No. 17-313

In the Supreme Court of the United States

SALOMON LEDEZMA-COSINO, AKA COCINO SOLOMAN LEDESMA, PETITIONER

v.

JEFFERSON B. SESSIONS III, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
CHAD A. READLER
Principal Deputy Assistant Attorney General
DONALD E. KEENER
PATRICK J. GLEN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the provisions of the Immigration and Nationality Act that render an alien ineligible for the discretionary relief of cancellation of removal if, prior to the application, the alien has been a "habitual drunkard," 8 U.S.C. 1101(f)(1) and 1229b(b)(1)(B), violate the equal protection component of the Fifth Amendment's Due Process Clause.

2. Whether the term "habitual drunkard" in 8 U.S.C. 1101(f)(1), is unconstitutionally vague.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-43a) is reported at 857 F.3d 1042. A prior opinion of the court of appeals (Pet. App. 44a-72a) is reported at 819 F.3d 1070. Prior decisions of the Board of Immigration Appeals (Pet. App. 73a-77a) and the immigration judge (Pet. App. 78a-85a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 30, 2017. The petition for a writ of certiorari was filed on August 25, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, the Attorney General may, in his discretion, cancel the removal of an alien who is

found to be removable. 8 U.S.C. 1229b. To obtain cancellation of removal, the alien bears the burden of proving both that he is statutorily eligible for such relief and that he warrants a favorable exercise of discretion. 8 U.S.C. 1229a(c)(4)(A); see 8 C.F.R. 1240.8(d).

To demonstrate eligibility for cancellation of removal, an alien who is not a lawful permanent resident must establish (i) that he has been present in the United States for a continuous period of at least ten years; (ii) that he has exhibited "good moral character" during that period; (iii) that he has not been convicted of certain listed crimes; and (iv) that his removal would cause "exceptional and extremely unusual hardship" to a "spouse, parent, or child" who is a United States citizen or lawful permanent resident. 8 U.S.C. 1229b(b)(1)(B) and (D). Although Congress has not defined the term "good moral character," it has provided that certain types of conduct preclude a finding of good moral character, including conduct demonstrating that the alien is a "habitual drunkard." 8 U.S.C. 1101(f)(1).

2. Petitioner is a native and citizen of Mexico who unlawfully entered the United States in December 1987. Pet. App. 6a; see Certified Administrative Record (A.R.) 695. In 2008, the Department of Homeland Security (DHS) began removal proceedings against petitioner following his arrest and conviction for drunk driving in California. See Pet. App. 6a, 42a. Petitioner conceded his removability but sought a discretionary grant of cancellation of removal pursuant to 8 U.S.C. 1229b(b)(1). Pet. App. 6a-7a.

In 2009, an immigration judge denied petitioner's request for cancellation of removal. A.R. 261-273. The immigration judge found that petitioner had voluntarily returned to Mexico in 2001 or 2002 after having been

detained by federal officers in the United States, and that he reentered the United States illegally about a week later. A.R. 262, 264. As a result, the immigration judge found that petitioner could not prove that he had been continuously present in the United States for the preceding ten years, as he must to qualify for cancellation of removal. A.R. 264-266. The immigration judge also found that petitioner had failed to show that his children (some of whom are United States citizens) "would suffer exceptional and extremely unusual hardship" if he were removed. A.R. 266; see A.R. 266-271. The immigration judge therefore ordered that petitioner be removed, though it granted him 60 days in which to voluntarily depart. A.R. 272.

Petitioner appealed to the Board of Immigration Appeals (Board). A.R. 248-250. The Board noted that, due to an apparent technical error, the audio recording of petitioner's removal proceeding was incomplete. A.R. 239. The Board returned the case to the immigration judge with instructions to "take such steps as are necessary and appropriate" to remedy the recording error. *Ibid.*

3. In 2011, the immigration judge convened a new removal hearing to allow petitioner to present testimony that had not been properly recorded during the initial hearing and to consider other relevant evidence that had come to light since the proceedings in 2009. Pet. App. 78a-79a. That evidence included petitioner's medical records from an extended period of hospitalization in 2010, which had significantly delayed petitioner's removal proceedings. *Id.* at 80a; see A.R. 71-74. Those records revealed that petitioner "had a serious alcohol dependency problem." Pet. App. 80a. They indicated, for example, that petitioner had been diagnosed with

acute alcoholic hepatitis and cirrhosis of the liver, A.R. 193, which his doctors attributed to petitioner's "heavy alcohol abuse" on a daily basis for over ten years, including drinking "1 liter of tequila per day on the average," Pet. App. 11a; see A.R. 190. Petitioner's daughter confirmed that petitioner had a severe "drinking problem" and that his liver had failed. Pet. App. 11a; see A.R. 96. Petitioner acknowledged that he drank large amounts of alcohol—including up to eight shots of liquor per day and "[s]ix or more" beers the day before he was hospitalized, A.R. 111—but contended that his drinking was intermittent and that he quit drinking altogether after his hospitalization. A.R. 112-114.

The immigration judge again denied petitioner's request for cancellation of removal. Pet. App. 78a-85a. Unlike in the earlier proceedings, the immigration judge "ma[de] no finding" about whether petitioner's removal would cause "exceptional and extremely unusual hardship" for his relatives. *Id.* at 79a. The immigration judge did, however, reinstate his prior finding that petitioner had failed to show continuous presence in the United States for ten years and thus did not qualify for cancellation of removal. *Id.* at 79a-80a. The immigration judge further found that petitioner's testimony had "some significant inconsistencies," including related to his earlier return to Mexico and his role in smuggling members of his family into the United States illegally, that indicated a lack of credibility. *Id.* at 80a.

The immigration judge also determined, in the alternative, that petitioner was a "habitual drunkard" under 8 U.S.C. 1101(f)(1), and thus could not establish the "good moral character" necessary to qualify for cancellation of removal. Pet. App. 80a-84a. The immigration

judge noted, for example, that petitioner's abuse of alcohol during the relevant ten-year period was so severe and widespread that it "almost resulted in his death." *Id.* at 80a; see *ibid.* (noting that petitioner's medical records indicated that he drank an "averag[e]" of "one liter of tequila a day" for ten years). The immigration judge further noted that petitioner had repeatedly "provided false testimony under oath" about his drinking, including by making untrue claims about the frequency and severity of his alcohol consumption and offering "evasive and vague" testimony about the circumstances of his earlier drunk driving conviction. *Id.* at 81a; see *id.* at 81a-83a.

In light of those findings, the immigration judge concluded that petitioner had not met his burden of demonstrating his eligibility for cancellation of removal. Pet. App. 84a. The immigration judge further concluded that, in light of petitioner's lack of good moral character, petitioner was ineligible for voluntary departure. *Ibid.*; see 8 U.S.C. 1229c(b)(1)(B) (authorizing voluntary departure only if the alien has demonstrated "good moral character for at least 5 years immediately preceding the alien's application for voluntary departure"). The immigration judge ordered that petitioner be removed. Pet. App. 85a.

The Board dismissed petitioner's appeal. Pet. App. 73a-77a. The Board noted that the record clearly established petitioner's "approximately decade-long alcohol dependency," which posed a serious risk to petitioner and to the public. *Id.* at 75a; see *id.* at 75a-76a (noting that petitioner "was convicted of driving under the influence on at least one occasion in 2008, precipitating his apprehension by immigration officials"). In light of that evidence, the Board affirmed the immigration judge's

finding that petitioner could not establish good moral character and was therefore ineligible for cancellation of removal and voluntary departure. *Id.* at 76a.

4. The court of appeals initially granted a petition for review and vacated the Board's decision. Pet. App. 44a-60a. As relevant here, petitioner argued that the term "habitual drunkard" in Section 1101(f)(1) violates the Fifth Amendment's Due Process Clause because it is unconstitutionally vague, Pet. C.A. Br. 17-24, and that it violates equal protection principles by irrationally singling out the "disease of alcoholism" as a sign of bad moral character, Pet. C.A. Supp. Br. 12; see *id.* at 3-12.

The court of appeals concluded that petitioner could not challenge the denial of discretionary relief on due process grounds "because non-citizens lack a protectable liberty interest in [such] relief." Pet. App. 50a. Nonetheless, the court held that Congress's decision to classify habitual drunkards as lacking good moral character violated equal protection principles because it treated alcoholics differently from individuals suffering from other medical conditions without a rational basis for doing so. *Id.* at 53a (concluding that Section 1101(f)(1) irrationally treats "people with chronic alcoholism [as] morally bad people solely because of their disease"). The court concluded that habitual alcohol abuse is not "equivalent to possessing poor moral character," and that Congress's contrary determination in Section 1101(f)(1) was rooted in "prejudice" and a "failure to understand mental illness." *Id.* at 57a-58a.

Judge Clifton dissented. Pet. App. 60a-72a. In his view, the "habitual drunkard" provision in Section 1101(f)(1) "easily" satisfies the "very low bar" imposed by rational-basis review, particularly in light of Congress's "exceptionally broad power in determining

which classes of aliens may remain in the country." *Id.* at 71a. He noted that, unlike many other medical conditions, habitual alcohol abuse contains a "volitional element" and strongly correlates with an increased risk of violence and injury to others. *Id.* at 68a; see *id.* at 69a ("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."). At base, Judge Clifton concluded, the majority had simply "substitute[d] its policy preference for that of Congress." *Id.* at 71a.

5. a. The court of appeals granted en banc review and reversed the panel's decision. Pet. App. 1a-27a. The court concluded that the term "habitual drunkard" in Section 1101(f)(1) has a commonly understood meaning, *id.* at 9a-10a (defining "habitual drunkard" as "a person who regularly drinks alcoholic beverages to excess"), which "readily lends itself to an objective factual inquiry" and is not unconstitutionally vague, *id.* at 12a. The court further noted that Congress's determination that individuals who engage in habitual alcohol abuse lack good moral character is permissibly based on the "person's *conduct* during the relevant time period," not on "the person's *status* as an alcoholic." *Id.* at 10a; see *ibid.* ("[N]ot all alcoholics are habitual drunkards."). And the court concluded that petitioner's conduct, including "daily consumption of one liter of tequila for a 10-year period, leading to a conviction for driving under the influence," was "clearly covered" by the statute. *Id.* at 12a; see *id.* at 10a-11a.

b. The en banc court further held that Congress's decision to deny certain forms of discretionary relief to habitual drunkards does not violate equal protection

principles under the Due Process Clause of the Fifth Amendment.

i. A plurality of four judges noted that, because Section 1101(f)(1) does not disadvantage a "suspect class," it need only "be rationally related to a legitimate governmental interest" to satisfy equal protection principles. *Id.* at 13a (quoting *Harris* v. *McRae*, 448 U.S. 297, 326 (1980)). 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." *Ibid.* That legislative choice, the plurality held, represents a legitimate governmental interest in furtherance of public safety. *Ibid.*

The plurality rejected as irrelevant petitioner's challenge to Congress's determination that habitual alcohol abuse prevents a finding of good moral character. Pet. App. 14a. The plurality observed that the good moral character requirement is merely an "intermediate label" used to separate those who are eligible for discretionary cancellation of removal from those who are not. *Id.* at 15a. The relevant question, the plurality explained, is whether Congress could rationally conclude that habitual drunkards should be ineligible for such discretionary relief, not whether Congress selected the wrong label for achieving that result. *Id.* at 14a-15a; see *id.* at 15a-16a ("We must ask whether the operative congressional action is rational, not whether the mere definition of a statutory term is rational."). Because "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," the plurality concluded that Section 1101(f)(1) posed no equal protection concern. *Id.* at 15a.

ii. Judge Kozinski, joined by Judges Bea and Ikuta, concurred in the rejection of petitioner's equal protection claim, but did so under a form of review more deferential than the rational basis standard applied in the domestic context. Pet. App. 18a-22a. In Judge Kozinski's view, an equal protection challenge to an immigration statute must contend with the political branches' "plenary power over immigration" and the corresponding principle that courts "owe far more deference" to congressional enactments in the immigration context "than in an ordinary domestic context." *Id.* at 18a. Because "excluding aliens for reasons Congress believes sufficient to serve the public welfare is a nigh-unquestioned power of a sovereign nation," Judge Kozinski would have "summarily" upheld the denial of discretionary relief in this case without subjecting the habitual drunkard provision to "probing or testing possible justifications." *Id.* at 19a, 21a-22a.

iii. Judge Watford, joined by Judges McKeown and Clifton, also rejected petitioner's equal protection challenge, but on a different theory than the plurality. Pet. App. 22a-27a. In Judge Watford's view, Section 1101(f)(1) establishes a permissible conclusive presumption that habitual drunkards lack good moral character because "Congress could rationally conclude that most habitual drunkards would be found to lack good moral character if individual determinations were permitted." *Id.* at 23a-24a. Judge Watford explained that "habitual drunkards" are at least partially responsible for their condition, which is "acquired as a result of frequent, repetitive acts of excessive drinking." *Id.* at 24a.

In light of that "volitional component" of habitual alcohol abuse, and the "well-documented connection between alcohol addiction and harm to others (in the form of drunken driving, domestic violence, and the like)," Judge Watford concluded that Congress had a rational basis for determining that "habitual drunkards" lack good moral character, even if those with other medical conditions are not so classified. *Id.* at 25a-27a.

c. Chief Judge Thomas, joined by Judge Christen, dissented. Pet. App. 28a-43a. He argued that the court of appeals should have avoided constitutional due process and equal protection questions by interpreting the term "habitual drunkard" in Section 1101(f)(1) to include only a person "who habitually abuses alcohol *and* whose alcohol abuse causes harm to other persons or the community." *Id.* at 39a (emphasis added). Chief Judge Thomas would have remanded the case to the Board for further proceedings to determine whether petitioner satisfied that definition. *Id.* at 42a.

ARGUMENT

Petitioner seeks review of the en banc court's rejection of his equal protection challenge to the denial of his application for cancellation of removal. No other court of appeals has addressed such a challenge to a finding of ineligibility based on the "habitual drunkard" provision of 8 U.S.C. 1101(f)(1), and review of that issue therefore does not warrant review. Petitioner nonetheless contends (Pet. 13-22) that this Court should grant review to resolve an alleged circuit conflict over the application of rational-basis review in the context of an equal protection challenge. No conflict exists, nor does petitioner demonstrate that the result in his case would have been different in any other circuit.

Petitioner further argues (Pet. 22-33) that the term "habitual drunkard" in Section 1101(f)(1) is unconstitutionally vague, but he identifies no circuit conflict on that issue or disagreement among federal courts concerning the meaning of that term. And petitioner's conduct—involving the daily consumption of up to a liter of tequila for ten years, leading to liver failure and a drunk driving conviction—would qualify as habitual drunkenness under any definition of that term. Regardless, this case presents a poor vehicle for considering petitioner's challenges because the immigration judge identified grounds for denying petitioner's request for discretionary relief that did not require application of the "habitual drunkard" provision. The petition for a writ of certiorari should be denied.

1. Petitioner contends (Pet. 13-22) that the plurality of the court of appeals erred in considering whether Congress had a rational basis for denying habitual alcohol abusers discretionary relief in the form of cancellation of removal, rather than focusing on the intermediate step of whether a rational basis existed for concluding that habitual alcohol abusers lack good moral character. As the plurality observed, petitioner's argument "misunderstands the nature of the equal protection inquiry." Pet. App. 14a.

a. This Court has repeatedly explained that "equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *FCC* v. *Beech Commc'ns, Inc.*, 508 U.S. 307, 313 (1993); see *Heller* v. *Doe*, 509 U.S. 312, 319 (1993) (same). Legislative action "that neither proceeds along suspect lines nor infringes fundamental constitutional rights" is afforded "a strong presumption of validity" and will survive an equal protection challenge "if there is any reasonably

conceivable state of facts that could provide a rational basis" for the action. *Beech Commc'ns*, 508 U.S. at 313, 314; see *Heller*, 509 U.S. at 320 (noting that the proponent of an equal protection challenge must "negative every conceivable basis which might support" the action) (citation omitted). "Where there are 'plausible reasons' for Congress' action," this Court's "'inquiry is at an end.'" *Beech Commc'ns*, 508 U.S. at 313-314 (quoting *United States R.R. Ret. Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980)); see *Armour* v. *City of Indianapolis*, 566 U.S. 673, 681 (2012) (same). The fact that Congress was not "actually motivated" by a conceived rational purpose in enacting the challenged law "is entirely irrelevant for constitutional purposes." *Beech Commc'ns*, 508 U.S. at 315.

Congress has determined that individuals who habitually abuse alcohol are ineligible for discretionary cancellation of removal. Petitioner does not contend that Congress lacks constitutional authority to make that judgment. Instead, he argues (Pet. 19-22) that Congress chose the wrong avenue for achieving that goal: instead of directly precluding habitual drunkards from obtaining discretionary relief, Congress precluded those who lack "good moral character" from obtaining such relief, 8 U.S.C. 1229b(b)(1)(B), and identified habitual drunkards as among the class of individuals who lack good moral character, 8 U.S.C. 1101(f)(1). But the fact that Congress chose to achieve its objective through the intermediate step of a "good moral character" provision in no way suggests that classifying habitual drunkards as ineligible for discretionary relief is unconstitutional. Equal protection analysis considers "the relationship of the classification *to its goal*," *Nordlinger* v. *Hahn*, 505 U.S. 1, 11 (1992) (emphasis added),

and "an imperfect fit between means and ends" is generally irrelevant to whether the ends are constitutional, *Heller*, 509 U.S. at 321.

The rationality of Congress's judgment about the "moral character" of individuals who habitually abuse alcohol, 8 U.S.C. 1101(f), is thus beside the point. Cancellation of removal is an extraordinary form of discretionary relief,[1] and Congress could have rationally concluded that habitual alcohol abuse poses unjustifiable risks to the public welfare and should disqualify a removable alien from such relief. See Pet. App. 13a, 26a, 65a-66a (noting the documented connections between habitual alcohol abuse and domestic violence, motor vehicle accidents, and other harms to public safety and welfare); cf. *Mahler* v. *Eby*, 264 U.S. 32, 39 (1924) (Congress has the "unquestioned right" to require the deportation "of persons who ha[ve] shown by their career that their continued presence here would not make for the safety or welfare of society."). At the very least, petitioner has not shown that no "reasonably conceivable state of facts" exists under which Congress could rationally have made that determination. *Beech Commc'ns*, 508 U.S. at 313.

b. Even if Congress were required to have a rational basis for classifying "habitual drunkard[s]" as persons lacking good moral character, 8 U.S.C. 1101(f)(1), in addition to having a rational basis for denying them dis-

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[1] Congress has provided that the Attorney General may grant cancellation of removal in no more than 4000 cases per fiscal year. 8 U.S.C. 1229b(e)(1). Immigration courts ordered over 96,000 aliens removed in 2016. See Executive Office for Immigration Review, U.S. Dep't of Justice, *FY 2016 Statistics Yearbook* C2 (Mar. 2017), https://www.justice.gov/eoir/page/file/fysb16/download.

cretionary relief, its classification would still be constitutional. Petitioner argues (Pet. 1) that Congress equated habitual alcohol abuse with a lack of good moral character in Section 1101(f)(1) based on "society's misunderstanding and stigmatization of alcoholism at the time" the law was enacted. He contends (*ibid.*) that current attitudes toward alcoholism are more enlightened and that treating those who habitually abuse alcohol as "categorically lack[ing] good moral character" is no longer "'rational nor consistent with our fundamental values'" (quoting Pet. App. 59a).

Congress was not, however, required to define the exclusions from the INA's "good moral character" requirement in a manner that comports with prevailing (or evolving) notions of what constitutes moral behavior. Rather, Congress is free to use the phrase "good moral character" in a specialized sense within the context of the immigration laws. See *Stenberg* v. *Carhart*, 530 U.S. 914, 942 (2000) ("When a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning."); see also Pet. App. 15a (noting that Congress could just as easily have referred to the exclusions from the good moral character requirement as "special class[es] of persons not eligible for cancellation of removal"). Because Congress's decision to deny discretionary relief to habitual alcohol abusers poses no equal protection concern, its decision to achieve that objective by adding habitual drunkards to the list of individuals unable to satisfy the "good moral character" requirement for such relief is likewise constitutional.

In any event, Congress could have rationally concluded that individuals who habitually abuse alcohol

lack "good moral character" under a more generic understanding of that phrase. Petitioner asserts (Pet. 1) that he was found to "lack[] good moral character due to his alcoholism diagnosis," which he derides (Pet. 32) as a "meaningless relic of past prejudices." But his premise is mistaken: as the court of appeals explained, Section 1101(f)(1) "asks whether a person's *conduct* during the relevant time period" involved habitual alcohol abuse; "the person's *status* as an alcoholic, or not, is irrelevant to the inquiry." Pet. App. 10a; see *ibid.* ("[N]ot all alcoholics are habitual drunkards.").[2] That conduct poses a "well-documented" danger to public safety "in the form of drunken driving, domestic violence, and the like," *id.* at 26a, as demonstrated by the facts of this case. See *id.* at 11a (noting that petitioner was convicted of drunk driving, which "is, self-evidently, a public harm"). Congress could have rationally concluded that a removable alien's habitual alcohol abuse, and the danger to the public welfare that comes with it, demonstrates a sufficient lack of good moral character to warrant denying the alien's request for discretionary cancellation of removal.

Moreover, as Judge Watford explained in his concurring opinion below, habitual alcohol abuse "does not come about overnight": it generally results from "frequent," "repetitive," and "volitional" "acts of excessive drinking" over an extended period of time. Pet. App. 24a; see *id.* at 25a (noting that "advances in our under-

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[2] Although petitioner contended below that he stopped drinking after his 2010 hospitalization, the court of appeals noted that this event occurred "*after* the relevant 10-year statutory period" in which he was required to demonstrate good moral character, and thus it was "irrelevant as a matter of law." Pet. App. 11a n.3.

standing of the neurobiology underlying addiction" confirm that, "at least to some extent, there is indeed a volitional component to developing an addiction to alcohol"). Habitual alcohol abusers could, therefore, reasonably be viewed as "at least partially responsible" for their condition. *Id.* at 24a. And Congress could have rationally concluded—especially in the context here, involving Congress's broad authority over immigration—that such individuals are, as a consequence, more "morally blameworthy" than those with other medical conditions and less deserving of discretionary relief from removal. *Id.* at 26a. Whether that determination is "wis[e]," "fair[]," or "logic[al]" has no bearing on Congress's constitutional authority to make it. *Beech Commc'ns*, 508 U.S. at 313.

2. Petitioner contends (Pet. 13) that the reasoning of the plurality opinion implicates a circuit conflict over "[w]hether, 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." That contention does not warrant review.

a. Each of the cases petitioner cites as evidence of a circuit conflict concerns the constitutionality of state licensing or regulatory requirements for casket retailers. See *St. Joseph Abbey* v. *Castille*, 712 F.3d 215 (5th Cir.), cert. denied, 134 S. Ct. 423 (2013); *Powers* v. *Harris*, 379 F.3d 1208 (10th Cir. 2004), cert. denied, 544 U.S. 920 (2005); *Craigmiles* v. *Giles*, 312 F.3d 220 (6th Cir. 2002). In *Castille* and *Craigmiles*, the courts held that the challenged statutes were not rationally related to their stated purposes (including consumer protection and promotion of public health and safety), and were instead efforts to protect funeral homes from competition,

which the courts determined was not a legitimate governmental interest. See *Castille*, 712 F.3d at 222, 224-226; *Craigmiles*, 312 F.3d at 224-225, 228. In *Powers*, the Tenth Circuit reached the opposite result, concluding that economic protectionism is a legitimate objective. 379 F.3d at 1222.

The different results in those cases turned on the courts' different answers to whether economic protectionism, without more, can form a rational basis for state legislation. See *Castille*, 712 F.3d at 222 (noting that "*Craigmiles* and *Powers* rest on their different implicit answers to the question of whether the state legislation was supportable by rational basis" on the ground that "economic protection [is] a traditional wielding of state power and rational by definition"). In each case, the court considered the same question at issue here: whether the statute's ultimate effect was rationally related to a legitimate governmental interest. None of the decisions on which petitioner relies holds that a law that achieves permissible and rational objectives may nonetheless be invalidated on equal protection grounds if the legislature achieved those objectives by defining the regulated conduct to be part of an intermediate category in which it (assertedly) does not cleanly fit.

Petitioner notes (Pet. 14-15) that *Castille* and *Craigmiles* considered the "structure" of the statues at issue in determining whether they violated equal protection principles, but that fact does not support his argument. In both cases, the laws at issue required casket retailers to obtain the same licenses or follow the same regulations as funeral homes with the ostensible purpose of protecting consumers and public health—even though most of the requirements for funeral homes had nothing

to do with the sale of caskets and other provisions of state law undermined the legislature's stated goals. See *Castille*, 712 F.3d at 223-224; *Craigmiles*, 312 F.3d at 224-225. The courts noted that this structure indicated that the laws were instead designed to produce the illegitimate result of protecting funeral homes from unwanted competition. *Ibid.* The courts did not suggest that, if the statutes' effects were legitimate, the legislature's decision to achieve those ends by requiring casket retailers to follow the same rules as funeral homes, rather than by directly forbidding anyone but funeral homes to sell caskets, would nonetheless have posed an independent constitutional problem.[3]

b. Even if a relevant circuit conflict existed, however, this case would not be a suitable vehicle for resolving it. First, petitioner cannot demonstrate that the Ninth Circuit or other circuits would have reached a different result in this case under the rule he advocates. As Judge Watford explained in his concurring opinion below (Pet. App. 22a-27a), petitioner would lose even

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[3] In *Craigmiles*, the court of appeals cited this Court's decision in *City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432 (1985), for the proposition that courts may be "suspicious of a legislature's circuitous path to legitimate ends when a direct path is available." 312 F.3d at 227. But that observation does not support petitioner's argument. *City of Cleburne* concerned a zoning ordinance that would have required a home for 13 intellectually disabled adults to obtain a permit to operate as a "hospital." 473 U.S. at 436-437. Citing the principle that a state "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational," *id.* at 446, this Court held that the ordinance's only apparent purpose was an illegitimate one: to unlawfully discriminate against people with intellectual disabilities by making it impossible for them to live together, *id.* at 450. No such issue is presented here.

under an approach that considered whether Congress chose rational means to achieve its permissible goals. See pp. 13-16, *supra*. The three judges who joined Judge Kozinski's concurring opinion agreed that, in the immigration context of this case, Congress's decision to equate habitual alcohol abuse with a lack of good moral character was "beyond cavil." Pet. App. 21a. And although the judges who joined the plurality opinion concluded that this case could be resolved without considering whether Congress's choice of means was rational, none of them suggested that Congress's choice of means was *not* rational. Indeed, Judge Clifton joined both the plurality opinion and Judge Watford's concurring opinion, indicating the lack of any necessary tension between the two. See *id.* at 6a n.1, 22a.

Second, this case arises in the special context of Congress's determination of which removable aliens should be permitted to remain in the country through a grant of discretionary relief. This Court "without exception has sustained Congress' plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden," *Kleindienst* v. *Mandel*, 408 U.S. 753, 766 (1972) (citation and internal quotation marks omitted), and it 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). In light of Congress's broad constitutional power over aliens, its "policy choices in the immigration context" are entitled to "special judicial deference." *Fiallo* v. *Bell*, 430 U.S. 787, 793 (1977); see Pet. App. 18a (Kozinski, J., concurring).

In *Fiallo*, this Court rejected a claim that a statute that granted an immigration preference to natural

mothers and their illegitimate children, but not natural fathers, violated equal protection principles because it was "based on an overbroad and outdated stereotype concerning the relationship of unwed fathers and their illegitimate children." 430 U.S. at 799 n.9. This Court explained that "it is not the judicial role in cases of this sort to probe and test the justifications for the legislative decision," and that the alien's argument "should be addressed to the Congress rather than the courts." *Id.* at 799 & n.9. The particular deference owed to Congress's judgment in this setting demonstrates that this case is far from an "ideal vehicle" to review the alleged circuit conflict petitioner identifies, which arises in a context unrelated to immigration. Pet. 17.

3. Petitioner argues (Pet. 22-33) that the term "habitual drunkard" in Section 1101(f)(1) is unconstitutionally vague. That assertion does not warrant review.

a. Contrary to petitioner's assertion (Pet. 23-25), nine judges of the en banc court agreed that the term "habitual drunkard" in Section 1101(f)(1) means "a person who regularly drinks alcoholic beverages to excess," and they rejected petitioner's vagueness challenge. Pet. App. 9a-10a; see *id.* at 6a n.1 (noting that nine judges joined that portion of the en banc court's opinion).[4] No court has held, or even suggested, that the term is vague. Indeed, before this case, no court of appeals had sought to define the term at all.

The definition adopted by the court of appeals comports with dictionary definitions of the term "habitual drunkard" from the time the INA was enacted, see

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[4] The two dissenting judges below did not address the constitutional issue because they would have adopted a different interpretation of "habitual drunkard" and remanded for application of that definition. See Pet. App. 43a.

Black's Law Dictionary 587 (4th ed. 1951) (a person "whose habit it is to get drunk; whose ebriety has become habitual"); contemporary definitions, see *Black's Law Dictionary* 607, 827 (10th ed. 2014) ("Someone who habitually consumes intoxicating substances excessively; esp., one who is often intoxicated."); and the law in the States, see, *e.g.*, *Shorthose* v. *Shorthose*, 49 N.E.2d 280, 282 (Ill. App. Ct. 1943) ("Habitual drunkenness * * * means an irresistible habit of getting drunk, a fixed habit of drinking to excess, such frequent indulgence to excess as to show a formed habit and inability to control the appetite."). It is also consistent with how the Board has applied the "habitual drunkard" provision. See *In re H-*, 6 I. & N. Dec. 614, 616 (B.I.A. 1955) (concluding that an alien qualified as a "habitual drunkard" because he "immediately began drinking heavily" after leaving treatment for alcoholism, "necessitating his immediate and forcible return"); cf. Pet. App. 75a-76a (similar in context of this case).

The court of appeals' definition also "readily lends itself to an objective factual inquiry," further mitigating any uncertainty in the statute's application. Pet. App. 12a. As the court explained, a person does not qualify as a "habitual drunkard" under Section 1101(f)(1) unless he engages in conduct that establishes a frequent pattern of drinking to the point of intoxication during the specific period in which he must demonstrate good moral character. *Id.* at 10a.

b. Petitioner notes (Pet. 24) that the two dissenting judges below adopted a different definition of "habitual drunkard," requiring both habitual drinking to excess and "harm to other persons or the community." Pet. App. 39a. But the fact that judges may disagree about the correct interpretation of a statutory term does not

mean that the term is so vague as to violate due process. A civil statute, like Section 1101(f)(1), is unconstitutionally vague only if it is completely "unintelligible" and "so vague and indefinite as really to be no rule or standard at all." *A. B. Small Co.* v. *American Sugar Ref. Co.*, 267 U.S. 233, 239-240 (1925). Even under the vagueness standard applicable to criminal laws, a challenger must show that the statutory language is "so standardless that it authorizes or encourages seriously discriminatory enforcement" or "fails to provide a person of ordinary intelligence fair notice of what is prohibited." *United States* v. *Williams*, 553 U.S. 285, 304 (2008). The mere existence of some statutory ambiguity, requiring that legislative language be interpreted by a court, does not satisfy either of those standards.

Petitioner similarly argues (Pet. 28-30) that the statute is unclear about what constitutes "regular" or "excessive" drinking. He cites two decisions that he claims illustrate that point, but they are distinguishable. In *Le* v. *Elwood*, No. 02-cv-3368, 2003 WL 21250632 (E.D. Pa. Mar. 24, 2003), the court stated, in dicta, that two drunk driving incidents occurring three years apart might not "by themselves" demonstrate a lack of good moral character, though the court found that the alien lacked good moral character on other grounds. *Id.* at *3. In *In re Petitioner*, No. 06 155 51404, 2007 WL 5315579 (Feb. 22, 2007), the DHS Administrative Appeals Office concluded that an alien was not a "habitual drunkard" where his alcohol abuse ended several years before he sought immigration benefits. *Id.* at *8. Those fact-bound decisions do not suggest any intractable disagreement over the meaning of the term "habitual drunkard."

But even if marginal cases could be imagined, that would not mean that the statute is vague. See *United States* v. *National Dairy Prods. Corp.*, 372 U.S. 29, 32 (1963) (noting that "statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language"). And petitioner's conduct—involving consumption of a liter of tequila a day for ten years, leading to liver failure and a drunk driving conviction—would clearly qualify as habitual drunkenness under any definition of the term. See *Parker* v. *Levy*, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness."); see also *Fisher* v. *Coleman*, 639 F.2d 191, 191-192 (4th Cir. 1981) (per curiam) (rejecting vagueness challenge to "habitual drunkard" provision in Virginia state law, where defendant clearly fell within the terms of the statute).

b. Contrary to petitioner's suggestion (Pet. 33), no reason exists to hold his petition for a writ of certiorari pending this Court's decision in *Sessions* v. *Dimaya*, No. 15-1498 (reargued Oct. 2, 2017). *Dimaya* concerns the constitutionality of the definition of a "crime of violence" in 18 U.S.C. 16(b), as incorporated into the INA's definition of an "aggravated felony," 8 U.S.C. 1101(a)(43)(F). The decision in that case will have no bearing on whether the unrelated term "habitual drunkard" is unconstitutionally vague.

4. In any event, this case would be a poor vehicle for considering either of the questions presented because the denial of discretionary relief in petitioner's case did not necessarily depend on application of the "habitual drunkard" provision of Section 1101(f)(1). In denying

petitioner's request for cancellation of removal, the immigration judge noted that petitioner admitted to having left and illegally reentered the United States in 2001 or 2002, and thus he could not establish his continuous residence in the United States for a period of ten years. Pet. App. 79a-80a; see A.R. 262, 264-266. Failing to establish continuous residence renders a person ineligible for cancellation of removal, whether or not the person can demonstrate his good moral character. See 8 U.S.C. 1229b(b)(1)(A).

The immigration judge did rely on petitioner's failure to establish his good moral character as a ground for denying his request for voluntary departure. See Pet. App. 84a; see also 8 U.S.C. 1229c(b)(1)(B) (authorizing voluntary departure only if the alien demonstrates "good moral character for at least 5 years immediately preceding the alien's application for voluntary departure"). As petitioner conceded below, however, the immigration judge could have reached the same conclusion under the catchall provision of 8 U.S.C. 1101(f), which states that the enumerated grounds for finding a lack of good moral character are not exclusive, without considering whether petitioner's excessive drinking and drunk driving conviction qualified him as a "habitual drunkard" within the meaning of Section 1101(f)(1). See, *e.g.*, Pet. C.A. Supp. Reh'g Br. 22 (acknowledging that adjudicators "may always consider conduct that potentially threatens public safety in making the discretionary determination" under Section 1101(f)'s catchall provision, including "a noncitizen's alcohol-related conduct"); Pet. C.A. Reh'g Opp. 11 ("An adjudicator may still find a noncitizen lacks 'good moral character,' even for specific drinking-related conduct, under [Section] 1101(f)'s 'catch-all' provision."). Petitioner identifies no

reason to think that, on the record of this case, he would be granted voluntary departure if his challenge to the "habitual drunkard" provision were successful.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
CHAD A. READLER
Principal Deputy Assistant Attorney General
DONALD E. KEENER
PATRICK J. GLEN
Attorneys

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