[4] There can be no meaningful, fair notice when the Executive branch can devise a collection of legal rules and then select whichever rule it prefers for the case at hand.

The BIA has argued that when Congress enacted the CIMT statute, it probably meant to refer to 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." *Matter of Mendez*, 27 I&N Dec. 219, 221 (BIA 2018).

Where did *this* definition come from? Not a single word of the BIA's definition can be found in the

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[4] These conflicting outcomes demonstrate the statute's irreducible vagueness. When "painstaking attempts" to craft a definition yield nothing more than "conflicting results," then the statute is beyond repair. *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89–90 (1921). To give a vivid example of this problem, Judge Posner reviewed the U.S. Department of State's efforts to separate turpitudinous crimes from non-turpitudinous crimes; in his concurrence, he concluded that the result resembled "the product of a disordered mind." *Arias*, 834 F.3d at 833.

statutory text. In effect, the Executive is "writing a new law rather than applying the one Congress adopted." *Davis*, 139 S. Ct. at 2324.

Worse, the government's proposed definition is so elastic that it's difficult to imagine what crimes *couldn't* be squeezed to fit inside. It extends to non-crimes like adultery, disrespecting elders, or cheating on a grade-school geography test. That is a serious problem: if Congress wanted to refer to *all* crimes, Congress "would have said so." *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1070–71 (9th Cir. 2007). If the phrase were revised to mean "crime ~~involving moral turpitude~~," then several provisions of the Immigration and Nationality Act would become "mere surplusage." *Id.*

So there must be some dividing line. Some guiding principle that allows noncitizens in our criminal-justice system to "plea bargain creatively . . . [to] reduce the likelihood of deportation." *Padilla*, 559 U.S. at 373. But if that line exists, it cannot be found anywhere in the BIA's erratic decrees.

The BIA resists any attempt to infuse standards or predictability into the CIMT definition. In *Ortega-Lopez v. Lynch*, 834 F.3d 1015 (9th Cir. 2016), the Ninth Circuit remanded due to the multiplicity of legal standards employed by the BIA. *Id.* at 1018.

On remand, the BIA again rattled off several legal standards, but it chided the court of appeals for trying to identify which one controlled. It called these standards "useful guideposts," and declined to "limit[]" the CIMT definition "strictly" to defined "categories."

Matter of Ortega-Lopez, 27 I&N Dec. at 386. Any hope for additional clarity was met with a shrug: the BIA stated that defining the phrase would be "unrealistic." *Id.*

2. Under *Davis*, due process forbids judges from imposing punishment due to their subjective assessments of a crime's "inherent features."

Davis clarified the constitutional dividing line in void-for-vagueness cases. *Davis* recognized that there would be no vagueness problem if a statute asked a *jury* to decide whether an individual's "real-world conduct" satisfied some qualitative standard. 139 S. Ct. at 2327; *accord Johnson*, 135 S. Ct. at 2561 ("As a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard . . . to real-world conduct.").

But if *judges* are required to divine a crime's "inherent features," that is "[j]ust the opposite." *Davis*, 139 S. Ct. at 2329; *accord Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004) (contrasting the "nature of the offense" with "the particular facts [of] petitioner's crime").

Several appellate judges have already reached a similar conclusion. For example, the "categorical approach" is a tool of statutory construction used to determine whether a state law fits a federal definition. *See Moncrieffe v. Holder*, 569 U.S. 184, 190–91 (2013). But in cases involving moral turpitude, the categorical approach serves little use. That's because "[i]n the

federal criminal law . . . there is no 'crime involving moral turpitude.'" *Ceron*, 747 F.3d at 786 (Bea, J., dissenting, joined by Gould, J.). "One has to have a *crime*, such as burglary, to use the . . . categorical analysis." *Navarro-Lopez*, 503 F.3d at 1085 (Bea, J., dissenting, joined by O'Scannlain, J.). In "moral turpitude" cases, "there is no federal *crime* to define. Much less is there one to *compare* to a state crime." *Id.*

Without a generic, federal crime to use as an objective yardstick, however, the categorical approach devolves into a freewheeling, subjective inquiry into morality. The key problem is that moral turpitude is not "objectively observable." It requires a "subjective evaluation" of the crime's inherent features. *Id.*; *cf. United States v. Williams*, 553 U.S. 285, 306 (2008) (summarizing Supreme Court decisions as prohibiting punishment when based on an observer's "subjective judgment," such as whether an individual's conduct was "annoying" or "indecent").

3. Jordan v. De George should be reconsidered.

In *Jordan*, this Court rejected a vagueness challenge to the phrase "moral turpitude." *Jordan* was careful to narrow its holding to that petitioner's offense, however. 341 U.S. 223, 232 (1951). "Whatever else" CIMT "may mean in peripheral cases, the decided cases make it plain that crimes in which fraud was an ingredient have always been regarded as involving moral turpitude." *Id. Jordan* thus acknowledged that

"less obvious cases" might exist, and that the "question of vagueness was not raised by the parties nor argued before this Court." *Id.*

Because *Jordan* "opined about vagueness without full briefing or argument on that issue," this Court is "less constrained to follow" that decision as precedent. *Johnson*, 135 S. Ct. at 2562–63. Moreover, the doctrine of *stare decisis* allows this Court to revisit an earlier decision "where experience with its application reveals that it is unworkable." *Id.* at 2562. And experience "is all the more instructive" when it comes to void-for-vagueness challenges because "the error of having rejected a vagueness challenge manifests itself precisely in subsequent judicial decisions: the inability of later opinions to impart the predictability that the earlier opinions forecast." *Id.*

Understandably, *Jordan* was unable to predict the gale of confusion that this statute would sow. Now, 68 years later, the Federal Reporter contains more than enough judicial expression calling the CIMT statute into question. *E.g.*, *Arias*, 834 F.3d at 831 (Posner, J., concurring) (deeming the phrase "meaningless"); *Nuñez*, 594 F.3d at 1130 (lamenting "the consistent failure of either the BIA or our own court to establish any coherent criteria for determining which crimes fall within that classification").

4. The CIMT phrase's vagueness invites arbitrary and capricious enforcement.

"Vague laws invite arbitrary power . . . by leaving the people in the dark about what the law demands and allowing prosecutors and courts to make it up." *Dimaya*, 138 S. Ct. at 1223–24 (Gorsuch, J., concurring). Thus, a "standardless" phrase can violate due process by "authoriz[ing] or encourag[ing] seriously discriminatory enforcement." *Williams*, 553 U.S. at 304.

This danger is not hypothetical. The CIMT phrase has been used to target homosexuals and homosexual behavior. *Hudson v. Esperdy*, 290 F.2d 879 (2d Cir. 1961); *Babouris v. Esperdy*, 269 F.2d 621 (2d Cir. 1959).

The phrase has enabled discrimination in other contexts, too: for example, in 1901, Alabama officials adopted a "catchall" provision to their State constitution to disenfranchise voters. That provision stripped the power to vote from individuals who had been convicted of "any . . . crime involving moral turpitude." *Hunter v. Underwood*, 471 U.S. 222, 226 (1985). The phrase, which was "not defined," became a tool of discrimination: "The registrars' expert estimated that by January 1903[, the "moral turpitude" provision] had disfranchised approximately ten times as many blacks as whites." *Id.*

As a final example, take *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942). There, Oklahoma passed a law punishing individuals who had been convicted of two or more felonies involving "moral

turpitude" with sterilization. *Id.* at 541. That included the crime of "stealing chickens." *Id.* at 537. This Court pointed out that the state's varying definitions of "moral turpitude" were so inexplicable that they violated equal protection. *Id.* at 541 (noting that there was no principled distinction between larceny, which was a crime of moral turpitude, and embezzlement, which was not). The Court warned that such arbitrary power, if placed "[i]n evil or reckless hands," can "cause races or types which are inimical to the dominant group to wither and disappear." *Id.*

Of course, *Hunter* and *Skinner* arose outside the immigration context. But "[t]he question is not whether discriminatory enforcement occurred here, and [the Court] assume[s] it did not." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1051 (1991). The question is "whether the [r]ule is so imprecise that discriminatory enforcement is a real possibility." *Id.* That is the case here. It is no surprise that those who wished to discriminate in *Hunter* enlisted such a pliable phrase—one that "turns upon the moral standards of the judges who decide the question." *Underwood v. Hunter*, 730 F.2d 614, 616 n.2 (11th Cir. 1984).

5. The CIMT statute impermissibly delegates a Legislative function to the Executive and Judicial branches.

Our Constitution assigns "[a]ll legislative Powers" to Congress. U.S. Const., art. I, § 1. This means "legislators may not abdicate their responsibilities for

setting the standards of the criminal law by leaving to judges the power to decide the various crimes includable in a vague phrase." *Dimaya*, 138 S. Ct. at 1227 (Gorsuch, J., concurring) (cleaned up).

In *Gundy*, several members of this Court explained how the void-for-vagueness doctrine and the non-delegation doctrine are two sides of the same coin: "A statute that does not contain 'sufficiently definite and precise' standards 'to enable Congress, the courts, and the public to ascertain' whether Congress's guidance has been followed at once presents a delegation problem and provides impermissibly vague guidance to affected citizens." 139 S. Ct. at 2142 (Gorsuch, J., dissenting) (citing *Grayned*, 408 U.S. at 108–09 ("A vague law impermissibly delegates basic policy matters")). The dissenting judge below recognized this link as well. He described the law's vagueness in terms that are reserved for non-delegation challenges. App.46a (moral turpitude has "no *intelligible* meaning") (emphasis added).

Judge Watford was right. The lack of an intelligible principle is evident when one compares this case to *Gundy*. In *Gundy*, the plurality found that an intelligible principle could be derived from four features: the statute's statement of purpose, which cabined the law's scope; the statute's definition of key terms, like "sex offender"; the "legislative history" that revealed what was "front and center in Congress's thinking"; and the fact that the Attorney General had eschewed an "expansive" view of his statutory powers. 139 S. Ct. at 2126–28.

The CIMT statute contains none of these features. No statement of purpose. No definition of key terms. As for legislative history, Congress was divided on the term's meaning. For example, a Congressman admitted: "No one can really say what is meant by saying a crime involving moral turpitude." *Restriction of Immigration: Hearing on H.R. 10384 Before the Comm. on Immigration & Naturalization*, 64th Cong. 8 (1916) (statement of Rep. Adolph J. Sabath). And the Attorney General, through his appointees on the Board of Immigration Appeals, has asserted an expansive view of his power to define the term. In fact, several appointees have described any limits on that power as "unrealistic." *Ortega-Lopez*, 27 I&N Dec. at 386 (citation omitted).

The lack of an intelligible principle is lying in plain sight: because Congress has never defined the phrase, its meaning has been "left to the BIA and courts to develop through case-by-case adjudication." *Morales-Garcia*, 567 F.3d at 1062. This abdication of legislative responsibility crosses the constitutional line.

The CIMT statute also fails to satisfy the test proposed by the *Gundy* dissenters. Those Justices concluded that Congress may authorize the Executive to "fill up the details"—if Congress first "makes the policy decisions." 139 S. Ct. at 2136.

To determine whether Congress has outsourced its foundational policymaking role, the *Gundy* dissenters reasoned, courts "must ask" three questions:

- "Does the statute assign to the executive only the responsibility to make factual findings?"
- "Does it set forth the facts that the executive must consider and the criteria against which to measure them?"
- "[D]id Congress, and not the Executive Branch, make the policy judgments?"

Id.

Here, the answer to all three questions is no. First, the CIMT statute hands *all* of the policy analysis to the Executive—not just the fact-finding function. Indeed, a Senate report recognized how the term's definition "depends on what the individual officer considers to be baseness, vileness, or depravity." S. Rep. No. 1515, 81st Cong., 2d Sess. 351 (1950).

Second, the statute does not describe what facts the Executive should consider, nor does it list any relevant criteria. These place the CIMT statute on a shakier foundation than even the "crime of violence" statute struck down in *Johnson*. There, the threshold was twilit by a "confusing list" of enumerated offenses that was "too varied to provide much assistance." *Dimaya*, 138 S. Ct. at 1221 (discussing *Johnson*, 135 S. Ct. at 2561). Here, there are no enumerated offenses at all, nor is there even a baseline guiding principle such as "violence." This "textual indeterminacy" leaves judges to chart their course with even fewer guideposts than other statutes already deemed unconstitutional. *Id.*

Third, the statute does not reflect a congressional policy judgment—it reflects the intentional abandonment of that judgment. Compare the CIMT statute with the statute that defines "aggravated felonies," which are also grounds for removal. When Congress enacted the aggravated-felony law, it did not leave that term's meaning to guesswork. Instead, Congress provided a list of concrete examples. 8 U.S.C. § 1101(a)(43)(A)–(U). Congress could amend the CIMT statute to mirror this approach. *See*, *e.g.*, Brian C. Harms, *Redefining "Crimes of Moral Turpitude": A Proposal to Congress*, 15 Geo. Immigr. L.J. 259, 284 (2001) (providing a draft CIMT statute that lists predicate crimes, just like the "aggravated felony" statute does).

To provide a simpler answer, Congress could also "say that a conviction for any felony carrying a prison sentence of a specified length opens an alien to removal. Congress has done almost exactly this in other laws." *Dimaya*, 138 S. Ct. at 1233 (Gorsuch, J., concurring) (citing 18 U.S.C. § 922(g)); *accord Romo*, 2019 WL 3808515, at *7 (Owens, J., concurring) (proposing a similar approach)).

But Congress never did that. Instead, it contrived a statutory catch-all that prevents ordinary people from knowing the law's meaning. In 1917, members of Congress were divided as to "which crimes were serious enough to warrant deportation." *See* Angela M. Banks, *The Normative and Historical Cases for Proportional Deportation*, 62 Emory L.J. 1243, 1270 (2013). Congress settled on the mutable phrase "moral turpitude," but "only after Congress agreed to authorize

criminal trial judges to prevent deportation . . . by issuing a judicial recommendation against deportation (JRAD)." *Id.* at 1272.

Thus, the statute's vagueness wasn't a legislative blunder—it was a deliberate abdication of duty. As in *Gundy*, "members of Congress could not reach consensus" so they "found it expedient to hand off the job to the executive and direct there the blame for any later problems that might emerge." 139 S. Ct. at 2143 (Gorsuch, J., dissenting). Because Congress "could not achieve the consensus necessary to resolve the hard problems associated with" the term, it "passed the potato to the Attorney General." *Id.* at 2144.

This legislative misadventure is inconsistent with our constitutional design. The CIMT statute threatens to "giv[e] the executive *carte blanche* to write laws"; this concentration of Executive power may "mark the end of any meaningful enforcement of our separation of powers and invite the tyranny of the majority that follows when lawmaking and law enforcement responsibilities are united in the same hands." *Id.* at 2145.

This constitutional imbalance is exacerbated by the *Chevron* doctrine, which requires the Judiciary to defer to the Executive's interpretation of ambiguous statutes. 467 U.S. at 845. This means that the Executive branch wields the power to "set and revise policy (legislative), override adverse judicial determinations (judicial), and exercise enforcement discretion (executive)." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1155 (10th Cir. 2016) (Gorsuch, J., concurring). This

arrangement would be foreign to the Founders, who believed that the concentration of these three powers "in the same hands . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47 (James Madison).

II. The retroactivity issue

A. Courts are sharply split on the test used for the retroactivity of agency adjudications.

When executive agencies announce rules via adjudications, the retroactivity of those rules can cause "mischief" and "ill effect[s]." *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947). But this Court has never provided any guidance on how to avoid these evils. Instead, it "gestured toward a vague balancing test without offering any specific standard." Peter Karanjia, *Hard Cases and Tough Choices: A Response to Professors Sunstein and Vermeule*, 132 Harv. L. Rev. F. 106, 113 (2019). Subsequent efforts to craft a workable rule have "produced a great deal of confusion within the lower courts." Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 Harv. L. Rev. 1924, 1946 (2018).

For example, the Ninth Circuit operates under the five-factor retroactivity test of *Montgomery Ward & Co. v. FTC*, 691 F.2d 1322, 1333 (9th Cir. 1982) (adopting the factors listed in *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 390–93 (D.C. Cir. 1972)). The Second, Third, and Seventh Circuits follow a similar approach. *Matthews v. Barr*, 927 F.3d 606, 634 (2d

Cir. 2019); *Laborers' Int'l Union of N. Am., AFL-CIO v. Foster Wheeler Energy Corp.*, 26 F.3d 375, 392 (3d Cir. 1994); *Velasquez-Garcia v. Holder*, 760 F.3d 571, 581 (7th Cir. 2014). The Eighth Circuit, in contrast, applies a three-factor test that it deems "similar" to the *Retail, Wholesale* test. *Ryan Heating Co. v. NRLB*, 942 F.2d 1287, 1289 (8th Cir. 1991).

The D.C. Circuit, which first invented the *Retail, Wholesale* test, later acknowledged that its "formulation of the standard . . . has varied." *United Food & Commercial Workers Int'l Union, AFL-CIO, Local No. 150-A v. NRLB*, 1 F.3d 24, 34 (D.C. Cir. 1993) (listing various standards it has applied over time). That circuit has since downplayed the five-factor test's usefulness, concluding that there was "no need to plow laboriously through" these factors because they "boil down . . . to a question of concerns grounded in notions of equity and fairness." *Cassell v. FCC*, 154 F.3d 478, 486 (D.C. Cir. 1998) (citing *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1082 n.9 (D.C. Cir. 1987) (en banc)).

The Fifth Circuit has rejected this five-factor test, concluding that its multiple factors "are of little practical use." *Microcomputer Tech. Inst. v. Riley*, 139 F.3d 1044, 1050 (5th Cir. 1998). It "balance[s] the ills of retroactivity against the disadvantages of prospectivity." *Id.* And the Tenth Circuit has edged away from this multi-factor test as well, deeming the factors "elaborate," not "exclusive," and not "even always the most pertinent." *De Niz Robles*, 803 F.3d at 1177. Instead, it has a bright-line rule: if a statute is so ambiguous that

its interpretation triggers *Chevron* deference, then that interpretation cannot be applied retroactively. *Id.*

The Tenth Circuit's rule derives from a straightforward axiom: "To regulate the past is judicial, to regulate the future is legislative." *Livingston's Lessee v. Moore*, 32 U.S. 469, 491 (1833). For centuries, that was the dividing line. Judges were deemed "the discoverers, not the creators, of the Law." 1 William Blackstone, Commentaries on the Laws of England *69–70; *accord* John Chipman Gray, The Nature and Sources of the Law 93 (2d ed. 1921). Accordingly, judicial rulings were presumed to have retrospective effect, as the judicial role was not "to pronounce a new law, but to maintain and expound the old one." *Id.*; *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting) (noting that this rule has been in operation "for near a thousand years").

The opposite is true for legislation: the presumption against retroactive legislation "embodies a legal doctrine centuries older than our Republic." *Vartelas*, 566 U.S. at 265; *see also Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855–56 (1990) (Scalia, J., concurring) (describing this presumption as a "timeless and universal rule" and tracing its development from ancient Greece to the time of the Founders).

So for executive agencies, any question about retroactivity turns on the character of the agency's function:

> [T]he more an agency acts like a judge—applying preexisting rules of general applicability to discrete cases and controversies—the closer it comes to the norm of adjudication and the stronger the case may be for retroactive application of the agency's decision. But the more an agency acts like a legislator—announcing new rules of general applicability—the closer it comes to the norm of legislation and the stronger the case becomes for limiting application of the agency's decision to future conduct.

De Niz Robles, 803 F.3d at 1172.

Thus, Congress can delegate its legislative powers to executive agencies—and when agencies exercise that power, courts must defer under *Chevron*. So if "Congress's delegates seek to exercise delegated legislative policymaking authority, their rules too should be presumed prospective in operation unless Congress has clearly authorized retroactive application." *Id.*

Ultimately, these diverging legal tests generate meaningfully different outcomes. If the government had commenced these proceedings in New Mexico, Mr. Mercado would likely be free to stay in the only country he has ever called home. But since the government commenced these proceedings in neighboring Arizona, Mr. Mercado now faces a life in exile.

B. The retroactivity question implicates serious concerns about the scope of agency power.

The rule against retroactivity prevents agencies from "upsetting settled expectations with a new rule of general applicability, penalizing persons for past conduct, doing so with a full view of the winners and losers—all with a decisionmaker driven by partisan politics." *De Niz Robles*, 803 F.3d at 1176.

Noncitizens have ample reason for concern when it comes to the BIA. Even though the BIA is a tribunal nestled within the Executive branch, its decisionmakers are not "insulated from politics and policymaking in the way Article III judges are." *Id.* at 1175.

The rule against retroactivity is designed to prevent creative bureaucrats from using creative legal interpretations to "exploit the power of retroactivity" in "worrisome" ways—by "punish[ing] those who have done no more than order their affairs around existing law." *Id.* at 1174–75.

Here, Mr. Mercado structured his plea deal to avoid the risk of deportation. As Judge Watford recognized in dissent, any noncitizen who took these actions would have been "eminently reasonable" in doing so. App.52a. So in cases like this one, retroactive application of the BIA's volte-face would generate a "trap for the unwary and paradoxically encourage those who bother to consult the law to disregard what they find." *De Niz Robles*, 803 F.3d at 1178–79.

C. This case is a good vehicle to decide the retroactivity question.

Mr. Mercado fully presented his retroactivity argument before both the Ninth Circuit panel and the en banc court. The retroactivity question turns on a bright-line rule of law that sidesteps any messy factual disputes: if *Chevron* deference applies, then the result cannot be retroactive. And if the Tenth Circuit's rule had been applied here, Mr. Mercado's immigration proceedings would likely have been terminated.

D. The retroactivity test used by the Tenth and Fifth Circuits is superior to the Ninth Circuit's test.

1. The Tenth and Fifth Circuits' test turns on whether the agency is fulfilling a legislative or judicial function.

As noted, many circuits adjudicate questions of retroactivity by applying a loose jumble of factors designed to address concerns about "equity and fairness." *Cassell*, 154 F.3d at 486. But few have announced any limits or principles that animate such broad, freewheeling inquiries.

The Tenth Circuit was perhaps the first to announce a rule with any solid doctrinal footing. That court recognized a link between two seminal administrative law cases: the first is *Chenery Corp.*, 332 U.S. at 202, which predicted that retroactive application of executive agencies' decisions could cause "ill effect[s]"

and "mischief"; the second is *Chevron*, which sheds light on the nature of agency power. Then-Judge Gorsuch's opinion in *De Niz Robles* explained that the "more an agency acts like a judge" by applying law to facts, "the closer it comes to the norm of adjudication and the stronger the case may be for retroactive application of the agency's decision." 803 F.3d at 1172. But *De Niz Robles* also warned, "the more an agency acts like a legislator" by issuing "new rules of general applicability," "the stronger the case becomes" to apply the agency's decisions only "to future conduct." *Id.*

On the surface, immigration adjudications may appear to fall on the "judicial" side of the line. After all, they resemble "quasi-judicial proceeding[s] with lawyers and administrative law judges and briefs and arguments and many of the other usual trappings of a judicial proceeding." *Id.* But "substance doesn't always follow form," *id.*, and *Chevron* helps reveal the true character of an agency's exercise of power.

The Tenth Circuit reasoned that Congress can delegate its legislative powers to executive agencies—and when agencies exercise that power, courts must defer under *Chevron*. So if "Congress's delegates seek to exercise delegated legislative policymaking authority, their rules too should be presumed prospective in operation unless Congress has clearly authorized retroactive application." *Id.*

It follows that "an agency exercising its *Chevron* step two . . . powers acts in substance a lot less like a judicial actor interpreting existing law and a good deal

more like a legislative actor making new policy." *Id.* "[A]n agency operating under the aegis of *Chevron* step two and *Brand X* comes perhaps as close to exercising legislative power as it might ever get." *Id.* (citing *Nat'l Cable & Telecom. Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005)). So if an agency steps into Congress's shoes under *Chevron* step two, then its actions must be "subject to the same presumption of prospectivity" that accompanies congressional legislation. *Id.*

2. The Tenth Circuit's rule is easier to administer.

For retroactivity questions, the Ninth Circuit employs a "totality-of-the-circumstances test—which is really . . . an invitation to make an ad hoc judgment regarding congressional intent." *City of Arlington*, 569 U.S. at 307. In other words, it is an invitation to decisional "chaos." *Id.*; *accord* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1182 (1989) (opaque, multi-factor rules impair equality, destroy predictability, and tempt judges to tailor the law to fit the case).

In contrast, the Tenth Circuit has (correctly) described the Ninth Circuit factors as a "judicial chore" that "isn't made any easier when the number of factors we're asked to juggle proliferates." *De Niz Robles*, 803 F.3d at 1180. Moreover, the Ninth Circuit's multi-factor muddle asks courts to "commensurate incommensurable legal factors"—a task that resembles asking judges

to "compare the weight of a stone to the length of a line." *Id.* at 1175.

The last time the Ninth Circuit took up the retroactivity question en banc, it left those judges confused:

> [S]ix of my colleagues pick one test while three others pick a different test. One judge believes that either test comes to the same result, and another agrees with the majority's conclusion while applying the test favored by the dissent. As an en banc court, we have a responsibility to bring clarity to our law. By the time lawyers in this circuit get through reading all of our opinions, they'll be thoroughly confused.

Garfias-Rodriguez, 702 F.3d at 532 (Kozinski, C.J., "disagreeing with everyone"). In contrast, the Tenth Circuit rule provides a bright-line rule: if an agency exercises its legislative powers under *Chevron* step two, then its actions should be prospective only.

The decision below illustrates the danger of employing a mishmash of imprecise factors. The judges stumbled to apply this test: the majority reasoned that "a change in law must have occurred before *Montgomery Ward* is implicated, App.31a, whereas the dissent concluded that the BIA's new rule "plainly constitutes the 'change in law' that the majority identifies as necessary to trigger retroactivity analysis." App.45a. Strangely, the judges below grappled with this question as a threshold inquiry, even though the second *Montgomery Ward* factor asks whether the agency departed from a "former rule" or "old standard." App.32a.

This confusion would never have occurred in the Fifth or the Tenth Circuits, which prevent judges from answering such questions that are unanswerable. *Cf. Garfias-Rodriguez*, 702 F.3d at 529 (Kozinski, C.J., disagreeing with everyone) (urging courts to shortcut this analysis because "retroactivity issues lurk in many, perhaps all cases"). Instead, the Tenth and Fifth Circuits would have held that the presence of *Chevron* deference provides a clear answer: retroactivity was impermissible.

3. The Tenth Circuit rule promotes fair notice.

If a statute is ambiguous, then "binding citizens to one reading over another may be akin to asking them to obey a law of which they could not know." Abner S. Greene, *Adjudicative Retroactivity in Administrative Law*, 1991 Sup. Ct. Rev. 261, 265. If a case reaches *Chevron* step two, then "the interpretive question is resolvable not from examining sources of congressional intent." *Id.* at 278. In other words, the "law has stopped," and "discretion takes over." *Id.* at 276; *accord Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (concluding that a similar form of deference is warranted only when the "legal toolkit is empty and the interpretive question still has no single right answer," such that the answer is "more [one] of policy than of law").

Consequently, "citizens are not on notice of the source of law that governs until the agency announces its policy choice." Greene, *Adjudicative Retroactivity*,

1991 Sup. Ct. Rev. at 276; *accord Garfias-Rodriguez*, 702 F.3d at 515–16 (noting that an agency's *Chevron*-step-two decision is "not a once-and-for-always definition of what the statute means, but an act of interpretation in light of its policymaking responsibilities") (citing *Chevron*, 467 U.S. at 864).

This rule prevents immigrants from being caught in a Catch-22. In other contexts involving agency deference, this Court has refused to place regulated parties in a similar bind:

> It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding.

Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 158–59 (2012). In other contexts, too, courts refuse to fault litigants for "relying on . . . precedent and not prophesying [an intervening change in law]." *United States v. Chittenden*, 896 F.3d 633, 640 (4th Cir. 2018). A contrary rule would "require a party to be clairvoyant." *Phillips v. Cameron Tool Corp.*, 950 F.2d 488, 491 (7th Cir. 1991).

4. The Tenth Circuit rule respects the separation of powers.

Several Members of this Court have expressed their worry that *Chevron* and *Brand X* accommodate a vision of Executive power that is inconsistent with the constitution's design. In particular, *Brand X* has raised the hackles of those who believe it allows agencies to "revis[e]" a "judicial declaration of the law's meaning." *Gutierrez-Brizuela*, 834 F.3d at 1150 (Gorsuch, J., concurring). The late Justice Scalia thought that *Brand X* introduced a "breathtaking novelty: judicial decisions subject to reversal by executive officers." *Brand X*, 545 U.S. at 1016. Or as Justice Thomas, who authored *Brand X*, wrote: it "wrests from Courts" the ultimate authority to interpret the law and "hands it over to the Executive." *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring).

The Tenth Circuit rule presents a modest opportunity to wrest some of that power back where it belongs: in the Judicial branch. If the agencies' *Chevron*-step-two decisions are prospective only, then agencies won't have the power to "revise" the work of Article III judges under *Brand X*. Instead, agencies will enjoy a more limited power: the power to announce *new* rules with *prospective* effect. Article III judges then will be able to review those rules. As a formal matter, therefore, the Judiciary will reclaim the power to say, once and for all, "what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

CONCLUSION

The petition should be granted.

Respectfully submitted,

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