No.

IN THE

Supreme Court of the United States

SALOMON LEDEZMA-COSINO,

Petitioner,

v.

JEFFERSON B. SESSIONS III, 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

Nora E. Milner
MILNER & MARKEE LLP
16870 W. Bernardo Dr.
Suite 320
San Diego, CA 92127

Kelsi Corkran
Counsel of Record
Thomas M. Bondy
Randall C. Smith
Benjamin F. Aiken
ORRICK, HERRINGTON &
SUTCLIFFE LLP
1152 15th Street NW
Washington, DC 20005
(202) 339-8400
kcorkran@orrick.com

Counsel for Petitioner

QUESTIONS PRESENTED

A noncitizen who is otherwise subject to removal from the United States may seek discretionary immigration relief by demonstrating "good moral character" during the relevant statutory period. A provision of the immigration laws, 8 U.S.C. § 1101(f), identifies several categories of noncitizens as categorically lacking in "good moral character." Among those categories of noncitizens deemed inherently immoral are "habitual drunkard[s]." The Ninth Circuit, sitting en banc, upheld that provision against vagueness and equal protection challenges. The court fractured, however, on the correct definition of "habitual drunkard" and on whether the statute's "good moral character" language is relevant at all under rational basis review.

The questions presented are:

1. In assessing a statute under rational basis review, must a court consider both the ultimate effect of the statute and the statutory means by which it achieves that effect, or must the court look only at the ultimate effect of the statute?

2. Is the habitual drunkard provision unconstitutionally vague?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Administrative Decision

Federal Statutes

Other Authorities

INTRODUCTION

More than half a century ago, Congress declared in the Immigration and Nationality Act of 1952 that certain groups of immigrants categorically lacked good moral character and were thus ineligible to even request discretionary relief from removal. Among the shunned were convicted murderers, adulterers, and drug traffickers. Those who assisted the Nazis or otherwise participated in torture or genocide would later join their ranks. Congress also lumped in with this group of malefactors "habitual drunkards," reflecting society's misunderstanding and stigmatization of alcoholism at the time.

The "habitual drunkard" provision, 8 U.S.C. § 1101(f)(1), lay dormant for decades until the government revived it in this case. Although the petitioner, Mr. Ledezma, has lived in this country for thirty years and he and his wife have raised their eight children here, an immigration judge found him ineligible for discretionary relief from removal because he lacked good moral character due to his alcoholism diagnosis.

A Ninth Circuit panel struck down the "habitual drunkard" provision as a violation of equal protection, holding that Congress lacked a rational basis for declaring that alcoholics categorically lack good moral character. "[C]lassifying alcoholics as evil people, rather than as individuals suffering from a disease," the panel explained, "is neither rational nor consistent with our fundamental values." App. 59a.

That decision, however, was vacated en banc. In a fractured decision that drew two concurrences and a

dissent, an en banc plurality held that the panel erred in focusing on the rationality of the good moral character classification rather than the rationality of categorically excluding "habitual drunkards" from eligibility for discretionary relief from removal. According to the plurality, "[t]he intermediate label [of bad moral character] is … of no constitutional moment, even if we were to agree that the label is unfortunate, outdated, or inaccurate." App. 15a. Concluding that "the operative congressional action" here—denial of cancellation of removal—is rational, the plurality found no equal protection problem. *Id.*

The plurality's reasoning squarely implicates an acknowledged circuit split that requires this Court's resolution. The "habitual drunkard" provision announces on its face Congress's intent to stigmatize people suffering from alcoholism as immoral, without any rational basis. The en banc plurality concluded otherwise only by explicitly declaring the means that Congress used—the statute's explicit "good moral character" classification—as "irrelevant" to the constitutional inquiry. App. 14a. That approach deepens a divide among the courts of appeals about whether courts analyzing a statute under rational basis review must consider the actual text and structure Congress employed to achieve its stated purpose, or whether it is sufficient that there is some other way in which it could have permissibly accomplished the same result.

The Court should also grant review to consider Ledezma's argument that the term "habitual drunkard" is unconstitutionally vague. Beginning with the immigration judge and continuing all the way through the en banc stage, "habitual drunkard" has

taken on a new definition in this case each time it has been reviewed. The profound disagreement among the original three-judge panel, the en banc majority opinion, the concurrences, and the dissent illustrate that the provision is so standardless that it authorizes arbitrary or discriminatory enforcement. At a minimum, the Court should hold this petition pending its resolution of *Sessions v. Dimaya*, No. 15-1498, another immigration case involving a vagueness challenge to a federal statute that therefore may warrant vacatur and remand in this case.

OPINIONS AND ORDERS BELOW

The opinion of the en banc court of appeals denying Ledezma's petition for review of the Board of Immigration Appeals' decision is reported at 857 F.3d 1042, and reproduced at App. 1a-43a. The opinion of the three-judge panel of the court of appeals is reported at 819 F.3d 1070, and reproduced at App. 44a-72a. The opinion of the Board of Immigration Appeals (reproduced at App. 73a-77a) and the order of the immigration judge (reproduced at App. 78a-85a) are unreported.

JURISDICTION

The judgment of the three-judge panel of the court of appeals was entered on March 24, 2016. The court of appeals vacated the three-judge panel's judgment and granted the government's petition for rehearing en banc on October 12, 2016. *See* 839 F.3d 805 (9th Cir. 2016). The en banc court denied Ledezma's petition for review on May 30, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are reproduced in the appendix to this petition. *See* App. 86a-102a.

STATEMENT OF THE CASE

The Government Places Ledezma In Removal Proceedings.

Petitioner Salomon Ledezma-Cosino is a native and citizen of Mexico who has lived in the United States since 1987. Administrative Record (A.R.) 695. He and his wife have raised eight children here, five of whom are U.S. citizens. A.R. 262. Ledezma has been the primary breadwinner for his family, supporting his wife and children by working as a specialist cement mason and concrete finisher. A.R. 263.

The government placed Ledezma in removal proceedings in 2008. A.R. 695. He conceded removability but requested cancellation of removal under 8 U.S.C. § 1229b or voluntary departure under 8 U.S.C. § 1229c. A.R. 277. An Immigration Judge ("IJ") denied his request for cancellation but granted Ledezma voluntary departure, noting that he had a "very strong factor" in his favor: His son Lucio, a U.S. citizen, would soon turn 21 and could then file a petition to allow his father to immigrate legally to the United States. A.R. 271.

After Ledezma appealed, the Board of Immigration Appeals remanded the case to the IJ because a

tape recording of the hearing cut off witness testimony. A.R. 239. Remand proceedings were delayed, however, after Ledezma was hospitalized for liver failure in June 2010. A.R. 72. Doctors determined that his condition resulted from a 10-year-long battle with alcoholism. A.R. 190, 193. He quit drinking following his hospitalization, A.R. 96, 114, and has remained sober ever since.

When the remand proceedings restarted, Ledezma submitted the medical records from his hospitalization and treatment as additional support for his request for discretionary relief. A.R. 123-200. His adult daughter, who was living with him while she completed school, testified that she had "seen a dramatic change, for the better, in [Ledezma] since" his hospitalization, and observed that he was "engaged with his family and he look[ed] healthier than before." A.R. 134. She questioned how her family would survive if left "fatherless," and worried that being separated from her father would be like "missing half of myself." A.R. 102, 135.

The Immigration Judge And Board of Immigration Appeals Determine That, Because He Suffers From Alcoholism, Ledezma Lacks Good Moral Character And Cannot Seek Discretionary Relief From Removal.

The IJ reaffirmed his denial of Ledezma's application for cancellation of removal, but on different grounds. As relevant here, the IJ concluded that Ledezma lacked good moral character under the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101, *et seq.*, because his medical records indicated

that he suffered from "severe alcohol dependency." App. 80a. Under the INA, the IJ explained, "if you are an habitual drunkard, you do not have good moral character." App. 81a. He thus concluded that, "based on all the comments made by the doctors," Ledezma was "an alcoholic" and therefore "not … eligible for cancellation" of removal. App. 81a. And because good moral character is also a requirement for voluntary departure, the IJ indicated that he "unfortunately" had to modify his previous decision granting voluntary departure and deny that relief as well. App. 84a-85a.

The BIA affirmed. The Board recognized that Ledezma was in recovery but observed that his medical records showed an "approximately decade-long alcohol dependency" consistent with his daughter's testimony "that her father had been an alcoholic." App. 75a. The Board acknowledged Ledezma's argument "that his alcoholism is a medical condition and not a moral failing," but concluded that this was irrelevant because "the statutory language … clearly bars an individual deemed a 'habitual drunkard' from demonstrating good moral character." App. 76a. The Board thus affirmed the IJ's conclusion that Ledezma's alcoholism rendered him ineligible to seek discretionary relief. App. 76a-77a.

The Ninth Circuit Panel Strikes Down The "Habitual Drunkard" Provision As Contrary To Equal Protection.

Ledezma petitioned for review by the Ninth Circuit, arguing that the "habitual drunkard" provision

was unconstitutionally vague. The Ninth Circuit requested supplemental briefing on whether the provision violates the Equal Protection Clause.

A three-judge panel of the Ninth Circuit stayed Ledezma's order of removal, and granted his petition for review. The panel observed that "it is apparent from the face of the statute that Congress has created a classification dividing 'habitual drunkards'—i.e. persons with chronic alcoholism—from persons who do not suffer from the same disease and identifying the former as necessarily lacking good moral character" for the purposes of the INA. App. 51a. That sort of classification is not permissible under the Equal Protection Clause, the panel explained, unless it is "rational for the government to find that people with chronic alcoholism are morally bad people solely because of their disease." App. 52a-53a. The panel considered a number of possible justifications for the provision—including the suggestion that "persons suffering from alcoholism … simply lack the motivation to overcome their disease" and statistics indicating a correlation between violence and alcohol abuse. App. 53a-59a. The panel concluded that none of these justifications made it rational to declare those deemed "habitual drunkards" categorically immoral. Ultimately, the panel concluded that "classifying alcoholics as evil people, rather than as individuals suffering from a disease, is neither rational nor consistent with our fundamental values." App. 59a.

Judge Clifton dissented. In Judge Clifton's view, the habitual drunkard provision is constitutional because there is a "volitional component of alcoholism that is properly subject to moral evaluation." App.

63a. Judge Clifton further stated that the panel erred in focusing on the statute's explicit linkage between alcoholism and "good moral character." App. 65a. He argued that the panel should have instead considered whether it would be constitutionally permissible "for Congress directly to provide that aliens who are habitual drunkards are ineligible for cancellation of removal," without making reference to moral character. App. 71a. Because he believed that the "habitual drunkard" provision would be constitutionally permissible if redrafted that way, he concluded that it should be upheld.

A Fractured En Banc Court Upholds the Statute And Denies Ledezma's Petition For Review.

The Ninth Circuit reheard the case en banc. Before the en banc court, the government asserted for the first time that "[t]he statute … does not classify 'habitual drunkards' by reference to any medical diagnosis of alcoholism, but rather focuses on the conduct of the alien during the good moral character period[.]" Gov't Supp. En Banc Br. at 12.

The en banc court denied Ledezma's petition for review in a fractured decision that split the court into four camps:

a. In an opinion by Judge Graber, a majority of the court held that "[t]he ordinary meaning of 'habitual drunkard' is a person who regularly drinks alcoholic beverages to excess." App. 9a-10a. The en banc court accordingly rejected the panel's interpretation of the term, which linked it with the medical condition

of alcoholism. Based on that conduct-based interpretation of the habitual drunkard provision, the court concluded that the provision is not unconstitutionally vague. App. 12a.

Only a plurality of four judges joined the final portion of Judge Graber's opinion addressing Ledezma's equal protection challenge. The plurality determined that, under rational basis review, the court was "limited to assessing congressional action," and that "[h]ere, Congress' action was the denial of cancellation of removal to habitual drunkards." App. 14a. Although the habitual drunkard provision on its face defines habitual drunkards as categorically lacking in "good moral character," the plurality characterized the statute's "good moral character" classification as an "intermediate label" that "is … of no constitutional moment, even if we were to agree that the label is unfortunate, outdated, or inaccurate." App. 15a. The plurality reasoned that "Congress could have chosen any phrase for the intermediate category—'special class of persons not eligible for cancellation of removal,' for example," or "could have eliminated the intermediate label altogether and simply listed behaviors that would disqualify applicants from obtaining cancellation of removal … and … the effect would be the same." App. 15a. The plurality then concluded that the provision passes constitutional muster because Congress had a rational basis for denying cancellation of removal to habitual drunkards. App. 16a.

b. Judge Kozinski, joined by Judges Bea and Ikuta, wrote a concurring opinion. Judge Kozinski described the majority's construction of the provision—

i.e., "applying [the statute] solely to conduct rather than medical status" and reading the "good moral character language to mean nothing"—as "interpretive gerrymandering" that "may be necessary" to preserve its constitutionality under rational basis review. App. 20a-21a. In his view, however, rational basis review did not apply: "[T]he near limitless power of the political branches over immigration and foreign affairs … puts the statute here beyond cavil." App. 21a.

c. Judge Watford, joined by Judges McKeown and Clifton, also concurred but on different grounds. Judge Watford rejected Judge Graber's effort to sever the habitual drunkard provision from the medical condition of alcoholism: "Habitual drunkards," Judge Watford observed, "are those who have allowed themselves to become so addicted to alcohol that they can no longer control their habit of drinking to excess." App. 24a. He also rejected the plurality's dismissal of the "good moral character" language as meaningless. According to Judge Watford, the equal protection inquiry is "whether Congress had a rational basis for establishing a conclusive presumption, not subject to rebuttal, that habitual drunkards lack good moral character[.]" App. 23a. The moral character classification survives rational basis review, Judge Watford concluded, because "there is indeed a volitional component to developing an addiction to alcohol, even if many other factors outside an individual's control also contribute." App. 25a.

d. Chief Judge Thomas, joined by Judge Christen, dissented. Like Judge Watford, the dissenters rejected the plurality's effort to erase the "good moral

character" language from the statute. On the contrary, Chief Judge Thomas explained, the statutory context of the phrase "habitual drunkard"—"contained in the definition of 'good moral character'"—"is critical." App. 32a.

Chief Judge Thomas observed that this case "presents serious constitutional questions as to the vagueness of the statute and whether it violates the Equal Protection Clause." App. 30a. Based on those constitutional questions, he determined that "the best construction of 'habitual drunkard' within the 'good moral character' definition is one who habitually abuses alcohol *and* whose alcohol abuse causes harm to other persons or the community." App. 39a (emphasis added). Because, under that definition, there was insufficient evidence to conclude that Ledezma was a "habitual drunkard," the dissenters "would remand th[e] petition to the BIA for application of the correct statutory standard or, to the extent there is remaining statutory ambiguity, for it to determine the meaning of the phrase 'habitual drunkard' in a way that does not make the phrase synonymous with 'alcoholic.'" App. 42a.

REASONS FOR GRANTING THE WRIT

This Court should grant review for two independent reasons. First, the Court should settle a dispute among the courts of appeals concerning rational basis review. The en banc plurality held below that the habitual drunkard provision does not violate the Equal Protection Clause because Congress could have denied habitual drunkards access to discretionary relief without stigmatizing them as lacking in good moral

character. Under this reasoning, it does not matter if Congress did something impermissible, so long as one can imagine a different statute that Congress could have passed that would have achieved the same ultimate result. The Tenth Circuit has adopted the same approach to rational basis review, while the Sixth and Seventh Circuits have recognized that even under permissive review, courts must consider the words and structure Congress actually used. This Court should grant review to resolve the split and make clear that Congress's text may not be ignored, no matter the level of scrutiny.

Second, the habitual drunkard provision is unconstitutionally vague. In this case alone, over a dozen judges have proposed no fewer than four different definitions of the term. The one the en banc majority settled on is the most ambiguous of them all. The decision below creates significant uncertainty, permits arbitrary enforcement, and opens the door for a surge in litigation as parties try to discern the provision's meaning. This Court should intervene now and strike the statute as vague, or at a minimum hold the petition pending resolution of *Sessions v. Dimaya*, No. 15-1498, another immigration case involving a vagueness challenge to a federal statute that therefore may warrant vacatur and remand in this case.

I. This Court Should Grant Review To Resolve The Circuit Split On Whether, In Conducting Rational Basis Review, Courts Must Look Only At The Statute's Ultimate Effect, Or Must Also Consider The Statute's Means Of Achieving That Effect.

The habitual drunkard provision renders those who fall under its scope ineligible to seek discretionary relief from removal through a distinctive and circuitous means: It defines "habitual drunkards" as categorically lacking in "good moral character," which in turn prevents them from seeking discretionary relief. The en banc plurality determined that "[i]t is irrelevant, for purposes of analyzing the equal protection claim, whether habitual drunkards lack good moral character." App. 14a. The constitutional inquiry under rational basis review, the plurality asserted, is "limited to assessing congressional action." App. 14a. Because the ultimate effect of the habitual drunkard provision is "the denial of cancellation of removal to habitual drunkards," the plurality concluded that the statutory means by which Congress achieved that effect could be regarded as a mere "intermediate label" that is "of no constitutional moment." App. 14a-15a.

That determination implicates a judicially acknowledged circuit split on a central, recurrent issue in equal protection doctrine: Whether, in conducting rational basis review, courts should look only at the ultimate effect of a law, or must also consider the statutory structure and means by which the law achieves that effect. This case presents an ideal vehicle for resolving the split because, in the habitual

drunkard provision, the distinction between the statutory means and its ultimate effect is clear. Furthermore, the conceptual question is important, because the statutory means at issue—a blanket declaration that those deemed "habitual drunkards" are inherently immoral—implicates the long-established principle that a statute cannot survive rational basis review if it is rooted in "a bare desire to treat [a particular class of people] as outsiders, pariahs who do not belong in the community." *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 473 (1985). As a result, whether the plurality was right that the statute's "good moral character" language is irrelevant to its constitutionality is outcome determinative.

A. The courts of appeals have staked out starkly divergent approaches to rational basis review.

The courts of appeals are split on whether, under rational basis review, courts must evaluate both the ultimate effect and the statutory means by which a law produces that effect, or must—as the plurality determined—treat the statutory means as "of no constitutional moment." App. 15a.

On one side of the split, the Fifth Circuit has, under rational basis review, rejected the state's "hypothesized footings for [a] challenged law" where they failed to account for "the *actual structure* of the challenged law." *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013) (emphasis added). The court observed that "there [was] a disconnect" between the state's hypothesized justifications for the law and the actual statutory scheme at issue. *Id*. at 225. Because

the "post hoc hypothes[es]" that the state offered failed to account for the actual provision at issue within the broader "matrix of Louisiana law," the court concluded that it failed rational basis review. *Id.* at 226.

The Sixth Circuit has likewise held that, although "[r]ational basis review … does not require the best or most finely honed legislation to be passed," it must account for the actual structure of the legislation at issue, and not some different legislation that the court imagines the legislature could have enacted. *Craigmiles v. Giles*, 312 F.3d 220, 227 (6th Cir. 2002). In particular, the Sixth Circuit observed that "[t]he Supreme Court, employing rational basis review, has been suspicious of a legislature's circuitous path to legitimate ends when a direct path is available." *Id.* The court invalidated the challenged legislation after it found "no rational relationship" between the actual structure of the statute and the "articulated purposes" offered to justify it, while determining that the provision was "very well tailored" to an "illegitimate purpose." *Id.* at 228.

On the other side of the split, the Tenth Circuit has expressly disagreed with the Sixth Circuit's approach and rejected the proposition that rational basis review requires "both an analysis of the legislation's *articulated* objective *and* the method that the legislature employed to achieve that objective." *Powers v. Harris*, 379 F.3d 1208, 1223 (10th Cir. 2004) (emphasis original). An analysis that looks both at the offered justifications for the legislation and the actual statutory method that the legislation employs to achieve those objectives, the Tenth Circuit asserted,

is inconsistent with "'traditional' rational-basis review's prohibition on looking at the legislature's actual motives." *Id*.

The plurality holding in this case squarely aligns the Ninth Circuit with the Tenth Circuit: The four-judge plurality held that a statute's structure "has no significance under rational basis review, which does not require a court to account for all of a statute's text," but rather looks solely at the "operative congressional action." App. 14a-15a. Although a total of five judges signed Judge Watford's concurrence and Chief Judge Thomas's dissent rejecting this position, the three judges who signed Judge Kozinski's concurrence made clear that the plurality's severance of the "good moral character" classification "may be necessary" to preserve the provision's constitutionality under rational basis review. App. 21a. Future panels of the Ninth Circuit may thus conclude that the four-judge plurality's determination that rational basis review looks only to the ultimate effect of legislation, and must ignore the legislative method of producing that effect, constituted the "narrowest grounds" on which a majority of the court agreed. *Hayes v. Ayers*, 632 F.3d 500, 519 (9th Cir. 2011) (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)). Such panels would then be bound by the four-judge plurality's determination on this dimension of rational basis review.

B. This case is an ideal vehicle to resolve the split.

This case offers an ideal vehicle to resolve this important, judicially acknowledged split because the habitual drunkard provision clearly employs a circuitous means to achieve its ultimate effect. As the plurality acknowledged, the statute operates indirectly, by means of an "intermediate label"—the definition of "good moral character." And the plurality's conclusion hinged on its determination that this "intermediate label" was constitutionally irrelevant because the statute could have been drafted some other way. App. 15a.

The habitual drunkard provision, therefore, squarely raises the question on which the circuits have split. If, as the Fifth and Sixth Circuits have held, rational basis review must look at the "actual structure" of the law, *St. Joseph Abbey*, 712 F.3d at 223, and must be "suspicious of a legislature's circuitous path to legitimate ends when a direct path is available," *Craigmiles*, 312 F.3d at 227, then Congress' decision to render a certain class of noncitizens categorically ineligible for discretionary relief by labelling them invariably lacking in "good moral character" is a crucial aspect of the court's assessment. But if, as the Tenth Circuit has held, rational basis review looks only to the ultimate effect of the statute, and ignores "the method that the legislature employed to achieve [an] objective," *Powers*, 379 F.3d at 1223, then the method by which Congress rendered those deemed "habitual drunkards" ineligible to seek discretionary relief would, as the plurality determined, be "of no constitutional moment," App. 15a.

This conceptual point around which the courts of appeals are split, moreover, is distinctly important here. This Court has long held that a statute fails rational basis review if it is rooted in "irrational prejudice" against people who suffer from a particular medical condition. *Cleburne*, 473 U.S. at 450; *see also Romer v. Evans*, 517 U.S. 620, 632 (1996) (statute fails rational basis review where it is rooted in "animus toward the class it affects"); *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) ("[A] bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."). Here, the means by which the habitual drunkard provision achieves its effects plainly demonstrates that the statute is rooted in animus and irrational prejudice regarding those deemed "habitual drunkards."

Indeed, only three judges on the en banc court—Judge Watford plus the two other judges who joined his concurrence—indicated that, even if the court did not treat the "good moral character" language as irrelevant, the provision would still survive rational basis review. The others recognized that, at the very least, the "good moral character" clause rendered the statute constitutionally problematic. The two dissenters observed that the statute, construed to define those who suffer from alcoholism as categorically immoral, raises "serious constitutional questions," and accordingly urged a different interpretation of the statute, which would almost certainly not encompass Ledezma. App. 30a, 39a-40a. Judge Kozinski likewise indicated that the "discrimination here would be far more problematic" if it operated in the domestic con-

text; his concurrence hinged on his view that immigration laws are not subject to rational basis review at all. App. 21a. The plurality's determination that it could affirm the statute by altogether ignoring the "good moral character" language, therefore, was critical to the court's determination that the statute survives rational basis review.

C. Disregarding a statute's means of achieving its ends is inconsistent with this Court's rational basis precedents.

The plurality's determination that the "good moral character" language was "of no constitutional moment," App. 15a, is rooted in a misreading of this Court's decision in *F.C.C. v. Beach Communications, Inc.* There, this Court held that "[w]here there are 'plausible reasons' for Congress' action, 'our inquiry is at an end.'" 508 U.S. 307, 313-14 (1993) (quoting *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980)). The plurality construed the reference to "Congress' action" to distinguish between the ultimate effect of the legislation at issue—which, the plurality determined, must be supported by legitimate government interests—and the statutory means that produce that effect—which the plurality deemed to be "irrelevant" to the constitutional inquiry. App. 15a-16a.

That interpretation of *Beach Communications* violates this Court's longstanding approach in rational basis cases. Rational basis review permits "an imperfect fit between means and ends," *Heller v. Doe*, 509 U.S. 312, 321 (1993), but its focus is still on the actual statutory means at issue. As this Court recently reiterated, rational basis review examines the rationality

of legislative "classifications," and requires "that the line *actually drawn* be a rational line." *Armour v. City of Indianapolis, Ind.*, 132 S. Ct. 2073, 2083 (2012) (emphasis added). The plurality's view that rational basis review regards the actual structure of the statute as irrelevant to the constitutional analysis has no basis in this Court's case law.

The Tenth Circuit's rejection of an inquiry into legislative means was likewise based on a misreading of *Beach Communications*. Citing *Beach Communications*, the Tenth Circuit stated that an inquiry that examined both "the legislation's *articulated* objective *and* the method that the legislature employed to achieve that objective" is inconsistent with "'traditional' rational-basis review's prohibition on looking at the legislature's actual motives." *Powers*, 379 F.3d at 1223. It does not follow from this Court's determination that rational basis review does not entail an inquiry into what "actually motivated the legislature," *Beach Commc'ns*, 508 U.S. at 315, however, that courts may disregard the structure of the legislation that the legislature *actually* enacted. Indeed, treating the actual structure of the legislation as irrelevant to the constitutional analysis is directly contrary to premises underlying rational basis review.

The prohibition on inquiring into a legislature's motives is rooted in "judicial restraint." *Id.* at 314. In *Cleburne*, this Court explained that the deference inherent in rational basis review arises from "respect for the separation of powers," which precludes courts from "closely scrutiniz[ing] legislative choices as to whether, how, and to what extent" legitimate government interests "should be pursued." 473 U.S. at 441-

42. But there is nothing "restrained" about a judicial decision that deems the actual text of a statute "irrelevant" and "of no constitutional moment." App. 14a-15a. By upholding the habitual drunkard provision simply because it could imagine a way in which it could be rewritten to make it less constitutionally problematic, the plurality misapprehended the nature of and reasons for the judicial deference underlying rational basis review.

At the same time, the plurality's approach vitiates the Equal Protection Clause's function as a shield against laws rooted in irrational prejudices or animus. As this Court held in *Cleburne*, in invalidating a municipal ordinance that singled out for disfavored legal treatment people who suffered from developmental disabilities, a statute fails rational basis review where it "sweeps too broadly" to rest on any justification other than "a bare desire to treat [a particular class of people] as outsiders, pariahs who do not belong in the community." 473 U.S. at 473. The habitual drunkard provision, which lumps those deemed "habitual drunkards" alongside people who have engaged in genocide and torture or committed aggravated felonies, *see* 8 U.S.C. § 1101(f), reflects a similar excessive sweep. Indeed, in one respect, the habitual drunkard provision presents an easier equal protection question than the statute at issue in *Cleburne*: While this Court in *Cleburne* inferred from the lack of any other plausible justification that the statute was rooted in a bare desire to treat members of a particular class as "pariahs who do not belong in the community," 473 U.S. at 473, here the statute proclaims that intent on its face.

The plurality upheld the statute, despite its explicit grounding in a desire to stigmatize a particular class of people, because it determined that the actual language and structure of the statute is irrelevant under rational basis review. Because that determination implicates an acknowledged circuit split that goes to the core of rational basis review, this Court should grant review to reject the plurality's reasoning, resolve the split, and invalidate the statute under the Equal Protection Clause.

II. The Court Should Also Review Ledezma's Vagueness Challenge To The Habitual Drunkard Provision.

This case has now been through four layers of review, and the term "habitual drunkard" has taken on a new meaning at each step. The lack of consensus from the en banc court—which produced four decisions, each endorsing a different interpretation of the term than the original panel or the immigration judge offered—illustrates the extent of the confusion over the term's meaning. Indeed, even the en banc majority's definition, which simply refers to "regularly" drinking alcohol "to excess," provides little guidance to immigrants seeking to avoid the bad moral character classification and its severe consequences.

This ambiguity threatens serious repercussions. Without a single coherent definition for "habitual drunkard," the statute permits arbitrary enforcement against the thousands of immigrants battling alcohol dependency in its many forms. It also creates uncertainty for the thousands more who legally drink alcohol but may fit into the government's expansive

definition of the term, which the en banc Ninth Circuit has now endorsed. That ambiguity and uncertainty render the statute unconstitutionally vague.

A. This case has generated at least four different interpretations of "habitual drunkard."

The fractured nature of the en banc decision demonstrates the significant confusion over the meaning of "habitual drunkard." Three different interpretations emerged from the en banc court—none of which mirrored the original three-judge panel's decision.

The three-judge panel held that it was "apparent from the face of the statute that Congress has created a classification" targeting "persons with chronic alcoholism." App. 51a. This definition echoed the immigration judge's conclusion that Ledezma was a "habitual drunkard" because he was "an alcoholic." App. 81a.

The en banc majority, however, rejected that definition. The majority instead held that a "person's *status* as an alcoholic . . . is irrelevant" to the inquiry because "Congress did not intend to equate 'habitual drunkard' with 'alcoholic.'" App. 10a (emphasis in the original). Instead, the majority believed "the statute asks whether a person's *conduct* during the relevant time period" establishes that he "regularly drinks alcoholic beverages to excess." App. 10a (emphasis in the original). The majority declined to elaborate, however, on what, it meant by "regularly" or "excess."

In his concurring opinion, Judge Kozinski, joined by Judge Bea and Judge Ikuta, suggested that the majority's definition involved "interpretive gerrymandering," but recognized that such a construction "may be necessary to preserve the constitutionality" of the habitual drunkard provision under rational basis review. App. 21a. In his view, however, rational basis review does not apply to immigration laws. App. 19a.

Judge Watford's concurrence, joined by Judges McKeown and Clifton, settled on a third definition. Judge Watford defined "habitual drunkards" as "those who have allowed themselves to become so addicted to alcohol that they can no longer control their habit of drinking to excess." App. 24a. His concurrence thus created a hybrid standard that combines the status-based definition the original panel offered (applying only to those who are "addicted") with the amorphous conduct-based standard that the en banc majority supported ("their habit of drinking to excess").

Finally, Chief Justice Thomas's dissenting opinion, joined by Judge Christen, agreed with the majority that the statute refers to conduct, but the dissent diverged over what conduct falls within the statute. In light of the "habitual drunkard" provision's placement in the statute under the "good moral character section," Chief Judge Thomas proposed that the term referred to "one who habitually abuses alcohol and whose alcohol abuse causes harm to other persons or the community." App. 39a. The dissent believed the statute's structure meant that a habitual drunkard must both (1) drink excessively and (2) harm his community because of his drinking. App. 39a. The dissent

recognized that Ledezma was likely not a habitual drunkard under this definition because "if the evidence pertaining to his diagnosis of alcoholism is set aside, there was not sufficient evidence to sustain the determination of ineligibility for cancellation or voluntary departure based on the 'habitual drunkard' clause." App 42a.

In short, the only thing consistent about the meaning of "habitual drunkard" over the course of this litigation is how inconsistently it has been interpreted. This single case has already produced four different statutory interpretations. As explained below, the inevitable conclusion that flows from this disagreement is that the statute is unconstitutionally vague.

B. The en banc court was wrong to hold that "habitual drunkard" is not unconstitutionally vague.

While the law can tolerate a certain degree of uncertainty, it can only flex so far. A statute is unconstitutionally vague if it "is so standardless that it authorizes or encourages seriously discriminatory enforcement" or if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited." *United States v. Williams*, 553 U.S. 285, 304 (2008). A provision does not survive this constitutional scrutiny just because "there is some conduct that clearly falls within the provision's grasp." *Johnson v. United States*, 135 S. Ct. 2551, 2561 (2015). The void for vagueness doctrine does not demand that a statute be "vague in all applications"; it requires only that the statute have a sufficient degree of "indeterminacy"

that it "denies fair notice to defendants and invites arbitrary enforcement by judges." *Id.* at 2561, 2557.

This rule applies with equal force to immigration statutes "in view of the grave nature of deportation." *Jordan v. DeGeorge*, 341 U.S. 223, 231 (1951). Indeed, the vagueness doctrine is especially necessary to protect against arbitrary enforcement in the high stakes world of deportation. *Cf. Judulang v. Holder*, 132 S. Ct. 476, 487 (2011) (rejecting immigration rule under the Administrative Procedure Act); *see also Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (holding that the Executive and Legislatives branches' power in the realm of discrimination "is subject to important constitutional limitations"); *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (stressing that "the more important aspect of vagueness doctrine" is "the requirement that a legislature establish minimal guidelines to govern law enforcement"). Tasked with the responsibility of deciding whether to upheave someone's life, immigration adjudicators' decisions cannot be "made a sport of chance." *Judulang*, 132 S. Ct. at 487.

The en banc court acknowledged that Congress did not define "habitual drunkard." App. 9a. Absent a statutory definition, courts first look to "whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). At this step, courts must consider "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* at 341.

"Habitual drunkard" does not have an ordinary meaning. In concluding otherwise, the en banc court relied primarily on Black's Law Dictionary. App. 9a-10a. The most recent version of Black's defines "habitual drunkard" as "[s]omeone who habitually consumes intoxicating substances excessively; esp. one who is often intoxicated." Drunkard, Black's Law Dictionary 607 (10th ed. 2014). But neither the en banc majority nor the government—which also relied on the most recent edition of Black's, Gov't Supp. En Banc Br. at 27-28—acknowledges that this edition also lists "alcoholic" as an alternative definition. *Id.* These conflicting definitions reflect the tension between the en banc majority opinion and the original panel's: One focuses on the immigrant's conduct, the other on his status.

The Black's Law definition of "habitual drunkard" has vacillated over the years, again highlighting the term's ambiguity. The edition immediately preceding the INA bridged the conduct-status divide with different terms altogether: a "habitual drunkard" was one "whose habit it is to get drunk," while a "common drunkard" was "a person who has been convicted of drunkenness . . . a certain number of times within a limited period"—although the dictionary also recognized that some courts equated the terms. Drunkard, Black's Law Dictionary 587 (4th ed. 1951). *See also* Drunkard, Black's Law Dictionary 624 (3rd ed. 1933) (same). In short, Black's Law Dictionary belies any notion that "habitual drunkard" has a plain, ordinary meaning.

Neither the "specific context" in which the "habitual drunkard" appears nor the "broader" statutory

context clears up the picture. *Robinson*, 519 U.S. at 340. As Ledezma explained below, the provision "appears alongside eight other provisions that describe people who lack good moral character under the INA, but it is unlike the others," all of which unambiguously describe immoral conduct. *See* Pet. Supp. Br. at 13; 8 U.S.C. § 1101(f). And there is no indication as to why Congress did not describe "habitual drunkard[s]" in terms of their conduct. In fact, "although many aspects of the [INA] were controversial and generated congressional debate, the legislative history is silent as to the specific reasoning behind including the good moral character requirement" at all. Jayesh M. Rathod, *Distilling Americans: The Legacy of Prohibition on U.S. Immigration Law*, 51 Hous. L. Rev. 781, 818 (2014). Looking elsewhere does not help either. It turns out that 8 U.S.C. § 1101(f)(1) is the only place in the entire U.S. Code where "habitual drunkard" appears.

The government argued below that the statute is not vague and has been applied consistently over the years. In the government's view, the statute requires "the adjudicator [to] assess only whether the alien consumed alcoholic beverages during the relevant time-period, and whether this consumption was excessive or entailed other adverse consequences, such as convictions related to the abuse of alcohol, *e.g.*, DUIs or public intoxication." Resp. Supp. Br. at 28. But the examples the government offered serve only to confirm that immigration judges' decisions have been arbitrary. As the government conceded below, two DUIs is insufficient to disqualify someone from having good moral character. Resp. Supp. Br. at 28, citing *Le v. Elwood*, 2003 WL 21250632, at *3 (E.D.

Pa. 2003). The same is true of excessive consumption: An immigration adjudicator has held that a noncitizen was not a "habitual drunkard"—despite a history of alcohol abuse—because he went to court-mandated Alcoholics Anonymous meetings and thus did "not rise to the level of that cited in the only [BIA] precedent . . . [i]n *Matter of H,*" where the noncitizen had snuck out of hospital treatment to drink heavily again. *In re Petitioner: Petition for Immigrant Battered Spouse*, 2007 WL 5315579, at *8 (AAO 2007). The government is thus of the view that DUI convictions and excessive consumption make someone a habitual drunkard, while exempting *some* DUIs and *some* excessive consumption. The government has identified no coherent standard or dividing line clarifying these irreconcilable positions.

The majority's holding, which the government can now apply going forward, is also far broader than the opinion suggests. Immigration judges now retain significant leeway to decide whether a noncitizen's alcohol consumption is "excess[ive]" or "regular." App. 9a-10a. This new formulation may capture tens of thousands of people that no reasonable person would categorize as "habitual" drinkers under any standard. For example, the en banc dissent rightly recognized that "all sober, recovering alcoholics who were diagnosed during the … qualifying period" may fit within the majority's standard, App. 38a, as does the archetypal college weekend binge drinker. The majority's opinion creates profound uncertainty for immigrants who engage in otherwise permissible conduct.

The en banc majority's definition is also vague on its own terms. The panel concluded that "habitual

drunkard" refers to anyone "who regularly drinks alcoholic beverages to excess." App. 9a-10a. But it went no further. How often is regular? How much is excess? The panel did not even clarify whether "excess" was an objective (reasonable person) or subjective (specific immigrant) standard. Immigrants are thus left to guess how often and to what degree they can engage in concededly legal conduct without risking life-altering consequences. But "a statute which … forbids … an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) (citations omitted).

The opinion below gave short shrift to Ledezma's vagueness argument, holding that he could not even raise it because he "has engaged in conduct that is clearly covered," regardless of the standard. App. 12a (citing *Holder v. Humanitarian Law Project*, 561 U.S. 1, 19 (2010)). That is wrong. The majority needed to look no further than the dissenting opinion for at least one reasonable definition of "habitual drunkard" that would not cover Ledezma's conduct. The dissent concluded that Ledezma likely would not fall within a definition that took into account the "habitual drunkard" provision's placement in the "good moral character" section of the statute. App. 39a-40a. The dissent's formulation thus incorporated a good moral character standard of doing harm to one's community. App. 39a. Ledezma, a recovering alcoholic who had engaged in his drinking at home and alone, and has no history of violence or other immoral behavior, would not be a habitual drunkard under the dissent's definition.

App. 40a-42a. The majority opinion ignored this sound conclusion.

C. The widespread ramifications of the government's enforcement of this unconstitutionally vague law warrant the Court's review.

For decades, the government chose not to rely on the habitual drunkard provision to deny an immigrant's eligibility for discretionary relief. But its decision to dust off the statute as its rationale for denying Ledezma access to discretionary relief—a decision that now bears the en banc Ninth Circuit's imprimatur—threatens broad ramifications. That is especially true given that the opinion below comes from the en banc Ninth Circuit and is thus binding precedent in the court of appeals with the nation's largest immigration docket.

The potential for widespread application is not hyperbole. Twenty-four million Americans, accounting for ten percent of the adult population, consume more than ten drinks per day. Christopher Ingram, *Think You Drink a Lot? This Chart Will Tell You*, Wash. Post (Sept. 25, 2014), http://tinyurl.com/y7pp3zyg. The court's uncertain standard could also apply to immigrants who are part of the sixty percent of college students who drink and twenty percent of college students with an alcohol use disorder. *See* National Institute on Alcohol Abuse and Alcoholism, *College Drinking* 2 (2015), http://tinyurl.com/hcmclcn. Immigrants, who make up 12.5% of the United States population, are not immune to the American drinking tradition—alcohol abuse is

prevalent among their population no less than among citizens. Magdalena Szaflarski, Lisa A. Cubbins & Jun Ying, *Epidemiology of Alcohol Abuse Among US Immigrant Populations* (2011), http://tinyurl.com/y83m6bqj.

Ledezma's case demonstrates how inconsistent and standardless the "habitual drunkard" provision is. The immigration judge originally granted Ledezma voluntary departure nine years ago, App. 79a, 84a, then withdrew that avenue of relief because "unfortunately [Mr. Ledezma] . . . was a habitual drunkard" based on the medical records that he voluntarily submitted. App. 84a. Ledezma then lost his BIA hearing, won before the original Ninth Circuit panel, and then lost again before the en banc panel—with each decision offering a new definition of the statute. App. 75a, 48a, 9a-10a.

The habitual drunkard provision is a meaningless relic of past prejudices. It has no place in modern society, and the broad construction the government urged and the Ninth Circuit adopted will cause confusion for those seeking to comply with the law and will arbitrarily deprive thousands of immigrants of eligibility for discretionary relief. This Court should stave off the inevitable flood of litigation that will follow and strike this anachronism down as unconstitutionally vague.

D. At a minimum, the Court should hold this petition pending its resolution of *Sessions v. Dimaya*.

At a minimum, the Court should hold this petition pending its disposition of *Sessions v. Dimaya*, 15-1498. Like this case, *Dimaya* is also an immigration case involving a vagueness challenge to a federal statute. This Court's decision in *Dimaya* may shed light on what limits on arbitrary enforcement a statute with severe consequences must establish and what degree of fair notice it must provide to comport with due process. Even if this Court were disinclined to take up the constitutionality of the habitual drunkard provision, therefore, it should at a minimum hold Ledezma's petition pending the decision in *Dimaya*, which may ultimately warrant vacatur and remand here to the Ninth Circuit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Nora E. Milner
MILNER & MARKEE LLP
16870 W. Bernardo Dr.
Suite 320
San Diego, CA 92127

Kelsi Corkran
Counsel of Record
Thomas M. Bondy
Randall C. Smith
Benjamin F. Aiken
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street NW
Washington, DC 20005
(202) 339-8400
kcorkran@orrick.com

Date: August 25, 2017

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SALOMON LEDEZMA-COSINO, aka Cocino Soloman Ledesma, *Petitioner*, v. JEFFERSON B. SESSIONS III, Attorney General, *Respondent*.	No. 12-73289 Agency No. A091-723-478 OPINION

On Petition for Review of an Order of the
Board of Immigration Appeals

Argued and Submitted En Banc January 18, 2017
San Francisco, California

Filed May 30, 2017

Before: Sidney R. Thomas, Chief Judge, and Alex Kozinski, Susan P. Graber, M. Margaret McKeown, Richard R. Clifton, Carlos T. Bea, Sandra S. Ikuta, Mary H. Murguia, Morgan Christen, Paul J. Watford, and John B. Owens, Circuit Judges.

Opinion by Judge Graber;
Concurrence by Judge Kozinski;
Concurrence by Judge Watford;
Dissent by Chief Judge Thomas

SUMMARY*

Immigration

The en banc court denied Ledezma-Cosino's petition for review of the Board of Immigration Appeals' decision concluding that he was ineligible for cancellation of removal on the ground that he failed to establish good moral character because, during the requisite period, he had been a "habitual drunkard."

In Part A, the en banc court held that substantial evidence supported the agency's finding that Ledezma-Cosino was a "habitual drunkard." In so concluding, the en banc court noted that the ordinary meaning of the term refers to a person who regularly drinks alcoholic beverages to excess, and noted evidence of Ledezma-Cosino's more-than-ten-year history of alcohol abuse, conviction for driving under the influence, and his daughter's testimony that his liver failed from drinking.

In Part B, the en banc court held that the term "habitual drunkard" was not unconstitutionally vague because it readily lends itself to an objective factual inquiry. The en banc court also concluded that whatever uncertainty the term may raise in borderline cases, a person of ordinary intelligence would have notice that the term encompasses Ledezma-Cosino's conduct.

---

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

In Part C, a plurality of the en banc court concluded that the statutory "habitual drunkard" provision does not violate equal protection. Applying ordinary rational basis review, the plurality concluded that Congress reasonably could have concluded that, because persons who regularly drink alcoholic beverages to excess pose increased risks to themselves and to others, cancellation of removal was unwarranted.

Concurring, Judge Kozinski, joined by Judges Bea and Ikuta, disagreed that ordinary rational basis review applies to decisions to exclude aliens. Under the plenary power doctrine, Judge Kozinski would overrule circuit precedent applying the domestic equal protection test to foreign relations. Judge Kozinski would hold that the government's burden is even lighter than rational basis in that the court should approve immigration laws that are facially legitimate without probing or testing possible justifications. Judge Kozinski would deny the petition for review summarily under this facially legitimate standard.

Concurring, Judge Watford, joined by Judges McKeown and Clifton, agreed that the statutory classification is subject to rational basis review and noted that the question whether the volitional component of excessive drinking is weighty enough to warrant treating habitual drunkards as morally blameworthy for their conditions is a policy question for Congress. Observing that the provision at issue is a conclusive presumption, Judge Watford noted that the Supreme Court has long held that conclusive

presumptions survive rational basis review even when the presumption established is both over- and underinclusive. In response to the suggestion that it is irrational to treat habitual drunkards as lacking good moral character while not treating those suffering other medical conditions as morally blameworthy, Judge Watford wrote that Congress could rationally conclude that habitual drunkards are not similarly situated to those suffering from other medical conditions.

Dissenting, Chief Judge Thomas, joined by Judge Christen, observed that Ledezma-Cosino was a recovering alcoholic, diagnosed with the disease during the qualifying period for good moral character. Analyzing the plain language of the statute, its structure, and its legislative history, Chief Judge Thomas concluded that the phrase "habitual drunkard" is not synonymous with "alcoholic," and thus, a diagnosis of alcoholism is insufficient to trigger the "habitual drunkard" provision and render a petitioner categorically ineligible for cancellation of removal. Chief Judge Thomas would construe the "habitual drunkard" provision to apply to one who habitually abuses alcohol and whose alcohol abuse causes harm to other persons or the community. Accordingly, Chief Judge Thomas would grant the petition for review and remand to the BIA to reconsider the case under a proper construction of the law, and would not reach the constitutional questions raised in the case.

COUNSEL

Kelsi Brown Corkran (argued), Thomas M. Bondy, Randall C. Smith, and Benjamin F. Aiken, Orrick Herrington & Sutcliffe LLP, Washington, D.C.; Nora E. Milner, Milner & Markee LLP, San Diego, California; for Petitioner.

Aimee J. Carmichael (argued) and Lisa M. Damiano, Attorneys; Patrick J. Glen, Senior Litigation Counsel; Terri J. Scadron and John W. Blakeley, Assistant Directors; Benjamin C. Mizer, Principal Deputy Assistant Attorney General; Office of Immigration Litigation, United States Department of Justice, Washington, D.C.; for Respondent.

James E. Tysse and G. Michael Parsons, Jr., Akin Gump Strauss Hauer & Feld LLP, Washington, D.C., for Amici Curiae Drug Policy Alliance, National Council on Alcoholism and Drug Dependence, and Phoenix House.

Stephen B. Kang and Jennifer Chang Newell, ACLU Foundation Immigrants' Rights Project, San Francisco, California; Omar Jadwat, ACLU Foundation Immigrants' Rights Project, New York, New York; for Amici Curiae ACLU Immigrants' Rights Project and National Immigration Project of the National Lawyers Guild.

OPINION

GRABER, Circuit Judge:

Petitioner Salomon Ledezma-Cosino, a native and citizen of Mexico, petitions for review of a final order of the Board of Immigration Appeals ("BIA"), which affirmed an immigration judge's ("IJ") denial of Petitioner's application for cancellation of removal. We deny the petition.[1]

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner entered the United States from Mexico, without admission or inspection, in 1987. On May 7, 2008, police in Carlsbad, California, arrested him on charges of driving under the influence of intoxicants and driving with a suspended license. A few days later, the Department of Homeland Security issued a notice to appear, charging Petitioner with removability under 8 U.S.C. § 1182(a)(6)(A)(i) because he was an alien present in the United States without having been admitted or paroled.

Petitioner appeared, with counsel, before an IJ, admitted all the factual allegations in the notice to appear, and conceded removability. But, as now relevant, he applied for cancellation of removal

---

[1] Judges Graber, Clifton, Murguia, and Owens join this opinion in full. Judges Kozinski, McKeown, Bea, Ikuta, and Watford join Parts A and B only. Accordingly, this opinion states the view of the court with respect to Parts A and B, and it states a plurality view with respect to Part C. All nine judges who are not dissenting concur in the result.

pursuant to 8 U.S.C. § 1229b(b)(1). To qualify for cancellation of removal, Petitioner had to demonstrate, among other things, that he was "a person of good moral character" during the 10-year period preceding his application for cancellation of removal. *Id.* § 1229b(b)(1)(B). Congress has defined the term "good moral character" to exclude anyone who has been a "habitual drunkard" during the relevant period. *Id.* § 1101(f)(1).

After a hearing on the merits, the IJ denied Petitioner's application for cancellation of removal. The IJ found that Petitioner had not met his burden of establishing that he was "a person of good moral character" because, during the requisite 10-year period, he had been a "habitual drunkard." The BIA affirmed that ground of decision and dismissed the appeal. A timely petition for review to this court followed. We have jurisdiction pursuant to 8 U.S.C. § 1252.

A three-judge panel granted the petition, vacated the BIA's decision, and remanded the matter for further proceedings on the ground that the "habitual drunkard" provision violates equal protection principles. *Ledezma-Cosino v. Lynch*, 819 F.3d 1070 (9th Cir. 2016). Upon grant of rehearing *en banc*, the panel's opinion was vacated. *Ledezma-Cosino v. Lynch*, 839 F.3d 805 (9th Cir. 2016) (order).

STANDARDS OF REVIEW

We review the agency's factual findings for substantial evidence. *Angov v. Lynch*, 788 F.3d 893,

898 (9th Cir. 2015). We must uphold the findings unless the record compels a contrary conclusion. *Id.* We review de novo whether a statutory provision is constitutional. *Vilchez v. Holder*, 682 F.3d 1195, 1198 (9th Cir. 2012).

DISCUSSION

To qualify for cancellation of removal, Petitioner had the burden of establishing that he:

> (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;
>
> (B) has been a person of good moral character during such period;
>
> (C) has not been convicted of [specified offenses]; and
>
> (D) establishes that removal would result in exceptional and extremely unusual hardship to [certain family members].

8 U.S.C. § 1229b(b)(1). Congress has defined the term "good moral character" in the following way:

> For the purposes of this chapter—

> No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was—
>
> (1) a habitual drunkard[.]

Id. § 1101(f).

In his opening brief to this court, Petitioner argued that substantial evidence does not support the agency's finding that he was a "habitual drunkard." He also argued that, under due process principles, the statutory "habitual drunkard" provision is unconstitutionally vague. The three-judge panel ordered supplemental briefing on additional constitutional issues, including whether the statutory provision violates equal protection principles. We address those three issues in turn.[2]

A. *Substantial evidence supports the finding that Petitioner was a "habitual drunkard."*

The immigration statutes do not define the term "habitual drunkard." "When a statute does not define a term, we generally interpret that term by employing the ordinary, contemporary, and common meaning of the words that Congress used." *Arizona v. Tohono O'odham Nation*, 818 F.3d 549, 556 (9th Cir. 2016) (internal quotation marks omitted). The ordinary meaning of "habitual drunkard" is a person who

[2] The government advances alternative grounds to reject the constitutional challenges. We need not, and do not, reach them.

regularly drinks alcoholic beverages to excess. *See, e.g.*, Black's Law Dictionary 587 (4th ed. 1951) (defining "habitual drunkard" as "[h]e is a drunkard whose habit it is to get drunk; whose ebriety has become habitual," citing a case that refers to a person who has been proved to be repeatedly drunk within a limited period); Black's Law Dictionary 607, 827 (10th ed. 2014) (defining "habitual drunkard" as, among other things, "[s]omeone who habitually consumes intoxicating substances excessively; esp., one who is often intoxicated").

Notably, not all alcoholics are habitual drunkards. As the government emphasizes in its brief to us, the statute asks whether a person's *conduct* during the relevant time period meets the definition; the person's *status* as an alcoholic, or not, is irrelevant to the inquiry. We know that Congress did not intend to equate "habitual drunkard" with "alcoholic" because, elsewhere in the statute, Congress used the term "alcoholic." *See* 8 U.S.C. § 1101(f)(1) (1952) (defining those who lack "good moral character" for certain purposes to include "habitual drunkard[s]"); 8 U.S.C. § 1182(a)(5) (1952) (defining excludable aliens to include "[a]liens who are narcotic drug addicts or chronic alcoholics"); *SEC v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003) ("It is a well-established canon of statutory interpretation that the use of different words or terms within a statute demonstrates that Congress intended to convey a different meaning for those words.").

Here, the record amply supports the agency's finding that Petitioner was a habitual drunkard. In

2010, treating doctors recorded a "more than ten-year history of heavy alcohol abuse," during which time Petitioner drank "1 liter of tequila per day on the average." In 2008, he was convicted of driving under the influence. During Petitioner's removal proceedings, Petitioner's daughter testified that he had "a drinking problem" and that his liver had failed because of "[t]oo much alcohol," "[t]oo much drinking." At a minimum, the evidence does not compel the conclusion that Petitioner was not a habitual drunkard.[3]

The dissenting opinion argues that the term "habitual drunkard" encompasses only those who "cause[ ] harm to other persons or the community." Dissent at 34. We need not decide whether "public harm" is a necessary component of the "habitual drunkard" definition. In making its determination that Petitioner was a habitual drunkard, the BIA expressly noted that Petitioner had been convicted of driving under the influence. Driving under the influence is, self-evidently, a public harm. At a minimum, the record does not compel the contrary result. We therefore disagree with the dissenting opinion that further proceedings are necessary in this case, even if public harm is required.

---

[3] The dissenting opinion begins with a false premise: that the BIA denied Petitioner relief "simply because he is a recovering alcoholic." Dissent at 24. Fairly read, the BIA's opinion relied solely on Petitioner's conduct. For example, the BIA noted that Petitioner "admitted to drinking excessively for the 1-year period leading up to his 2010 hospital visit, but minimized his *behavior* outside of this period." (Emphasis added.) Moreover, whether Petitioner stopped drinking *after* the relevant 10-year statutory period is irrelevant as a matter of law.

B. *The statutory "habitual drunkard" provision is not unconstitutionally vague.*

A statute is unconstitutionally vague if it "is so standardless that it authorizes or encourages seriously discriminatory enforcement" or if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited." *United States v. Williams*, 553 U.S. 285, 304 (2008). As just noted, the term "habitual drunkard" readily lends itself to an objective factual inquiry. And whatever uncertainty the term "habitual drunkard" may raise in borderline cases, a person of ordinary intelligence would have fair notice that the term encompasses an average daily consumption of one liter of tequila for a 10-year period, leading to a conviction for driving under the influence. Because Petitioner has engaged in conduct that is clearly covered, he "cannot complain of the vagueness of the law as applied to the conduct of others." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 19 (2010) (internal quotation marks omitted). Because the statute is not unconstitutionally vague under the criminal law standard, it necessarily satisfies any lesser vagueness standard that might apply in a non-criminal context. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982).

C. *The statutory "habitual drunkard" provision does not violate equal protection principles.*

"Where, as here, the Congress has neither invaded a substantive constitutional right or freedom, nor

enacted legislation that purposefully operates to the detriment of a suspect class, the only requirement of equal protection is that congressional action be rationally related to a legitimate governmental interest." *Harris v. McRae*, 448 U.S. 297, 326 (1980). "A legislative classification must be wholly irrational to violate equal protection." *De Martinez v. Ashcroft*, 374 F.3d 759, 764 (9th Cir. 2004) (internal quotation marks omitted). Petitioner bears the burden "to negate every conceivable basis which might have supported the [legislative] distinction." *Angelotti Chiropractic, Inc. v. Baker*, 791 F.3d 1075, 1086 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2379 (2016) (internal quotation marks omitted).

Congress reasonably could have concluded that, because persons who regularly drink alcoholic beverages to excess pose increased risks to themselves and to others, cancellation of removal was unwarranted. We see nothing irrational about that legislative choice, which furthers the legitimate governmental interest in public safety. Nor does it matter that Congress has permitted cancellation of removal for other groups who may pose similar risks.

> [I]n "the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." A legislature may address a problem "one step at a time," or even "select one phase of one field and apply a remedy there, neglecting the others."

Jefferson v. Hackney, 406 U.S. 535, 546 (1972) (quoting *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955)); *see also McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 809 (1969) ("[A] legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked.").

Petitioner does not seriously dispute the foregoing analysis. Instead, he asserts that it is irrational to classify habitual drunkards as persons who lack good moral character. Petitioner misunderstands the nature of the equal protection inquiry.

The constitutional inquiry is limited to assessing congressional action. "[T]he only requirement of equal protection is that congressional action be rationally related to a legitimate governmental interest." *McRae*, 448 U.S. at 326. "Where there are plausible reasons for Congress' action, our inquiry is at an end." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-14 (1993) (internal quotation marks omitted).

Here, Congress' action was the denial of cancellation of removal to habitual drunkards. It is irrelevant, for purposes of analyzing the equal protection claim, whether habitual drunkards lack good moral character. Congress achieved its result by using an intermediate category of persons who lack "good moral character" and by then defining that category to include habitual drunkards, among others. But the specific term, "good moral character," has no significance under rational basis review, which

does not require a court to account for all of a statute's text, just whether the statute is rationally related to a legitimate governmental interest. Congress could have chosen any phrase for the intermediate category—"special class of persons not eligible for cancellation of removal," for example—and the effect would be the same. Or Congress could have eliminated the intermediate label altogether and simply listed behaviors that would disqualify applicants from obtaining cancellation of removal—and again the effect would be the same. The intermediate label is therefore of no constitutional moment, even if we were to agree that the label is unfortunate, outdated, or inaccurate.

The Supreme Court's decision in *Beach Communications* is instructive on this point. Congress required persons to obtain a franchise if they wished to operate a "cable system," 47 U.S.C. § 541, and Congress defined that term to encompass some facilities but not others, 47 U.S.C. § 522(7). The Supreme Court addressed an equal protection challenge to the statutory scheme by asking whether the congressional action—requiring operators of some facilities to obtain a franchise but not requiring operators of other facilities to obtain a franchise—was irrational. *Beach Commc'ns*, 508 U.S. at 317-20. The Court did *not* ask whether, in the abstract, it was rational for Congress to define the term "cable system" in the manner that Congress had chosen.

That same approach applies here. We must ask whether the operative congressional action is rational, not whether the mere definition of a

statutory term is rational. Because the denial of cancellation of removal to habitual drunkards is rationally related to the legitimate governmental interest in public safety, Petitioner's equal protection argument fails.

Judge Kozinski's concurring opinion faults us for applying ordinary rational basis review; the concurrence asserts that an even more deferential standard applies. But we have consistently held, citing the same cases that the concurrence cites, that ordinary rational basis review is the appropriate standard in the immigration context. *See, e.g.*, *Hernandez-Mancilla v. Holder*, 633 F.3d 1182, 1185 (9th Cir. 2011) ("We review equal protection challenges to federal immigration laws under the rational basis standard … ."); *Ablang v. Reno*, 52 F.3d 801, 804 (9th Cir. 1995) (holding that the deferential test described by the Supreme Court "is equivalent to the rational basis test typically applied in equal protection cases").[4] Our sister circuits agree.[5] Because Petitioner's equal protection fails under the ordinary

---

[4] *Accord Masnauskas v. Gonzales*, 432 F.3d 1067, 1071 (9th Cir. 2005); *Taniguchi v. Schultz*, 303 F.3d 950, 957 (9th Cir. 2002); *Ram v. INS*, 243 F.3d 510, 517 (9th Cir. 2001); *Friend v. Reno*, 172 F.3d 638, 645-46 (9th Cir. 1999); *United States v. Viramontes-Alvarado*, 149 F.3d 912, 916 (9th Cir. 1998); *Wauchope v. U.S. Dep't of State*, 985 F.2d 1407, 1414 n.3 (9th Cir. 1993); *United States v. Barajas-Guillen*, 632 F.2d 749, 752 (9th Cir. 1980).

[5] *E.g.*, *Ashki v. INS*, 233 F.3d 913, 919-20 (6th Cir. 2000); *Breyer v. Meissner*, 214 F.3d 416, 422 n.6 (3d Cir. 2000); *Azizi v. Thornburgh*, 908 F.2d 1130, 1133 & n.2 (2d Cir. 1990).

rational basis test, this case provides no reason to question that longstanding approach.

Petition DENIED.

KOZINSKI, Circuit Judge, with whom Circuit Judges BEA and IKUTA join, concurring.

The majority analyzes this case as if it involved governmental conduct in the domestic sphere, but it doesn't. The President and Congress have excluded an alien pursuant to their plenary power over immigration. The Supreme Court "has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens." *Demore v. Kim*, 538 U.S. 510, 522 (2003). We thus owe far more deference here than in an ordinary domestic context. *See Fiallo v. Bell*, 430 U.S. 787, 792 (1977).

For well over a century, the Court has sharply curtailed review of laws governing the admission or exclusion of aliens under the plenary power doctrine. The Court has said that "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) (quotation marks and alteration omitted). This is because the power to exclude or expel is "an inherent and inalienable right of every sovereign and independent nation." *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893). Such power is inherent because the very idea of nationhood requires the drawing of thorny lines—between members and non-members, between admitted and excluded. Our Constitution is the organizing document of a well-defined polity, not an international Golden Rule.

In recent years, the federal courts have been less than consistent in articulating the strength and scope of the plenary power doctrine. *See* Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 Hastings Const. L. Q. 925, 930 (1995). Today's opinion adds to the uncertainty by applying the domestic equal protection test to the sphere of foreign relations. That our circuit has made this error before, as the majority notes, is of no moment when we are sitting en banc. Our principal duty as an en banc court is to correct our circuit law when it has gone astray. I would overrule our precedent and hold that the government's burden is even lighter than rational basis: We approve immigration laws that are facially legitimate without probing or testing possible justifications. *See Fiallo*, 430 U.S. at 799 (citing *Mandel*, 408 U.S. at 770).[1]

One reason for the confusion in this area may be that courts have had difficulty articulating a standard

---

[1] Although *Fiallo* held that this standard is the most probing scrutiny we may apply to such laws, 430 U.S. at 795, the Supreme Court expressly left open the question of whether some immigration laws "are so essentially political in character as to be nonjusticiable," *id*. at 793 n.5. Some Supreme Court cases can be read as so holding. *See, e.g.*, *Galvan v. Press*, 347 U.S. 522, 530-31 (1954) (noting that "a whole volume" of authorities reject the proposition "that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens"); *Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1895) ("The power of congress to exclude aliens altogether … and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications.").

below ordinary rational basis review, even though the existence of such a standard—call it "minimally rational basis"—ineluctably follows from the Supreme Court's repeated insistence that Congress can "make rules as to aliens that would be unacceptable if applied to citizens." *Demore*, 538 U.S. at 522. What could the Supreme Court mean if not that something less than ordinary rational basis applies?[2]

The majority interprets section 1101(f)(1) as applying solely to conduct rather than medical status, and it reads the statute's "good moral character"

---

[2] The literature scrutinizing scrutiny is vast. *See, e.g.*, Tara Leigh Grove, *Tiers of Scrutiny in a Hierarchical Judiciary*, 14 Geo. J. L. & Pub. Pol'y 475 (2016); Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 Yale L. J. 3094 (2015); Aziz Z. Huq, *Tiers of Scrutiny in Enumerated Powers Jurisprudence*, 80 U. Chi. L. Rev. 575 (2013). I believe our usual tiers—rational, intermediate and strict—are better understood as rough ordinal concepts rather than hermetically sealed categories that preempt the field. New categories can join this ordering: Strict scrutiny emerged in *Korematsu v. United States*, 323 U.S. 214 (1944); intermediate scrutiny came in *Craig v. Boren*, 429 U.S. 190 (1976). Other courts and commentators have hinted wryly at mythical creatures like "rational basis with bite," "intermediate-intermediate scrutiny" and "strict scrutiny light." *See* Kenji Yoshino, *The New Equal Protection*, 124 Harv. L. Rev. 747, 759 (2011); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 791 (1994) (Scalia, J., dissenting); *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 954 (7th Cir. 2007) (Evans, J., dissenting). And while the "facially legitimate" standard sketched in *Mandel* and *Fiallo* is necessarily lower than ordinary rational basis, there may be other ways to describe this same conclusion. For example, I see no logical difference between saying that something less than ordinary rational basis applies and saying that the set of acceptable rational bases is broader in the immigration context than elsewhere.

language to mean nothing. Such interpretive gerrymandering may be necessary to preserve the constitutionality of a statute that operates in the domestic sphere. But there's no need to nip and tuck the text here. Congress can exclude Ledezma on account of a medical condition or it can do so because it considers him immoral. This is a facially legitimate exercise of Congress's plenary power, and we have no business passing judgment on it.

Judge Watford's deft concurrence shows why the difference in standards matters. I agree with him that the statute draws distinctions between aliens based on moral judgment.[3] But the discrimination here would be far more problematic if a legislature allocated public housing or Medicare only to those citizens with "good moral standing"—and conclusively excluded "habitual drunkards" from the eligible list. In my view, it's the near limitless power of the political branches over immigration and foreign affairs that puts the statute here beyond cavil.

Untold masses were turned away at Ellis Island—or prevented from boarding ships for America—for medical reasons, my grandfather among them. This was a misfortune for those turned away, but excluding aliens for reasons Congress believes

---

[3] More broadly, I note that a medical diagnosis does not *ipso facto* innoculate [sic] one from moral judgment. Plenty of medical conditions, including alcoholism, are shaped by behavior our society deems volitional. How we evaluate this volitional component—and draw the line between determinism and free will—is a question of philosophy, not scientific inquiry. Morality does not end where diagnosis begins, and it's scientific hubris to pretend otherwise.

sufficient to serve the public welfare is a nigh-unquestioned power of a sovereign nation. I'm aware of no country that fails to adhere to this precept. Nor has the Supreme Court stepped back from it. Until and unless it does, we have no business applying domestic equal protection law to political judgments—even foolish ones—made in the sphere of foreign relations. I would deny the petition summarily with a citation to *Fiallo*.

WATFORD, Circuit Judge, joined by McKEOWN and CLIFTON, Circuit Judges, concurring:

We took this case en banc to decide whether the Immigration and Nationality Act's "habitual drunkard" provision, 8 U.S.C. § 1101(f)(1), is facially unconstitutional on the theory that it violates the equal protection component of the Fifth Amendment's Due Process Clause. I think the majority rightly rejects that challenge, but my reasons for reaching that conclusion differ.

The statutory classification at issue does not implicate a fundamental right or target a suspect class, so it is subject to rational basis review. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993); *Fiallo v. Bell*, 430 U.S. 787, 793 n.5 (1977). No one disputes that it is perfectly rational for Congress to deny cancellation of removal to those who lack good moral character. *See* 8 U.S.C. § 1229b(b)(1)(B). Congress' judgment on that score is entitled to considerable deference, given the breadth of its authority to regulate the admission and exclusion of non-citizens. *Fiallo*, 430 U.S. at 792. The only

question, then, is whether Congress had a rational basis for establishing a conclusive presumption, not subject to rebuttal, that habitual drunkards lack good moral character, which is what § 1101(f)(1) does.

Conclusive presumptions of this sort are, by their nature, blunt instruments. No doubt there are individuals who, if given the opportunity to do so, could establish that they possess good moral character notwithstanding the fact that they are or were an habitual drunkard. It may well be that the petitioner in this case, Salomon Ledezma-Cosino, is one of those people. But the Supreme Court has long held that conclusive presumptions survive rational basis review even when the presumption established is both over- and underinclusive. *See, e.g.*, *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 316-17 (1976) (*per curiam*) (upholding mandatory retirement age of 50 for police officers); *Weinberger v. Salfi*, 422 U.S. 749, 776-77 (1975) (upholding provision denying Social Security benefits to surviving spouse of wage earner married less than nine months at time of wage earner's death). Here, if Congress could rationally conclude that a substantial number of those found to be habitual drunkards would also be found, upon examination, to lack good moral character, then it could establish the conclusive presumption created by § 1101(f)(1) simply to avoid the administrative costs that individual determinations of good moral character would entail. *See Salfi*, 422 U.S. at 777.

I think Congress could rationally conclude that most habitual drunkards would be found to lack good

moral character if individual determinations were permitted. That could be true, of course, only if habitual drunkards may in some sense be deemed morally blameworthy for acquiring their condition, for it would be irrational to brand someone as lacking in good moral character due to a medical condition developed through no fault of their own. In my view, Congress could rationally deem habitual drunkards to be at least partially responsible for having developed their condition. Habitual drunkards are those who have allowed themselves to become so addicted to alcohol that they can no longer control their habit of drinking to excess. That loss of control does not come about overnight; it is acquired as a result of frequent, repetitive acts of excessive drinking. *See, e.g.*, Bouvier's Law Dictionary 489 (William Edward Baldwin ed., Baldwin's Century ed. 1948) (defining the term "habitual drunkard" in this way: "A person given to inebriety or the excessive use of intoxicating drink, who has lost the power or the will, by frequent indulgence, to control his appetite for it."). Drinking to excess with such frequency that it leads to the loss of one's ability to refrain from excessive drinking in the future is conduct that Congress could rationally view as volitional, and therefore the proper subject of moral blame.

None of this is to say that Congress' decision to regard habitual drunkards as morally blameworthy for their condition is a wise one. We know considerably more about alcohol addiction today than we did back in 1952, when Congress enacted § 1101(f)(1). Scientists tell us, for example, that some people are much more prone to becoming addicted to

substances like alcohol than others, with genetic factors accounting for 40 to 70 percent of individual differences in the risk for addiction. U.S. Department of Health and Human Services, Office of the Surgeon General, *Facing Addiction in America: The Surgeon General's Report on Alcohol, Drugs, and Health* 2-22 (2016). In addition, there is a high correlation between alcohol abuse and post-traumatic stress disorder (PTSD), a condition that virtually no one could be blamed for acquiring. As the Surgeon General's report notes, "[i]t is estimated that 30-60 percent of patients seeking treatment for alcohol use disorder meet criteria for PTSD, and approximately one third of individuals who have experienced PTSD have also experienced alcohol dependence at some point in their lives." *Id*. at 2-22 to 2-23 (footnotes omitted).

Still, as a result of advances in our understanding of the neurobiology underlying addiction, we know that substance use disorders (including addiction, the most severe form) "typically develop gradually over time with repeated misuse" of the substance in question, and that one of the key factors in determining whether a person develops an addiction is "the amount, frequency, and duration of the misuse." *Id*. at 1-6 to 1-7. Modern science thus confirms that, at least to some extent, there is indeed a volitional component to developing an addiction to alcohol, even if many other factors outside an individual's control also contribute. Whether the volitional component is weighty enough to warrant treating habitual drunkards as morally blameworthy for their condition is a policy question for Congress to

resolve. Under rational basis review, it is not for us "to judge the wisdom, fairness, or logic" of Congress' decision in that regard. *Beach Communications*, 508 U.S. at 313.

It has been suggested that Congress' decision to treat habitual drunkards as lacking in good moral character is irrational because Congress has not classified individuals suffering from other chronic medical conditions, such as diabetes, heart disease, and bipolar disorder, as morally blameworthy for their conditions. The mere fact that a classification drawn by Congress may be underinclusive, however, is not sufficient to render it invalid under rational basis review. *Salfi*, 422 U.S. at 776. In any event, Congress could rationally conclude that habitual drunkards are not similarly situated to those suffering from other medical conditions. Even if there is arguably a volitional component involved in developing medical conditions like diabetes and heart disease (say, consuming excessive amounts of sugar or red meat), Congress could rationally view that conduct as less morally blameworthy than consuming excessive amounts of alcohol to the point of losing control over the ability to abstain. Plus, the well-documented connection between alcohol addiction and harm to others (in the form of drunken driving, domestic violence, and the like) distinguishes alcohol addiction from other medical conditions that pose a risk primarily to the health of the individual sufferer, rather than to the safety of others. These differences provide a rational basis for Congress' decision to classify habitual drunkards as lacking in good moral

character, but not those suffering from other medical conditions.

THOMAS, Chief Judge, with whom CHRISTEN, Circuit Judge, joins, dissenting:

The government proposes to bar the petitioner from immigration relief simply because is he a recovering alcoholic. It reasons that, because he was diagnosed with the disease during the qualifying period, he categorically must be labeled a "habitual drunkard," and is *per se* ineligible for cancellation of removal as someone who lacks good moral character. But the terms "alcoholic" and "habitual drunkard" are not synonymous, either as a matter of immigration law, or as a matter of fact. For that reason, I would grant the petition for review and remand for the Board of Immigration Appeals ("BIA") to reconsider the case under a proper construction of the law. Therefore, I must respectfully dissent.

I

A

As we observed more than four decades ago, "[t]he proposition that chronic acute alcoholism is itself a disease, 'a medically determinable physical or mental impairment,' is hardly debatable today." *Griffis v. Weinberger*, 509 F.2d 837, 838 (9th Cir. 1975). It has been recognized as a disease by the American Medical Association since 1956. American Medical Association, *Manual on Alcoholism for Physicians* (American Medical Association, 1957). Alcoholism is a neurobiological medical condition, and an individual's risk of becoming alcoholic depends on a

number of factors beyond volitional choice, including genetics and environmental influences. *See, e.g.*, U.S. Dep't of Health & Human Servs., Office of the Surgeon General, *Facing Addiction in America: the Surgeon General's Report on Alcohol, Drugs, and Health (2016) [hereinafter Surgeon General's Report]*; World Health Org., *Neuroscience of Psychoactive Substance Use and Dependence* (2004). Indeed, the Surgeon General has rejected the notion that alcoholism and other addictions are moral failings; instead, they are chronic illnesses "that we must approach with the same skill and compassion with which we approach heart disease, diabetes, and cancer." *Surgeon General's Report* at v, 1-2.

Despite this near-universal medical consensus, the government urges that a diagnosis of the disease of alcoholism must categorically mean that someone lacks good moral character and is therefore *per se* ineligible for cancellation of removal. This view is not supported by the statute, and certainly not by common sense. Perhaps, as some suggest, the phrase "habitual drunkard" is purely anachronistic. That well may be so, as evidenced by the fact that, aside from this case, there is only one reported BIA decision—from more than a half century ago—discussing it. *Matter of H*, 6 I & N Dec. 614 (1955). But it is still part of the statute and, if the government now intends to invoke it, a more definitive explanation of its meaning is required.

B

Our analysis must begin with the acknowledgment that this case presents serious constitutional questions as to the vagueness of the statute and whether it violates the Equal Protection Clause. In such circumstances, we are instructed to avoid constitutional issues "where an alternative interpretation of the statute is 'fairly possible.'" *INS v. St. Cyr.*, 533 U.S. 289, 299-300 (2001) (citation omitted). Fortunately, we need not confront those constitutional questions, because an examination of the statute confirms that a diagnosis of the disease of alcoholism does not, as a matter of immigration, mean that a petitioner lacks good moral character as a "habitual drunkard."

Employing the familiar tools of statutory construction, and mindful of the need to avoid constitutional questions, we look first at the plain words of the statute, "particularly to the provisions made therein for enforcement and relief." *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981). "[W]hen deciding whether the language is plain, we must read the words 'in their context and with a view to their place in the overall statutory scheme.'" *King v. Burwell*, __ U.S. __, 135 S. Ct. 2480, 2489 (2015) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). In addition, we examine the legislative history, the statutory structure, and "other traditional aids of statutory interpretation" in order to ascertain congressional intent. *Middlesex Cnty.*, 453 U.S. at 13. As part of statutory analysis, "[w]e also look to similar

provisions within the statute as a whole and the language of related or similar statutes to aid in interpretation." *United States v. LKAV*, 712 F.3d 436, 440 (9th Cir. 2013).

The present "good moral character" definition was enacted as part of the Immigration and Naturalization Act of 1952 ("INA"), which defined certain categories of individuals who were, *per se*, lacking in good moral character, including "habitual drunkard[s]," adulterers, gamblers, persons who gave false testimony for the purpose of obtaining immigration benefits, murderers, and those who had been convicted of a crime and confined to a penal institution for an aggregate of at least 180 days. Public L. 82-414 § 101(f), 66 Stat. 163, 172 (1952).

So, did Congress mean to include in the term "habitual drunkard" all individuals who had been diagnosed with alcoholism, or did it intend to distinguish between the two concepts? The text and history of the INA lead to the conclusion that Congressional intent was to create a distinction.

First, Congress well knew how to use the terms "alcoholism" and "alcoholic" in immigration law. In the Immigration Act of 1917, Congress added "persons with chronic alcoholism" to the classes of aliens excluded from admission to the United States. Immigration Act of 1917, Pub. L. No. 64-301, § 3, 39 Stat. 874, 875 (1917) (repealed 1952). With enactment of the INA, Congress repealed many of the provisions of the 1917 Act relating to categories of excludable aliens, but explicitly modified the exclusion

provisions to include "[a]liens who are narcotic drug addicts or chronic alcoholics." 66 Stat 163, 172-73 (1952). "[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (internal quotation marks omitted); *see also Center for Community Action and Environmental Justice v. BNSF R.R. Co.*, 764 F.3d 1019, 1024 (9th Cir. 2014). Therefore, the structure and context of the INA indicate a Congressional intent to distinguish the phrases. In addition, during the period when the INA was enacted, common public understanding was that the concepts were distinct. For example, Webster's New World Dictionary—published four years after the passage of the INA—distinguishes between a drunkard and an alcoholic: a "drunkard" is "a person who often gets drunk; inebriate," whereas an "alcoholic" is "one who has chronic alcoholism." Webster's New World Dictionary 17, 231 (1956). Webster's Collegiate Dictionary, published in 1947, defined "alcoholism" as "a diseased condition caused by excessive use of alcoholic liquors" and a "drunkard" as a "toper["] or "sot." Webster's Collegiate Dictionary (5th ed. 1947). And, as previously observed, the American Medical Association recognized alcoholism as a disease in 1956.

Second, the statutory context of the phrase "habitual drunkard" is critical. It is contained in the definition of "good moral character," as one of the listed categories of character attributes that preclude

relief. 8 U.S.C. § 1101(f)(1). The general concept of "good moral character" as a prerequisite to obtaining immigration benefits dates back to the adoption of the first naturalization statute in 1790, Act of Mar. 26, 1970, ch. 3, § 1, 1 Stat. 103, and grounded in the notion that an applicant should have spent some time as a resident and then "be able to bring testimonials of a proper and decent behavior."[1] It deals with one's character, not one's medical afflictions.

According to the present statute's terms, its purpose is to define which individuals necessarily lack good moral character. *See* 8 U.S.C. § 1101(f) ("No person shall be regarded as, or found to be, a person of good moral character who … is, or was … a habitual drunkard."). Other noncitizens who necessarily lack good moral character—and are therefore categorically barred from receiving discretionary relief—under Section 101(f) are (1) individuals engaged in prostitution, the smuggling of illegal immigrants into the country, or polygamy; (2) individuals "whose income is derived principally from illegal gambling activities" or who have "been convicted of two or more gambling offenses"; (3) individuals who have "been convicted of an aggravated felony"; or (4) individuals engaged in conduct relating to "assistance in Nazi persecution, participation in genocide, or commission of acts of torture or extrajudicial killings." 8 U.S.C. § 1101(f).

Every other category in Section 101(f) describes conduct that results in public harm or harm to others.

---

[1] 1 Annals of Congress 1154 (1790) (Joseph Gales ed., 1834) (statement of Rep. Jackson).

Under the doctrine of *noscitur a sociis*, according to which "a word is known by the company it keeps," *S.D. Warren Co. v. Maine Bd. of Env'l Protection*, 547 U.S. 370, 378 (2006), "habitual drunkard" should apply only to individuals who engage in certain types of harmful conduct. Therefore, an individual's status as suffering from the disease of alcoholism cannot be sufficient to trigger the "habitual drunkard" provision; being an alcoholic does not necessarily result in public harm or harm to others.

Third, not only does the context of "good moral character" suggest analysis of conduct, rather than a disease, but the statutory provisions as to the avenue of relief afforded strengthens that conclusion. The phrase "good moral character" is employed in various immigration contexts including naturalization, *see* 8 U.S.C. § 1427(a)(3), becoming a lawful permanent resident, *see* 8 U.S.C. § 1255b, adjustment of status, *see* 8 U.S.C. § 1154, grant of voluntary departure, *see* 8 U.S.C. § 1229c, and cancellation of removal, 8 U.S.C. § 1229b.

For our contextual purposes, the relevant provision is cancellation of removal and its predecessor statute, suspension of deportation. Relief via suspension of deportation was established by the INA. One of the eligibility requirements for suspension of deportation was that the applicant be someone whose deportation would result in "exceptional and extremely unusual hardship" to the alien or an immediate family member who was a citizen or lawful permanent resident. 8 U.S.C.

§ 1254(a)(1) (repealed).[2] Among the critical factors in determining the requisite hardship was "health, especially tied to inadequate medical care in the home country." *Urban v. INS*, 123 F.3d 644, 648 (7th Cir. 1997); *see also In re Anderson*, 16 I. & N. Dec. 596, 597-98 (1978) (noting among the the [sic] relevant factors to be "condition of health" and "severe illness"); *In re Louie*, 10 I. & N. Dec. 223, 225 (1963) (granting suspension of deportation based on medical condition of father). In 1962, Congress replaced the "exceptional and extremely unusual hardship" standard with "extreme hardship."

In 1997, Congress eliminated the remedy of suspension of deportation, and replaced it with "cancellation of removal," which is the operative statute in this case. 8 U.S.C. § 1229b. Eligibility for relief was still predicated on hardship, with a stricter standard returning to the original language of "exceptional and extremely unusual hardship," and limiting the hardship determination to qualifying relatives. *Id.* Medical condition continued to be an important factor in determining eligibility for relief. *See, e.g.*, *Fernandez v. Gonzales*, 439 F.3d 592, 601-02 (9th Cir. 2006) (noting it would be error for the BIA to refuse to hear evidence of a life-threatening medical condition in the context of cancellation of removal); *see also In re Gonzalez Recinas*, 23 I. & N. Dec. 467, 470 (2002) (noting that the new hardship standard "is

[2] The other two requirements were that the applicant had been physically present in the United States for a continuous period of not less than seven years immediately preceding the application date, and was a person of good moral character during that period. 8 U.S.C. § 1254(a)(1) (repealed).

not so restrictive that only a handful of applicants, such as those who have a qualifying relative with a serious medical condition, will qualify for relief."). In short, medical condition and health have always been important considerations in determining hardship, either through suspension of deportation or cancellation of removal. Thus, it would be inconsistent with the statute, when considered in context, to construe it to mean that the *disease* of alcoholism, by itself, would *per se* disqualify a petitioner from relief when the establishment of a serious medical condition can be a qualifying factor.

Fourth, in a different section of the INA, Section 212(a)(1)(A)(iii), Congress demonstrated a more nuanced understanding of alcohol dependence. There, it established that a noncitizen is inadmissible if he or she "is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services in consultation with the Attorney General) to have a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others." *See* 8 U.S.C. § 1182(a)(1)(A)(iii)(I); *see also* 8 U.S.C. § 1182(a)(1)(A)(iii)(II). An implementing regulation treats alcoholics as having a "physical or mental disorder" for the purpose of inadmissibility under this statute. *See* 42 C.F.R. 34.2(n); Am. Psychiatric Ass'n, *supra*; Center for Disease Control & Prevention, *Technical Instructions for Physical or Mental Disorders with Associated Harmful Behaviors and Substance-Related Disorders for Civil Surgeons* (2013), *available at* http://tinyurl.com/jqaggoo. It is

important to emphasize, however, that this statute only refuses admissibility to alcoholics whose alcohol-related *behavior* "pose[s] … a threat to the property, safety, or welfare of the alien or others." 8 U.S.C. § 1182(a)(1)(A)(iii)(I). It does not exclude alcoholics based on an outdated stigma that they are categorically immoral.

Finally, as we have noted, the assessment of good moral character in the immigration context requests the agency to "weigh and balance the favorable and unfavorable facts or factors, reasonably bearing on character, that are presented in evidence." *Torres-Guzman v. INS*, 804 F.2d 531, 534 (9th Cir. 1986). Although this general concept does not construe the "habitual drunkard" provision, it reinforces the idea of the general purpose of the statute, and the need for a case-by-case determination. Consistent with this approach, courts have declined to find a lack of good moral character based on isolated alcohol-related conduct. For example, several district courts have held that a single conviction for driving under the influence ("DUI")—and sometimes more than one—cannot render someone a person of bad moral character under Section 101(f). *See, e.g.*, *Rangel v. Barrows*, No. 4:07-cv-279, 2008 WL 4441974, at *4 (E.D. Tex. Sept. 25, 2008) ("[T]he applicable law is unanimous in support of the proposition that, in the absence of aggravating factors, a single [DUI] conviction is insufficient to deny an application for naturalization on the basis that the applicant lacks good moral character."); *Ragoonanan v. U.S. Citizenship & Immigration Servs.*, No. 07-3461 PAM/JSM, 2007 WL 4465208, at *5 (D. Minn. Dec. 18,

2007) (holding that "a single [DUI] conviction resulting in probation" is insufficient to establish bad moral character); *Yaqub v. Gonzales*, No. 1:05-cv-170, 2006 WL 1582440, at *4 (S.D. Ohio June 6, 2006) (concluding that "two DUI arrests" are insufficient to find petitioner lacks good moral character); *Le v. Elwood*, No. Civ.A. 02-CV-3368, 2003 WL 21250632, at *3 (E.D. Pa. 2003) (concluding that two DUI convictions, did not, standing alone, "amount to a finding of 'habitual drunkard'").

In addition, the statutory construct of "good moral character" has also embraced the concept of redemption. *See, e.g.*, *Santamaria-Ames v. INS*, 104 F.3d 1127, 1132 (9th Cir. 1996) ("Whether the petitioner can establish that he has reformed and rehabilitated from this prior conduct is germane to the determination of whether he has established good moral character … ."); *Yuen Jung v. Barber*, 184 F.2d 491 (9th Cir. 1950) (noting that if a prior bad act precluded one from establishing good moral character, "would require a holding that Congress had enacted a legislative doctrine of predestination and eternal damnation.") Here, however, the government's proposed holding would mean that all sober, recovering alcoholics who were diagnosed during the seven year qualifying period would necessarily be considered "habitual drunkards" and categorically ineligible for relief. The construction more consistent with the statute would be to allow the agency to consider and balance the equities of each individual circumstance on a case by case basis.

In short, when we consider the plain language of the statute, its structure, and its legislative history, we must conclude that the phrase "habitual drunkard" is not synonymous with "alcoholic." Thus, a diagnosis of the disease of alcoholism is insufficient to trigger the "habitual drunkard" provision, and render a petitioner categorically ineligible for discretionary cancellation of removal relief.

Instead, the phrase "habitual drunkard" is best understood in the context of its statutory setting of "good moral character," which has commonly been understood to reflect, as Judge Learned Hand put it, the "common conscience" of the community. *Johnson v. United States*, 186 F.2d 588, 590 (2d Cir. 1951). To that end, courts have generally focused on whether the challenged conduct is harmful to the public, or whether it is purely private. *See Nemetz v. INS*, 647 F.2d 432, 436 (4th Cir. 1981) (noting that the appropriate analysis "is whether the act is harmful to the public or is offensive merely to a personal morality."); *In re Labady*, 326 F. Supp. 924, 927 (S.D.N.Y. 1971) ("The most important factor to be considered is whether the challenged conduct is public or private in nature.").

Thus, in context, the best construction of "habitual drunkard" within the "good moral character" definition is one who habitually abuses alcohol and whose alcohol abuse causes harm to other persons or the community. This interpretation is consistent with the statutory language, structure, and context, and avoids any constitutional infirmity.

To be sure, an alcoholic may also fit the definition of "habitual drunkard" by conduct that causes harm to others or the public. But to say that status of being diagnosed an alcoholic always means that one is a "habitual drunkard," is not consistent with the statute.

II

A proper construction of the phrase "habitual drunkard" is critical to the outcome of this petition. Mr. Ledezma-Cosino has been in the United States for twenty years. He works in construction, specializing in cement masonry and concrete finishing. He and his wife have eight children, five of whom are United States citizens. At his first immigration hearing, he admitted removability, but applied for cancellation of removal and voluntary departure under 8 U.S.C. § 1229b-c. In support of his application for cancellation of removal, he contended that his removal would result in exceptional and extremely unusual hardship to his children because of economic disadvantage, the difficulties of adjusting to life in Mexico, and his youngest daughter's asthma. At the first hearing, the immigration judge ("IJ") found, on the merits, that Ledezma-Cosino had not established the statutory hardship requirement. The IJ denied cancellation of removal, but granted voluntary departure.

Ledezma-Cosino appealed to the BIA. The BIA remanded the case because the trial transcript was defective because there was no record of the last witness, Ledezma-Cosino's daughter, Yadira

Ledezma. The BIA instructed the IJ to complete the record.

At the first post-remand hearing, the government attested to the IJ that there had been no negative developments as to Ledezma-Cosino between the hearings. At the scheduled second hearing, counsel requested a continuance because Ledezma-Cosino had been hospitalized with a liver ailment. At a subsequent scheduling hearing, counsel presented medical records to show that his client had been hospitalized.

At the hearing on the merits, the judge placed the medical records into the record himself. Yadira Ledezma testified, as well as Ledezma-Cosino. The judge questioned both about Ledezma-Cosino's drinking because it had been reflected in the medical records. Ledezma-Cosino testified that he had been sober since the hospitalization. At the conclusion of the testimony, the government argued that he had not satisfied the hardship requirement and questioned whether he had been truthful on his application. The government did not argue that he was categorically ineligible for relief because he was a "habitual drunkard."

The IJ then, sua sponte, declared Ledezma-Cosino ineligible for relief because he was a "habitual drunkard," and also denied voluntary departure for that reason. The BIA dismissed his appeal on the sole basis that he is a "habitual drunkard" and therefore failed to "me[e]t the requisite period of good moral character" required for discretionary relief. In

reaching this conclusion, the BIA considered only that Ledezma-Cosino (1) was hospitalized for a serious liver condition in 2010 and drank alcohol excessively for a year leading up to his hospital visit, (2) had a decade-long alcohol dependency, (3) was an alcoholic according to his daughter's testimony, and (4) was convicted of a DUI in 2008.

Aside from the DUI conviction, there was no evidence in the record of any harm to the public or others. Indeed, the only evidence was that he was an excellent worker. Thus, if the evidence pertaining to his diagnosis of alcoholism is set aside, there was not sufficient evidence to sustain the determination of ineligibility for cancellation or voluntary departure based on the "habitual drunkard" clause.

Therefore, I would remand this petition to the BIA for application of the correct statutory standard or, to the extent there is remaining statutory ambiguity, for it to determine the meaning of the phrase "habitual drunkard" in a way that does not make the phrase synonymous with "alcoholic."

Whether or not the agency would ultimately grant relief in this case is a separate question. In the end, the decision as to whether an applicant is afforded discretionary cancellation of removal is committed solely to the executive branch, not subject to our review. But legal eligibility for relief is subject to our review, and it is important for future cases of those who seek relief, and the attorneys who represent them, that the law is accurately defined. Given the government's new reliance on what had been

considered an antediluvian phrase, resolution of its meaning is particularly critical.

Because I would resolve the petition on the basis of statutory interpretation, or remand, I would not reach the constitutional questions raised in this case.

For these reasons, I respectfully dissent.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SALOMON LEDEZMA-COSINO, AKA Cocino Soloman Ledesma, *Petitioner*, v. LORETTA E. LYNCH, Attorney General, *Respondent*.	No. 12-73289 Agency No. A091-723-478 OPINION

On Petition for Review of an Order of the Board of Immigration Appeals

Argued and Submitted
July 10, 2015—Pasadena, California

Filed March 24, 2016

Before: Stephen Reinhardt and Richard R. Clifton, Circuit Judges and Miranda M. Du,* District Judge.

Opinion by Judge Reinhardt;
Dissent by Judge Clifton

* The Honorable Miranda M. Du, District Judge for the U.S. District Court for the District of Nevada, sitting by designation.

SUMMARY**

Immigration

The panel granted Salomon Ledezma-Cosino's petition for review of the Board of Immigration Appeals' decision finding him ineligible for cancellation of removal or voluntary departure because he lacked good moral character as a "habitual drunkard" under 8 U.S.C. § 1101(f)(1).

The panel held that Ledezma-Cosino is barred from raising a due process claim, but he could bring an equal protection challenge because it does not require a liberty interest. The panel held that § 1101(f)(1) is unconstitutional under the Equal Protection Clause because there is no rational basis to classify people afflicted by chronic alcoholism as innately lacking good moral character. The panel remanded for further proceedings in light of the opinion.

Dissenting, Judge Clifton wrote that the opinion disregards the legal standard to be applied, and that § 1101(f)(1) should easily clear the very low bar of the rational basis test. Judge Clifton would find that the majority opinion includes several false legal premises, and it relies upon the false factual dichotomy that diagnosis of chronic alcoholism as "medical" means there can be no element of drunkenness subject to free will or susceptible to a moral evaluation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

COUNSEL

Nora E. Milner (argued), Milner & Markee, LLP, San Diego, California, for Petitioner.

Lisa M. Damiano (argued), Stuart F. Delery, Benjamin C. Mizer, and Terri J. Scadron, United States Department of Justice, Office of Immigration Litigation, Washington D.C., for Respondent.

OPINION

REINHARDT, Circuit Judge:

The Board of Immigration Appeals (BIA) determined that Petitioner Salomon Ledezma-Cosino was not eligible for cancellation of removal or voluntary departure because, under 8 U.S.C. § 1101(f)(1), as a "habitual drunkard"—that is, a person with chronic alcoholism—he inherently lacked good moral character. He now petitions for review, contending that the Due Process Clause and Equal Protection Clause of the Constitution forbid the Government from making such an irrational classification as to moral character on the basis of a medical disability. We hold that, under the Equal Protection Clause, a person's medical disability lacks any rational relation to his classification as a person with bad moral character, and that § 1101(f)(1) is therefore unconstitutional. We grant the petition for review, vacate the BIA's decision, and remand for further proceedings in light of this opinion.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction under 8 U.S.C. § 1252(a)(2)(D) to review constitutional claims raised upon a petition for review. *Cabrera-Alvarez v. Gonzales*, 423 F.3d 1006, 1009 (9th Cir. 2005). This includes any alleged "colorable constitutional violation." *Martinez-Rosas v. Gonzales*, 424 F.3d 926, 930 (9th Cir. 2005). As the BIA lacks jurisdiction to rule upon the constitutionality of the statutes it administers, *In re Fuentes-Campos*, 21 I. & N. Dec. 905 (BIA 1997), it did not rule on the constitutional claim raised by petitioner. We review that claim de novo. *Chavez-Perez v. Ashcroft*, 386 F.3d 1284, 1287 (9th Cir. 2004).

BACKGROUND

Even when the government may deport a non-citizen, the Attorney General has the discretion not to do so by, among other avenues, cancelling the removal under 8 U.S.C. § 1229b or allowing the non-citizen to voluntarily depart the country under 8 U.S.C. § 1229c. Each of these avenues provides a benefit for the non-citizen. The benefit of cancellation is obvious: non-citizen may remain in the country. Voluntary departure's benefit is less intuitive, but no less important to the many non-citizens who receive this form of relief. If a non-citizen can voluntarily depart rather than be deported, "he or she avoids extended detention pending completion of travel arrangements; is allowed to choose when to depart (subject to certain constraints); and can select the country of destination. And, of great importance, by

departing voluntarily the alien facilitates the possibility of readmission." *Dada v. Mukasey*, 554 U.S. 1, 11 (2008).

Congress limited eligibility for cancellation or voluntary departure to non-citizens of "good moral character." 8 U.S.C. §§ 1229b(b)(1)(B); 1229c(b)(1)(B). Given the presumed difficulty of enumerating traits demonstrating good moral character, the relevant statute defines good moral character by listing the categories of people who lack it. 8 U.S.C. § 1101(f). This list includes, among others, people who have participated in genocide or torture, been convicted of an aggravated felony or several gambling offenses, spent 180 days in custody as a result of a conviction or convictions, lied to obtain a benefit in immigration proceedings, and people who are "habitual drunkard[s]." *Id*. (containing full list). Any person deemed to lack good moral character may not be considered for discretionary relief.

Ledezma-Cosino is a person who was determined to lack good moral character by virtue of his classification as a "habitual drunkard" under the statutory provision. He is a citizen of Mexico who entered the United States in 1997 without being legally admitted and has been in the country since that time except for a few brief departures. He has eight children, five of whom are United States citizens. He supports his family by working in the construction industry.

He is also a chronic alcoholic or a "habitual drunkard." His medical records state that he has a

ten-year history of alcohol abuse, during which he drank an average of one liter of tequila each day. Examining doctors have diagnosed him with acute alcoholic hepatitis, decompensated cirrhosis of the liver, and alcoholism. His abuse of alcohol has led to at least one DUI conviction.

Immigration and Customs Enforcement (ICE) detained Ledezma-Cosino in 2008. Over several hearings in front of the Immigration Judge (IJ), he conceded removability but sought cancellation of removal or voluntary departure. The IJ denied relief for several reasons, but the BIA affirmed solely on the ground that Ledezma-Cosino was ineligible because he lacked good moral character as a "habitual drunkard." The BIA recognized that Ledezma-Cosino raised a constitutional argument about this classification but noted that it does not have jurisdiction over constitutional issues.

Following the BIA's denial of his appeal from the IJ, Ledezma-Cosino petitioned for review. After oral argument, we ordered supplemental briefing on the question whether § 1101(f)(1) violates due process or equal protection on the ground that chronic alcoholism is a medical condition not rationally related to the presence or absence of good moral character.

DISCUSSION

Ledezma-Cosino argues that the denial of his request for cancellation of removal or voluntary departure on the ground that he lacks good moral

character because he is "a habitual drunkard" deprives him of due process and equal protection of the law. We first address whether he has a protectable liberty interest for his due process claim and then turn to his equal protection argument.

I

The Government first argues that Ledezma-Cosino is unable to raise a due process or equal protection claim because non-citizens lack a protectable liberty interest in discretionary relief. We agree that non-citizens cannot challenge denials of discretionary relief under the due process clause because they do not have a protectable liberty interest in a privilege created by Congress. *Tovar-Landin v. Ashcroft*, 361 F.3d 1164, 1167 (9th Cir. 2004); *Munoz v. Ashcroft*, 339 F.3d 950, 954 (9th Cir. 2003). An equal protection claim, however, does not require a liberty interest. *Sandin v. Conner*, 515 U.S. 472, 487 & n.11 (1995) (holding that prisoner had no liberty interest for the purpose of the due process clause, but that he may nonetheless challenge arbitrary state action under the equal protection clause). Accordingly, Ledezma-Cosino is barred from raising a due process claim but may raise an equal protection challenge.

II

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all

persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). The Supreme Court has long held that the constitutional promise of equal protection of the laws applies to non-citizens as well as citizens. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Although Congress's power to regulate the exclusion or admission of non-citizens is extremely broad, *see Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Perez-Oropeza v. INS*, 56 F.3d 43, 45 (9th Cir. 1995), a classification between non-citizens who are otherwise similarly situated nevertheless violates equal protection unless it is rationally related to a legitimate government interest, *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 603 (9th Cir. 2002). Here, the government interest is in excluding persons of bad moral character. The Government "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne*, 473 U.S. at 446. The absence of a rational relationship between a medical disease and bad moral character therefore renders any classification based on that relationship a violation of the Equal Protection Clause.

At the outset, it is apparent from the face of the statute that Congress has created a classification dividing "habitual drunkards"—i.e. persons with chronic alcoholism—from persons who do not suffer from the same disease and identifying the former as necessarily lacking good moral character. Although acknowledging the classification, the Government maintains that the statute does not target a status (alcoholism) but rather specific symptoms (habitual and excessive drinking) and that we therefore should

not be concerned that the statute classifies a medical condition as constituting bad moral character. The Government is wrong. Just as a statute targeting people who exhibit manic and depressive behavior would be, in effect, targeting people with bipolar disorder and just as a statute targeting people who exhibit delusional conduct over a long period of time would be, in effect, targeting individuals with schizotypal personality disorder, a statute targeting people who habitually and excessively drink alcohol is, in effect, targeting individuals with chronic alcoholism. *Cf. Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 689 (2010) (declining to distinguish between status and conduct in cases in which the conduct was intertwined with the status). The Government's argument does not in fact advance the resolution of the issue before us. It simply states the obvious. Every person who is, by definition, a habitual drunkard will regularly exhibit the symptoms of his disease by drinking alcohol excessively. *See* Black's Law Dictionary (10th ed. 2009) (defining "habitual drunkard" as "someone who consumes intoxicating substances excessively; esp., one who is often intoxicated," and "[a]n alcoholic").

Given the classification in the statute, the question becomes whether Congress's disparate treatment of individuals with alcoholism is "rationally related to a legitimate state interest" in denying discretionary relief to individuals who lack good moral character. *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1065 (9th Cir. 2014). In other words, is it rational for the government to find that

people with chronic alcoholism are morally bad people solely because of their disease?

The answer is no. Here, the Government concedes that alcoholism is a medical condition, as we have long recognized to be the case. *Griffis v. Weinberger*, 509 F.2d 837, 838 (9th Cir. 1975) ("The proposition that chronic acute alcoholism is itself a disease, 'a medically determinable physical or mental impairment,' is hardly debatable today."). Like any other medical condition, alcoholism is undeserving of punishment and should not be held morally offensive. *Powell v. Texas*, 392 U.S. 514, 549–51 (1968) (White, J., concurring) (describing chronic alcoholism as a "disease" and stating that "the chronic alcoholic with an irresistible urge to consume alcohol should not be punishable for drinking or for being drunk"). Although people with alcoholism continue to face stigma, "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *City of Cleburne*, 473 U.S. at 448 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)). We are well past the point where it is rational to link a person's medical disability with his moral character.

The Government first argues that persons suffering from alcoholism are morally blameworthy because they simply lack the motivation to overcome their disease. The study on which the Government relies, W.R. Miller, *Motivation for Treatment: A Review With Special Emphasis on Alcoholism*, 98 Psychological Bulletin 84, (1985) (Ex. A), does not support the proposition that alcoholics lack motivation. The study actually refutes the proposition

urged by the Government, noting that the "trait model," according to which alcoholics employ defense mechanisms because they lack sufficient motivation to stop drinking,

> ha[s] failed to find support in the empirical literature. Extensive searches for "the alcoholic personality" have revealed few definitive traits or patterns typical of alcoholics beyond those directly attributable to the effects of overdrinking. The character defense mechanism of denial has been found to be no more frequent among alcoholics than among nonalcoholics.

Id. Put differently, the theory that alcoholics are blameworthy because they could simply try harder to recover is an old trope not supported by the medical literature; rather, the inability to stop drinking is a function of the underlying ailment.

The Government's position to the contrary has deplorable, troubling, and wholly unacceptable implications. Taking the Government's logic as true, a disproportionate number of today's veterans, many of whom suffer from Post Traumatic Stress Disorder, would lack good moral character because they are consumed by—and cannot overcome—their alcoholism. *See* Andrew Saxon, *Returning Veterans with Addictions*, Psychiatric Times (July 14, 2011), http://www.psychiatrictimes.com/military-mental-health/returning-veterans-addictions/ (noting that 12% to 15% of recently deployed veterans to Iraq

tested positive for alcohol problems); Thomas Brinson & Vince Treanor, *Vietnam Veterans and Alcoholism*, The VVA Veteran (August 1984), *http://www.vva.org/archive/TheVeteran/2005_03/feature_alcoholism.htm* ("[Thirty-six] percent of the Vietnam veterans studied demonstrated alcoholism or significant alcohol-related problems which could develop into alcoholism."); National Center for PTSD, Department of Veterans Affairs, http://www.ptsd.va.gov/public/problems/ptsd_substance_abuse_veterans.asp (noting that PTSD and substance abuse often occur simultaneously in veterans and that 1 in 10 returning soldiers from Iraq and Afghanistan seen at Veterans Affairs hospitals have a substance abuse problem); Magdalena Cérda et al., *Civilian Stressors Associated with Alcohol Use Disorders in the National Guard*, 47 Am. J. of Preventative Med. 461 (2014) (noting that soldiers in the National Guard have double the rate of alcohol abuse and linking this high rate to civilian stressors—including family disruption, problems with health insurance, and legal problems—caused by intermittent deployment). A disproportionate number of Native Americans similarly would be classified as lacking good moral character under the Government's theory. *See* RJ Lamarine, *Alcohol Abuse Among Native Americans,* 13 J. Community Health 143, 143 (1988) ("Epidemiological data indicate that elevated morbidity and mortality attributable to alcohol abuse among [Native Americans] remain at epidemic levels."); Palash Ghoash, *Native Americans: The Tragedy of Alcoholism*, International Business Times (Feb. 11, 2012), http://www.ibtimes.com/native-americans-tragedy-alcoholism-214046 ("According to

the Indian Health Services, the rate of alcoholism among Native Americans is six times the U.S. average."); Patricia Silk-Walker et al., *Alcoholism, Alcohol Abuse, and Health in American Indians and Alaska Natives*, 1 Am. Indian and Alaska Native Mental Health Res. 65 (1988) ("[Four] of the top 10 causes of death among American Indians are attributable in large part to alcohol abuse … ."). Finally, a disproportionate number of people who are homeless would not only be deprived of the government assistance they so desperately need but they would be officially condemned as bad people, undeserving of such help. Dennis McCarty et al., *Alcoholism, Drug Abuse, and the Homeless*, 46 Am. Psychologist 1139 (1991) (citing credible estimates that alcohol abuse affects 30% to 40% of homeless persons); Substance Abuse & Mental Health Servs. Admin., *Current Statistics on the Prevalence and Characteristics of People Experiencing Homelessness in the United States*, at 2 (2011) (same). Surely, the Government does not seriously assert that the veterans of the wars in Vietnam, Iraq, and Afghanistan who suffer from chronic alcoholism, as well as a highly disproportionate number of Native Americans, and a substantial portion of America's homeless population are all people of bad moral character.

The Government next contends that individuals suffering from habitual alcoholism have bad moral character because they "are at an increased risk of committing acts of violence or self-harm," citing several studies to the effect that alcoholism leads to the commission of certain crimes. *See* D. W. Webster

& J. S. Vernick, *Keeping Firearms From Drug and Alcohol Abusers*, 15 Inj. Prev. 425 (2009) (Ex. B) (arguing that alcohol abusers should be barred from acquiring firearms because of the increased risk of violence); Phyllis W. Sharps et al., *The Role of Alcohol Use in Intimate Partner Femicide*, 10 Am. J. Addictions 122, 133 (2001) (Ex. C) (discussing the link between alcohol and intimate partner violence); Frederick P. Rivara et al., *Alcohol and Illicit Drug Abuse and the Risk of Violent Death in the Home,* 278 JAMA 569 (1997) (Ex. D) (noting that alcohol abuse is linked to being a victim of homicide and suicide); Gary M. McClelland et al., *Alcohol Intoxication and Violent Crime: Implications for Public Health Policy*, 10 Am. J. Addictions 70 (2000) (Ex. E) (tracing the relation between police encounters and alcohol). Several of these studies have no link to moral culpability at all; even the Government would concede that being a victim of a crime or committing suicide does not show poor moral character. More important, the link between alcohol and violence does not make being the victim of the disease of alcoholism equivalent to possessing poor moral character. Indeed, although individuals with bipolar disorder have a lifetime incidence of aggressive behavior 14 to 25 percentage points higher than average and are at greater risk of self-harm, Jan Volavka, *Violence in Schizophrenia and Bipolar Disorder*, 25 Psychiatria Danubina 24, 27 (2013); KR Jamison, *Suicide and Bipolar Disorder,* 61 J. Clinical Psychiatry 47-51 (2000), no one would suggest that people with bipolar disease lack good moral character. Alcoholism is no different. On a similar note, the Government points to state laws that bar individuals with alcoholism from carrying

firearms and policies that bar individuals with alcoholism from obtaining residence at the U.S. Soldiers' and Airmen's Home as evidence that people with alcoholism pose a particular moral threat. These examples are irrelevant. Unlike the statute at issue, these policies are designed for a different purpose—the avoidance of unnecessary conflict—not to limit activities of alcoholics because they lack good moral character. [1]

The Government last argues that "habitual drunkards have been the target of laws intending to protect society since the infancy of the nation" and that such history proves the rationality of the legislation. History is a useful guide in this case, but it undercuts rather than buttresses the Government's argument. Because of the failure to understand mental illness, people with mental disabilities have in the past faced severe prejudice. *City of Cleburne*, 473 U.S. at 438. The very article the Government cites points to a darker origin for the targeting of habitual drunkards by immigration laws. The article contends that the laws, passed in the mid-1950s, "operated as forms of social control over immigrants and were

---

[1] What actions may be taken to limit the possibility that individuals suffering from chronic alcoholism will commit criminal acts is another question, one not necessary for us to consider here, although banning them from possessing firearms or driver's licenses are obvious areas for consideration. Similarly, when or how persons with chronic alcoholism may be punished for criminal acts committed while in an alcoholic state is another question to be considered elsewhere. None of this has anything to do, however, with whether individuals suffering from the disease of alcoholism are innately without good moral character.

driven by economic, political and xenophobic impulses" rather than a concern over moral character. Jayesh Rathod, *Distilling Americans: The Legacy of Prohibition on U.S. Immigration Law*, 51 Hous. L. Rev. 781, 846 (2013); *see also id.* at 823. As we recently learned in the context of laws discriminating on the basis of sexual orientation, "new insights and societal understandings can reveal unjustified inequality … that once passed unnoticed and unchallenged." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015). These new insights are particularly common in the field of mental health, where the Supreme Court has shifted from upholding sterilization of the mentally ill, notoriously declaring that "[t]hree generations of imbeciles are enough," *Buck v. Bell*, 274 U.S. 200, 207 (1928), to deploring the "grotesque mistreatment" of those with intellectual and mental disabilities, *City of Cleburne*, 473 U.S. at 438. Here, the over half-century that has passed since the "habitual drunkard" clause took effect has provided similar new insights in treating alcoholism as a disease rather than a character defect.

If anything, history tells us that animus was the impetus behind the law. That animus, of course, "is not a legitimate state interest." *Ariz. Dream Act,* 757 F.3d at 1067 (citing *Romer v. Evans*, 517 U.S. 620, 634 (1996)). We have also been taught through the passage of time that classifying alcoholics as evil people, rather than as individuals suffering from a disease, is neither rational nor consistent with our fundamental values. In sum, the Government's reliance on history not only fails to support the singling out of chronic alcoholics as without moral

character but tells us that such a classification is violative of the Equal Protection Clause of our Constitution.

CONCLUSION

There is no rational basis for classifying persons afflicted by chronic alcoholism as persons who innately lack good moral character. As such, we hold 8 U.S.C. § 1101(f)(1) unconstitutional, vacate the BIA's decision, and remand for further proceedings consistent with this opinion.

VACATED and REMANDED.

CLIFTON, Circuit Judge, dissenting:

The words "equal protection" did not appear in the opening brief filed on behalf of Petitioner Solomon Ledezma-Cosino. Given that, it is not surprising that they did not appear in the government's answering brief, either. Ledezma did not file a reply brief. So how did the issue arise?

The argument deemed persuasive in the majority opinion is an argument of the majority's own creation. Ledezma did not make that argument until urged to do so by the majority at oral argument and via a subsequent order for supplemental briefing. Perhaps that pride of authorship helps to explain why the majority finds the argument persuasive, despite its obvious and multiple flaws.

Our decision in this case disregards the legal standard to be applied. The "rational basis" test sets a very low bar, and Congress has exceptionally broad power in determining which classes of aliens may remain in the country. The statute at issue here, 8 U.S.C. § 1101(f)(1), should easily clear that bar.

It does not, in the majority's view, only because the majority relies upon a false factual dichotomy—that diagnosis of the condition of chronic alcoholism as "medical" means that there can be no element of drunkenness that is subject to free will or susceptible to a moral evaluation. The majority then goes on to hold that it is irrational for Congress to have reached a conclusion on that subject contrary to the majority's own view. Specifically, the majority assumes that a person found to be a habitual drunkard is in that state only because of factors beyond his control, such that it is irrational to hold him accountable for it. But chronic alcoholics do not have to be habitual drunkards. Ledezma himself puts the lie to the majority's assumed premise, because despite his alcoholism, and to his credit, the record in this case tells us that he ultimately overcame that condition and stopped drinking.

I respectfully dissent.

I. The Legal Standard

The majority opinion concludes that 8 U.S.C. § 1101(f)(1) fails the rational basis test. That means that the statute, in the words of the majority opinion, at 7-8, is not "rationally related to a legitimate

government interest" and its "'relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.'" (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985)).

The rational basis test does not set a standard that is tough to satisfy. A legislative classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). Federal statutes enjoy "a strong presumption of validity," "and those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it[.]'" *Id.* at 314-15 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)). Rational basis review does not provide "a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Id.* at 313.

The rational basis test is particularly forgiving in the context of immigration policy. "[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). Likewise, "the right to terminate hospitality to aliens," and "the grounds on which such determination shall be based, have been recognized as matters solely for the responsibility of the Congress and wholly outside the power of this Court to control." *Id.* "In the exercise of its broad power over naturalization and immigration, Congress regularly

makes rules that would be unacceptable if applied to citizens." *Demore v. Kim*, 538 U.S. 510, 511 (2003).

II. False Factual Premise

The majority begins with a false factual dichotomy—that diagnosis of the condition of chronic alcoholism as "medical" means that there can be no element of drunkenness that is subject to free will or susceptible to a moral evaluation. But if chronic alcoholics really had no ability to control their conduct, then such individuals would never be able to stop drinking. We know that is not the case, as Ledezma himself laudably demonstrated. Chronic alcoholics do not have to be habitual drunkards.

The majority, in disregard of the standard of review, discredited scientific and behavioral evidence tending to establish the volitional component of alcoholism that is properly subject to moral evaluation. One study cited by the government collected reams of scientific literature addressing the dominant view that "motivation" is a critical component of positive treatment outcomes. *See* William R. Miller, *Motivation for Treatment: A Review With Special Emphasis on Alcoholism*, 98 Psychological Bulletin 84 (1985) (recounting survey evidence that among alcoholism treatment personnel "75% believed patient motivation to be important to recovery, and 50% viewed it as essential"). The study noted that "motivation is frequently described as a prerequisite and a *sine qua non* for treatment, without which the therapist can do nothing[.]" *Id*. Endorsing that concept, the author concluded that

motivation could be increased by "setting demanding but attainable goals." *Id.* at 99. Put differently, the Miller study showed that chronic alcoholics who received consistent reinforcement for their daily decision not to drink were more likely to avoid relapsing into habitual intoxication.

The majority opinion, at 10, discredits reliance on the Miller study by mischaracterizing the government's argument. The majority argues that the study does not support the proposition that alcoholics lack motivation and notes that the study discredits what is known as the "trait model." But the government never argued that alcoholics lack motivation or that they fit a specific trait model. It argued only that habitual drunkenness has a volitional component. That point is amply supported by the Miller study and by the voluminous literature it discussed. By contrast, the position favored by the majority—that alcoholics have no ability to refrain from habitual drunkenness—finds very little support in the scientific literature. *See, e.g.*, Am. Psych. Assoc., *Diagnostic and Statistical Manual of Mental Disorders* 490, 493 (5th ed. 2013) (explaining that "[a]lcohol use disorder is often erroneously perceived as an intractable condition").

Even if the issue were debatable, that does not provide a license for the majority to override Congress. "[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Beach Communications,* 508 U.S. at 315. Congress could have rationally speculated that

chronic alcoholism has a volitional component. Therefore, it could rationally exclude habitual drunkards from discretionary deportation benefits because such individuals engage in volitional conduct that imposes a significant burden on public health and safety.

III. False Legal Premises

The majority also engages several false legal premises.

A. The Majority Misidentifies the Goal of the Statute

The majority opinion, at 9, identifies the central question in this case as whether it is "rational for the government to find that people with chronic alcoholism are morally bad people solely because of their disease[.]" But that is decidedly not the question that is before the court. The real question is whether "there is any reasonably conceivable state of facts that could provide a rational basis for" denying discretionary deportation benefits to habitual drunkards. *Beach Communications*, 508 U.S. at 313. The answer should be obvious. Congress has unquestionable power to exclude certain groups of aliens regardless of any moral culpability. *See Kim*, 538 U.S. at 521-22. This is particularly true where the identified group threatens or even simply burdens institutions of public health and safety.

Such is the case here. The impacts of alcohol abuse on crime and public safety are "extensive and far-

reaching." U.S. Dep't of Justice, *Alcohol and Crime 2* (1998). "About 3 million violent crimes occur each year in which victims perceive the offender to have been drinking at the time of the offense." *Id.* at 5. "Two-thirds of victims who suffered violence by an intimate … reported that alcohol had been a factor. Among spouse victims, 3 out of 4 incidents were reported to have involved an offender who had been drinking." *Id.* Approximately "40% of individuals in the United States experience an alcohol-related adverse event at some time in their lives, with alcohol accounting for up to 55% of fatal driving events." *DSM V*, *supra*, at 496.

The majority responds, at 13, by invoking its false framework. It argues that "the link between alcohol and violence does not make being the victim of the disease of alcoholism equivalent to possessing poor moral character." That is irrelevant to the real question in this case, which is whether Congress had a rational basis for excluding habitual drunkards from discretionary deportation benefits. Clearly it did. The demonstrable link between alcohol use and violence firmly establishes the rationality of 8 U.S.C. § 1101(f).

B. A Medical Condition Is Not a Constitutional Talisman

Another false legal premise is the majority's apparent view that Congress could not rationally exclude a category of aliens on the basis of a medical condition. But the government's ability to exclude individuals is "exceptionally broad." *Fiallo v. Bell*, 430

U.S. at 792. Does the majority seriously doubt the government's ability to exclude individuals infected with the Ebola virus or individual carriers of antibiotic-resistant bacteria from this country? Or perhaps the majority believes that because a condition is medically describable, it is impervious to moral judgment. But we know that cannot be the case. Pedophilia is a medically describable condition that can overwhelm an individual's decision-making capacity, and yet nothing would or should prevent Congress from excluding known pedophiles under the framework of moral character. In short, the bare fact that a condition is medically describable does not create a constitutional talisman that exempts the afflicted from Congress's legitimate immigration policies.

C. Ledezma Failed to Identify Similarly Situated Groups

At the majority's encouragement, Ledezma submitted a supplemental brief arguing that it was irrational to distinguish between habitual drunkards and individuals with heart disease, cancer, diabetes, syphilis, and HIV. But these groups are not similarly situated to habitual drunkards "in those respects relevant to [Congress's] policy." *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1064 (9th Cir. 2014). At a broad level, there is no evidence that the undifferentiated class of individuals with "medical diseases" are responsible for 3 out of 4 instances of spousal abuse, 55% of fatal driving events, or 3 million violent crimes per year. Even descending to the particulars, Ledezma proffered no evidence that

individuals suffering from the conditions that he listed pose the same kind of threat to public safety as habitual drunkards. Because these groups are not similarly situated with respect to the government's legitimate policy interest, Congress had a rational basis for treating habitual drunkards differently.

Moreover, nobody chooses to have heart disease, cancer, diabetes, or other such diseases. There is a volitional element to habitual drunkenness that distinguishes that condition from diseases generally. To be sure, there are connections between lifestyle choices and some other medical conditions, such as between smoking and lung cancer. But it is not irrational for Congress to view that connection as substantially more attenuated or to decide to treat those afflicted with those diseases differently than those who are habitual drunkards.

The majority, dissatisfied with Ledezma's selection of control groups and undeterred by the fact that it is the petitioner's burden to negative every conceivable basis in support of the statute, argues, at 13, that it is irrational to distinguish between chronic alcoholics and individuals with bipolar disorder, because individuals with bipolar disorder also have an increased incidence of aggressive and violent behavior. But habitual drunkards are distinguishable from individuals with bipolar disorder. Whereas the contribution of alcohol to crimes of violence is substantial, "the contribution of people with mental illnesses to overall rates of violence is small," and "the magnitude of the relationship is greatly exaggerated in the minds of the general population." Institute of

Medicine, *Improving the Quality of Health Care for Mental and Substance-Use Conditions* 103 (2006). Congress had a rational basis for distinguishing between the mentally ill and habitual drunkards—habitual drunkards pose a far more serious threat to public health and safety.

Even if the classification chosen by Congress was arguably under-inclusive, that is not a rational basis problem. A statute does not fail rational-basis review merely because it was "not made with mathematical nicety or because in practice it results in some inequality." *Heller v. Doe*, 509 U.S. 312, 321 (1993) (quotation marks and citation omitted).

In sum, none of the groups that Ledezma cited are similarly situated to habitual drunkards in the respects relevant to Congress's exclusion.

D. The Majority Applies Heightened Scrutiny By Stealth

The rational basis test sets out a standard that is not difficult to satisfy. Statutory classifications enjoy "a strong presumption of validity." *Beach Communications*, 508 U.S. at 314. "[T]hose attacking the rationality of the legislative classification have the burden to negative every conceivable basis that might support it[.]" *Id.* at 315 (internal quotation marks and citation omitted). Courts must refrain from engaging in "courtroom fact-finding" and must indulge every reasonable inference in support of a statute. *Id.* "Where there are plausible reasons for

Congress' action, our inquiry is at an end." *Id.* at 313-14 (internal quotation marks and citation omitted).

These standards are common grist for the appellate mill, yet the majority opinion bypasses them almost entirely. Nowhere does the majority apply a presumption of constitutionality. Nowhere does it hold the Petitioner to his burden of negating every conceivable rationale offered in support of the law. It rejects as unpersuasive the scientific and behavioral data indicating that overcoming chronic alcoholism involves free will. The majority opinion is cast in the language of rational basis review, but it sidesteps the essential question, which is whether Congress had a rational basis for excluding habitual drunkards from discretionary deportation benefits.

The majority prefers to focus on Congress's manner of acting, i.e., its use of a moral character framework. But whether Congress chose the best method to do something that it undoubtedly has the authority to do is the stuff of narrow tailoring. In short, the majority opinion has applied heightened scrutiny by stealth, and in so doing, has usurped Congressional authority in an area where that authority is at its apex.

IV. The Pointlessness of This Decision

I cannot help but wonder about the point of the exercise undertaken by the majority opinion. That Congress has the power to exclude aliens with medical conditions is unquestioned, even though there is no fault or moral component to most diseases.

There are reasons for Congress to decide that the country should not accept or harbor sick aliens who might infect others or whose treatment might impose heavy costs. There are reasons for Congress to decide that habitual drunkards in particular should be excluded because of the harm they might do to others and the heavy costs that their presence might impose on this country. Nobody has contended that it would be irrational for Congress directly to provide that aliens who are habitual drunkards are ineligible for cancellation of removal. The majority simply doesn't like the way that Congress has accomplished that result, by way of the requirement for "good moral character." But what good does the majority opinion really accomplish by preventing Congress from doing something that it surely could do directly? I do not see the point.

V. Conclusion

The rational basis test sets a very low bar, and Congress has exceptionally broad power in determining which classes of aliens may remain in the country. The statute at issue here, 8 U.S.C. § 1101(f)(1), should easily clear that bar. The majority holds that it does not by subverting the standards of rational basis review to substitute its policy preference for that of Congress.

Properly applied, rational basis review "is a paradigm of judicial restraint." *Beach Communications*, 508 U.S. at 313. Regrettably, the majority opinion is not. It is an unwarranted

intrusion on separation of powers, and it demands correction.

I respectfully dissent.

APPENDIX C

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A091 723 478 – San Diego, CA

Date: SEP 17, 2012

In re: SALOMON LEDEZMA-COSINO
a.k.a. Cocino Soloman Ledesma

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Nora Milner, Esquire

ON BEHALF OF DHS: J. L. Woodmansee
Assistant Chief Counsel

CHARGE:
Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] – Present without being admitted or paroled

APPLICATION: Cancellation of removal; voluntary departure

The respondent, a native and citizen of Mexico, appeals from the Immigration Judge's June 22, 2009, and June 21, 2011, decisions denying his applications for cancellation of removal and voluntary departure under sections 240A(b) and 240B(b) of the Immigration and Nationality Act, 8 U.S.C. §§ 1229b(b) and 1229c(b). The Department of Homeland Security ("DHS") opposes the appeal. The appeal will be dismissed.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge for clear error. 8 C.F.R. § 1003.1(d)(3)(i) (2012). We review all other issues, including questions of law and issues of discretion, de novo. 8 C.F.R. § 1003.1(d)(3)(ii). The respondent's application was filed after May 11, 2005, and therefore is governed by the provisions of the REAL ID Act. *See Matter of S-B-*, 24 I&N Dec. 42, 44-45 (BIA 2006).

We affirm the Immigration Judge's determination that the respondent has not shown that he has met the requisite period of good moral character and is thus ineligible for cancellation of removal. *See* section 240A(b)(1)(B) of the Act (stating that an alien must show that he or she has been a person of good moral character for not less than 10 years immediately preceding the date of his or her application); *Matter of Ortega-Cabrera*, 23 I&N Dec. 793 (BIA 2005) (holding that because an application for cancellation of removal is a continuing one for purposes of evaluating good moral character, the period during which good moral character must be

established ends with the entry of a final administrative order). Specifically, the respondent has not shown that he is not barred from demonstrating good moral character by section 101(f)(1) of the Act, 8 U.S.C. §101 (f)(1), which states that an alien deemed a "habitual drunkard" during the relevant time period cannot demonstrate good moral character. *See Matter of H-*, 6 I&N Dec. 614, 616 (BIA 1955) (finding an alien to be barred under this provision where medical evidence showed that the alien had been a chronic alcoholic since 1953 and had been committed to a hospital for treatment).

Here, in remanded proceedings, the respondent submitted medical evidence showing that he was hospitalized for a serious liver condition in 2010 (I.J., at 3; Exhs. R-3, Tab A, and R-5, Tab E). The Immigration Judge noted that this evidence stated that the cause of the problem was the respondent's approximately decade-long alcohol dependency (I.J. at 3; Exh. R-3, Tab A). The respondent's daughter also testified that her father had been an alcoholic, although he was not drinking at the time of the June 21, 2011, hearing (I.J. at 5; Tr. at 33-34; Exh. R-5, Tab D). The respondent admitted to drinking excessively for the 1-year period leading up to his 2010 hospital visit, but minimized his behavior outside of this period (I.J. at 5; Tr. at 49-57). We note, however, that he does not challenge the Immigration Judge's findings regarding his alcoholism on appeal, and we discern no clear error in these findings. 8 C.F.R. § 1003.1(d)(3)(i). Additionally, the respondent was convicted of driving under the influence on at least one occasion in 2008, precipitating his apprehension

by immigration officials (I.J. decision dated June 22, 2009, at 2; June 22, 2009, Tr. at 39, 64). We agree with the Immigration Judge that, given the totality of the evidence presented, the respondent has not met his burden of demonstrating that he has had good moral character for the past 10 years. Sections 101(f)(1) and 240A(b)(1)(B) of the Act; 8 C.F.R. § 1003.1(d)(3)(ii). Additionally, because we agree that the respondent was a habitual drunkard within the past 5 years, he has not demonstrated eligibility for voluntary departure (I.J. at 6-7). Section 240B(b)(1)(B) of the Act.

We acknowledge the respondent's argument that, given the lack of precedent interpreting the term "habitual drunkard," he should not be faulted for failing to check the box indicating that he was a habitual drunkard on his application for relief. However, because we affirm the Immigration Judge's determination that the respondent is barred from showing good moral character due to being a habitual drunkard under section 101(f)(1) of the Act, rather than for having given false testimony under section 101(f)(6) of the Act, this argument does not assist him. The respondent also cites to non-binding State Department guidance regarding a ground of inadmissibility not at issue in this case to argue that his alcoholism is a medical condition and not a moral failing. While we acknowledge this argument, we note that the statutory language of section 101(f)(1) of the Act clearly bars an individual deemed a "habitual drunkard" from demonstrating good moral character. Rather than challenging the Immigration Judge's determination in this regard, the respondent appears

to challenge the validity of this statutory provision. However, we are without jurisdiction to rule upon the constitutionality of the statutes that we administer. *See Matter of Fuentes-Campos*, 21 I&N Dec. 905, 912 (BIA 1997); *Matter of C-*, 20 I&N Dec. 529, 532 (BIA 1992).

For the reasons above, the appeal is dismissed.
ORDER: The appeal is dismissed.

/s/ Roger A. Pauley
FOR THE BOARD

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
San Diego, California

File No.: A 091 723 478 June 21, 2011

In the Matter of	)	
	)	
SALOMON LEDEZMA-COSINO	)	IN REMOVAL PROCEEDINGS
	)	
	)	
Respondent	)	

CHARGE:

APPLICATIONS:

ON BEHALF OF RESPONDENT: Cesar Luna	ON BEHALF OF DHS: Jennifer Woodmansee

SECOND ORAL OPINION AND ORDER OF THE IMMIGRATION JUDGE

This Court rendered an oral decision, which is transcribed and part of the record, on June 22, 2009.

The case was sent back by the Board because there appeared to be no record of the last testimony

presented by the respondent, which was the respondent's daughter, Yadira Ledezma, so the case was sent back to the Court to have Ms. Ledezma testify again, and she did testify, and her testimony was recorded to the digital audio recording system.

On a review of the case, and the evidence presented previously and evidence presented now, I am going to make the following decision.

The decision that I issued on June 22, 2009 is reinstated here, with the following modifications.

I make no finding about whether the respondent's evidence meets the requirement of exceptional and extremely unusual hardship.

I reiterate my finding that the respondent has not been able to show sufficient evidence that he meets the continuous ten years physical presence given the interruption of that period of time by the voluntary departure, administratively, that was given to him.

And for the reasons stated in my prior decision, I reinstate those findings and incorporate them by reference here to this decision.

I note that there has been no evidence presented after the case was sent back to show, in any way, shape or form, that my conclusions previously were incorrect, so I have no reason to set aside my conclusions previously. I evaluated the evidence then

and I evaluate the evidence now, and I reach the same conclusion.

The same with respect to the respondent's credibility issues and his failure to provide adequate explanations. I reiterate those findings.

Now, with the advantage of having a transcript, I add that the respondent had some significant inconsistencies in two aspects of his case, which are very important, and that is the voluntary departure, and also his participation in assisting in the smuggling of his family. The explanation that he gave for these discrepancies is not satisfactory to the Court.

We also have learned now, from evidence that was submitted after the case was sent back, that the respondent had a serious alcohol dependency problem. This problem comes to light because he was hospitalized as a result of a serious problem with his liver that almost resulted in his death. As described by the medical reports provided by the respondent himself, the physicians who examined the respondent indicated that the reason for his problem is a severe alcohol dependency. The [*sic*] describe the dependency as being a ten-year problem, averaging one liter of tequila a day.

Now, the respondent, again in his application, was faced now with another discrepancy in the application he swears to be true under oath, and it is that he marks that he has not been an habitual drunkard.

Now, there are two issues here.

One is the issue that if you are an habitual drunkard, you do not have good moral character during the period of time you are an habitual drunkard, which is a requirement for the cancellation, at least for ten years. The episode which required his hospitalization, which brings to light the fact that, based on all the comments made by the doctors, he is an alcoholic, happened in the summer of 2010, so that happened after the hearing that we had in June 2009, a year later. So there is strong evidence here suggesting that the respondent would also not be eligible for cancellation because he was a habitual drunkard during the period of time that he has to have good moral character.

However, another issue is brought forth by this new evidence which also presents a problem for the respondent with respect to his eligibility for cancellation, and that is that the respondent has provided false testimony under oath, and the false testimony is that his application does not include that he is a habitual drunkard. The application is signed under oath, and it is a very important instrument in the evaluation of the cases by this Immigration Court.

I noticed that for the limited questioning that was asked of the respondent in relation to the DUI, the respondent again, in his typical evasive and vague manner, gave very limited responses about his involvement with alcohol, or any hint as to whether he was having any type of alcohol dependency problem.

The explanation that he has given today, he was not given that opportunity, is not satisfactory to the Court.

First of all, the explanation is, again, typically very vague, and it is difficult to understand, really, what is the explanation is that he has given. It seemed to be that he thought, in his mind, that habitual drunkard meant somebody who is a danger to the community, who is out there in the streets drinking and creating problems. He said that he did not think he was creating problems because he did all his drinking at home, and he got drunk at home and did not cause any problems, in his mind. That may be some type of excuse as to his understanding of the term habitual drunkard, but the term habitual drunkard is there for a reason. That question is there for a reason, and it is because it is one of the grounds under Section 101(f) for a lack of good moral character. Now, if there is a term that has a legal implication in the terminology of the questions, there is a reason for that legal terminology, and the respondent has to understand that as the application is prepared with the assistance of his attorney. The same can be said for other legal terms in the questioning in the application, such as voluntary departures, entry. All these are terms of art in the Immigration law context, so the excuse that, oh, I thought that meant something different and not the legal meaning of it is insufficient, in the Court's view. The respondent did have an attorney when the application was prepared.

I also am disturbed by the respondent's explanation because in his explanation he seems to have minimized that he had a severe drinking problem. This is inconsistent with the evidence that he himself presents; the medical reports, which do portray the situation as a very serious one in terms of the alcohol addiction and abuse of alcohol by the respondent. His daughter also testified that he was an alcoholic. The respondent admits that he was. He says he probably was, but he minimizes the extent of his drinking in an effort to explain why he said he was not a habitual drunkard.

If the explanation here is that, well, I do not consider myself as a habitual drunkard but that is an excuse to answering that question the wrong way, there would be no point in that question because it is well known that most alcoholics deny the fact that they are alcohol dependent, the same way that drug addicts do. So it is really not an adequate explanation or excuse for not answering that question truthfully.

It appears, also, from the evidence presented, which I believe is much more reliable than the respondent's testimony, which I found and I still find today not to be credible, that at the time of the respondent's hearing in 2009 apparently the respondent was in a serious drinking dependency problem, and one has to question, also, if this is a problem he had for ten years, how reliable can his memory be about things that he testified to, and the explanations that he gave, and the testimony he offered. It is another reason for doubting his credibility.

In short, the respondent does not meet the requirements for cancellation regardless of the hardship, he does not have the good moral character, and he has not established continuity of ten years physical presence. He has the burden of proof, as I indicated previously, for that.

So, therefore, under that same analysis, unfortunately the respondent does not meet the requirements for voluntary departure either because he was a habitual drunkard during the last five years, and he needs to have good moral character for five years for voluntary departure, post-conclusion. So, I must, unfortunately, modify my decision that way also now.

Therefore, my modification of the prior decision is that I deny cancellation of removal under Section 240A(b)(1) of the Act based on the fact that he has not been able to establish the continuity of his ten years physical presence, and he has not been able to establish good moral character for a period of ten years.

I make no finding on the hardship question.

Also, with respect to voluntary departure, I have to deny that relief for the same reasons previously stated; that he has not shown that he has good moral character for five years immediately preceding that application.

Therefore, the order of the Court of June 22 is modified as indicated previously, and the Court issues the following order.

ORDERS

IT IS ORDERED the respondent is denied the cancellation of removal application under Section 240A(b)(1) of the Act.

IT IS FURTHER ORDERED the respondent is also denied voluntary departure at conclusion of proceedings under Section 240B(b) of the Act.

IT IS FURTHER ORDERED the respondent is ordered removed to Mexico, based on the charge in the charging document.

So ordered.

IGNACIO P. FERNANDEZ
Immigration Judge

APPPENDIX E

The Fifth Amendment of the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment of the United States Constitution
Article I

I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

8 U.S.C.A. § 1101(f)

Definitions

(f) For the purposes of this chapter--

No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established is, or was--

(1) a habitual drunkard;

(2) Repealed. Pub.L. 97-116, § 2(c)(1), Dec. 29, 1981, 95 Stat. 1611.

(3) a member of one or more of the classes of persons, whether inadmissible or not, described in paragraphs (2)(D), (6)(E), and (10)(A) of section 1182(a) of this title; or subparagraphs (A) and (B) of section 1182(a)(2) of this title and subparagraph (C) thereof of such section[1] (except as such paragraph relates to a single offense of simple possession of 30 grams or less of marihuana), if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period;

(4) one whose income is derived principally from illegal gambling activities;

---

[1] So in original. The phrase "of such section" probably should not appear.

(5) one who has been convicted of two or more gambling offenses committed during such period;

(6) one who has given false testimony for the purpose of obtaining any benefits under this chapter;

(7) one who during such period has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more, regardless of whether the offense, or offenses, for which he has been confined were committed within or without such period;

(8) one who at any time has been convicted of an aggravated felony (as defined in subsection (a)(43)); or

(9) one who at any time has engaged in conduct described in section 1182(a)(3)(E) of this title (relating to assistance in Nazi persecution, participation in genocide, or commission of acts of torture or extrajudicial killings) or 1182(a)(2)(G) of this title (relating to severe violations of religious freedom).

The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character. In the case of an alien who makes a false statement or claim

of citizenship, or who registers to vote or votes in a Federal, State, or local election (including an initiative, recall, or referendum) in violation of a lawful restriction of such registration or voting to citizens, if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such statement, claim, or violation that he or she was a citizen, no finding that the alien is, or was, not of good moral character may be made based on it.

8 U.S.C.A. § 1229b(b)

Cancellation of removal; adjustment of status

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents

(1) In general

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien--

(A) has been physically present in the United States for a continuous period of

not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

(2) Special rule for battered spouse or child

(A) Authority

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien demonstrates that--

(i)(I) the alien has been battered or subjected to extreme cruelty by a spouse or parent who is or was a United States citizen (or is the parent of a child of a United

States citizen and the child has been battered or subjected to extreme cruelty by such citizen parent);

(II) the alien has been battered or subjected to extreme cruelty by a spouse or parent who is or was a lawful permanent resident (or is the parent of a child of an alien who is or was a lawful permanent resident and the child has been battered or subjected to extreme cruelty by such permanent resident parent); or

(III) the alien has been battered or subjected to extreme cruelty by a United States citizen or lawful permanent resident whom the alien intended to marry, but whose marriage is not legitimate because of that United States citizen's or lawful permanent resident's bigamy;

(ii) the alien has been physically present in the United States for a continuous period of not less than 3 years immediately preceding the date of such application, and the issuance of a charging document for removal proceedings shall not toll the 3-

year period of continuous physical presence in the United States;

(iii) the alien has been a person of good moral character during such period, subject to the provisions of subparagraph (C);

(iv) the alien is not inadmissible under paragraph (2) or (3) of section 1182(a) of this title, is not deportable under paragraphs (1)(G) or (2) through (4) of section 1227(a) of this title, subject to paragraph (5), and has not been convicted of an aggravated felony; and

(v) the removal would result in extreme hardship to the alien, the alien's child, or the alien's parent.

(B) Physical presence

Notwithstanding subsection (d)(2), for purposes of subparagraph (A)(ii) or for purposes of section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996), an alien shall not be considered to have failed to maintain continuous physical presence by reason of an absence if the alien

demonstrates a connection between the absence and the battering or extreme cruelty perpetrated against the alien. No absence or portion of an absence connected to the battering or extreme cruelty shall count toward the 90-day or 180-day limits established in subsection (d)(2). If any absence or aggregate absences exceed 180 days, the absences or portions of the absences will not be considered to break the period of continuous presence. Any such period of time excluded from the 180-day limit shall be excluded in computing the time during which the alien has been physically present for purposes of the 3-year requirement set forth in this subparagraph, subparagraph (A)(ii), and section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996).

(C) Good moral character

Notwithstanding section 1101(f) of this title, an act or conviction that does not bar the Attorney General from granting relief under this paragraph by reason of subparagraph (A)(iv) shall not bar the Attorney General from finding the alien to be of good moral character under subparagraph (A)(iii) or section

1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996), if the Attorney General finds that the act or conviction was connected to the alien's having been battered or subjected to extreme cruelty and determines that a waiver is otherwise warranted.

(D) Credible evidence considered

In acting on applications under this paragraph, the Attorney General shall consider any credible evidence relevant to the application. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General.

(3) Recordation of date

With respect to aliens who the Attorney General adjusts to the status of an alien lawfully admitted for permanent residence under paragraph (1) or (2), the Attorney General shall record the alien's lawful admission for permanent residence as of the date of the Attorney General's cancellation of removal under paragraph (1) or (2).

(4) Children of battered aliens and parents of battered alien children

(A) In general

The Attorney General shall grant parole under section 1182(d)(5) of this title to any alien who is a--

(i) child of an alien granted relief under section 1229b(b)(2) or 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996); or

(ii) parent of a child alien granted relief under section 1229b(b)(2) or 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996).

(B) Duration of parole

The grant of parole shall extend from the time of the grant of relief under subsection (b)(2) or section 1254(a)(3) of this title (as in effect before the title III- A effective date in section 309 of the

Illegal Immigration Reform and Immigrant Responsibility Act of 1996) to the time the application for adjustment of status filed by aliens covered under this paragraph has been finally adjudicated. Applications for adjustment of status filed by aliens covered under this paragraph shall be treated as if the applicants were VAWA self-petitioners. Failure by the alien granted relief under subsection (b)(2) or section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996) to exercise due diligence in filing a visa petition on behalf of an alien described in clause (i) or (ii) may result in revocation of parole.

(5) Application of domestic violence waiver authority

The authority provided under section 1227(a)(7) of this title may apply under paragraphs (1)(B), (1)(C), and (2)(A)(iv) in a cancellation of removal and adjustment of status proceeding.

(6) Relatives of trafficking victims

(A) In general

Upon written request by a law enforcement official, the Secretary of Homeland Security may parole under section 1182(d)(5) of this title any alien who is a relative of an alien granted continued presence under section 7105(c)(3)(A) of Title 22, if the relative--

(i) was, on the date on which law enforcement applied for such continued presence--

(I) in the case of an alien granted continued presence who is under 21 years of age, the spouse, child, parent, or unmarried sibling under 18 years of age, of the alien; or

(II) in the case of an alien granted continued presence who is 21 years of age or older, the spouse or child of the alien; or

(ii) is a parent or sibling of the alien who the requesting law enforcement official, in consultation with the Secretary of Homeland Security, as appropriate, determines to be in present danger of retaliation as a result of the alien's escape from the severe form of trafficking or

cooperation with law enforcement, irrespective of age.

(B) Duration of parole

(i) In general

The Secretary may extend the parole granted under subparagraph (A) until the final adjudication of the application filed by the principal alien under section 1101(a)(15)(T)(ii) of this title.

(ii) Other limits on duration

If an application described in clause (i) is not filed, the parole granted under subparagraph (A) may extend until the later of--

(I) the date on which the principal alien's authority to remain in the United States under section 7105(c)(3)(A) of Title 22 is terminated; or

(II) the date on which a civil action filed by the principal alien under section 1595 of Title 18 is concluded.

(iii) Due diligence

Failure by the principal alien to exercise due diligence in filing a visa petition on behalf of an alien described in clause (i) or (ii) of subparagraph (A), or in pursuing the civil action described in clause (ii)(II) (as determined by the Secretary of Homeland Security in consultation with the Attorney General), may result in revocation of parole.

(C) Other limitations

A relative may not be granted parole under this paragraph if--

(i) the Secretary of Homeland Security or the Attorney General has reason to believe that the relative was knowingly complicit in the trafficking of an alien permitted to remain in the United States under section 7105(c)(3)(A) of Title 22; or

(ii) the relative is an alien described in paragraph (2) or (3) of section 1182(a) of this title or paragraph (2) or (4) of section 1227(a) of this title.

8 U.S.C.A. § 1229c(b)

Voluntary Departure

(b) At conclusion of proceedings

(1) In general

The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense if, at the conclusion of a proceeding under section 1229a of this title, the immigration judge enters an order granting voluntary departure in lieu of removal and finds that--

(A) the alien has been physically present in the United States for a period of at least one year immediately preceding the date the notice to appear was served under section 1229(a) of this title;

(B) the alien is, and has been, a person of good moral character for at least 5 years immediately preceding the alien's application for voluntary departure;

(C) the alien is not deportable under section 1227(a)(2)(A)(iii) or section 1227(a)(4) of this title; and

(D) the alien has established by clear and convincing evidence that the alien

has the means to depart the United States and intends to do so.

(2) Period

Permission to depart voluntarily under this subsection shall not be valid for a period exceeding 60 days.

(3) Bond

An alien permitted to depart voluntarily under this subsection shall be required to post a voluntary departure bond, in an amount necessary to ensure that the alien will depart, to be surrendered upon proof that the alien has departed the United States within the time specified.