No. 22-356

IN THE

Supreme Court of the United States

EVERTON DAYE,
Petitioner,

v.

MERRICK B. GARLAND, U.S. ATTORNEY GENERAL,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF FOR FORMER EXECUTIVE OFFICE OF IMMIGRATION REVIEW JUDGES AS AMICI CURIAE IN SUPPORT OF PETITIONER

Esthena L. Barlow
Brian Wolfman
Counsel of Record
Madeline Meth
GEORGETOWN LAW
APPELLATE COURTS
IMMERSION CLINIC
600 New Jersey Ave., NW
Washington, D.C. 20001
(202) 661-6582
wolfmanb@georgetown.edu

Table of Contents

Table of Authorities

Cases **Page(s)**

Statutes

Other Authorities

Interest of Amici[1]

Amici curiae are former United States immigration judges and former members of the Board of Immigration Appeals. The Appendix lists the signatories by name.

While serving as immigration judges and Board members, amici regularly determined whether noncitizens who appeared before them should be removed from the United States because of a past conviction for a "crime involving moral turpitude." *See* 8 U.S.C. § 1227(a)(2)(A). Amici thus have extensive experience trying to make sense of that ambiguous, values-based language. They submit this brief in support of the petition for certiorari because their on-the-ground experience has shown them that Section 1227(a)(2)(A) is impossible to apply consistently and fairly.

Introduction and Summary of Argument

This brief presents amici's practical perspective on why the Immigration and Nationality Act's provision for removal based on a conviction for a "crime involving moral turpitude" is void for vagueness. Section 1227(a)(2)(A) combines the imprecision of the phrase "moral turpitude" with the indeterminacy of applying that phrase to a hypothetical set of facts

---

[1] Counsel of record for all parties received notice of amici's intent to file this brief at least ten days before its due date. The parties have consented to this filing. No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel made a monetary contribution to the preparation or submission of this brief.

under the categorical approach. The result is a provision so vague that adjudicators cannot agree on how to conduct the inquiry and frequently reach inconsistent results.

The Act charges immigration judges with determining which crimes involve "moral turpitude." Though the statute provides no definition, in 1951, this Court held that the "language conveys sufficiently definite warning as to the proscribed conduct." *Jordan v. De George*, 341 U.S. 223, 231-32 (1951). But time has disproved that understanding. The usual "consistency [that] can be expected to emerge with the accretion of case law," *S.E.R.L. v. Att'y Gen.*, 894 F.3d 535, 550 (3d Cir. 2018), has not materialized. Indeed, the typical sources of clarity—the Board of Immigration Appeals and the courts of appeals—have produced more questions than answers. Whose morals matter? How should judges discern what those morals are? What course should judges follow when moral views conflict? How do they account for changes in views over time? Immigration judges have no way to know. And the uncertainty that the statute's vague words create left amici with no guide except their own moral intuitions.

To this ambiguity, add that, under the categorical approach, immigration judges do not evaluate the actual conduct engaged in by the noncitizen before them. Instead, they must assess the moral implications of a theoretical set of facts—the "least culpable" means of committing the crime in question. The hypothetical nature of this mode of analysis exacerbates the underlying vagueness of the statutory phrase "crime involving moral turpitude."

Recently, this Court has struck down statutory provisions that suffered from analogous uncertainty, holding each unconstitutionally vague. *See Johnson v. United States*, 576 U.S. 591 (2015); *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018); *United States v. Davis*, 139 S. Ct. 2319 (2019). Section 1227(a)(2)(A) should suffer the same fate.

The real-world effects of Section 1227(a)(2)(A)'s vagueness confirm this conclusion. Attempts to curtail the provision's arbitrariness by articulating standards have failed. The Board and the courts of appeals have repeatedly but unsuccessfully tried to craft a workable set of rules for identifying which crimes involve moral turpitude. Their efforts have instead produced a series of non-dispositive, ad hoc tests that generate inconsistent and arbitrary results. Confusion abounds in immigration courts and in Article III courts alike, with widespread disagreement over whether a given crime involves moral turpitude. Among other unexplainable outcomes, the courts of appeals part ways on whether crimes such as making a terroristic threat or deceptively using a social security number involve moral turpitude. Amici were required to sort through this morass, unsure of which of the growing list of ad hoc tests applied or how to deal with the conflicting results. Their experiences confirm that the phrase "moral turpitude" is too vague to govern the "particularly severe 'penalty'" of removal. *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010) (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893)).

For these reasons, this Court should grant review and reverse.

Argument

I. The statutory phrase "crime involving moral turpitude" invites arbitrary enforcement.

Under the Due Process Clause, "a vague law is no law at all." *Davis v. United States*, 139 S. Ct. 2319, 2323 (2019). The void-for-vagueness doctrine ensures the public has "fair notice" of what conduct a statute prohibits. *Johnson v. United States*, 576 U.S. 591, 595 (2015). And, even "more important[ly]," *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983), it "guards against arbitrary or discriminatory law enforcement," *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018) (plurality opinion) (citations omitted); *see also id.* at 1231 (Gorsuch, J., concurring).

Three times in the past decade, this Court has relied on the Due Process Clause to strike down a statute requiring judges to apply the categorical approach to indeterminate, standardless statutory language. *Johnson*, 576 U.S. at 606; *Dimaya*, 138 S. Ct. at 1223; *Davis*, 139 S. Ct. at 2336. In *Johnson*, the statutory provision penalized individuals convicted of crimes that categorically involved conduct presenting a "serious potential risk" of injury. 18 U.S.C. § 924(e)(2)(B)(ii). The provisions in *Dimaya* and *Davis* similarly penalized those with convictions for crimes that categorically posed a "substantial risk" of the use of physical force against another. *Id.* §§ 16(b), 924(c)(3)(B). And because the categorical approach applied, courts had to assess the risk posed not by the "real-world facts" of the case but by the "kind of conduct that the 'ordinary case' of a crime involves"—that is, an "imaginary" version of the crime. *Dimaya*, 138 S. Ct. at 1213-14 (quoting *Johnson*, 576 U.S. at 596-97). The mental gymnastics of this approach

resulted in an "abstract inquiry" with too little "predictability" to "pass constitutional muster." *Id.* (citation omitted); *see also Johnson*, 576 U.S. at 604; *Davis*, 139 S. Ct. at 2326.

The phrase "crime involving moral turpitude" in Section 1227(a)(2)(A) contains a similarly fatal degree of uncertainty. Immigration judges must conjure a "least culpable" version of the offense in question and determine whether that hypothetical crime involves the amorphous concept of moral turpitude. As a result, Section 1227(a)(2)(A) leaves immigration judges to "guesswork and intuition" and thus invites arbitrary enforcement. *Dimaya*, 138 S. Ct. at 1223 (quoting *Johnson*, 576 U.S. at 600).

A. Immigration judges have no helpful guidance about what "moral turpitude" means.

Congress charged immigration judges with determining which crimes involve "moral turpitude," but neither the text, the legislative history, nor Board caselaw provides any clarity over that term's meaning.

The relevant text is ambiguous, authorizing the removal of certain noncitizens convicted of crimes "involving moral turpitude." 8 U.S.C. § 1227(a)(2)(A). The statute fails to define that term, and dictionaries from around the time of the provision's adoption provide no meaningful guidance. *See Moral*, Black's Law Dictionary (2d ed. 1910) (defining "moral" as "pertaining or relating to the conscience … or to the principles of right conduct"); *Turpitude*, Black's Law Dictionary (2d ed. 1910) (defining "turpitude" as "everything done contrary to justice, honesty, modesty, or good morals"); *see also Turpitude*, Black's Law Dictionary (1st ed. 1891) (same).

Congress recognized the statute's vagueness from the start. During a hearing on the bill, a legislator warned that "moral turpitude has not been defined" and "[n]o one can really say what is meant by saying a crime involving moral turpitude." *Restriction of Immigration: Hearings on H.R. 10384 Before the H. Comm. on Immigr. & Naturalization*, 64th Cong. 8 (1916) (statement of Rep. Adolph J. Sabath). Courts recognize that "Congress knowingly conceived [the provision] in confusion," *Cabral v. I.N.S.*, 15 F.3d 193, 194 (1st Cir. 1994), and continue to lament its ambiguity, *see, e.g.*, *Munoz-Rivera v. Wilkinson*, 986 F.3d 587, 590 (5th Cir. 2021); *Franklin v. I.N.S.*, 72 F.3d 571, 572 (8th Cir. 1995); *Arias v. Lynch*, 834 F.3d 823, 831 (7th Cir. 2016) (Posner, J., concurring).

The Board's attempts to create its own, more rigorous definition have failed. It defines a crime involving moral turpitude as one that "shocks the public conscience" because it "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." *Matter of Silva-Trevino*, 26 I. & N. Dec. 826, 833 (B.I.A. 2016); *Matter of Danesh*, 19 I. & N. Dec. 669, 670 (B.I.A. 1988). This definition, which amounts to "a list of antiquated synonyms for bad character," *Arias*, 834 F.3d at 831-32 (Posner, J., concurring), leaves immigration judges with "a lot of work to be done when particular crimes or specific acts must be characterized," *Garcia-Martinez v. Barr*, 921 F.3d 674, 676 (7th Cir. 2019). And, as we explain below (at 13-17), the Board's efforts to refine its definition have been thwarted because the concept of "moral turpitude" is inherently difficult to pin down.

B. Without guidance, the moral-turpitude inquiry is rife with uncertainty.

The ambiguity surrounding the concept of "moral turpitude" leaves a host of unanswered questions that immigration judges struggle to resolve in deciding individual cases.

To start, it is unclear *whose* morals should drive the inquiry. The Board has directed immigration judges to ascertain the moral sentiments of "society" and "the public." *Matter of Silva-Trevino*, 26 I. & N. Dec. 826, 833-34 (B.I.A. 2016); *Matter of Danesh*, 19 I. & N. Dec. 669, 670 (B.I.A. 1988). But do "society" and "the public" consist of the local community, the country as a whole, or some other cohort? Some cases suggest that immigration judges should assess the morals "prevailing in the United States as a whole." *Walcott v. Garland*, 21 F.4th 590, 601 (9th Cir. 2021) (quotation marks omitted). But most cases fail to specify whose morals they are evaluating.[2] This ambiguity leaves immigration judges without a frame of reference for their analysis.

Even when immigration judges know whose morals they should discern, they struggle in practice to determine what those morals are. How can

---

[2] *See, e.g.*, *Rosa Pena v. Sessions*, 882 F.3d 284, 287 (1st Cir. 2018); *Jang v. Garland*, 42 F.4th 56, 60 (2d Cir. 2022); *Larios v. Att'y Gen. U.S.*, 978 F.3d 62, 69-70 (3d Cir. 2020); *Nunez-Vasquez v. Barr*, 965 F.3d 272, 282 (4th Cir. 2020); *Diaz Esparza v. Garland*, 23 F.4th 563, 570 (5th Cir. 2022); *Reyes v. Lynch*, 835 F.3d 556, 560 (6th Cir. 2016); *United States v. Valenzuela*, 931 F.3d 605, 608 (7th Cir. 2019); *United States v. Escobar*, 970 F.3d 1022, 1025 (8th Cir. 2020); *Veloz-Luvevano v. Lynch*, 799 F.3d 1308, 1312 (10th Cir. 2015); *Zarate v. U.S. Att'y Gen.*, 26 F.4th 1196, 1200-01 (11th Cir. 2022).

immigration judges "ascertain the moral sentiments of masses of persons on any better basis than a guess?" *Jordan v. De George*, 341 U.S. 223, 238 (1951) (Jackson, J., dissenting). Should they use "statistical analys[es]? Surveys? Experts? Google? Gut instinct?" *Sessions v. Dimaya*, 138 S. Ct. 1204, 1215 (2018) (plurality opinion) (quoting *Johnson v. United States*, 576 U.S. 591, 597 (2015)). Irrationality is "inherent in the task of translating the religious and ethical connotations of the phrase [moral turpitude] into legal decisions." *Islas-Veloz v. Whitaker*, 914 F.3d 1249, 1259 (9th Cir. 2019) (Fletcher, J., concurring). Thus, the "ill-defined" statutory language, *Dimaya*, 138 S. Ct. at 1223, leaves immigration judges with no handholds for gauging society's morals. As former immigration judge Carol King puts it, the dearth of guidance made her feel "like a fish out of water."[3]

It is unsurprising that immigration judges struggle with this inquiry. As former immigration judge Jeffrey Chase explains, these decisions are "far outside" immigration judges' "area of expertise." The scope of duties that immigration judges typically perform—finding facts and applying legal standards to them—does not include sussing out society's values. Our constitutional system typically reserves value-laden, ethical judgments for elected officials, who can "respond to the will and consequently the moral values of the people." *McCleskey v. Kemp*, 481 U.S. 279, 319 (1987) (citation omitted); *see, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 735-36 (1997). Immigration

[3] Quotations from former immigration judges in this brief are taken from interviews with amici conducted by amici's counsel.

judges lack the ability—and structural legitimacy—to channel the moral views of the public.

Immigration judges also are unable to reach rational determinations when moral views conflict. The United States is a "large country," and acts that are regarded as immoral in one place are acceptable in others. *Zarate v. U.S. Att'y Gen.*, 26 F.4th 1196, 1200 n.2 (11th Cir. 2022) (citation omitted). In the past, people have disagreed over whether avoiding liquor taxes was immoral. *De George*, 341 U.S. at 238 (Jackson, J., dissenting). Today, immigration judges must grapple with diverging opinions on marijuana.[4] Section 1227(a)(2)(A) requires them to reconcile society's conflicting views on marijuana and objectively decide if its use is morally turpitudinous. Is there some "not-well-specified-yet-sufficiently-large" percentage of the public that must find a crime to be immoral before an immigration judge should do the same? *See Dimaya*, 138 S. Ct. at 1216. That ambiguity produces unpredictability. Some immigration judges may conclude marijuana use is immoral. Other judges could reasonably reach the opposite outcome.

Uncertainty remains even when the relevant court of appeals has squarely addressed the criminal statute at issue. Moral views are "susceptible to change based on the prevailing views in society." *Islas-Veloz*, 914

---

[4] Thirty-seven states have legalized marijuana for medical purposes, and twenty-one of those states have legalized it for recreational use as well. *State Medical Cannabis Laws*, Nat'l Conf. of State Legislators (Nov. 9, 2022), https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx. By contrast, ten states permit its use in very limited quantities or at limited potency only, and three states criminalize its possession entirely. *Id.*

F.3d at 1258 (Fletcher, J., concurring) (quoting *Matter of Lopez-Meza*, 22 I. & N. Dec. 1188, 1191 (B.I.A. 1999)). A decades-old precedent holding that a crime involves moral turpitude may not reflect society's views today. *See, e.g.*, *Matter of S-*, 8 I. & N. Dec. 409, 415 (B.I.A. 1959) (holding that consensual sodomy is a crime involving moral turpitude). If an immigration judge applies outdated precedent, it runs the risk of enshrining "the set of morally framed norms" from an earlier era. Julia Ann Simon-Kerr, *Moral Turpitude*, 2012 Utah L. Rev. 1001, 1008 (2012). But at the same time, immigration judges have a responsibility to apply precedent faithfully. They are left to navigate these crosscurrents without adequate judicial guidance.

In light of these unresolved ambiguities, immigration judges inevitably find themselves relying on their personal moral views. Former immigration judge Susan Roy explained that when the statute, the Board, and the courts of appeals failed to produce answers, she was "more likely to rule consistent with [her] personal bias, albeit unintentionally." As a result, decisions may rest on the "moral reactions of particular judges to particular offenses," *Islas-Veloz*, 914 F.3d at 1259 (Fletcher, J., concurring) (quoting *De George*, 341 U.S. at 239) (Jackson, J., dissenting)), not a broader, evenhanded principle.

C. The categorical approach exacerbates the arbitrariness of the moral-turpitude inquiry.

A statute so standardless that it tempts decisionmakers to "pursue their personal predilections" raises due process concerns on its own. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (citation omitted). But the vagueness of the words "moral

turpitude" is not the only opening through which arbitrariness can enter the analysis.

The Act requires immigration judges to determine whether a crime involves moral turpitude by applying the categorical approach. *Pereida v. Wilkinson*, 141 S. Ct. 754, 762 (2021). To do so, a judge may not "consider the facts of an individual's crime as he actually committed it" but instead may analyze only the crime's elements. *Id.* In doing so, judges hypothesize the "least culpable conduct necessary to sustain a conviction under the statute." *Lauture v. U.S. Att'y Gen.*, 28 F.4th 1169, 1176 (11th Cir. 2022) (citation omitted). So, a conviction under the statute is for a "crime involving moral turpitude" only if the postulated least-culpable conduct necessarily involves moral turpitude. *Diaz Esparza v. Garland*, 23 F.4th 563, 568 (5th Cir. 2022).

This inquiry injects additional uncertainty into the moral-turpitude analysis. At the threshold, immigration judges must envision the least culpable conduct that a statute criminalizes. Any given judge might resolve that question differently. The uncertainty about how to ascertain what moral sentiments inform the concept of "moral turpitude" likewise infects the exercise of identifying the least culpable way to commit an offense.

That is not to say that the categorical approach poses a problem in its typical applications. As a general matter, amici found the categorical approach workable. But the lack of clarity in the text of Section 1227(a)(2)(A) prevents the categorical approach from serving as a manageable tool. Instead, the categorical approach amplifies the ambiguity inherent in the concept of "moral turpitude," just as it compounded the

uncertainty of the phrases "substantial risk" and "serious potential risk" in *Johnson*, *Dimaya*, and *Davis*. In amici's experience, these deficiencies in Section 1227(a)(2)(A) left them at sea and transformed them from evenhanded decisionmakers into arbitrary enforcers of the law.

II. Courts have repeatedly tried to craft a standard for what qualifies as a crime involving moral turpitude, but they have failed.

The "failure of 'persistent efforts'" to settle on a test provides "evidence of vagueness." *Johnson v. United States*, 576 U.S. 591, 598 (2015) (quoting *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 91 (1921)). Prior to *Johnson*, this Court and the lower courts tried for nine years to interpret the challenged provision, but consensus and clarity eluded them. *Id.* at 601-02. These "repeated attempts and repeated failures to craft a principled and objective standard" confirmed the provision's "hopeless indeterminacy." *Id.* at 598.

Over one hundred years of endeavoring to define a "crime involving moral turpitude" have proved equally fruitless. This statutory language has generated the same "pervasive disagreement about the nature of the inquiry one is supposed to conduct" as did the provisions at issue in *Johnson*, *Dimaya*, and *Davis*. *See, e.g.*, *Johnson*, 576 U.S. at 601. A review of the grab-bag of approaches and contradictory decisions in the lower courts shows that Section 1227(a)(2)(A) is "nearly impossible to apply consistently," and repeated attempts to correct this problem have failed. *Id.* (citation omitted). Amici have experienced the consequences of this futility firsthand.

A. Efforts to settle on a test for crimes involving moral turpitude have failed.

The Board of Immigration Appeals has tried to craft a workable test. But "moral turpitude" cannot be reduced to a clear standard. So, instead of arriving at a uniform and usable definition, the Board has delineated various ad hoc tests, none of which can guarantee the correct answer. This leaves immigration judges where they started, without a standard to apply.

As both the Board and courts acknowledge, moral turpitude is a "nebulous" concept. *Matter of Lopez-Meza*, 22 I. & N. Dec. 1188, 1191 (B.I.A. 1999) (quoting *Franklin v. I.N.S.*, 72 F.3d 571, 573 (8th Cir. 1995)). The Board has long explained that moral turpitude refers to "conduct that shocks the public conscience" because it "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." *Matter of Silva-Trevino*, 26 I. & N. Dec. 826, 833 (B.I.A. 2016); *Matter of Danesh*, 19 I. & N. Dec. 669, 670 (B.I.A. 1988); *Matter of Flores*, 17 I. & N. Dec. 225, 227 (B.I.A. 1980). A crime meets this definition if its elements include "reprehensible conduct" and a "culpable mental state." *Matter of Silva-Trevino*, 26 I. & N. Dec. at 834. The ambiguity and circularity of this language render it useless. *See supra* at 5-6.

Perhaps because its definition remains vague, the Board has tried to offer rules of thumb for identifying crimes involving moral turpitude. But each comes with its own complexity and unpredictability.

"Among the tests" for determining that a crime involves moral turpitude is whether "the act is

accompanied by a vicious motive," a "corrupt mind," or "evil intent." *Matter of Osman Salad*, 27 I. & N. Dec. 733, 735 (B.I.A. 2020) (citation omitted); *Chanmouny v. Ashcroft*, 376 F.3d 810, 814 (8th Cir. 2004). But ultimately, "the presence or absence of a corrupt or vicious mind is not controlling." *Hernandez-Perez v. Holder*, 569 F.3d 345, 348 (8th Cir. 2009) (quoting *Keungne v. U.S. Att'y Gen.*, 561 F.3d 1281, 1284 (11th Cir. 2009)); *see Nicanor-Romero v. Mukasey*, 523 F.3d 992, 998 (9th Cir. 2008); *Matter of Torres-Varela*, 23 I. & N. Dec. 78, 83 (B.I.A. 2001).

The Board has also asked whether the crime involves conduct that is malum in se, meaning "conduct that is per se morally reprehensible and intrinsically wrong," *Matter of Ruiz-Lopez*, 25 I. & N. Dec. 551, 551 (B.I.A. 2011), or malum prohibitum. *See Mohamed v. Holder*, 769 F.3d 885, 888 (4th Cir. 2014). But the distinction between crimes that are malum in se and malum prohibitum is "paper thin." *Arias v. Lynch*, 834 F.3d 823, 832 (7th Cir. 2016) (Posner, J., concurring). Like the "evil intent" test, this heuristic is "more a general rule than absolute standard." *Matter of Torres-Varela*, 23 I. & N. Dec. at 84; *see Serrano-Soto v. Holder*, 570 F.3d 686, 691 n.4 (6th Cir. 2009).

Yet another of the Board's ad hoc tests is whether there are "additional aggravating elements" present that "transform an offense that otherwise would not be a crime involving moral turpitude into one that is." *Matter of Lopez-Meza*, 22 I. & N. Dec. at 1196. An aggravating factor might include the use of a deadly weapon or the existence of a trusted relationship between the perpetrator and the victim. *Uppal v. Holder*, 605 F.3d 712, 717 (9th Cir. 2010). But the

"presence or absence" of these factors, whatever they may be, "is not determinative," *Alonzo v. Lynch*, 821 F.3d 951, 959 (8th Cir. 2016) (quoting *Matter of Solon*, 24 I. & N. Dec. 239, 246 (B.I.A. 2007)), and "reasonable persons can differ" on the effect of these aggravating factors, *Matter of Torres-Varela*, 23 I. & N. Dec. at 86.

One might expect other considerations, like the gravity of the crime or the length of the sentence, to bear on the moral-turpitude determination. Though these considerations are instructive, they are not dispositive. The Board has insisted that neither the "seriousness of a criminal offense" nor the "severity of the sentence" fully answers the question whether a crime involves moral turpitude. *Matter of Serna*, 20 I. & N. Dec. 579, 581 (B.I.A. 1992).

Separately, courts and the Board have attempted to give fraud crimes special treatment. Purporting to follow this Court's seventy-year-old decision in *Jordan v. De George*, 341 U.S. 223 (1951), the Board has concluded that crimes with an element or "ingredient" of fraud categorically involve moral turpitude. *Matter of Flores*, 17 I. & N. Dec. at 228 (quoting *De George*, 341 U.S. at 232). The courts of appeals agree.[5] Though

---

[5] *E.g.*, *Da Silva Neto v. Holder*, 680 F.3d 25, 32 (1st Cir. 2012); *Mendez v. Mukasey*, 547 F.3d 345, 347 (2d Cir. 2008); *Sasay v. Att'y Gen. U.S.*, 13 F.4th 291, 297-98 (3d Cir. 2021); *Kporlor v. Holder*, 597 F.3d 222, 225 (4th Cir. 2010); *Hyder v. Keisler*, 506 F.3d 388, 391 (5th Cir. 2007); *Yeremin v. Holder*, 738 F.3d 708, 714 (6th Cir. 2013); *Arias*, 834 F.3d at 827; *Villatoro v. Holder*, 760 F.3d 872, 877 (8th Cir. 2014); *Leal v. Holder*, 771 F.3d 1140, 1146 (9th Cir. 2014); *Rodriguez-Heredia v. Holder*, 639 F.3d 1264, 1268 (10th Cir. 2011); *Zarate v. U.S. Att'y Gen.*, 26 F.4th 1196, 1201 (11th Cir. 2022).

that might seem administrable on its face, the circuits disagree on a key premise: what qualifies as fraud. In some courts, any crime involving "deceptive intent" alone involves moral turpitude. *E.g.*, *Munoz-Rivera v. Wilkinson*, 986 F.3d 587, 592 (5th Cir. 2021). Other courts have rejected a "deception-only" standard, finding it an inadequate "proxy" for fraud. *E.g.*, *Flores-Molina v. Sessions*, 850 F.3d 1150, 1164, 1170 (10th Cir. 2017). Still others have questioned whether special treatment for fraud crimes is at all logical, labeling the per se rule for fraud crimes an "absurd distinction." *Arias*, 834 F.3d at 833-36 (Posner, J., concurring) (observing that State Department guidance categorizes mail fraud as morally turpitudinous while exempting crimes like escape from prison).

The struggle to produce a test reflects the reality that the concept of "moral turpitude" resists a precise definition that can be applied fairly and consistently. *See infra* at 17-19. The courts of appeals have observed as much, noting that the "amorphous nature" of the moral-turpitude inquiry has led to a "patchwork" of subsidiary tests, *Da Silva Neto*, 680 F.3d at 29, instead of a "consistent or easily applied set of criteria," *Nicanor-Romero*, 523 F.3d at 998. As a result, moral turpitude's "contours have been left to case-by-case adjudication" by various decisionmakers for over a century. *Zarate*, 26 F.4th at 1199.[6] Amici as immigration judges fell back on a decisional process

[6] *See also, e.g.*, *Medina v. United States*, 259 F.3d 220, 227 (4th Cir. 2001); *Ruiz-Lopez v. Holder*, 682 F.3d 513, 516 (6th Cir. 2012); *Mei v. Ashcroft*, 393 F.3d 737, 739 (7th Cir. 2004); *Franklin*, 72 F.3d at 572-73; *De Leon v. Lynch*, 808 F.3d 1224, 1228 (10th Cir. 2015).

that is neither evenhanded nor predictable: "You know it when you see it."

B. The confusion about how to identify a crime involving moral turpitude has led to inconsistent and arbitrary results.

Without a usable standard, determining whether a particular crime involves moral turpitude is "not an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 378 (2010) (Alito, J., concurring in the judgment). Unsurprisingly, courts reach different conclusions about which crimes involve moral turpitude even when evaluating materially identical statutes. The following examples illustrate this inconsistency and arbitrariness.

Terroristic threat. In identically worded statutes, New Jersey and Minnesota criminalize making a threat to terrorize another, to cause evacuation, or to otherwise cause serious public inconvenience. *See* N.J. Stat. Ann. § 2C:12-3; Minn. Stat. § 609.713. The Eighth Circuit holds that this crime involves moral turpitude, yet the Third Circuit holds it does not. *Compare Avendano v. Holder*, 770 F.3d 731, 735 (8th Cir. 2014), *with Larios v. Att'y Gen. U.S.*, 978 F.3d 62, 72-73 (3d Cir. 2020).

Sex offender registration. Minnesota and Virginia criminalize knowingly failing to register as a sex offender. *See* Minn. Stat. § 243.166, subdiv. 5(a); Va. Code Ann. § 18.2-472.1. The Eighth Circuit holds that this crime involves moral turpitude, yet the Fourth Circuit holds it does not. *Compare Bakor v. Barr*, 958 F.3d 732, 738 (8th Cir. 2020), *with Mohamed v. Holder*, 769 F.3d 885, 890 (4th Cir. 2014).

Reckless endangerment. Several states criminalize recklessly placing a person in danger of death or serious injury. *See* 18 Pa. Cons. Stat. § 2705; Ariz. Rev. Stat. Ann. § 13-1201; Ark. Code Ann. § 5-13-205(a). The Eighth and Ninth Circuits hold that this crime involves moral turpitude, yet the Third Circuit holds it does not. *Compare Estrada-Rodriguez v. Lynch*, 825 F.3d 397, 406 (8th Cir. 2016), *and Leal v. Holder*, 771 F.3d 1140, 1148-49 (9th Cir. 2014), *with Mahn v. Att'y Gen. of U.S.*, 767 F.3d 170, 175 (3d Cir. 2014).

Deceptive use of a social security number. 42 U.S.C. § 408(a)(7)(B) prohibits an individual from falsely representing ownership of a social security number with the intent to deceive. The Fifth and Eighth Circuits hold that this crime involves moral turpitude, yet the Second and Ninth Circuits hold it does not. *Compare Munoz-Rivera v. Wilkinson*, 986 F.3d 587, 591 (5th Cir. 2021), *and Guardado-Garcia v. Holder*, 615 F.3d 900, 902 (8th Cir. 2010), *with Ahmed v. Holder*, 324 F. App'x 82, 83-84 (2d Cir. 2009), *and Beltran-Tirado v. I.N.S.*, 213 F.3d 1179, 1184-85 (9th Cir. 2000). The Eleventh Circuit concluded in an unpublished opinion that social-security-number misuse involves moral turpitude, *Moreno-Silva v. U.S. Att'y Gen.*, 481 F. App'x 611, 613 (11th Cir. 2012), but recently remanded for reconsideration of that same question, *Zarate v. U.S. Att'y Gen.*, 26 F.4th 1196, 1208-09 (11th Cir. 2022).

Misprision. 18 U.S.C. § 4 criminalizes knowingly concealing and failing to alert government authorities that a felony has been committed. The Fifth and Eleventh Circuits hold that this crime involves moral turpitude, yet the Second and Ninth Circuits hold it

does not. *Compare Villegas-Sarabia v. Sessions*, 874 F.3d 871, 881 (5th Cir. 2017), *and Itani v. Ashcroft*, 298 F.3d 1213, 1216 (11th Cir. 2002), *with Mendez v. Barr*, 960 F.3d 80, 88 (2d Cir. 2020), *and Robles-Urrea v. Holder*, 678 F.3d 702, 711 (9th Cir. 2012).

Even when courts deal with statutes that are not identical, arbitrary results still arise. It is hard to understand, for example, why courts have held that passing bad checks involves moral turpitude, *Dolic v. Barr*, 916 F.3d 680, 686 (8th Cir. 2019), but money-laundering does not, *Jang v. Garland*, 42 F.4th 56, 64 (2d Cir. 2022). Similarly, it is unclear why a person who commits robbery by using force while stealing a vehicle does not commit a crime involving moral turpitude, *Barbosa v. Barr*, 926 F.3d 1053, 1059 (9th Cir. 2019), but a person who shoplifts does, *Matter of Diaz-Lizarraga*, 26 I. & N. Dec. 847, 852-53 (B.I.A. 2016). Or why solicitation to possess four pounds of marijuana is a crime involving moral turpitude, *Romo v. Barr*, 933 F.3d 1191, 1195-96 (9th Cir. 2019), but offering to transport less than two pounds of marijuana is not, *Walcott v. Garland*, 21 F.4th 590, 600 (9th Cir. 2021). And while a simple DUI does not involve moral turpitude, if the noncitizen's driver's license is suspended, that transforms the crime into one involving moral turpitude. *See Alonzo v. Lynch*, 821 F.3d 951, 955-56 (8th Cir. 2016).

These outcomes show that immigration judges cannot conduct the moral-turpitude inquiry consistently or predictably. Decades of arbitrary results make clear that the long-running attempt to define a "crime involving moral turpitude" is a "failed enterprise." *Johnson v. United States*, 576 U.S. 591, 601-02 (2015).

C. Amici's experiences attempting to apply the many ad hoc tests for crimes involving moral turpitude confirm the phrase's vagueness.

As immigration judges, amici regularly struggled with the confusing array of tests and the frustration of inconsistent results discussed earlier. The repeated (and failed) efforts to establish a test for which crimes involve moral turpitude forced amici to operate in a constantly changing legal landscape. In former immigration judge Carol King's words, as soon as amici "got a handle" on the test du jour, "it would shift," and they would find themselves forced "to rethink the whole thing." Amici found it "disorienting" and "confusing" to keep up with the "repeatedly shifting analyses."

Even though the Board and the courts of appeals strove to define "crimes involving moral turpitude," their efforts did not improve the situation for immigration judges, the people who actually do the everyday work. Amici waited for much-needed clarity. But to their frustration, it did not arrive. Even for those who served for decades, the moral-turpitude inquiry became no clearer over time. Instead, the menu of ad hoc tests, all imperfect, just ballooned without adding any precision or clarity. Seventy years after this Court wrongly brushed aside the difficulties in identifying a crime involving moral turpitude, *Jordan v. De George*, 341 U.S. 223, 231-32 (1951), the inquiry remains untenable.

The vagueness of "crime involving moral turpitude" was never more frustrating to amici than when they reached results inconsistent with their colleagues' conclusions. It is one thing to apply a well-defined legal rule and disagree with another judge's logic or

analysis. It is another thing to wade through a standardless inquiry and come up with a result that diverges from others'.

Their decades of experience have left amici certain that Section 1227(a)(2)(A) is unconstitutionally vague. They witnessed "repeated attempts" to refine the analysis, each of which only contributed to "pervasive disagreement" over the appropriate way to apply the statutory language. *Johnson v. United States*, 576 U.S. 591, 598, 601 (2015). In the face of this confusion, their analysis was unguided and "anything but evenhanded, predictable, or consistent." *Id.* at 606. Section 1227(a)(2)(A) thus "produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.* at 598.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Esthena L. Barlow
Brian Wolfman
Counsel of Record
Madeline Meth
GEORGETOWN LAW
APPELLATE COURTS
IMMERSION CLINIC
600 New Jersey Ave., NW
Washington, D.C. 20001
(202) 661-6582
wolfmanb@georgetown.edu

Counsel for Amici Curiae

November 14, 2022

Appendix

List of Amici

This appendix lists the signatories to this brief and their service as judges with the Executive Office of Immigration Review.

Hon. Steven Abrams, Immigration Judge, New York, Varick St., and Queens Wackenhut, 1997-2013

Hon. Terry A. Bain, Immigration Judge, New York, 1994-2019

Hon. Dayna M. Beamer, Immigration Judge, Honolulu, 1997-2021

Hon. Sarah M. Burr, Assistant Chief Immigration Judge and Immigration Judge, New York, 1994-2012

Hon. Esmerelda Cabrera, Immigration Judge, New York, Newark, and Elizabeth, NJ, 1994-2005

Hon. Jeffrey S. Chase, Immigration Judge, New York, 1995-2007

Hon. George T. Chew, Immigration Judge, New York, 1995-2017

Hon. Alison Daw, Immigration Judge, Los Angeles, San Francisco, 2006-2018

Hon. Bruce J. Einhorn, Immigration Judge, Los Angeles, 1990-2007

Hon. Cecelia M. Espenoza, Appellate Immigration Judge, Board of Immigration Appeals, 2000-2003

Hon. Noel A. Ferris, Immigration Judge, New York, 1994-2013

Hon. James R. Fujimoto, Immigration Judge, Chicago, 1990-2019

Hon. Gilbert Gembacz, Immigration Judge, Los Angeles, 1996-2008

Hon. Alberto E. Gonzalez, Immigration Judge, San Francisco, 1995-2005

Hon. John F. Gossart, Jr., Immigration Judge, Baltimore, 1982-2013

Hon. Paul Grussendorf, Immigration Judge, Philadelphia and San Francisco, 1997-2004

Hon. Miriam Hayward, Immigration Judge, San Francisco, 1997-2018

Hon. Charles M. Honeyman, Immigration Judge, New York and Philadelphia, 1995-2020

Hon. William P. Joyce, Immigration Judge, Boston, 1996-2002

Hon. Samuel Kim, Immigration Judge, San Francisco, 2020-2022

Hon. Carol King, Immigration Judge, San Francisco, 1995-2017

Hon. Elizabeth A. Lamb, Immigration Judge, New York, 1995-2018

Hon. Dana Leigh Marks, Immigration Judge, San Francisco, 1987-2021

Hon. Margaret McManus, Immigration Judge, New York, 1991-2018

Hon. Steven Morley, Immigration Judge, Philadelphia, 2010-2022

Hon. Charles Pazar, Immigration Judge, Memphis, 1998-2017

Hon. Laura Ramirez, Immigration Judge, San Francisco, 1997-2018

Hon. John W. Richardson, Immigration Judge, Phoenix, 1990-2018

Hon. Lory D. Rosenberg, Appellate Immigration Judge, Board of Immigration Appeals, 1995-2002

Hon. Susan G. Roy, Immigration Judge, Newark, 2008-2010

Hon. Paul W. Schmidt, Chairperson and Appellate Immigration Judge, Board of Immigration Appeals, 1995-2003; Immigration Judge, Arlington, 2003-2016

Hon. Patricia M. B. Sheppard, Immigration Judge, Boston, 1993-2006

Hon. Ilyce S. Shugall, Immigration Judge, San Francisco, 2017-2019

Hon. Andrea Hawkins Sloan, Immigration Judge, Portland, 2010-2017

Hon. Gustavo Villageliu, Appellate Immigration Judge, Board of Immigration Appeals, 1995-2003; Immigration Judge, Miami, 1990-1995

Hon. Robert D. Vinikoor, Immigration Judge, Chicago, 1984-2017

Hon. Robert D. Weisel, Assistant Chief Immigration Judge, Immigration Judge, New York, 1989-2016