No. 21-1355

In the Supreme Court of the United States

SANTIAGO ALEJANDRO DIAZ-ESPARZA, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a conviction for "[d]eadly [c]onduct" in violation of Tex. Penal Code Ann. § 22.05(a) (Vernon 2019) is a "crime[] involving moral turpitude" under 8 U.S.C. 1227(a)(2)(A)(ii).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-24) is reported at 23 F.4th 563. The decisions of the Board of Immigration Appeals (Pet. App. 25-33) and the immigration judge (Pet. App. 34-41) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 2022. The petition for a writ of certiorari was filed on April 14, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is a noncitizen who was convicted of deadly conduct in violation of Tex. Penal Code Ann. § 22.05(a) (Vernon 2019) and of evading arrest with a motor vehicle in violation of Tex. Penal Code Ann.

§ 38.04 (Vernon 2016). Pet. App. 2.[1] An immigration judge (IJ) found petitioner removable as a noncitizen who has been "convicted of two or more crimes involving moral turpitude," under 8 U.S.C. 1227(a)(2)(A)(ii). Pet. App. 34-41. Petitioner appealed to the Board of Immigration Appeals (Board), arguing that his conviction for deadly conduct did not qualify as a crime involving moral turpitude. *Id.* at 31. The Board affirmed, *id.* at 25-33, and the court of appeals denied a petition for review, *id.* at 1-24. The court explained that the offense of deadly conduct under Texas law is categorically a crime involving moral turpitude because it "requires an offender to take actions creating 'imminent danger' of * * * 'permanent disfigurement' or 'protracted' bodily 'impairment[]' to another person," and it further "requires the offender to be 'aware of but consciously disregard[]' the 'substantial and unjustifiable risk' of injury his behavior poses." *Id.* at 13-14 (quoting Tex. Penal Code Ann. §§ 1.07(a)(46), 6.03(c), 22.05(a)).[2]

1. Petitioner is a citizen of Mexico who entered the United States without inspection in 1999 and became a lawful permanent resident in 2005. Pet. App. 2. In June 2013, petitioner was convicted of deadly conduct in violation of Tex. Penal Code Ann. § 22.05(a) (Vernon 2019). Pet. App. 26. That offense requires that a person "recklessly engage in conduct that places another in imminent danger of serious bodily injury." Tex. Penal Code Ann. § 22.05(a) (Vernon 2019). Texas law provides that

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[1] This brief uses the term "noncitizen" as equivalent to the statutory term "alien." See *Barton* v. *Barr*, 140 S. Ct. 1442, 1446 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)).

[2] The Fifth Circuit did not indicate the version of the Texas Penal Code that it was citing, but the relevant statutory provisions have not changed since well before petitioner was convicted.

a "person acts recklessly * * * when he is aware of but consciously disregards a substantial and unjustifiable risk" that is "of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise." *Id.* § 6.03(c) (Vernon 2021). Texas law also provides that "'[s]erious bodily injury' means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." *Id.* § 1.07(a)(46).

The year after his deadly conduct conviction, petitioner was convicted of evading arrest with a motor vehicle in violation of Tex. Penal Code Ann. § 38.04 (Vernon 2016). Pet App. 2. Based on that conviction, he was served with a notice to appear in removal proceedings, in which he was found removable under 8 U.S.C. 1227(a)(2)(A)(iii) as a noncitizen who has been convicted of an aggravated felony. Pet. App. 2. The court of appeals denied a petition for review, and petitioner filed a petition for certiorari with this Court. *Id.* at 3. The Court granted the petition, vacated, and remanded based on its decision in *Sessions* v. *Dimaya*, 138 S. Ct. 1204 (2018), and the court of appeals remanded to the Board, which terminated the removal proceedings in light of *Dimaya*. Pet. App. 3.

The Department of Homeland Security later served petitioner with a new notice to appear, this time charging him with being removable under 8 U.S.C. 1227(a)(2)(A)(ii) as a noncitizen who has been "convicted of two or more crimes involving moral turpitude." Pet. App. 3. An IJ found petitioner removable on the basis of his convictions for deadly conduct and evading arrest with a motor vehicle. *Id.* at 34-41. The Board affirmed,

id. at 25-33, rejecting petitioner's assertion that deadly conduct in violation of Tex. Penal Code Ann. § 22.05(a) (Vernon 2019) is not a "crime[] involving moral turpitude" under 8 U.S.C. 1227(a)(2)(A)(ii), Pet. App. 31-32.

2. Petitioner filed a petition for judicial review, which the court of appeals dismissed. Pet. App. 1-24.

The court of appeals first rejected petitioner's assertion that his deadly conduct offense could not qualify as a crime involving moral turpitude under the circuit's decision in *Gomez-Perez* v. *Lynch*, 829 F.3d 323 (5th Cir. 2016). Pet. App. 8-11. The court explained that *Gomez-Perez* held that misdemeanor assault under Tex. Penal Code Ann. § 22.01(a)(1) is not a crime involving moral turpitude because that offense "encompasses 'relatively minor physical contacts.'" Pet. App. 9 (quoting *Esparza-Rodriguez* v. *Holder*, 699 F.3d 821, 824 (5th Cir. 2012)). The court determined that the same reasoning does not apply to the deadly conduct offense because it requires "'imminent danger of serious bodily injury,'" which "entails a much greater degree of potential physical harm than misdemeanor assault." *Id.* at 10 (citation omitted).

The court of appeals then determined that the Texas offense of deadly conduct qualifies as a crime involving moral turpitude. Pet. App. 12-15. The court observed that "several decisions of [its] sister circuits hold[] that analogous" state statutes "define" crimes involving moral turpitude, and the court was "[p]ersuaded by this authority." *Id.* at 12-13. The court further explained that "[d]eadly conduct requires an offender to take actions creating 'imminent danger' of serious physical injury" such as "'permanent disfigurement' or 'protracted' bodily 'impairment.'" *Id.* at 13 (quoting Tex. Penal Code Ann. §§ 1.07(a)(46), 22.05(a)). It found that

such behavior falls within the definition of a crime involving moral turpitude because it involves conduct that "shocks the public conscience as being inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons." *Id.* at 13-14 (quoting *Villegas-Sarabia* v. *Sessions*, 874 F.3d 871, 877 (5th Cir. 2017), cert. denied, 139 S. Ct. 320 (2018)) (citation omitted). The court also observed that the Texas statute requires that an offender "'consciously disregard[]' the 'substantial and unjustifiable risk' of injury his behavior poses," *id.* at 14 (quoting Tex. Penal Code Ann. § 6.03(c)(46)) (brackets in original), and thereby establishes the "'vicious motive'" or "'corrupt mind'" typically required by the Board's "definition of moral turpitude," *ibid.* (quoting *Villegas-Sarabia*, 874 F.3d at 878) (citation omitted).

Finally, the court of appeals rejected petitioner's assertion—first raised "in a [Federal] Rule [of Appellate Procedure] 28j letter submitted after the close of briefing"—that the deadly conduct offense could not qualify as a crime involving moral turpitude "because the offense encompasses acts creating a serious *risk* of harm, but not actual harm." Pet. App. 14. The court observed that it "ordinarily do[es] not consider such belated contentions, but even if [it] did, the claim fails" because "[b]oth the [Board] and other courts of appeal have determined" that a crime involving moral turpitude may involve a substantial and unjustifiable risk of harm rather than the "actual infliction of physical harm." *Id.* at 14-15 (footnote omitted).

ARGUMENT

Petitioner renews his contention (Pet. 12-22) that the Texas offense of deadly conduct cannot qualify as a crime involving moral turpitude because it can be satis-

fied by a substantial and unjustifiable risk of serious bodily injury rather than an actual injury. The court of appeals decision is correct; there is no conflict in the circuits on the issue; and this case would be a poor vehicle because of the cursory analysis that the court of appeals gave to the argument, which was presented for the first time in a post-briefing Rule 28(j) letter. The petition for a writ of certiorari should be denied.

1. a. The court of appeals correctly determined that deadly conduct under Tex. Penal Code Ann. § 22.05(a) (Vernon 2019) qualifies as a crime involving moral turpitude. The Board has explained that a crime involving moral turpitude involves "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 re Silva-Trevino*, 26 I. & N. Dec. 826, 833 (B.I.A. 2016) (citation omitted). The court appropriately applied that definition to petitioner's Texas conviction, finding that the offense of deadly conduct necessarily involves conduct that "shocks the public conscience as being inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons." Pet. App. 13-14 (quoting *Villegas-Sarabia* v. *Sessions*, 874 F.3d 871, 877 (5th Cir. 2017), cert. denied, 139 S. Ct. 320 (2018)) (citation omitted).

As the court of appeals explained, the Texas offense involves both an actus reus and a mens rea typical of crimes involving moral turpitude. Pet. App. 13-14. The actus reus involves "reprehensible conduct," *Silva-Trevino*, 26 I. & N. Dec. at 834, because it "requires an offender to take actions creating imminent danger of serious physical injury," Pet. App. 13 (citation and internal quotation marks omitted). And the mens rea is suf-

ficiently culpable because it requires that an offender "be 'aware of but consciously disregard[]' the 'substantial and unjustifiable risk' of injury" that he is creating. *Id.* at 14 (quoting Tex. Penal Code Ann. § 6.03(c)). Indeed, Texas law expressly provides that "reckless" conduct must involve the conscious disregard of a risk "of such a nature and degree that" the failure to perceive it "constitutes a gross deviation from the standard of care that an ordinary person would exercise," Tex. Penal Code Ann. § 6.03(c) (Vernon 2021), suggesting that offenses committed recklessly will necessarily be committed in a manner that is "contrary to" the "duties owed between persons or to society," a hallmark of crimes involving moral turpitude, *Silva-Trevino*, 26 I. & N. Dec. at 833.

Other courts of appeals have consistently found that similar state offenses qualify as crimes involving moral turpitude. See *Leal* v. *Holder*, 771 F.3d 1140, 1144-1148 (9th Cir. 2014) (recklessly endangering another person with a substantial risk of death or physical injury under Arizona law is a crime involving moral turpitude); *Idy* v. *Holder*, 674 F.3d 111, 118-119 (1st Cir. 2012) (recklessly engaging in conduct that places another in danger of serious bodily injury under New Hampshire law is a crime involving moral turpitude); *Hernandez-Perez* v. *Holder*, 569 F.3d 345, 348 (8th Cir. 2009) (reckless child endangerment under Iowa law is a crime involving moral turpitude); *Keungne* v. *U.S. Att'y Gen.*, 561 F.3d 1281, 1286-1287 (11th Cir. 2009) (per curiam) (recklessly endangering the bodily safety of another under Georgia law is a crime involving moral turpitude); *Knapik* v. *Ashcroft*, 384 F.3d 84, 90 (3d Cir. 2004) (felony endangerment under New York law is a crime involving moral

turpitude). The court below appropriately joined that judicial consensus.

b. Petitioner's argument to the contrary depends almost entirely on the contention (Pet. 18-20) that his offense could not qualify as a crime involving moral turpitude because offenses committed with the mens rea of recklessness do not qualify unless they result in "physical injury." That contention has been repeatedly rejected by the Board, see, *e.g.*, *In re Leal*, 26 I. & N. Dec. 20, 24-25 (B.I.A. 2012), and by the courts of appeals, see pp. 7-8, *supra* (collecting cases). As the Board has explained, "[c]ertainly, if death or serious bodily injury *had* resulted from" the conduct in which the offender engaged there would be "little difficulty in finding that [the offense] involved moral turpitude," and "the [offender's] good fortune in not killing or injuring anyone does not mitigate the moral baseness of his offense." *Leal*, 26 I. & N. Dec. at 26.[3]

2. Petitioner contends (Pet. 13-17) that this Court's review is warranted because the Third Circuit broke from the consensus view that offenses involving the reckless creation of a substantial risk of harm may con-

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[3] Petitioner ignores the Board's decision in *Leal* and instead claims (Pet. 6-7) that his position is supported by earlier Board decisions such as *In re Fualaau*, 21 I. & N. Dec. 475 (B.I.A. 1996). But *Leal* explained that *Fualaau* only determined that, because of the nature of "*simple assault* crime[s]," they generally do not qualify as crimes involving moral turpitude unless they result in "serious bodily injury"; *Fualaau* "did not indicate that the infliction of such an injury was a general requirement in all cases involving recklessness." *Leal*, 26 I. & N. Dec. at 26 n.4. Cf. Pet. App. 11 (similarly distinguishing petitioner's deadly conduct offense from a Texas misdemeanor assault offense, which is not a crime that categorically involves moral turpitude because it "includes reckless infliction of de minimis bodily injury").

stitute crimes involving moral turpitude in *Mahn* v. *Attorney General*, 767 F.3d 170 (2014). That contention is mistaken. In *Mahn*, the Third Circuit held that an offense under Pennsylvania's reckless endangerment statute did not constitute a crime involving moral turpitude because the offense was defined to include not only conduct that actually "'places'" others in danger but also "conduct that '*may* place another person in danger of . . . serious bodily injury.'" *Id.* at 174 (quoting and adding emphasis to 18 Pa. Cons. Stat. Ann. § 2705 (2008)). The court reasoned that the statute's inclusion of instances where nobody was placed in any danger prevented the offense from categorically involving moral turpitude. As the court explained, even "driv[ing] through a red light on an empty street or speed[ing] down an empty thoroughfare" could present a hypothetical risk of danger, but it would not be "inherently base, vile, or depraved, contrary to the accepted rules of morality." *Ibid.* (citation and internal quotation marks omitted).

Mahn does not support petitioner's claim that there is any conflict in the circuits. The decision rested on the specific text of the Pennsylvania statute, and the Third Circuit contrasted that statute with the one it had considered in *Knapik*, a case in which it held that New York's felony endangerment offense constituted a crime involving moral turpitude. *Mahn*, 767 F.3d at 174-175. In *Knapik*, the Third Circuit recognized that New York's offense qualifies as a crime involving moral turpitude because it is defined to cover reckless conduct that "create[s] a 'grave risk of death to another person' 'under circumstances evincing a depraved indifference to human life.'" 384 F.3d at 90 (quoting N.Y. Penal Law § 120.25 (2004)). The *Mahn* court therefore acknowl-

edged that the subset of reckless conduct that actually "creates a grave risk of endangerment" to another person still qualifies as morally turpitudinous, 767 F.3d at 175 (emphasis omitted), even though it concluded that the broader range of reckless conduct that merely "*may* put a person in danger * * * does not necessarily implicate moral turpitude," *ibid.*; see *Rosario-Ovando* v. *Attorney Gen.*, No. 21-1810, 2022 WL 2205257, at *9 (3d Cir. June 21, 2022) (nonprecedential decision describing *Mahn* as having "reasoned that a traffic offense where no other person is actually placed in danger is not categorically a crime involving moral turpitude").

Petitioner's Texas deadly conduct offense is much more similar to the New York endangerment crime that the Third Circuit found morally turpitudinous in *Knapik* than it is to the Pennsylvania crime that the same court considered in *Mahn*. Like the New York law, the Texas offense covers only conduct that actually "places another in imminent danger of serious bodily injury." Tex. Penal Code Ann. § 22.05(a) (Vernon 2019). The Texas law does not cover the wider category of conduct that "*may*" place someone else at risk. *Mahn*, 767 F.3d at 175.

3. Finally, even if this Court were inclined to consider the question presented, this case would be a poor vehicle because petitioner did not raise the question of whether an injury is required for reckless conduct to qualify as morally turpitudinous until a post-briefing Rule 28(j) letter. Pet. App. 14-15. The court of appeals observed that it "ordinarily do[es] not consider such belated contentions," but that "even if [it] did, the claim fail[ed]" based on the decisions of the Board and other courts. *Id.* at 14. This Court's review could be hindered by petitioner's failure to brief the question in the court

of appeals, and the cursory consideration that the court gave the issue as a result.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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