No. 19-282

IN THE

Supreme Court of the United States

MANUEL OLIVAS-MOTTA,

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

REPLY BRIEF

JEROME MAYER-CANTÚ
4287 Gilbert Street
Oakland, CA 94611

KARA HARTZLER
Counsel of Record
2485 Island Avenue
San Diego, CA 92102
(917) 853-1250
karahartzler101@gmail.com

Counsel for Petitioner

293852

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page(s)

Cases

Statutes and Other Authorities

REPLY BRIEF FOR PETITIONER

"[T]he presumption that legislation operates only prospectively is nearly as old as the common law." *De Niz Robles v. Lynch*, 803 F.3d 1165, 1169 (10th Cir. 2015) (Gorsuch, J.). But in its Brief in Opposition (BIO), the government dodges the central question in this case—whether the presumption against retroactivity applies to executive agencies exercising their legislatively-delegated authority under step two of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843 (1984). Instead, it claims that retroactivity concerns are not implicated here because the agency's U-turn in Mr. Olivas-Motta's case was not a "change in law." BIO 7–10. The government also insists that the Court's decision in *Jordan v. De George*, 341 U.S. 223 (1951), forecloses any argument that the phrase "crime involving moral turpitude" is unconstitutionally vague. BIO 12–15.

The government's diversionary tactics are a dead give-away that Mr. Olivas-Motta's petition merits a grant of certiorari. Not only do the government's policy shifts under *Chevron* portend a larger threat to the separation of powers, a century of failed efforts to define "moral turpitude" confirms that the phrase contains more uncertainty than due process can tolerate. To ensure that the agency's retroactive application of an undefinable concept does not punish people for "past conduct they cannot now alter." *De Niz Robles*, 803 F.3d at 1174–75, the Court should grant certiorari.

I. The Court should consider whether and when an agency's *Chevron* policy-making authority applies retroactively.

In its response, the government raises no procedural or vehicle concerns with Mr. Olivas-Motta's petition. Instead, it claims that retroactivity principles do not apply here because the agency never effected a change in law. BIO 7–10. The government recognizes that the Board of Immigration Appeals first said that Arizona reckless endangerment was *not* categorically a "crime involving moral turpitude" and then years later—after Mr. Olivas-Motta pleaded guilty—said it *was*. But the government insists this was not a bait-and-switch meriting any type of retroactivity analysis. At least three reasons show why this is wrong.

A. Agencies exercising *Chevron*-step two authority function as legislators, not judges.

Mr. Olivas-Motta agrees with the government on one thing: the BIA's decision in *Matter of Leal* 26 I. & N. Dec. 20 (BIA 2012), was not a change in *law*. Rather, it was a change in *policy*. As then-Judge Gorsuch explained in *De Niz Robles*, an agency acting under *Chevron* "avowedly and self-consciously" exercises its delegated policy-making authority to draft a "new rule of general applicability according to its vision of the law as it should be." 803 F.3d at 1173. So in this context, agencies do not function like *courts*, which discern "'what the law has always meant'" and are thus entitled to retroactive application of their decisions. *Id.* Instead, they act like *legislatures*, which means their decisions—like any other policy changes—apply prospectively only. *Id.*

Take the BIA's decision here. Prior to *Leal*, the agency recognized that people had been convicted of Arizona reckless endangerment for throwing water balloons at passing vehicles—a crime that does not require "any particular aggravated means" and thus did not involve moral turpitude. *In re Valles-Moreno*, 2006 WL 3922279, at *2 (BIA 2006). But six years later, under a new administration, the BIA decided that throwing water balloons "appears relatively innocuous" until one considers that they were "thrown at vehicles that were moving at high speeds on a public highway." *Matter of Leal*, 26 I. & N. Dec. at 26. Suddenly the offense involved moral turpitude. *See id.*

But in reaching this conclusion, the BIA pointed to no intervening judicial decision. It cited no tools of statutory interpretation to support its newfound belief that throwing water balloons at cars is morally depraved. It simply asserted that it was free to "reconsider" its prior decision. Pet. App. 32a.

This was policy-making, not law. By definition, an agency at *Chevron* step two does not seek to "enforce the law as it is" but to "exploit a gap in the law to implement its own (current but revisable) vision of what the law should be." *De Niz Robles*, 803 F.3d at 1176. So while agencies may enjoy the political flexibility that allows Congress to initiate policy changes, they cannot simultaneously don a judicial robe to demand that those changes apply retroactively.

B. The government's theory vastly expands executive power.

The government's theory that *Leal* triggered no change in law fails for a second reason: it has all the

credibility of an executive fox guarding the administrative henhouse. In cases challenging retroactivity, the BIA consistently denies that its policy modifications constitute a change in law. *See, e.g.*, *De Niz Robles*, 803 F.3d at 1172 (BIA insisting it "d[id] not change the law, but rather explain[ed] what the law has always meant"); *Obeya v. Sessions*, 884 F.3d 442, 445 (2d Cir. 2018) (BIA claiming it did not "depart" from its precedent" but merely "'revis[ed] its standard'"); *Matter of Cordero-Garcia,* 27 I. & N. Dec. 652, 657 (BIA 2019) (BIA contending it only "clarified" its prior rule). Yet courts have consistently rejected these claims. *See De Niz Robles*, 803 F.3d at 1178 (BIA's "180-degree-opposed judgment" was "'an abrupt departure'"); *Obeya*, 884 F.3d at 446 (BIA's purported "update" to its precedent "created a new rule"); *Valenzuela Gallardo v. Lynch*, 818 F.3d 808, 813 (9th Cir. 2016) (BIA's holding "departs from its prior interpretations"). So the agency's poor track record gives the Court little reason to believe that *this* time it can take the government at its word.

The government's position is hardly surprising. The executive branch—regardless of political affiliation—has every incentive to apply its policy as broadly as possible to situations past and present. This emphasizes the need to consider whether *Chevron* decisions may apply to prior conduct, since executive agencies will always seek to upend the settled expectations of those subject to their authority. Not only does this "punish those who have done no more than order their affairs around existing law," *De Niz Robles*, 803 F.3d at 1174–75, it creates a dangerous power grab in which an Article II agency not only receives a delegation of power from an Article I

legislature but then demands deference from an Article III judiciary while exercising it. This is precisely the type of constitutional line-crossing that merits the Court's attention.

Instead of grappling with these critical separation-of-powers issues, the government faults Mr. Olivas-Motta for failing to argue that reckless endangerment is not a crime involving moral turpitude. BIO 7, 9. This diversion fails for two reasons. First, Mr. Olivas-Motta *did* make this argument below (Pet. App. 4a), but determined it was not an appropriate question for certiorari. Second, the issue of whether reckless endangerment involves moral turpitude goes to the heart of the second question presented—how does one determine whether a crime is "inherently base, vile, or depraved" when no definition of that phrase exists (and even the BIA believes that creating one would be "unrealistic"? *Matter of Ortega-Lopez*, 27 I. & N. Dec. 382, 386 (BIA 2018) (citation omitted)). The Court should see the government's arguments for what they are: an attempt to distract from the question of whether the administrative state, acting in its policy-making capacity, may apply its reach retroactively.

C. Under any standard, *Matter of Leal* cannot apply retroactively.

In arguing that *Matter of Leal* does not apply retroactively, the government first denies that any circuit split exists. BIO 11. But while most circuits apply a "balancing test" to questions of retroactivity, the Tenth Circuit holds that *Chevron*-step two decisions "normally merit prospective application only." *De Niz Robles*, 803 F.3d at 1177; *see also id.* at 1175 (agreeing with the view that "most every administrative

decision should be presumptively prospective"). So at a minimum, the Tenth Circuit starts with a "presumption" against retroactivity rather than a scale-weighing comparison—a difference in legal standards that will frequently change the outcome.

Not only do the circuits' approaches directly conflict, they bear little resemblance to the retroactivity analysis this Court has invoked in immigration cases. In *I.N.S. v. St. Cyr*, the Court found a "clear difference" between noncitizens who are "facing *possible* deportation and facing *certain* deportation." 533 U.S. 289, 325 (2001) (emphasis added). And *Vartelas v. Holder* held that the "essential inquiry" for immigration retroactivity is "whether the new provision attaches new legal consequences to events completed before its enactment." 566 U.S. 257, 273 (2012). *See also Hughes Aircraft Co. v. United States ex rel Schumer,* 520 U.S. 939, 949 (1997) (holding that an increased likelihood of facing a *qui tam* action constitutes an impermissible retroactive effect). None of these endorses a fuzzy balancing test that leaves it "up to every judge and every panel to conduct a retroactivity analysis whenever they feel it in their guts." *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 532 (9th Cir. 2012) (en banc) (Kozinski, J., disagreeing with everyone).

The government also insists that retroactivity principles do not apply here because *Matter of Leal* did not "effect a change in law." BIO 7. But as Judge Watford explained in his dissent, "[t]he holding in *Matter of Leal* represents a 'new rule' under any definition of that term." Pet. App. 19a.

Judge Watford observed that when Mr. Olivas-Motta pleaded guilty, the "best guidance" on whether

reckless endangerment would be a crime involving moral turpitude came from a series of published BIA cases. Pet. App. 23a. These cases held that a reckless *mens rea* requires some sort of "aggravating circumstance" (such as death or serious bodily injury) to be a crime involving moral turpitude. Pet. App. 23a (citing *Matter of Fualaau*, 21 I. & N. Dec. 475, 478 (BIA 1996); *Matter of Wojtkow*, 18 I. & N. Dec. 111, 113 (BIA 1981); *Matter of Medina*, 15 I. & N. Dec. 611, 614 (BIA 1976)).[1] Because Arizona reckless endangerment lacked any such "aggravating circumstance," the BIA relied on this precedent to hold in unpublished cases that it was *not* a crime involving moral turpitude. Pet. App. 24a. And because the lawyer who advised Mr. Olivas-Motta on the immigration consequences of his plea "had no reason to anticipate" this precedent would change, her advice (and Mr. Olivas-Motta's reliance on it) were "eminently reasonable." Pet. App. 27a.

But the following year, the Attorney General issued a new decision declaring that moral turpitude requires "only 'reprehensible conduct and some degree of scienter.'" Pet. App. 24a (quoting *Matter of Silva-Trevino*, 24 I. & N. Dec. 687, 689 n.1 (A.G. 2008)). This change "eliminate[d] the aggravating-circumstance requirement for offenses with a *mens rea* of recklessness." Pet. App. 24a. In *Matter of Leal*, the BIA then applied this principle to Arizona reckless endangerment five years *after* Mr. Olivas-Motta's plea, holding

[1] The government attempts to distinguish these cases on the basis that they involved assault. BIO 9, But as Judge Watford observed, none of the cases held that the aggravating-circumstance requirement was "limited to assault offenses alone," and there is "no logical reason" it would be. Pet. App. 24a n.1.

that it was a crime involving moral turpitude. Pet. App. 25a.

So even though the legal advice Mr. Olivas-Motta received was "sound at the time," Pet. App. 22a, the subsequent application of a new *Chevron*-based decision nullified the value of this advice and stripped him of the benefit of his plea. In similar cases, this Court has held that depriving a defendant of the benefit of a plea that was "likely facilitated" by his understanding of its immigration consequences would "surely be contrary to familiar considerations of fair notice, reasonable reliance, and settled expectations." *St. Cyr*, 533 U.S. at 323 (quotations omitted). So as Judge Watford observed, this is a "prime example" of a case in which "retroactive application of a new rule is impermissible." Pet. App. 21a. *See also* Brief of Amici Curiae Law Professors, *Islas-Veloz v. Barr*, 19-627 (E. Chemerinsky) (describing the "untenably cruel" and "shocking" facts of Mr. Olivas-Motta's case).

Even if this Court doubts that an agency's policy changes may never apply retroactively, it should still grant certiorari to decide *when* a retroactivity test should apply and *what* that test should look like. If it does not, agencies will keep exercising their unchecked authority to "single out disfavored persons" like Mr. Olivas-Motta and "punish them for past conduct they cannot now alter." *De Niz Robles*, 803 F.3d at 1174–75.

II. The "crime involving moral turpitude" statute is unconstitutional.

In its opposition, the government also transforms Mr. Olivas-Motta's facial challenge into an as-applied challenge and denies that the statute contains the type of "grave uncertainty" necessary to be unconstitutional. BIO 14, 17. It also maintains that *Jordan v. De George*, 341 U.S. 223 (1951), "long ago rejected a vagueness challenge" to the same statute. BIO 7. Neither contention is correct.

A. Statutes with no "core" are reviewed for facial constitutionality.

The government first argues that the question presented must be recast as an as-applied challenge—one "rooted in the circumstances of petitioner's case and particular offense." BIO 15. But while such challenges may be appropriate for statutes that are "imprecise but comprehensible," other statutes have "no standard of conduct at all." *Smith v. Goguen*, 415 U.S. 566, 578 (1974) (quotations omitted). And where a statute "simply has no core," *id.*, a trilogy of recent cases confirms that courts review for facial constitutionality. *See Johnson v. United States*, 135 S. Ct. 2551, 2560–61 (2015); *Sessions v. Dimaya*, 138 S. Ct. 1204, 1214 n.3 (2018); *United States v. Davis*, 139 S. Ct. 2319, 2329 (2019).

Here, not only does the phrase "crime involving moral turpitude" contain "no intelligible meaning," Pet. App. at 20a (Watford, J., dissenting), it requires judges to categorically assess the morality of an offense's elements and compare it to the morality of other crimes to reach a values-based conclusion. *Romo v. Barr*, 933 F.3d 1191, 1200 (9th Cir. 2019) (Owens,

J., concurring) (observing that judges must "play the role of a Rorschach psychologist"). If anything, this presents a *stronger* case for facial vagueness than the risk-of-violence statutes struck down in *Johnson*, *Dimaya*, and *Davis*.

B. *Jordan v. De George* does not foreclose this claim.

The government also argues that the circuits are bound by *Jordan v. De George*'s rejection of a similar vagueness challenge nearly seventy years ago. BIO 13. But in *Jordan*, the majority only upheld the moral turpitude statute as to *fraud* crimes—not to its alternative definition of crimes that are "inherently base, vile, or depraved." *See id.* at 232 (stating that "[w]hatever else the phrase 'crime involving moral turpitude' may mean in peripheral cases," fraud crimes "have always been regarded as involving moral turpitude"). So the constitutionality of the "base, vile, or depraved" portion of the definition remains an open question. *See Islas-Veloz v. Barr*, 914 F.3d at 1255 (Fletcher, J., concurring) (noting that the *Jordan* majority "did not quarrel with [the dissent's] conclusion that the definition of 'crimes involving moral turpitude' in non-fraud cases was unconstitutionally vague").

Furthermore, because the parties in *Jordan* never raised the issue below, the Court reached its conclusion *sua sponte* and so is "less constrained to follow" that decision as precedent. *Johnson*, 135 S. Ct. at 2562–63 (citation omitted). *Stare decisis* is further weakened when "experience with its application reveals that it is unworkable." *Id.* at 2562 (citation omitted). And experience "is all the more instructive" in void-for-vagueness cases because the error of having previously rejected a vagueness challenge becomes

apparent through the "inability of later opinions to impart the predictability that the earlier opinion forecast." *Id.*

After decades of subsequent experience, judges are now criticizing the statute as an "amorphous morass," *Partyka v. Attorney Gen.*, 417 F.3d 408, 409 (3d Cir. 2005); "schizophrenic," *Hernandez-Martinez v. Ashcroft*, 329 F.3d 1117, 1119 (9th Cir. 2003) (Wardlaw, J., concurring)); and "an embarrassment to a modern legal system," *Arias v. Lynch*, 834 F.3d 823, 835 (7th Cir. 2016) (Posner, J., concurring). After "more than a century of experience with 'moral turpitude,' it is time to recognize another failed enterprise." *Islas-Veloz*, 914 F.3d at 1261 (Fletcher, J., concurring).

C. Allowing the Executive and Judiciary to define "moral turpitude" offends the separation of powers.

Despite its assurance that the statute poses no vagueness problems, the government's definition of "moral turpitude" merely repeats a jumble of words devised by executive bureaucrats: "conduct that is inherently base, vile, or depraved" that involves "both a culpable mental state and reprehensible conduct." BIO 16 (citation omitted). But if the concept of textualism means anything, this failure to provide a workable definition should set off alarm bells. Not to worry, the government insists, because the BIA and federal courts have issued "numerous decisions" providing "substantial guidance as to what crimes do and do not qualify." BIO 16. But this improvisational approach to statutory interpretation reveals a deeper flaw of constitutional dimensions.

Mr. Olivas-Motta's petition explained how the void-for-vagueness doctrine is a "corollary" of the broader separation-of-powers doctrine "requiring that Congress, rather than the Executive or Judicial Branch, define what conduct is sanctionable and what is not." *Dimaya*, 138 S. Ct. at 1212. This principle similarly animates the non-delegation doctrine, which is just a "different name[ ]" for the Court's efforts to "rein in Congress." *Gundy v. United States*, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting). And though Mr. Olivas-Motta explained how the moral turpitude statute lacks *any* of the features necessary to comprise an "intelligible principle" under the non-delegation doctrine, Pet. 31-35a, the government never attempts to rebut this.

So whether analyzed under the rubric of vagueness or non-delegation, the result is the same: the "crime involving moral turpitude" statute epitomizes Congress' deliberate abdication of its legislative duties. This abdication invites executive actors and judges to fill the vacuum with their best guesses as to what offends the nation's moral sensibility. The end result is a statute that violates the separation of powers, upends our constitutional order, and betrays the Founders' vision.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

JEROME MAYER-CANTÚ
4287 Gilbert Street
Oakland, CA 94611
(415) 530-6444
jmayercantu@gmail.com

KARA HARTZLER
Counsel of Record
2485 Island Avenue
San Diego, CA 92102
(917) 853-1250
karahartzler101@gmail.com

Counsel for Petitioner

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