No. 12-73289

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SALOMON LEDEZMA-COSINO,

Petitioner,

v.

LORETTA E. LYNCH, United States Attorney General,

Respondent.

RESPONDENT'S PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

ADMINISTRATIVE DECISIONS

FEDERAL STATUTES

Immigration and Nationality Act of 1952, as amended:

STATE STATUTES

MISCELLANEOUS

INTRODUCTION

Respondent Loretta E. Lynch respectfully petitions this Court for rehearing en banc. In its panel decision, a two-judge majority concluded that a provision of the Immigration and Nationality Act, establishing a per se rule that "habitual drunkards" are ineligible for certain immigration relief and benefits, is facially invalid under the Equal Protection Clause. *Ledezma-Cosino v. Lynch*, -- F.3d -- (9th Cir. 2016). In reaching this conclusion, the panel majority failed to apply the deferential rational-basis standard of review and failed to undertake the proper equal protection analysis mandated by the Supreme Court. Rehearing en banc is warranted as this case presents a question of exceptional importance: whether a duly enacted federal statute is constitutionally infirm. The Court should grant rehearing and answer that question in the negative, as the provision at issue is rationally related to Congress's purpose of not extending eligibility for relief and benefits to classes of aliens whose presence may harm others or impose heavy costs on the United States.

BACKGROUND

Petitioner, a citizen of Mexico, unlawfully entered the United States in December 1987. Certified Administrative Record ("A.R.") 695. In 2008, following a second conviction for DUI, he was charged with removability as an alien present in the United States without having been admitted or paroled. *Id.* at 695. Petitioner conceded removability, but sought relief in the form of cancellation of removal and voluntary departure. *Id.* at 276-77.

To establish eligibility for these forms of discretionary relief, an alien must establish that he possessed "good moral character" during the relevant statutory time frame. *See* 8 U.S.C. 1229b(b)(1)(B), 8 U.S.C. 1229c(b)(1)(B). By statute, Congress has provided that certain conduct will necessarily entail a determination that the alien lacked good moral character. *See* 8 U.S.C. 1101(f). As relevant here, an alien cannot 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." 8 U.S.C. 1101(f)(1).

Petitioner and his daughter both testified before the IJ, and documentary evidence was submitted. *Id.* at 90-119, 123-200. This evidence indicated a history of chronic alcohol abuse, beginning with the delay in the hearings brought about by Petitioner's hospitalization for issues related to his liver-function. *Id.* at 72-73. The hospital's discharge summary characterized Petitioner's symptoms as consistent with acute alcoholic hepatitis and alcoholic cirrhosis. *See* A.R. 193. The "history & physical" narrative also indicated a lengthy history of alcohol abuse—"the patient has more than [a] ten year history of heavy alcohol abuse, up to 1 liter of tequila per day." *Id.* at 189.

Subsequent testimony was not consistent with these medical reports. His daughter testified that Petitioner had a drinking problem, but that he had not had a drink since his hospitalization. *See* A.R. 96. She did not offer any details on the amount or intensity of his prior abuse. Petitioner testified that

he would drink continuously for a period of time, perhaps two to three weeks, but that he would then go as long as four months without having any alcohol. *See id.* at 112-13. He offered no explanation for where the doctor would have obtained the information for the report, characterizing Petitioner's abuse as lengthy and intense. *Id.* at 118.

The IJ denied Petitioner's applications for relief. A.R. 49-56. Noting both the testimonial and documentary evidence, the IJ concluded that Petitioner had a "very serious" history of "alcohol addiction and abuse," spanning a ten-year period during which he was daily drinking up to 1 liter of liquor. *Id.* at 51. Given this history, the IJ concluded that he was ineligible for relief under the "habitual drunkard" provision. *Id.* at 51-52, 55. The Board dismissed Petitioner's appeal, holding that "given the totality of the evidence presented, [he] has not met his burden of demonstrating" statutory eligibility for relief. *Id.* 3-4.

On March 24, 2016, this Court issued a decision, with Judge Reinhardt, joined by Judge Du, voting to grant the petition for review and holding, after *sua sponte* raising the issue at oral argument, "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." Slip Op. at 3.

Regarding the equal protection challenge, the majority identified the relevant government interest as the exclusion of "persons of bad moral character" from consideration for relief. *Id.* at 7. The majority held that the

term "habitual drunkard" necessarily encompasses "chronic alcoholics," and that the statute distinguishes between different medical conditions, as alcoholism is a disease. *Id.* at 8-9. The majority thus framed the question as whether it is "rational for the government to find that people with chronic alcoholism are morally bad people solely because of their disease?" *Id.* at 9. It answered in the negative, rejecting the argument that it is rational to impart moral blameworthiness to "habitual drunkards" because of the volitional aspect of the disease and recovery, deeming this "an old trope not supported by the medical literature[.]" *Id.* at 10-12. The majority also rejected reliance on public safety, reasoning that: 1) some of those concerns have no link to a finding of poor moral character; and 2) other diseases also carry an increased risk of violence to self and others. *Id.* at 12-14. Accordingly, the majority held that "[t]here is no rational basis for classifying persons afflicted by chronic alcoholism as persons who innately lack good moral character. As such, we hold [Section] 1101(f)(1) unconstitutional[.]" Slip Op. at 15.

Judge Clifton dissented, and would have held that there are no groups similarly situated to the class of "habitual drunkards," and, in any event, that the statute passed constitutional muster as rationally related to legitimate government interests (*Id.* at 20-23).

ARGUMENT

Rehearing en banc is warranted, as this case "involves a question of exceptional importance." Fed. R. App. P. 35(a)(2). The panel majority,

abdicating its limited judicial function in reviewing the immigration statute, concluded that a provision of the INA is unconstitutional. This conclusion is premised on a fundamental misapplication of the rational-basis standard of review in derogation of the Supreme Court's consistent statement of the considerations that should govern that review. Moreover, the majority's expansive conception of its role in reviewing immigration policy decisions may well have effects beyond this specific case, leading to a process of continual judicial second-guessing of Congressional policymaking that will be destructive to the operation of any orderly immigration system.

A. The Panel Majority Failed to Apply the Rational-Basis Standard of Review to Section 1101(f)(1)

1. Congressional authority over immigration, the limited scope of judicial intervention, and the rational-basis standard of review

In defining the authority of Congress over immigration matters in *Fiallo v. Bell*, the Supreme Court quoted Justice Frankfurter's concurrence in *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952): "[t]he conditions of entry for every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, the right to terminate hospitality to aliens, the grounds of 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." *Fiallo*, 430 U.S. 787, 796 (1977) (quoting *Harisiades*, 342 U.S. at 596-97 (Frankfurter, J., concurring)). In *Fiallo*, the Supreme Court built on this premise: "[I]t is important to underscore the limited scope of judicial inquiry

into immigration legislation. This Court has repeatedly emphasized that over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens. Our cases have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo*, 430 U.S. at 792 (quotation marks and internal citations omitted). Accordingly, under Supreme Court precedent, "the power over aliens is of a political character and therefore subject only to narrow judicial review." *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976) (citation omitted).

The Constitution provides some protection to aliens present in the United States, but this fact does not lead to the conclusion that aliens, as a group, must be confined to a single, homogeneous legal classification. *See Mathews v. Diaz*, 426 U.S. 67, 76, 78 (1976). There are numerous statutory provisions that are based on the premise that legitimate distinctions may cause benefits or burdens to be accorded to some classes of individuals but not to others. *Id.* at 78. In creating such distinctions in the field of immigration, Congress enjoys plenary power. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *Fiallo*, 430 U.S. at 792; *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972). Congress need not choose the least extreme or restrictive means in constructing immigration legislation, so long as the resulting provisions pass constitutional "muster," *Demore v. Kim*, 538 U.S. 510, 528 (2003), and it may, and indeed does regularly, "make[] rules in this

context that would be unacceptable if applied to citizens," *id.* at 511 (citation omitted).

Given the limited nature of judicial inquiry into the constitutionality of immigration legislation, *see Mow Sun Wong*, 426 U.S. at 101-02 n.21, the federal courts apply rational basis review to equal protection challenges raised in the context of the INA. *See Masnauskas v. Gonzales*, 432 F.3d 1067, 1071 (9th Cir. 2005). Legislation subject to rational basis review has a strong presumption of validity, and such review does not permit the courts to adjudicate the wisdom, logic, or fairness of legislative choices. *See Heller v. Doe*, 509 U.S. 312, 319 (1993). Rather, the "burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it," *id.* at 320 (quotation marks and internal citations omitted), regardless of whether the basis "has a foundation in the record." *Hernandez-Mezquita v. Ashcroft*, 293 F.3d 1161, 1164 (9th Cir. 2002) (citation omitted). Thus, a statute that limits the relief available to certain classes of aliens will be "valid unless wholly irrational." *Taniguchi v. Schultz*, 303 F.3d 950, 957 (9th Cir. 2002) (citation omitted).

2. The panel majority failed to apply the appropriately deferential rational-basis standard

The panel majority failed to apply the foregoing principles in undertaking its analysis. The decision's lax application of the governing rational-basis standard of review is not just erroneous, but in conflict with a long and unbroken line of Supreme Court and Ninth Circuit decisions

explicating the proper approach to an equal protection challenge implicating neither a fundamental right nor a suspect class.

First, a statute challenged on equal protection grounds and subject to only rational basis review is entitled to a presumption of constitutionality. *See Heller*, 509 U.S. at 319-20. The majority failed to apply that presumption in this case, *see* Slip Op. at 24 (Clifton, J., dissenting), and instead, from the opening reasoning of its opinion, seemingly applies an opposite presumption—that the statute should be found unconstitutional *unless* the government could submit a significant enough justification for the provision. *See, e.g.*, Slip Op. at 8 (rejecting government argument in favor of constitutionality), 10 (same), 12 (same), 14 (same).

Second, under rational-basis review, the burden is on the challenger of the statute to negate every possible justification for the statutory classification. *See Heller*, 509 U.S. at 320-21; *Hernandez-Mezquita*, 293 F.3d at 1164. The majority nowhere held Petitioner to his burden, *see* Slip Op. at 24 (Clifton, J., dissenting), an especially odd omission considering his concession that public health and safety considerations represent "valid government interests" that Congress could legislate to protect. *See* Pet. Supp. C.A. Br. at 4. Rather, and again, the panel placed a burden on the government to justify the existence of this statutory classification, rather than requiring Petitioner to establish that it lacks any conceivable rational basis. *See, e.g.*, Slip Op. at 8, 10, 12, 14.

Third, under rational-basis review, the courts owe deference to the policy judgments made by Congress in enacting a statute, and should defer to those determinations unless wholly irrational. *See FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). The majority evidences no deference to the determinations of Congress, and its opinion frequently reads like exactly what it is—a fundamental disagreement over the policy Congress has chosen to enact. *See* Slip Op. at 12-14 (disagreeing with import of scientific studies on the link between violence and alcohol-abuse, as well as the relevance of laws restricting access to driver's licenses and firearms); *id.* at 14-15 (providing an historical overview of new insights into health since enactment of the INA). Yet again, rational-basis review is not a license to "judge the wisdom, fairness, or logic of legislative choices." *Beach Communications, Inc.*, 508 U.S. at 313 (internal citations omitted).

Similar observations lead Judge Clifton to note in dissent that these errors are not just misapplication of the appropriate standard of review. Rather, the majority's opinion applies "heightened scrutiny by stealth, and in so doing, has usurped Congressional authority in an area where that authority is at its apex." Slip Op. at 24-25 (Clifton, J., dissenting).

B. Section 1101(f)(1) does not Violate the Equal Protection Clause

On proper application of equal protection principles, Section 1101(f)(1) passes constitutional muster. First, the equal protection challenge must fail at the threshold, as the statutory provision does not discriminate between two similarly situated classes of aliens. Second, even assuming two

such classes, rational bases support the classification established by Congress.

1. Section 1101(f)(1) does not discriminate between two similarly situated classes of aliens

To successfully assert an equal protection challenge, an alien must first establish that there are two classes who are similarly situated, with one class being subject to differential treatment. *See City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). "The groups need not be similar in all respects, but they must be similar in those respects relevant to the [challenged] policy." *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1063-64 (9th Cir. 2014) (citation omitted).

The panel majority concluded that the phrase "habitual drunkard" necessarily denoted an exclusive class comprised of those suffering from "chronic alcoholism," *see, e.g.*, Slip Op. at 8 ("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"), that this class is similarly situated to individuals who have received other medical diagnoses, and that the two classes are treated differently solely based on the underlying medical condition possessed by class members. *See ibid.*

There is, however, no similarly situated class, and this conclusion turns on three discrete determinations: 1) the phrase "habitual drunkard" is not coextensive with any alcohol-related medical diagnosis; 2) even

assuming medical diagnosis does define similar classes, there is a volitional component to recovery for chronic alcoholics that is lacking in most other diseases; and 3) the threats to public health and safety from those exhibiting alcoholic tendencies are more significant than those from others with medical conditions.

First, the statute itself does not reference any medical diagnosis and whether an individual qualifies as a "habitual drunkard" does not turn on whether he has received any medical diagnosis relating to alcoholism. This classification turns, rather, on the *conduct* of the alien during the relevant period during which good moral character is required, disqualifying those who, like Petitioner, frequently and excessively consumed alcohol. *Compare Matter of H-*, 6 I. & N. Dec. 614, 615-16 (BIA 1955) (applying provision where alien surreptitiously escaped from hospital, and "immediately began drinking heavily, necessitating his immediate and forcible return"), *with In re: Petitioner; Petition for Immigrant Battered Spouse*, 2007 WL 5315579 (Administrative Appeals Office 2007) (declining to apply provision where alien "complied with his court order to attend AA meetings and ceased drinking alcohol of his own volition"). It is the conduct of the alien that disqualifies him from relief, not any underlying medical diagnosis. This point is most clear in the context of a "recovering" alcoholic—an individual who has been medically diagnosed with alcoholism but ceases to drink. That medical diagnosis persists even where the drinking ceases, and thus this alien—an alien diagnosed with alcoholism—could

establish good moral character *so long as* he was in recovery during the period such good moral character was required. Thus, the relevant classification of an alien as a "habitual drunkard" is not based on his *status* as a person with medically diagnosed alcoholism, a diagnosis that would persist even during periods of sobriety, but on his *conduct* during the statutorily prescribed period.[1] Given this, the class "habitual drunkard" is not similarly situated to other classes comprised of those who have received a particular medical diagnosis.

Second, even assuming the connection between "habitual drunkard" and a medical diagnosis of alcoholism, this class is not similarly situated to other classes who are suffering from diseases or medical conditions. As an initial matter, the capacity for success in treatment of alcoholism hinges to a

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[1] Supreme Court precedent supports the permissibility of drawing a distinction between the *status* and *conduct* of an individual, and punishing *conduct* even if the mere status of the individual would be an impermissible ground on which to impose punishment. *See Robinson v. California*, 370 U.S. 660, 666 (1962) (finding unconstitutional a law that "ma[de] it a criminal offense for a person to 'be addicted to the use of narcotics[,]'" because it impermissibly "ma[de] the 'status' of narcotic addiction a criminal offense," rather than "punish[ing] a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration."); *see also Powell v. Texas*, 392 U.S. 514, 532 (1968) (plurality opinion) (upholding a public intoxication law and distinguishing *Robinson* on the ground that the law does not "punish a mere status," but rather "impose[s] upon [individuals] a criminal sanction for public behavior which may create substantial health and safety hazards ... and which offends the moral and esthetic sensibilities of a large segment of the community."). This distinction having been upheld in the context of an Eighth Amendment challenge, it is surely reasonable under the lower threshold of rational-basis review.

far more significant degree on the alcoholic's motivation and commitment to a treatment program than it does for other medical conditions, such as cancer. As Alcoholics Anonymous has noted, "Rarely have we seen a person fail who has thoroughly followed our path." Miller, "Motivation for Treatment: A Review with Special Emphasis on Alcoholism," *Psychological Bulletin*, Vol. 98(1); 84—107 (1985), at 85. Accordingly, there is a volitional component to alcoholism that is lacking in many other medical conditions.

Further, the "habitual drunkards" contemplated by this statutory classification are at a significantly increased risk of endangering themselves and others, a point to which Petitioner's own DUI arrests attest. *See* Webster & Vernick, "Keeping Firearms From Drug and Alcohol Abusers," *Injury Prevention*, Vol. 15(6); 425—427 (2009), at 425. There is substantial scientific evidence indicating that people who abuse alcohol are at increased risk of committing acts of violence or self-harm. *See ibid.*; *see generally* Sharps, et al., "The Role of Alcohol Use in Intimate Partner Femicide," *The American Journal on Addictions*, Vol. 10(2); 122—135 (2001); McClelland & Teplin, "Alcohol Intoxication and Violent Crime: Implications for Public Health Policy," *The American Journal on Addictions*, Vol. 10(Supp.); 70—85 (2001); Rivara, et al., "Alcohol and Illicit Drug Abuse and the Risk of Violent Death in the Home," *JAMA*, Vol. 278(7); 569—575 (1997). This increased risk to the public and themselves distinguishes alcoholics from those suffering from other medical conditions.

Accordingly, there are not two similarly situated classes implicated by Section 1101(f)(1). The statute does not reference a medical condition or diagnosis, nor is a diagnosis sufficient to bring one within the bounds of the statute. But even assuming there are two such classes, the volitional aspect of recovery for alcoholics and the higher danger these individuals pose to public health and safety establish a sufficient basis for concluding that the two classes are not similarly situated. Thus, the statutory classification implicates no equal protection concerns. *See Jankowski-Burczyk v. INS*, 291 F.3d 172, 176 (2d Cir. 2002) ("the government can treat persons differently if they are not 'similarly situated.'") (quotation marks and citation omitted).

2. Even assuming two similarly situated classes of aliens, there is a rational basis for directing that "habitual drunkards" should be deemed statutorily ineligible for discretionary relief

Even assuming there are two classes of aliens who are similarly situated, and that Congress has concluded that only "habitual drunkards," amongst those aliens with medical conditions, should be deemed ineligible for relief, this distinction need only pass rational basis review. *See Heller*, 509 U.S. at 319-20. Where there are "plausible reasons for Congress' action," the court's "inquiry is at an end." *Romero-Ochoa v. Holder*, 712 F.3d 1328, 1331 (9th Cir. 2013) (citation omitted).

Construing the issue as whether it is "rational for the government to find that people with chronic alcoholism are morally bad people solely because of their disease," Slip Op. at 9, the majority concluded there was *no* rational basis to support the classification. It concluded that: 1) a medical

condition cannot serve as a basis for moral opprobrium; 2) the belief that there is a volitional component to alcoholism "is an old trope"; and 3) the risks of harm to self and others are not necessarily connected to the moral culpability of the offender, and other medical conditions also exhibit heightened risk of harm to self and others. Based on these considerations, the majority found "no rational basis for classifying persons afflicted by chronic alcoholism as persons who innately lack good moral character." Slip Op. at 15.

The majority erred in its narrow focus on Congressional purpose and in its lack of deference to rational bases that could animate that purpose. First, as Judge Clifton correctly noted in dissent, the issue is not simply whether there is a rational basis for concluding that "habitual drunkards" lack good moral character, but whether there was a rational basis for Congress to conclude that such aliens should not be eligible for discretionary relief. In this broader conception of Congressional purpose, the "habitual drunkard" provision operates as a categorical bar to discretionary relief and channels the Executive's exercise of that discretion away from aliens whom Congress did not want to be eligible. It is correct to note that Congress effectuated this categorical ban by linking "habitual drunkards" with a lack of good moral character, but the majority focused too narrowly on this tree to the exclusion of the forest—ultimately, this provision is about the class of aliens Congress wanted to be eligible for specified relief and benefits.

Second, given this more expansive construction of the question presented, there are rational bases on which Congress could conclude that "habitual drunkards" are not *entitled* to discretionary relief or other benefits. It is rational for Congress to bar an alien who engages in conduct that increases his risk of perpetrating acts of violence or self-harm from establishing statutory eligibility for discretionary relief or naturalization. As previously noted, scientific evidence establishes a link between alcohol abuse and risks of violence, *see*, *e.g.*, Webster & Vernick, *supra*, at 425; Sharps, et al., *supra*, at 131-34, and one study has even found that nearly half of violent police-encounters with citizens have some connection to alcohol, *see* McClelland & Teplin, *supra*, at 75 (tab. 1), 77.

It was also rational for Congress to bar such individuals from relief and other benefits where this same class has consistently been subjected to various restrictions on other rights and privileges. Jurisdictions have provisions limiting access to firearms and the types of permits an alcohol-abuser may obtain to carry such weapons. *See* Gov't Supp. C.A. Br. at 13 n.11. States have also limited the ability to obtain a driver's license in certain circumstances, *see*, *e.g.*, Colorado Rev. Stat. Ann. § 42-2-104(2)(c); Kansas Stat. Ann. § 8-237(d); M.D. Code (Transportation) § 16-103.1(2), while the federal government bars abusers from residence at the U.S. Soldiers' and Airmen's Home, *see* National Defense Authorization Act, 1991 § 4822, Pub. L. 101-510.

These are rational bases on which to uphold the Congressional determination that a "habitual drunkard" may not establish statutory eligibility for the discretionary relief at issue in this case.[2] Such individuals pose a heightened risk of violence to themselves and others, and have frequently been denied other rights and privileges on this same basis. At the very least, it is not "wholly irrational" for Congress to treat "habitual drunkards" differently than it treats aliens with cancer or diabetes.

[2] It is especially important to respect Congress's determination of who should be eligible for relief given the limited number of cancellation applications that may be granted each year, 4,000, and the millions of aliens who may be eligible to pursue such applications. *See* 8 U.S.C. 1229b(e)(1) (limiting cancellation to 4,000 applicants per fiscal year); Migration Policy Institute, Press Release (Nov. 19, 2014), available at http://www.migrationpolicy.org/news/mpi-many-37-million-unauthorized-immigrants-could-get-relief-deportation-under-anticipated-new (estimating 3.7 million aliens eligible for DAPA-consideration, a population with substantial overlap with the cancellation-eligible population).

CONCLUSION

For all the foregoing reasons, the petition for rehearing en banc should be granted.

Respectfully submitted,

/s/ Patrick J. Glen
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Dated: June 7, 2016

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rules 35-1 and 40-1, the foregoing Petition for Rehearing En Banc is proportionally spaced in a 14-point Times New Roman typeface, and is in compliance with Fed. R. App. P. 32(c) and Circuit Rule 40-1(a), in that it contains 4,200 words.

/s/ Patrick J. Glen
PATRICK J. GLEN
Counsel for Respondent

Attachment

Ledezma-Cosino v. Lynch, --- F.3d ---- (9th Cir. 2016)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

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* 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.

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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: the 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 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

[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.

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.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 7, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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IN THE
United States Court of Appeals for the Ninth Circuit

SALOMON LEDEZMA-COSINO,
Petitioner,
v.

LORETTA E. LYNCH,
United States Attorney General,
Respondent.

PETITIONER'S OPPOSITION TO THE GOVERNMENT'S PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Administrative Decisions

Statutes

Rules

Legislative Materials

Other Authorities

INTRODUCTION

This case does not warrant en banc review. In the 64-year history of the Immigration and Nationality Act, this is the first time a court—at any level, in any Circuit—has been asked to review an immigration agency's application of a provision deeming "habitual drunkards" to lack good moral character. Since Congress enacted the INA during the Truman Administration, the immigration agencies themselves have applied the "habitual drunkard" provision in only a small handful of cases. And the provision applies to immigration benefits that are ultimately discretionary in any event. Immigration agencies thus may (and do) deny benefits to noncitizens whose individual conduct and circumstances make them undeserving of relief, whether or not the categorical bar on "habitual drunkards" is in force.

In other words, there may not be a less invoked or consequential provision in the entire INA.

The government nevertheless contends that the panel opinion, which invalidated the "habitual drunkard" provision, "presents a question of exceptional importance" warranting the extraordinary step of en banc review. Pet. 1. The government is wrong. The panel opinion

does nothing to disturb immigration agencies' ability to make case-by-case discretionary determinations about individuals' alcoholism-related conduct. Individuals who "pose [a danger] to public health and safety" may be denied relief now as before. Pet. 14. Thus, the practical effect of the panel opinion is exceedingly limited.

En banc review is also unwarranted because the panel correctly held that immigration relief cannot be denied by classifying persons with the medical condition of alcoholism as inherently lacking "good moral character." Suffering from a medical disorder bears no relation to morality, so classifying people with chronic alcoholism as "habitual drunkard[s]" who inherently lack "good moral character" does nothing but stigmatize and punish that class. Under the Equal Protection Clause, however, "mere negative attitudes … are not permissible bases for" a legislative distinction between classes of individuals. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985).

The government and the dissent's contrary arguments depend upon recasting the "habitual drunkard" provision as a public-safety-oriented rule, designed to ban those with a dangerous medical condition just as those with tuberculosis are excludable from the United States.

But that is not what the "habitual drunkard" provision does. A *different* statute did exclude chronic alcoholics on health-related grounds from 1917 to 1990, and Congress repealed that "outmoded" provision. The "habitual drunkard" provision, in contrast, is a definitional one that simply labels chronic alcoholics as categorically lacking "good moral character." 8 U.S.C. § 1101(f)(1). Only by marking those suffering from chronic alcoholism with society's moral disapproval does the statute yield any immigration consequences. Because there is no "rational relationship between a medical disease and bad moral character," the panel correctly held the derogatory "habitual drunkard" provision violates the Equal Protection Clause. Slip op. 8.

In the end, there is no good reason for this Court to expend its en banc resources reevaluating this archaic provision. It would be especially unwarranted for this Court to endorse the antiquated view that those suffering from chronic alcoholism are immoral. The dissent suggests that, while "nobody chooses to have heart disease, cancer, [or] diabetes," alcoholism does involve a choice "susceptible to a moral evaluation." Dissent 18, 22. Alcoholism is, however, a bona fide

medical condition, and the government cannot consistent with equal protection morally condemn people based on their disease.

The petition should be denied.

STATEMENT

1. 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 has raised eight children, five of whom are U.S. citizens. A.R. 262. Ledezma is the primary breadwinner for his family, supporting his wife and children by working in the construction industry as a specialist cement mason and concrete finisher. A.R. 263.

After Ledezma was arrested for driving under the influence in 2008, he was placed in removal proceedings. A.R. 695. He conceded removability because he was never admitted or paroled into the United States, but he requested cancellation of removal or voluntary departure. A.R. 277, 695.

In 2010, while in removal proceedings, Ledezma was hospitalized for liver failure. A.R. 72. Doctors treating him determined that his condition derived from a long battle with alcoholism. A.R. 193. Following his hospitalization, he quit drinking. A.R. 96, 114.

Ledezma submitted the medical records regarding his hospitalization and treatment in further support of his request for discretionary immigration relief. A.R. 123-200. His adult daughter, who was living with him and whom he was supporting while she completed school, testified that she had "seen a dramatic change, for the better, in [her] father since he was hospitalized," and observed that he was "engaged with his family and he looks healthier than before." A.R. 134. She worried that, if forced to return to Mexico, he would be deprived of necessary medical care, and that his depression at being separated from his family would cause him to begin drinking again. A.R. 102. She testified that being separated from her father would be like "missing half of myself." A.R. 135.

2. The IJ denied Ledezma's application for cancellation. The IJ found that Ledezma did not meet the continuous-physical-presence requirement of § 1229b(b)(1)(A) or the "good moral character" requirement of § 1229b(b)(1)(B). A.R. 50-51, 55. The IJ noted that, under the statutory definition of "good moral character," 8 U.S.C. § 1101(f), "if you are an habitual drunkard, you do not have good moral character." A.R. 51. And the IJ observed that he had "learned now …

that [Ledezma] had a serious alcohol dependency problem," based on "medical records provided by [Ledezma] himself." A.R. 51.

Earlier in the removal proceedings, the IJ had indicated he would grant voluntary departure, because Ledezma's U.S. citizen son would soon turn 21 and would be able to file a petition for his father to obtain legal status, which Ledezma could obtain more easily if he departed voluntarily. A.R. 271-73. But the IJ's final order explained that he "unfortunately" had to modify his prior decision granting voluntary departure, because that relief also requires good moral character. A.R. 54-55.

3. On appeal, the BIA affirmed solely on the good moral character ground. The Board noted that Ledezma had challenged only the validity of the "habitual drunkard" provision, not whether he met the statutory definition, so it rejected Ledezma's argument because "we are without jurisdiction to rule upon the constitutionality of the statutes that we administer." A.R. 4.

4. This Court then stayed Ledezma's order of removal, Dkt. 3, and ultimately granted his petition for review. The panel first held Ledezma's Due Process Clause challenge to the "habitual drunkard"

provision must fail under this Court's precedent because noncitizens "do not have a protectable liberty interest" in discretionary immigration relief. Slip op. 6-7.

Next, the panel held that "[t]he absence of a rational relationship between a medical disease and bad moral character … renders any classification based on that relationship a violation of the Equal Protection Clause." Slip op. 8. The panel explained that "[a]lthough 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.'" Slip op. 9 (quoting *City of Cleburne*, 473 U.S. at 448).

The panel then rejected the only potential rationale for linking alcoholism with morality—that "persons suffering from alcoholism … simply lack the motivation to overcome their disease"—determining that this theory "is an old trope not supported by the medical literature." Slip op. 10. The history of the "habitual drunkard" provision confirmed that "animus was the impetus behind the law," and so "classifying alcoholics as evil people, rather than individuals suffering from a disease, is neither rational nor consistent with our fundamental values." Slip op. 15. The panel also held that any other

potential justifications for the provision, such as the danger posed by chronic alcoholics, have nothing to do with moral character, and thus cannot justify the provision. Slip op. 12-14.

Judge Clifton dissented. He wrote that the panel misidentified the purpose of the "habitual drunkard" barrier, failed to identify similarly situated groups, and applied "heightened scrutiny by stealth." Dissent 20-25.

REASONS FOR DENYING THE PETITION

I. The Validity Of The "Habitual Drunkard" Provision, Which In 64 Years Has Almost Never Been Invoked, Does Not Warrant En Banc Review.

"'En banc courts are the exception, not the rule.' They are 'not favored,' Fed. R. App. P. 35, and 'convened only when extraordinary circumstances exist.'" *Makaeff v. Trump Univ., LLC*, 736 F.3d 1180, 1180 (9th Cir. 2013) (Wardlaw & Callahan, JJ., concurring in the denial of rehearing en banc) (quoting *United States v. American-Foreign S.S. Corp.*, 363 U.S. 685, 689 (1960)) (internal citations omitted). Accordingly, this Court "only invoke[s] the en banc process to secure or maintain uniformity of our decisions or because a question of exceptional importance is involved," not "to dig through our circuit's

trove of opinions and call cases that we would have decided differently." *Id.* at 1187.

The government alleges no intra- or inter-circuit conflict here. There is none: No other court has ever passed upon the constitutionality of the "habitual drunkard" provision. Indeed, no other court has passed upon an agency's application of the provision *at all*.

The government nevertheless posits that "this case presents a question of exceptional importance: whether a duly enacted federal statute is constitutionally infirm." Pet. 1. But holding a law unconstitutional, while certainly a serious matter, does not itself render a case "exceptionally" important. This Court regularly denies rehearing en banc when three-judge panels hold statutes unconstitutional. *See, e.g.*, *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), *reh'g en banc denied*, No. 11-71307 (9th Cir. Jan. 25, 2016) (declaring the "crime of violence" definition in 18 U.S.C. § 16(b) unconstitutional); *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014), *reh'g en banc denied*, 779 F.3d 902 (9th Cir. 2015), *cert. denied sub. nom. Otter v. Latta*, 135 S. Ct. 2931 (2015) (declaring two states' bans on same-sex marriage unconstitutional); *United States v. Alvarez*, 617 F.3d 1198 (9th Cir.

2010), *reh'g en banc denied*, 638 F.3d 666 (9th Cir. 2011), *aff'd*, 132 S. Ct. 2537 (2012) (declaring the Stolen Valor Act unconstitutional).

The provision here is far less important than those statutes because it is almost never applied. Until this case, no court anywhere had been called upon to review an immigration agency's application of the provision in any context, whether relief from removal or naturalization. The provision never arises in litigation because the immigration agencies virtually never invoke it. The BIA itself has only one published decision discussing the provision, issued *61 years ago*. *See In re H—*, 6 I. & N. Dec. 614, 616 (BIA 1955). Thus, in this case, the BIA acknowledged the "lack of precedent interpreting the term 'habitual drunkard.'" A.R. 4.

Drinking-related conduct is often addressed under *other* provisions of immigration law unaffected by the panel opinion here. This Court has recently considered, for example, whether multiple DUI convictions indicate a noncitizen lacks "good moral character," wholly apart from the "habitual drunkard" provision, *Gutierrez v. Holder*, 662 F.3d 1083, 1087-88 (9th Cir. 2011) (applying § 1101(f)'s "catch-all" provision); whether DUI convictions may be deemed particularly serious

crimes for purposes of barring asylum, *Delgado v. Holder*, 648 F.3d 1095, 1105-08 (9th Cir. 2011) (en banc); and whether certain DUI convictions are disqualifying offenses under the criminal grounds for removability, *e.g.*, *Marmolejo-Campos v. Holder*, 558 F.3d 903, 913-17 (9th Cir. 2009) (en banc). Those questions are recurring and important. The question here, in contrast, arises from an unusual case in which the agency instead invoked the obscure "habitual drunkard" provision.

Moreover, the invalidation of the "habitual drunkard" provision will have *zero* impact on immigration agencies' ability to deny immigration benefits. An adjudicator may still find a noncitizen lacks "good moral character," even for specific drinking-related conduct, under § 1101(f)'s "catch-all" provision: "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." *See, e.g.*, *Gutierrez*, 662 F.3d at 1087-88; *Ragoonanan v. USCIS*, Civ. No. 07-3461, 2007 WL 4465208, at *3 (D. Minn. Dec. 18, 2007).

And most immigration benefits that require a showing of "good moral character"—like cancellation of removal, § 1229b(b)(1)(B), voluntary departure, § 1229c(b)(1)(B), naturalization, § 1427(a), and

relief under the Violence Against Women Act,

§§ 1154(a)(1)(A)(iii)(II)(bb), 1229b(b)(2)(A)(iv)—are discretionary in any event, so relief may still be denied based on case-specific circumstances as appropriate.[1] All that eliminating this categorical bar does is give an agency the *option* of favorably exercising its discretion based on the facts of a particular noncitizen's case. *See, e.g.*, *In re Gonzales-Figeroa*, 2006 WL 729784, at *1-2 (BIA Feb. 10, 2006) (affirming discretionary grant of voluntary departure where noncitizen had several convictions that he testified were a "result of his drinking," but he had later joined Alcoholics Anonymous and quit drinking; government did not invoke the "habitual drunkard" provision). "As a result, to the extent that [this Court's] rejection of" the habitual drunkard provision "may have any practical effect on policing our Nation's borders, it is a limited one."

[1] *See, e.g.*, *Portillo-Rendon v. Holder*, 662 F.3d 815, 816 (7th Cir. 2011) (IJ denied discretionary relief based on "indifference to the welfare of other drivers and pedestrians and defiance of known legal obligations" evidenced by noncitizen's convictions for driving while intoxicated and driving without a license); *In re Khanzetyan*, 2008 WL 1924552, at *3 (BIA Apr. 1, 2008) (concluding that "the adverse equities warrant a discretionary denial" where noncitizen had been convicted of 22 offenses, including driving under the influence).

Moncrieffe v. Holder, 133 S. Ct. 1678, 1692 (2013) (internal quotation marks omitted).

In short, given its extremely limited impact, the panel opinion does not warrant en banc review.

II. The Panel Correctly Held The "Habitual Drunkard" Provision Violates The Equal Protection Clause.

A. There is no rational basis for deeming those suffering from the medical condition of chronic alcoholism to lack good moral character.

"To withstand equal protection review, legislation that distinguishes between" two classes of people "must be rationally related to a legitimate governmental purpose." *Cleburne*, 473 U.S. at 446. 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." *Id.* And certain objectives—like "mere negative attitudes," *id.* at 448; "animus," *Romer v. Evans*, 517 U.S. 620, 632 (1996); or a "bare … desire to harm a politically unpopular group," *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)—are not legitimate state interests.

The panel correctly concluded that the "habitual drunkard" provision denies equal protection to people suffering from the medical

condition of alcoholism. The government's interest in limiting discretionary immigration benefits to noncitizens with "good moral character" is plainly legitimate. But, as the panel recognized, it is not "rational to link a person's medical disability with his moral character," because there is nothing morally "blameworthy" about having a medical disability. Slip op. 9-10; *see Brown v. Lucky Stores, Inc.*, 246 F.3d 1182, 1187 (9th Cir. 2001) (concluding that people suffering from alcoholism are medically disabled and protected under the Americans with Disabilities Act). Deeming people with the medical condition of alcoholism to be immoral is no more rational than labeling those with lung cancer or HIV/AIDS or deafness as immoral. The "core concern of the Equal Protection Clause" is to act "as a shield against [such] arbitrary classifications." *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 598 (2008).

Moreover, the panel correctly recognized that the INA's moral condemnation of people with this medical disability was historically motivated by improper prejudice and "'xenophobic impulses.'" Slip op. 14 (quoting Jayesh Rathod, *Distilling Americans: The Legacy of Prohibition on U.S. Immigration Law*, 51 Hous. L. Rev. 781, 846

(2013)). The INA's legislative history, for example, is rife with observations about different immigrant groups, such as, "[T]he Irish led in [criminal] commitments for drunkenness and vagrancy." S. Rep. No. 81-1515, at 187 (1950); *see* Rathod, *supra*, at 819-23 (collecting examples).

Even the statute's crude terminology, "habitual drunkard," harkens back to temperance-movement-era laws that predate the understanding of alcoholism as a medical condition and not a moral failing. Rathod, *supra*, at 793-96. And the provision's original statutory placement—in a lineup with "adulter[ers], polygamists, prostitutes, gamblers, narcotics addicts, [and] murderers," *Petition of Denessy*, 200 F. Supp. 354, 358 (D. Del. 1961); *see* Immigration and Nationality Act, Pub. L. No. 82-414, § 101(f), 66 Stat. 163, 172 (1952)—underscores that "mere negative attitudes" about those suffering from the medical condition of alcoholism improperly motivated the law. *Cleburne*, 473 U.S. at 448.

B. The government's defenses of the provision are meritless.

The government offers three substantive defenses of the provision. None withstands scrutiny.

First, the government asserts that the "habitual drunkard" classification turns on "the conduct of the alien … not any underlying medical diagnosis." Pet. 11. But that is no distinction where the medical condition is what drives the conduct. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews."). Habitual drunkenness is conduct that "happen[s] to be engaged in exclusively or predominantly by a particular class of people"—those with chronic alcoholism—so "an intent to disfavor that class can readily be presumed" from a law targeting that conduct. *Id.* at 270. As the panel correctly noted, the Supreme Court has consistently "declin[ed] to distinguish between status and conduct in cases in which the conduct was intertwined with the status." Slip op. 8 (citing *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 689 (2010)). And the BIA here was quite clear that it found Ledezma to be a "habitual drunkard" *because of* his "decade-long alcohol dependency." A.R. 4.

Second, the government argues that chronic alcoholics are unlike those with other diseases because "the capacity for success in treatment of alcoholism hinges to a far more significant degree on the alcoholic's

motivation and commitment to a treatment program than it does for other medical conditions." Pet. 12-13. That is nonresponsive. Even if willpower were *necessary* to keep chronic alcoholism under control, there is no plausible argument that it is *sufficient* to do so. People with alcoholism may be motivated to quit drinking but nevertheless fail *because* their disease overpowers their will. *See, e.g.*, Xavier Noël et al., *Alcoholism and the Loss of Willpower: A Neurocognitive Perspective*, 24 J. Psychophysiology 240, 240, 246 (Jan. 2010) ("[A]lcoholism is a form of addiction characterized by an imbalance between two separate, but interacting, psychological registers leading to loss of willpower…. Cognitive deficits in individuals with alcoholism … contribut[e] … to the vulnerability to alcoholism and to relapse once detoxified."). There is thus no rational basis for categorically deeming those unable to stop drinking morally "blameworthy." Slip op. 10.

Third, the government suggests this Court should adopt a "more expansive construction of the question presented" by asking not "whether there is a rational basis for concluding that habitual drunkards lack good moral character, but whether there was a rational basis for Congress to conclude that such aliens should not be eligible for

discretionary relief." Pet. 15-16. The government answers its reframed question by pointing to alcoholics' "heightened risk of violence to themselves and others." Pet. 17; *see* Pet. 13-14, 16. The dissent's analysis depends upon the same reframing. *See* Dissent 20-23.

But the government may not rewrite the statute's text or history. From 1917 to 1990, the immigration statutes did have a provision that excluded chronic alcoholics from entering the United States for health and safety reasons. *See* Immigration Act of 1917, Pub. L. No. 64-301, § 3, 39 Stat. 874, 875 (repealed 1952); Immigration and Nationality Act, Pub. L. No. 82-414, § 212(a)(5), 66 Stat. 163, 183 (1952). Congress then recognized that the "health and safety" concern was "outmoded" and repealed that provision. H.R. Rep. No. 101-955, at 128; *see* Immigration Act of 1990, Pub. L. No. 101-649, § 601(a), 104 Stat. 4978, 5067 (1990).

Congress thus knew how to exclude certain noncitizens, including those with chronic alcoholism, on health and safety grounds. But Congress did something very different with the "habitual drunkard" provision. The provision renders people suffering from chronic alcoholism ineligible for discretionary relief only by virtue of defining them, categorically, as morally bad people. And it is *that* means to the

end of denying benefits—stigmatizing a medical condition as immoral—that conveys the "negative attitudes," *Cleburne*, 473 U.S. at 448, and the "desire to harm a politically unpopular group," *Moreno*, 413 U.S. at 534, that implicate equal protection.

Indeed, the only reason to enact the "habitual drunkard" provision—and the only reason to maintain it while eliminating the health-based exclusion ground—was to tag those suffering from alcoholism with a badge of moral disapproval. "Such animus, however, is not a legitimate [governmental] interest." *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1067 (9th Cir. 2014). Even under rational basis review, courts "need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975).

C. The panel properly applied rational-basis review.

The government also objects that the panel "failed to apply the appropriately deferential rational-basis standard." Pet. 7, 9. But rational-basis review operates as real review, not the rubber stamp the

government suggests. That is why the Supreme Court alone has struck down 17 laws under rational-basis review since 1971.[2] "[E]ven in the ordinary equal protection case calling for the most deferential of standards," courts "insist on knowing the relation between the classification adopted and the object to be attained." *Romer*, 517 at 632. And that link "must find some footing in the realities of the subject addressed by the legislation," *Heller v. Doe*, 509 U.S. 312, 321 (1993).

The panel's analysis here tracked *City of Cleburne v. Cleburne Living Center* precisely. *Cleburne* evaluated a municipal ordinance requiring a special permit before the construction of a group home for the developmentally disabled. Applying rational-basis review, the Court concluded that the city's proffered justifications were either

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[2] *See United States v. Windsor*, 133 S. Ct. 2675 (2013); *Romer v. Evans*, 517 U.S. 620 (1996); *Quinn v. Millsap*, 491 U.S. 95 (1989); *Allegheny Pittsburgh Coal Co. v. Cty. Comm'n*, 488 U.S. 336 (1989); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985); *Hooper v. Bernalillo Cty. Assessor*, 472 U.S. 612 (1985); *Williams v. Vermont*, 472 U.S. 14 (1985); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869 (1985); *Plyler v. Doe*, 457 U.S. 202 (1982); *Zobel v. Williams*, 457 U.S. 55 (1982); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973); *James v. Strange*, 407 U.S. 128 (1972); *Jackson v. Indiana*, 406 U.S. 715 (1972); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Lindsey v. Normet*, 405 U.S. 56 (1972); *Reed v. Reed*, 404 U.S. 71 (1971).

rooted in "mere negative attitudes, or fear," or otherwise lacked any rational relationship to the distinction between developmentally disabled people and others. 473 U.S. at 448-49. Similarly, in *Arizona Dream Act Coalition*, this Court considered and rejected each of Arizona's "justifications for [its] policy" preventing certain noncitizens from obtaining driver's licenses. 757 F.3d at 1065-68. Here, as well, the panel appropriately considered and rejected the potential justifications offered by the government (and repeated in its petition). Slip op. 10-15.

Notwithstanding this precedent, the government contends that the panel improperly "placed a burden on the government to justify the existence of this statutory classification, rather than requiring Petitioner to establish that it lacks any conceivable rational basis." Pet. 8. The government misunderstands the nature of rational-basis review. Although the challenger bears the burden of negating possible rationales for a law—even after-the-fact rationalizations never considered by the legislature—rational-basis review does not change the ordinary rules of adversarial litigation that require parties to at least articulate the reasons for their positions.

Accordingly, even in the cases the government cites for their sweeping statements about the rational-basis standard, the Supreme Court did not base its decisions on wholesale conjecture. Rather, the Court relied on the rationales articulated by the government and examined the plausibility and underlying logic of those arguments. *See, e.g.*, *Heller*, 509 U.S. at 321-22 (reviewing evidence and concluding that "Kentucky's basic premise that mental retardation is easier to diagnose than is mental illness has a sufficient basis in fact"); *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 317-20 (1993) (holding that challengers had failed to show the "assumptions" behind "the FCC's explanation" for its policy were "irrational"). The panel did the same in this case. Only here, the government's rationales for morally condemning people with chronic alcoholism had no basis in logic or fact. The panel's decision was correct and need not be revisited.

CONCLUSION

The petition for rehearing en banc should be denied.

Respectfully submitted,

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August 10, 2016

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Circuit Rules 35-4(a) and 40-1(a), in that it contains 4,182 words.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 10, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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