No. ________

In The

Supreme Court of the United States

BAUDEL VELAZQUEZ-SOBERANES,

Petitioner,

v.

LORETTA E. LYNCH, ATTORNEY GENERAL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a conviction for Arizona endangerment – which requires no more than simple driving under the influence – may trigger removal from the United States as a crime involving moral turpitude ("CIMT").

Whether the Board of Immigration Appeals' definition of a non-fraudulent CIMT as "reprehensible conduct committed with some degree of scienter" renders the statute unconstitutionally void for vagueness.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Baudel Velazquez-Soberanes, respectfully petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit").

OPINIONS BELOW

The opinion of the Ninth Circuit denying Mr. Velazquez-Soberanes' petition for review of a decision from the Board of Immigration Appeals ("BIA") is an unpublished Memorandum Decision reported at *Velazquez-Soberanes v. Holder*, No. 11-73668, 2014 U.S. App. LEXIS 21274 (9th Cir. Nov. 6, 2014). *See* App. 1. A contemporaneously published opinion in *Leal v. Holder*, 771 F.3d 1140 (9th Cir. 2014) controlled the Ninth Circuit's analysis in Mr. Velazquez-Soberanes' case. The February 17, 2014 denial of Mr. Velazquez-Soberanes' petition for panel and en banc reconsideration is unreported. *See* App. 25. The December 1, 2011 opinion of the BIA dismissing Mr. Velazquez-Soberanes' appeal is unpublished and unreported. *See* App. 6. The July 28, 2011 opinion of the BIA remanding Mr. Velazquez-Soberanes' case back to the Immigration Judge ("IJ") is unpublished and unreported. *See* App. 10. The initial, written decision of the IJ, dated March 1, 2011, finding Mr. Velazquez-Soberanes removable is unpublished and unreported. *See* App. 13. The oral decision of the IJ, dated August 26, 2011, again

finding Mr. Velazquez-Soberanes removable is also unpublished and unreported. *See* App. 17.

JURISDICTION

The Ninth Circuit entered the original judgment on November 6, 2014, and denied rehearing en banc on February 17, 2015. *See* App. 1, 25. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

FEDERAL STATUTE

8 U.S.C. § 1182(a)(2)(A)(i). In general except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . .

is inadmissible.

ARIZONA STATUTE

Ariz. Rev. Stat. § 13-1201. Endangerment; classification

A. A person commits endangerment by recklessly endangering another person

with a substantial risk of imminent death or physical injury.

B. Endangerment involving a substantial risk of imminent death is a class 6 felony. In all other cases, it is a class 1 misdemeanor.

STATEMENT OF THE CASE

Baudel Velazquez-Soberanes is a native and citizen of Mexico. He came to the United States without inspection in 1992 and was admitted to the United States as a lawful permanent resident on February 24, 2004. *See* App. 1.

On September 10, 2010, the Department of Homeland Security ("DHS") placed Mr. Velazquez-Soberanes in removal proceedings with service of a Notice to Appear. The DHS alleged that on May 25, 2008, Mr. Velazquez-Soberanes was convicted in the Lake Havasu Municipal Court for the offense of domestic violence in violation of Ariz. Rev. Stat. § 13-1203(A)(1). Based upon this conviction, the DHS charged Mr. Velazquez-Soberanes with removability under 8 U.S.C. § 1227(a)(2)(A)(ii) as a person convicted of a crime of domestic violence, stalking, or child abuse after entry into the United States. *See* App. 1.

On October 6, 2010, during a master calendar hearing, the DHS filed an I-261, Additional Charges of Inadmissibility/Deportability. In lieu of the alleged conviction for domestic violence, the DHS alleged that

on May 25, 2008, Mr. Velazquez-Soberanes was convicted in the Lake Havasu Justice Court for the offense of assault/domestic violence, a class one misdemeanor, in violation of Ariz. Rev. Stat. § 13-1203(A)(1). The DHS also alleged three more convictions. The DHS alleged that on April 7, 2009, Mr. Velazquez-Soberanes was convicted in the Lake Havasu Justice Court for the offense of resisting arrest, a class one misdemeanor, in violation of Ariz. Rev. Stat. §§ 13-701, 13-702, 13-801, 13-2501, and 13-2508. The DHS also alleged that on September 19, 2008, Mr. Velazquez-Soberanes was convicted in the Lake Havasu Justice Court for the offense of attempted unlawful flight, a class one misdemeanor, in violation of Ariz. Rev. Stat. §§ 13-707, 13-801, 13-1001, and 28-622.01. Finally, the DHS alleged that on May 28, 2004, Mr. Velazquez-Soberanes was convicted in the La Paz County Superior Court for the offense of endangerment, in violation of Ariz. Rev. Stat. § 13-1201(A)(1). *See* App. 13.

Based on these allegations, the DHS charged Mr. Velazquez-Soberanes with removability under 8 U.S.C. § 1227(a)(2)(A)(ii) as a person convicted of two or more crimes involving moral turpitude after entry into the United States. Based on the 2004 endangerment conviction, the DHS also charged Mr. Velazquez-Soberanes with removability pursuant to 8 U.S.C. § 1227(a)(2)(A)(i) as a person convicted of a CIMT within five years of admission to the United States. *See* App. 13.

During a hearing on November 15, 2010, the IJ sustained most of the DHS's allegations as to Mr. Velazquez-Soberanes' convictions, but reset the matter to allow Mr. Velazquez-Soberanes to demonstrate his eligibility for relief sought in the form of readjustment of status with a waiver under INA § 212(h). On March 1, 2011, the IJ found that Mr. Velazquez-Soberanes was not eligible for the relief and subsequently ordered him removed to Mexico as a person convicted of a crime of domestic violence, a CIMT within five years of admission, and two or more CIMTs after entry. *See* App. 13.

Mr. Velazquez-Soberanes subsequently filed a timely appeal to the Board of Immigration Appeals. In a July 28, 2011 unpublished opinion, the BIA remanded the record back to the IJ with instructions to enter a new decision in which the IJ's findings of facts and legal conclusions are more fully explained. *See* App. 10.

On August 26, 2011, the IJ dictated a new oral decision. *See* App. 17. As instructed by the BIA, the IJ stated for the record that he was relying heavily upon the CIMT analysis set forth in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), finding the convictions for felony endangerment, resisting arrest, and unlawful flight to all be CIMTs, thus resulting in two or more CIMTs under 8 U.S.C. § 1227(a)(2)(A)(ii). Mr. Velazquez-Soberanes was again ordered removed. *See* App. 17.

Mr. Velazquez-Soberanes timely appealed the IJ's August 26, 2011 decision to the BIA. He conceded that the crime of resisting arrest qualified as a CIMT, but challenged the designation of his convictions for unlawful flight and endangerment as CIMTs. Since only one additional CIMT would render Mr. Velazquez-Soberanes removable under INA § 237(a)(2)(A)(ii), the BIA confined its analysis to the offense of endangerment only, declining to reach unlawful flight. Resting on *Silva-Trevino*, the BIA found that reckless mens rea was sufficient to find that the offense of endangerment categorically qualified as a CIMT. The BIA dismissed Mr. Velazquez-Soberanes' appeal, affirming that Mr. Velazquez-Soberanes had been convicted of two CIMTs under 8 U.S.C. § 1227(a)(2)(A)(ii). *See* App. 6.

Mr. Velazquez-Soberanes then filed a timely petition for review to the Ninth Circuit. The primary issue raised in his petition was whether Mr. Velazquez-Soberanes' conviction for endangerment under Ariz. Rev. Stat. § 28-1381(A)(1) qualifies as a CIMT. In an unpublished memorandum decision, the Ninth Circuit denied Mr. Velazquez-Soberanes' petition for review relying explicitly on *Leal v. Holder*, 771 F.3d 1140 (9th Cir. 2014), a contemporaneously published opinion in which the Court of Appeals deferred to the BIA's finding that a conviction for violating Arizona's endangerment statute was categorically a CIMT. *See* App. 1. Like the BIA, the Ninth Circuit in *Leal* did not acknowledge that simple driving under the influence was not a CIMT. Instead, the Ninth Circuit held

that Mr. Leal could not show a realistic probability that the statute involved non-turpitudinous conduct by pointing to evidence of his own conviction because "the simple fact remains that in pleading guilty to felony endangerment, Leal necessarily admitted to the elements of the crime," which categorically involved moral turpitude. *Id.* at 1148. In denying Mr. Velazquez-Soberanes' petition, the Ninth Circuit referred to *Leal* in concluding "that voluntary intoxication to the point of unawareness of risk could serve as a proxy for traditional recklessness to find felony endangerment is a CIMT." *See* App. 1.

Mr. Velazquez-Soberanes filed a timely petition for panel and en banc reconsideration, as did Mr. Leal. Both Petitioners renewed their arguments from below. Additionally, in support of Mr. Leal's petition for rehearing, the Arizona Attorneys for Criminal Justice and the Pima County Public Defender's Office filed an amicus brief pointing out that Arizona endangerment is the most common plea for defendants charged with DUI who lack a valid driver's license. The amicus brief also reported that DUI in Arizona is a strict liability offense and that 77% of all endangerment convictions involved simple driving under the influence. The Ninth Circuit summarily denied both Mr. Velazquez-Soberanes', and Mr. Leal's, petitions for rehearing; this petition for certiorari followed. *See* App. 25.

SUMMARY OF THE ARGUMENT

Similar to Mr. Leal's proceedings, at every stage of Mr. Velazquez-Soberanes' proceedings, the agency and the Ninth Circuit refused to admit that Arizona's endangerment statute may be violated by simple driving under the influence, which the agency has squarely held does not involve moral turpitude. By doing so, the agency and the Ninth Circuit flouted this Court's rule that a state offense is not a categorical match for a generic federal definition if a person can show a "realistic probability" that the state offense reaches conduct that does not fall within the generic definition. Even assuming that the BIA intended to reverse decades of precedent holding that simple DUI is not a CIMT, the agency's decision is not a reasonable interpretation of the statute under *Chevron* step two because it holds that mere voluntary intoxication can satisfy the stringent mens rea requirement and conflates turpitudinous conduct with mere illegal conduct. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

In the alternative, the Court should reach the question left unanswered in *Jordan v. De George*, 341 U.S. 223 (1951), by considering whether the statute is unconstitutionally void for vagueness as applied to nonfraudulent CIMTs. The agency's definition of a CIMT as "reprehensible conduct" committed with "some degree of scienter" contains no meaningful mens rea or actus reus and does not give courts a reliable framework upon which to review the agency's decisions. Given the long historical acceptance that simple DUI is not

a CIMT, neither Mr. Velazquez-Soberanes, nor Mr. Leal, had sufficient warning that their conduct would be found a CIMT and have thus met the void-for-vagueness test. Concerns of unconstitutional vagueness are particularly acute in light of this Court's recent holding that criminal defense attorneys must advise their clients of the immigration consequences of a conviction – a task made nearly impossible by an ambiguous and elusive CIMT definition. For these reasons, the Court should grant certiorari.

REASONS FOR GRANTING THE WRIT

I.

*MATTER OF LEAL** CONFLICTS WITH DECADES OF PRECEDENT HOLDING THAT DRIVING UNDER THE INFLUENCE IS NOT A CRIME INVOLVING MORAL TURPITUDE.

A. The BIA and Circuit Courts Have Long Held That Driving Under the Influence Is Not a CIMT.

Courts have long described the phrase "crime involving moral turpitude" as being one of the most nebulous and undefined terms in federal law. *See Padilla v. Kentucky*, 559 U.S. 356, 378 (2010) (Alito, J., concurring) ("[T]he term 'moral turpitude' evades precise definition.") (quoting the ABA Guidebook § 4.65, at 130); *Matter of Lopez-Meza*, 22 I&N Dec.

* *Matter of Leal*, 26 I&N Dec. 20 (BIA 2012).

1188, 1191 (BIA 1999) (noting that while the term "CIMT" has been subject to interpretation for over a century, "its precise meaning and scope have never been fully settled"); *Marmolejo-Campos v. Holder*, 558 F.3d 903, 909 (9th Cir. 2009) (en banc) (stating that the term "falls well short of clarity"). Yet since Congress first used the term over a century ago, this Court has only considered the meaning of the term once, in 1951. *See Jordan v. De George*, 341 U.S. 223 (1951). There, a frustrated dissenter complained that "[i]f we go to the dictionaries, the last resort of the baffled judge, we learn little except that the expression is redundant, for turpitude alone means moral wickedness or depravity and moral turpitude seems to mean little more than morally immoral." *Id.* at 234 (Jackson, J., dissenting).

But while the term's exact meaning remains unclear, the BIA and federal courts have always agreed on one thing – that conduct amounting to simple driving under the influence is *not* a CIMT. In *Matter of Lopez-Meza*, an en banc BIA panel attributed the lack of case law addressing this question to the "long historical acceptance that a simple DUI offense does not inherently involve moral turpitude." 22 I&N Dec. at 1194. The BIA found this to be so because driving under the influence is ordinarily "a regulatory offense that involves no culpable mental state requirement, such as intent or knowledge" and thus is "malum in se" rather than "malum prohibitum." *Id.* at 1193, 1194. Thus, the BIA concluded that "the offense of driving under the influence under Arizona law does not, without more, reflect conduct that is necessarily morally reprehensible or that indicates

such a level of depravity or baseness that it involves moral turpitude." *Id*. at 1194.

No circuit court has ever held to the contrary. In *Knapik v. Ashcroft,* the Third Circuit relied on *Lopez-Meza* to state that drunk driving "almost certainly does not involve moral turpitude." 384 F.3d 84, 90 (3d Cir. 2004). *See also Efagene v. Holder*, 642 F.3d 918, 924 (10th Cir. 2011) (citing *Lopez-Meza* to state that drunk driving is not a CIMT because "it lacks any mens rea requirement"); *Jaghoori v. Holder*, 772 F.3d 764, 768 (4th Cir. 2014) (finding that a petitioner's convictions for driving under the influence did not render him removable); *Jaghoori v. Holder*, 772 F.3d 764, 768 (4th Cir. 2014) (citing *Lopez-Meza* with approval); *Keungne v. U.S. Atty. Gen.*, 561 F.3d 1281, 1285 (11th Cir. 2009) (citing *Lopez-Meza* with approval). Prior to its decision in this case, the Ninth Circuit reached the same conclusion in an en banc decision, pointing to *Lopez-Meza* and observing that "[t]he BIA has never held that a simple DUI offense is a crime involving moral turpitude." *Marmolejo-Campos v. Holder*, 558 F.3d 903, 913 (9th Cir. 2009) (en banc). Thus, until recently, the agency and every circuit court to have expressly considered the issue has unanimously concluded that driving under the influence is not a CIMT.

B. Although the Majority of Arizona Endangerment Offenses – Including Mr. Leal's – Involve No More Than Simple DUI, *Leal* Ignored This Court's "Realistic Probability" Test to Find Endangerment a Categorical CIMT.

Despite this historical unanimity, the BIA and the Ninth Circuit abandoned basic tenets of the categorical approach to hold in *Leal* that driving under the influence is a CIMT. To determine whether a state offense is broader than the generic federal definition of a ground of removability, federal courts employ the familiar "categorical approach." *See Taylor v. United States*, 495 U.S. 575 (1990). Under this approach, a court must presume that a state offense "rested upon nothing more than the least of the acts criminalized" and then evaluate whether such acts fall outside of the generic definition set forth in the Immigration and Nationality Act. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1680 (2013) (quotations, citation, and alterations omitted).

But to identify the minimum conduct necessary to sustain a state conviction, this Court requires the petitioner to show a "realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). Under this "realistic probability" test, a petitioner must "point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for

which he argues." *Id*. If he cannot do so, then only a "theoretical possibility" exists that the statute is overbroad. *Id.* But if he *can* point to real-world examples showing that the state statute reaches non-generic conduct, the court may not assume that a state offense is a categorical match for the generic federal offense. *See, e.g., Moncrieffe*, 133 S. Ct. at 1693 (explaining that a state firearms statute that included antique firearms is only overbroad if the petitioner demonstrates that "the State actually prosecutes the relevant offense in cases involving antique firearms").

In *Leal*, Mr. Leal satisfied the "realistic probability" test several times over. First, he showed that his own offense involved nothing more than drunk driving by pointing to the presentence report, which stated that "[t]he defendant was weaving and traveling 20 mph under the speed limit," that he "admitted to drinking two beers," and that he had a blood alcohol concentration of .170/.173. Moreover, the factual basis set by Mr. Leal's defense attorney stated:

> On May 14, 2006 in Maricopa County, my client Edgar Leal, consumed alcoholic beverages that impaired his ability to operate a vehicle to the slightest degree and he chose to get into a vehicle and drive. That satisfies Count 2. By committing driving while under the influence of intoxicating liquor, he then placed any motorists or pedestrians in risk of serious physical injury. And that should

> satisfy Count 1 which was also on May 14, 2006 in Maricopa County.

Thus, Mr. Leal "point[ed] to his own case" to show that Arizona interprets the element of a "substantial, actual risk of imminent death" to be the same risk that occurs whenever a person is "driving while under the influence of intoxicating liquor" – a risk that has *never* been found to elevate a DUI to the level of a CIMT. *See Lopez-Meza*, 22 I&N Dec. at 1194.

Additionally, Mr. Leal and Mr. Velazquez-Soberanes both showed that Arizona frequently applies its endangerment statute to simple driving under the influence. Mr. Leal, and Mr. Velazquez-Soberanes, pointed to authority stating that Arizona endangerment is "the most common plea offered as an alternative to a first time non-injury aggravated DUI." *See* James Nesci, *Arizona DUI Defense: The Law and Practice*, p.23 (3rd ed. 2012).[1] Even more, Mr. Leal specifically solicited an amicus brief from the Arizona affiliate of the National Association of Criminal Defense Lawyers and an Arizona public defender's office showing that approximately *77% of all endangerment convictions* involve conduct that amounts to no more than driving under the influence.

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[1] Mr. Leal as well as Mr. Velazquez-Soberanes also cited case law showing Arizona endangerment had been applied to other non-turpitudinous offenses, such as juvenile adjudications where minors threw water balloons at passing vehicles. *See* AOB 29 (citing *Matter of Navajo County Juvenile Delinquency Action No. 89-J-099*, 793 P.2d 146 (Ariz. Ct. App. 1990)).

Thus, by "point[ing] to his own case [and] other cases," Mr. Leal established – not only a "realistic probability" that Arizona would apply its endangerment statute to conduct that has never been held a CIMT – but a near certainty that it does so in the *majority* of cases."

In both cases, the Ninth Circuit inexplicably ignored this. In response to Mr. Leal's reliance on his own case and the cases of others, it simply stated: "Leal necessarily admitted to the elements of the crime, including the creation of a substantial, actual risk of imminent death to another person" and deferred to the BIA's finding that the creation of such a risk involved moral turpitude. *Leal*, 771 F.3d at 1148. But as this Court has repeatedly stated, the process of determining the elements of a state statute requires courts to look – not only to an offense's statutory language – but also to state decisions *interpreting the scope* of that statute. *See Johnson v. United States*, 559 U.S. 133, 138 (2010) (finding that it is "bound by" state court interpretations of a state statute). Thus, even if a statute's language, on its face, suggests that its elements involve moral turpitude, a court may not ignore a petitioner's showing that state courts have *defined* those elements to reach conduct that falls outside the generic federal definition.

By ignoring the fact that Arizona regularly applies its endangerment statute to simple driving under the influence, *Leal* effectively abrogates this Court's "realistic probability" test and its instruction

that courts applying the categorical approach must look to the "least of the acts criminalized." *Moncrieffe*, 133 S. Ct. at 1693. If federal courts are routinely permitted to ignore state courts' interpretations of their own statutes, it will create competing federal and state interpretations of the same statute, trigger widespread judicial confusion, and directly violate this Court's admonishment that federal courts are "bound by" state court decisions. *Johnson*, 559 U.S. at 138. On this basis alone, a grant of certiorari is warranted.

C. *Leal* Is Not Reasonable and Does Not Merit Deference Under *Chevron* Step Two.

Assuming that *Leal* correctly understood the broad scope of the Arizona endangerment statute and simply intended to overturn decades of precedent holding that driving under the influence is not a CIMT, this decision was not reasonable. The Court's review of an agency's construction of the statute is governed by the familiar two-step process in which the Court must first determine whether Congress has "unambiguously" spoken to the precise question at issue. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). If it has, then courts must abide by the plain language of the statute. *See id*. But if the statute is silent or ambiguous, the question is whether "the agency's answer is based on a permissible construction of the statute." *Id.* at 843. Thus, even assuming that the term "crime involving moral turpitude" would be deemed

ambiguous, the proper analysis is whether *Leal*'s finding that drunk driving constitutes a CIMT is a "permissible construction of the statute."

At a minimum, *Leal* is not reasonable because the BIA provided no explanation whatsoever for reversing decades of precedent holding that driving under the influence is not a CIMT. *See Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.,* 545 U.S. 967, 981 (2005) (stating that "[u]nexplained inconsistency" can be a reason for finding an agency interpretation "arbitrary and capricious"). The BIA nowhere acknowledged that Mr. Leal's conviction involved simple driving under the influence and that by finding it categorically a CIMT, the BIA was reversing its own en banc decision in *Lopez-Meza* and the "long historical acceptance that a simple DUI offense does not inherently involve moral turpitude." 22 I&N Dec. at 1194. While the Court has cautioned that mere change is not per se "invalidating," *Brand X,* 545 U.S. at 981, it has nevertheless required the BIA to "provide reasoned explanation for its action" and exercise its discretion in "some rational way." *Judulang v. Holder*, 132 S. Ct. 476, 484, 485 (2011) (quotations and citation omitted). But as in *Judulang,* "[t]he BIA has flunked that test here." *Id*. at 484.

Even if the BIA *had* explained its abrupt shift, the conclusion that driving under the influence involves moral turpitude is not a reasonable interpretation of the statute. In an oft-cited administrative

case from the 1940s, the agency defined a CIMT as follows:

> A crime involving moral turpitude may be either a felony or misdemeanor, existing at common law or created by statute, and is an act or omission which is malum in se and not merely malum prohibitum; which is actuated by malice or committed with knowledge and intention and not done innocently or (without advertence) or reflection; which is so far contrary to the moral law, as interpreted by the general moral sense of the community, that the offender is brought to public disgrace, is no longer generally respected, or is deprived of social recognition by good living persons; but which is not the outcome merely of natural passion, of animal spirits, of infirmity of temper, of weakness of character, of mistaken principles, unaccompanied by a vicious motive or a corrupt mind.

Jordan, 341 U.S. at 237 n.9 (Jackson, J., dissenting).

A comparison of Arizona endangerment to this definition shows how far afield the agency has drifted in the last seventy years, as endangerment satisfies *none* of these clauses. First, this definition requires an offense that is malum in se – i.e., an offense embodying "a vicious motive or a corrupt mind." But under Arizona law, a person may commit endangerment with either (1) a conscious disregard of a substantial and unjustifiable risk, *or* (2) unawareness of such risk *solely by reason of voluntary intoxication*. *See* Ariz. Rev. Stat. § 105(9)(c) (defining "recklessness"

for purposes of Arizona law). Even assuming that a "conscious disregard" (which is generally equated with recklessness) provides the intent necessary for a CIMT, *Leal* recognized that even this minimal mens rea was not necessary because excessive voluntary intoxication could "serve as a proxy for conscious disregard of the risk itself." 771 F.3d at 1148. Practically speaking this means that a person could be permanently removed from the United States – not because he consciously disregarded a "substantial risk of imminent death or physical injury" – but because he became intoxicated. Thus, *Leal* holds that a person has a "vicious motive or a corrupt mind" whenever he or she intends to engage in the perfectly legal activity of being under the influence of alcohol.

Second, the agency's traditional CIMT definition envisioned an offense that is "so far contrary to the moral law . . . that the offender is brought to public disgrace, is no longer generally respected, or is deprived of social recognition by good living persons." *Jordan*, 341 U.S. at 237 n.9. While the serious consequences of drunk driving cannot be overlooked, one would be hard-pressed to characterize it as an offense after which a person's standing in society could never recover. This is particularly true with Arizona endangerment, which, unlike some DUI statutes, contains no aggravating factor of serious bodily injury or death. *Compare Leocal v. Ashcroft*, 543 U.S. 1, 3 (2004) (considering whether a Florida DUI statute containing an element of serious bodily injury was a "crime of violence"). Indeed, Arizona case law is clear

that endangerment "does not require that the person endangered be actually physically injured or even be aware that they were endangered." *State v. Villegas-Rojas*, 296 P.3d 981, 983 (Ariz. Ct. App. 2012). As such, it would be an exaggeration to say that a person who is caught driving home after having one too many glasses of wine with dinner has been "brought to public disgrace" or cast out of society, as the CIMT definition requires.

By straying so far from the well-established definition of moral turpitude, *Leal* evidences the BIA's recent tendency to conflate "turpitudinous" conduct with mere "unlawful" conduct. In the last ten years, the BIA has taken up the issue of moral turpitude in twenty-one precedential decisions and found the state offense to be categorically a CIMT in nineteen of them.[2] The Ninth Circuit itself has criticized the BIA

[2] The offenses that the BIA has held involve moral turpitude in the last ten years include reckless endangerment with risk of serious bodily injury (*Matter of O.A. Hernandez*, 26 I&N Dec. 464 (BIA 2015)); malicious vandalism with gang enhancement (*Matter of Hernandez*, 26 I&N Dec. 397 (BIA 2014)); false statement to government official (*Matter of Pinzon*, 26 I&N Dec. 189 (BIA 2013)); sponsoring or exhibiting an animal in an animal fighting venture (*Matter of Ortega-Lopez*, 26 I&N Dec. 99 (BIA 2013)); indecent exposure (*Matter of Cortes Medina,* 26 I&N Dec. 79 (BIA 2013)); reckless endangerment with a risk of death (*Matter of Leal*, 26 I&N Dec. 20 (BIA 2012)); accessory after the fact (*Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011)); unlawful flight (*Matter of Ruiz-Lopez*, 25 I&N Dec. 551 (BIA 2011)); any intentional sexual conduct by an adult with a child under 16 (*Matter of Guevara Alfaro*, 25 I&N Dec. 417 (BIA 2011)); welfare fraud (*Matter of Cortez*, 25 I&N Dec. 301 (BIA 2010)); burglary

(Continued on following page)

for "only explain[ing] why we choose to criminalize [an offense] in the first place," not whether it is "worse than any *other* crime – whether it is more than serious, or whether it offends the most fundamental values of society." *Robles-Urrea v. Holder*, 678 F.3d 702, 710 (9th Cir. 2012) (quotations, alterations, and citation omitted). *See also Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1075 (9th Cir. 2007) (Reinhardt, J., concurring for the majority) (stating that if the Court does not "adhere to our precedents limiting the scope of [crime involving moral turpitude], the category will sooner or later come to mean simply 'crimes,'" which would "not only would dilute our language, it would also contravene Congress's intent"). In short, the BIA increasingly assumes that *illegal* acts must be *turpitudinous* acts.

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of an occupied dwelling (*Matter of Louissaint*, 24 I&N Dec. 754 (BIA 2009)); intentional sexual contact with a person the defendant knew or should have known was a child (*Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)); intentional assault with injury (*Matter of Solon*, 24 I&N Dec. 239 (BIA 2007)); failure to register as a sex offender (*Matter of Tobar-Lobo*, 24 I&N Dec. 143 (BIA 2007)); trafficking in counterfeit goods (*Matter of Kochlani*, 24 I&N Dec. 128 (BIA 2007)); money laundering (*Matter of Tejwani*, 24 I&N Dec. 97 (BIA 2007)); retail theft and unsworn falsification (*Matter of Jurado*, 24 I&N Dec. 29 (BIA 2006)); misprision of a felony (*Matter of Robles*, 24 I&N Dec. 22 (BIA 2006)); and possession of child pornography (*Matter of Olquin*, 23 I&N Dec. 896 (BIA 2006)). The two cases finding an offense *not* categorically a CIMT involved domestic assault and battery (*Matter of Sejas*, 24 I&N Dec. 236 (BIA 2007)) and domestic battery (*Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006)).

This is precisely what the BIA did here. In explaining how voluntary intoxication could provide the necessary scienter for a CIMT, the BIA explained only why recklessness resulting from voluntary intoxication renders one criminally culpable – not why it provides the necessary "vicious motive or corrupt mind" to be a CIMT. *See Leal*, 26 I&N Dec. at 24 (stating that "one who has voluntarily impaired his own faculties should be responsible for the consequences") (quotations and citation omitted). But by doing so, *Leal* no longer reserves the term "moral turpitude" for offenses involving "rather grave acts of baseness or depravity such as murder, rape, and incest." *Navarro-Lopez*, 503 F.3d at 1074 (internal quotations and citation omitted). Instead, *Leal* lumps within the CIMT definition offenses that – not only cause no harm or injury – but involve no more than an intent to become legally intoxicated. Because Congress could not have intended to impose the grave consequences of deportation and strip long-term immigrants of "all that makes life worth living," *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922), on the basis of such conduct, the Court should grant certiorari to consider whether *Leal* is a permissible construction of the statute under *Chevron* step two.

II.

THE BIA'S DEFINITION OF A NON-FRAUDULENT CIMT AS "REPREHENSIBLE CONDUCT AND SOME DEGREE OF SCIENTER" RENDERS THE STATUTE UNCONSTITUTIONALLY VOID FOR VAGUENESS.

To satisfy due process, a statute must describe an offense "'with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Skilling v. United States*, 561 U.S. 358, 402-03 (2010) (quoting *Kolender v. Lawson,* 461 U.S. 352, 357 (1983)). While the void-for-vagueness doctrine has typically been applied to statutes, the doctrine also extends to judicial interpretations and agency rulemaking. *See Rogers v. Tennessee*, 532 U.S. 451, 457 (2001) (stating that the doctrine can apply to "an unforeseeable and retroactive judicial expansion of statutory language"); *Hoffman Estates v. Flipside, Hoffman Estates,* 455 U.S. 489, 503 (1982) (reviewing a business regulation for vagueness). Thus, both statutes and the agency decisions interpreting them may be found void for vagueness.

In this Court's only decision grappling with the definition of "moral turpitude," it considered whether a conviction for conspiracy to defraud the United States of taxes on distilled spirits was a CIMT. *See Jordan*, 341 U.S. at 223-24. Below, the court of appeals had held that, for purposes of the Immigration Act, the phrase "crime involving moral turpitude" was

intended to include "only crimes of violence, or crimes which are commonly thought of as involving baseness, vileness or depravity." *Id*. at 226. This Court disagreed, noting that "[t]he phrase 'crime involving moral turpitude' has without exception been construed to embrace fraudulent conduct." *Id*. at 232.

Although the question of unconstitutional vagueness "was not raised by the parties nor argued before this Court," the Court nevertheless confronted it, applying the test of whether the statutory language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Id*. at 229, 231-32. The Court concluded that "[w]hatever else the phrase 'crime involving moral turpitude' may mean in peripheral cases," the petitioner's case involved fraud – "an ingredient [that] ha[s] always been regarded as involving moral turpitude." *Id*. at 232. As such, the petitioner had "sufficiently definite warning" that his offense involved moral turpitude. *Id*. at 231-32. Importantly, the Court did *not* go on to consider whether the statute would be unconstitutionally vague as applied to non-fraudulent crimes – i.e., those involving "baseness, vileness or depravity." *Id*. at 232.

Justice Jackson, Justice Black, and Justice Frankfurter vigorously dissented, characterizing "moral turpitude" as "an undefined and undefinable standard." *Id*. at 235 (Jackson, J., dissenting). Noting that most decisions seem to rest "upon the moral reactions of particular judges to particular offenses,"

the dissent questioned, "[h]ow many aliens have been deported who would not have been had some other judge heard their cases," lamenting that this was not "government by law." *Id*. at 239-40. Recognizing deportation as a "savage penalty," the dissent stated that due process "requires standards for imposing it as definite and certain as those for conviction of crime." *Id*. at 243. While the dissent expressed its "extreme reluctance to adjudge a congressional Act unconstitutional," it explained that it did not question Congress' authority to define deportable conduct – only the power of the agency and courts to order deportation "until Congress has given an intelligible definition of deportable conduct." *Id*. at 245.

In the sixty-four years since *Jordan,* this Court has never returned to consider whether the statute is unconstitutionally vague as applied to non-fraudulent offenses involving "baseness, vileness or depravity" – a consideration that is long overdue. In 2008, the Attorney General sought to bring clarity to this term by defining it as "reprehensible conduct and some level of scienter." *Silva-Trevino,* 24 I&N at 706. While the Attorney General recently vacated *Silva-Trevino* on other grounds (relating to whether adjudicators could consider evidence outside of the record of conviction), he expressly stated that "[n]othing in this order is intended to affect Board determinations that an offense entails or does not entail 'reprehensible conduct and some form of scienter.' " *Matter of Silva-Trevino*, 26 I&N Dec. 550, 554 n.3 (A.G. 2015). The Attorney General noted that the BIA had applied this

standard in four precedent opinions – including the very decision Mr. Leal challenges here – and declined to withdraw it. *Id.*

But this definition of moral turpitude as "reprehensible conduct and some level of scienter" has only served to heighten the confusion. Under this definition, an offense need not have as an element the "vicious motive" historically associated with the term – indeed, it need have no motive or intent at all, as the definition requires only recklessness. And even assuming that the "conscious disregard" associated with recklessness could be considered a "vicious motive," *Leal* demonstrates that a defendant need not have *any* level of scienter if he was intoxicated. Moreover, it would be difficult to imagine a *more* broadly-drawn actus reus than "reprehensible conduct," which fails to identify any specific act and could be applied to anything from failure to pay a parking ticket to murder, depending on "the moral reactions of particular judges." *Jordan*, 341 U.S. at 239 (Jackson, J., dissenting). Thus, this definition strips non-fraudulent CIMTs of any meaningful mens rea *or* actus reus – a combination that cannot survive a void-for-vagueness challenge.

Here, Mr. Velazquez-Soberanes, just like Mr. Leal, can easily satisfy the void-for-vagueness test because neither the statute nor the BIA's definition of it conveys "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Id.* at 231-32. Turning again to *Leal*, when Mr. Leal had several beers at his

cousin's house and decided to drive home, he could not have known that this would render him removable given the "long historical acceptance that a simple DUI offense does not inherently involve moral turpitude." *Lopez-Meza*, 22 I&N Dec. at 1194. The analysis is no different for Mr. Velazquez-Soberanes, even though the conduct underlying his criminal charges are based on non-DUI conduct. *See, e.g., Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159, 1166 (9th Cir. 2006) (analyzing Arizona's definition of recklessness and holding that, without the element of willfulness, an assault conviction could not categorically be considered a CIMT). Because the term "crime involving moral turpitude" therefore did not provide Mr. Velazquez-Soberanes, nor Mr. Leal, "sufficiently definite warning as to the proscribed conduct," this Court should grant certiorari to consider whether the statute is void for vagueness.

The Court recently underscored the importance of these concerns in *Padilla v. Kentucky*, acknowledging that "deportation is an integral part – indeed, sometimes the most important part – of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." 559 U.S. at 364. Because of this, the Court held that the Sixth Amendment guarantee of effective assistance of counsel requires defense counsel to provide affirmative, competent advice to a noncitizen defendant regarding the immigration consequences of a guilty plea. *Id*. at 369. But when Congress and the agency have provided no meaningful definition of the term

"crime involving moral turpitude," defense attorneys lack the ability to accurately advise their clients about the immigration consequences of a particular offense, thereby leaving themselves vulnerable to ineffective assistance claims and their clients unable to make knowing and intelligent pleas. Accordingly, the vagueness of "moral turpitude" carries repercussions for the entire criminal justice system, and the Court should grant certiorari to address the question left unanswered in *Jordan*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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<u>*Velazquez-Soberanes* v. Holder</u>

United States Court of Appeals for the Ninth Circuit

October 7, 2014; November 6, 2014, Filed

No. 11-73668

Reporter

589 Fed. Appx. 839; 2014 U.S. App. LEXIS 21274

BAUDEL *VELAZQUEZ-SOBERANES*, Petitioner, v. ERIC H. HOLDER, Jr., Attorney General, Respondent.

Notice: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: On Petition for Review of an Order of the Board of Immigration Appeals. Agency No. A079-220-140.

Disposition: PETITION FOR REVIEW DENIED.

Counsel: For Baudel *Velazquez-Soberanes*, Petitioner: John Martin Pope, Benjamin Wiesinger, Pope & Associates, PC, Phoenix, AZ.

For ERIC H. HOLDER, Jr., Attorney General, Respondent: Gregory Darrell Mack, Esquire, Senior Litigation Counsel, Oil, Carlton Frederick Sheffield, U.S. Department of Justice, Washington, DC; Chief Counsel ICE, Office of The Chief Counsel, Department of Homeland Security, San Francisco, CA.

Judges: Before: D.W. NELSON, SILVERMAN, and M. SMITH, Circuit Judges.

Opinion

MEMORANDUM*

Baudel *Velazquez-Soberanes* ("*Velazquez-Soberanes*") petitions for review of the Board of Immigration Appeals' ("BIA") dismissal of his appeal of a final order of removal. The BIA held that *Velazquez-Soberanes* had been convicted of two or more crimes involving moral turpitude ("CIMTs") and was thus removable. We have jurisdiction pursuant to 8 U.S.C. § 1252, and we deny the petition.

Velazquez-Soberanes is a native and citizen of Mexico, born in Guasave, Mexico in 1977, who entered the U.S. without inspection in 1992. *Velazquez-Soberanes* was granted status as a lawful permanent resident on February 24, 2004. On September 10, 2010, the Department of Homeland Security ("DHS") served *Velazquez-Soberanes* with a Notice to Appear, charging him with removability under 8 U.S.C. § 1227(a)(2)(E)(i) as a person convicted of a crime of domestic violence, stalking, or child abuse after entry into the U.S. On October 6, 2010, the DHS filed Additional Charges of Inadmissability/Deportability, charging *Velazquez-Soberanes* with removability under

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

8 U.S.C. § 1227(a)(2)(A)(ii) as a person convicted of two or more CIMTs after entry into the U.S. and under 8 U.S.C. 1227(a)(2)(A)(I) as a person convicted of a CIMT within five years of admission to the U.S.

At a hearing on October 6, 2010, *Velazquez-Soberanes* admitted he was a native and citizen of Mexico but denied removability. On November 15, 2010, the Immigration Judge ("IJ") sustained most of DHS's allegations as to *Velazquez-Soberanes'*s convictions and subsequently issued an order of removal against *Velazquez-Soberanes* as a person convicted of a crime of domestic violence, a CIMT within five years of admission, and two or more CIMTs after entry. *Velazquez-Soberanes* appealed to the BIA, which remanded the case to the IJ to explain his reasoning properly.

On remand, the IJ again issued an order of removal against *Velazquez-Soberanes* based on the same grounds. Of relevance here, the IJ found the convictions for felony endangerment, resisting arrest, and unlawful flight all to be CIMTs, thus resulting in two or more CIMTs under 8 U.S.C. § 1227(a)(2)(A)(ii). *Velazquez-Soberanes* timely appealed the decision again to the BIA, conceding his conviction for resisting arrest was a CIMT but challenging the designation of his convictions for unlawful flight and endangerment as CIMTs. The BIA dismissed the appeal, holding felony endangerment in Arizona to be categorically a CIMT and declining to reach the issue of whether unlawful flight is a CIMT. Additionally, the BIA's decision was limited to affirming that

Velazquez-Soberanes had been convicted of two CIMTs under 8 U.S.C. § 1227(a)(2)(A)(ii).

Where the BIA's decision is unpublished and not directly controlled by a published opinion, as is the case here, we may afford the BIA's decision deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161, 89 L Ed. 124 (1944), depending in part on its persuasive value. *Marmolejo-Campos v. Holder*, 558 F.3d 903, 909 (9th Cir. 2009) (en banc). We hold that the BIA's decision here is persuasive and warrants Skidmore deference. In an opinion filed contemporaneous with this memorandum, we held that the BIA reasonably interpreted the INA to include felony endangerment in Arizona as a CIMT and thus deferred to the BIA's decision in that case under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). *Leal v. Holder*, 771 F.3d 1140,2014 U.S. App. LEXIS 21193 (9th Cir. [Date], 2014). Our reasoning in that case is equally applicable here.

As we have previously explained, CIMTs may be premised on reckless conduct where there is "serious resulting harm." *Ceron v. Holder*, 747 F.3d 773, 783 (9th Cir. 2014) (en banc) (quoting *In re Solon*, 24 I. & N. Dec. 239, 242 (BIA 2007)). Recklessly placing another person in substantial, actual risk of imminent death, as is required for felony endangerment, *State v. Carreon*, 210 Ariz. 54, 107 P.3d 900, 909 (Ariz. 2005) (en banc), is "base, vile, and depraved conduct" that qualifies this crime as a CIMT, *Nunez v. Holder*,

594 F.3d 1124, 1131 (9th Cir. 2010). Because a required element of felony endangerment is substantial, actual risk of imminent death to another person, there is no "realistic possibility" that the statute will be applied to non-turpitudinous conduct. *See Turijan v. Holder*, 744 F.3d 617, 620 (9th Cir. 2014). Although not addressed by the BIA in this case, we held in *Leal* that the BIA reasonably interpreted the INA to conclude that voluntary intoxication to the point of unawareness of risk could serve as a proxy for traditional recklessness to find felony endangerment is a CIMT. We thus see no reason to remand to the BIA for consideration of that issue. The BIA' s interpretation of the INA is persuasive.

PETITION FOR REVIEW DENIED.

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

Decision of the Board of
Immigration Appeals

Falls Church, Virginia 22041

File: A079 220 140 – Florence, AZ Date: DEC -1 2011

In re: BAUDEL *VELAZQUEZ*-SOBERANES a.k.a.
Baudel Velasquez-Soberanes

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF
OF RESPONDENT: John M. Pope, Esquire

ON BEHALF OF DHS: Robert C. Bartlemay, Sr.
Senior Attorney

APPLICATION: Termination of proceedings

The respondent, a native and citizen of Mexico, appeals from an Immigration Judge's August 26, 2011, decision concluding that he is removable from the United States under sections 237(a)(2)(A)(i) and (ii) of the Immigration and Nationality Act, 8 U.S.C. §§ 1227(a)(2)(A)(i) and (ii). The Department of Homeland Security ("DHS") opposes the appeal. The appeal will be dismissed.

The Board reviews an Immigration Judge's findings of fact, including findings as to the credibility of testimony, under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). The Board reviews questions of law, discretion, and judgment and all

other issues in appeals from decisions of Immigration Judges de novo. 8 C.F.R § 1003.1(d)(3)(ii).

We address the question of whether the DHS met its burden of proof to establish that the respondent is removable under section 237(a)(2)(A)(ii) of the Act as an alien convicted of two or more crimes involving moral turpitude (CIMTs). The respondent discusses four convictions on appeal; one each for felony endangerment, attempted unlawful flight, assault/domestic violence (a class 1 misdemeanor) and resisting a police officer.

A crime qualifies as a CIMT if it involves reprehensible conduct committed with some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness. *Matter of Silva-Trevino,* 24 I&N Dec. 687, 706 & n.5 (AG. 2008).

The respondent does not dispute that his conviction for resisting arrest qualifies under current precedent as a CIMT. Respondent's Br. at 14.

Upon de novo review, we conclude that the respondent's conviction for felony endangerment under ARIZ. REV. STAT. 13-1201(A)(1) is a CIMT. The statute defines endangerment as "recklessly endangering another person with a substantial risk of imminent death or physical injury." Because recklessness is an element of the crime of endangerment, it involves the scienter required by *Matter of Silva-Trevino, supra.*

The Arizona courts have indicated that one of the elements of endangerment is that "the victim must be

placed in actual substantial risk of imminent death or physical injury." *State v. Doss,* 966 P.2d 1012, 1015 (Ariz. Ct. App. 1998) (citations omitted), *citing State v. Morgan,* 625 P.2d 951, 956 (Ariz. Ct. App. 1981). We conclude that putting another in danger of life or physical injury by means of a conscious act that posed an actual substantial risk of such harm is inherently "reprehensible conduct" within the meaning of *Matter of Silva-Trevino, supra.* As a categorical matter, the "substantial" risk of "imminent death or physical injury" distinguishes this statute from a less serious simple assault statute, which might punish an offensive touching that carries no risk of physical injury, much less a substantial risk of such an outcome. *See, e.g. Matter of Solon,* 24 I&N Dec. 239 (BIA 2007). Also as a categorical matter, the recklessness required distinguishes this case from similar statutes which do not require a showing of any mens rea whatsoever. *See, e.g, Matter of Perez-Contreras,* 20 I&N Dec. 615 (BIA 1992).

Based on the foregoing, we conclude that the respondent has been convicted of at least two CIMTs. It is not contested that the CIMTs in question did not arise from a single scheme. As these two crimes render the respondent removable under section 237(a)(2)(A)(ii) of the Act, we need not consider whether the respondent's convictions for assault and attempted unlawful flight are CIMTs. We also need not consider whether the respondent is removable under section 237(a)(2)(A)(i) of the Act, relating to a CIMT committed within five years after the date of

admission for which a sentence of one year or longer may be imposed. The respondent has raised no issues in his appeal brief regarding possible eligibility for relief from removal, and we consider those issues waived.

For the foregoing reasons, the following order will be entered.

ORDER: The respondent's appeal is dismissed.

/s/ [Illegible]
FOR THE BOARD

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

Falls Church, Virginia 22041

Decision of the Board of
Immigration Appeals

File: A079 220 140 – Florence, AZ Date: JUL 28 2011

In re: BAUDEL *VELAZQUEZ*-SOBERANES

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF
OF RESPONDENT: John M. Pope, Esquire

ON BEHALF OF DHS: Dion A. Morwood
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(E)(i), I&N Act [8 U.S.C. § 1227(a)(2)(E)(i)] – Convicted of crime of domestic violence, stalking, or child abuse, child neglect, or child abandonment

Lodged: Sec. 237(a)(2)(A)(i), I&N Act [8 U.S.C. § 1227(a)(2)(A)(i)] – Convicted of crime involving moral turpitude

Sec. 237(a)(2)(A)(ii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(ii)] – Convicted of two or more crimes involving moral turpitude

APPLICATION: Adjustment of status

The respondent, a lawful permanent resident and a native and citizen of Mexico, appeals the Immigration Judge's March 1, 2011, order finding him removable and ineligible to apply for adjustment of status as he did not qualify for a waiver under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h). The Department of Homeland Security ("DHS") has filed a brief in opposition. The record will be remanded for further proceedings.

The Board reviews an Immigration Judge's findings of fact, including an adverse credibility finding, under the clearly erroneous standard. 8 C.F.R. § 1003.1(d)(3)(i). The Board reviews questions of law, discretion, and judgment and all other issues in appeals from decisions of Immigration Judges de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

We find that the Immigration Judge's decision regarding the charges of removability is inadequate. The Immigration Judge did not provide comprehensive factual findings or legal analysis to sustain the removability charges. The Immigration Judge simply referred to the DHS's response to the respondent's motion to terminate as the basis of his decision (I.J. at 2; Exh. 5). Because of the lack of sufficient factual findings and legal analysis, the record will be remanded for further proceedings on whether the respondent is removable and, if so, whether he is eligible for relief. *See Matter of S-H-,* 23 I&N Dec. 462, 465-66 (BIA 2002) (remanding to the Immigration Judge noting the lack of factual findings and legal analysis); *Matter of A-P-,* 22 I&N Dec. 468, 477

(BIA 1999) (stating that an "oral decision must accurately summarize the relevant facts, reflect the Immigration Judge's analysis of the applicable statutes, regulations, and legal precedents, and clearly set forth the Immigration Judge's legal conclusions"). Accordingly, the following is entered.

ORDER: The record is remanded for further proceedings consistent with this order and the entry of a new decision.

/s/ Anne J. Greer
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Florence, Arizona

File A 079 220 140 March 1, 2011

In the Matter of

BAUDEL VELASQUEZ-SOBERANES,	)	IN REMOVAL PROCEEDINGS
Respondent	)	

CHARGES: Section 237(a)(2)(E)(i), INA, domestic violence conviction; Section 237(a)(2)(A)(ii), INA, two crimes involving moral turpitude; and Section 237(a)(2)(A)(i), INA, crime involving moral turpitude committed within five years, for which a sentence of one year or longer could have been imposed.

APPLICATION:

ON BEHALF OF RESPONDENT:	ON BEHALF OF THE GOVERNMENT:
Gabriel Leyba, Esquire	Dion Morwood, Esquire

DECISION OF THE IMMIGRATION JUDGE

The respondent in this case is a male, native and citizen of Mexico, who was placed in removal proceedings by the issuance of a Notice to Appear dated September 10, 2010 (Exhibit 1). The Government also submitted an I-261 dated October 6, 2010 (Exhibit 2).

The respondent admitted allegations 1 through 4 on the Notice to Appear, denied allegation 6 on the Notice to Appear, denied the charge on the Notice to Appear, and denied allegations 5, 7, 8 and 9, and the charges on the I-261.

The Government submitted documents to the Court to include an I-213 and conviction documents. Based upon those conviction documents, the Court found that allegations 5, 7, 8 and 9 on the I-261 had been sustained. That is, the convictions for the assault, domestic violence on May 25th, 2008 in Lake Havasu City Justice Court, the April 7, 2009 conviction in Lake Havasu City Justice Court for resisting arrest, the September 19, 2008 conviction in Lake Havasu City Justice Court for attempted unlawful flight, and the October 12, 2004 in La Paz County, Arizona Superior Court for endangerment.

The Court did not find that allegation 6 on the Notice to Appear had been sustained.

The respondent filed a motion to terminate (Exhibit 4), and the Government responded in its opposition to the motion to terminate (Exhibit 5). Based upon the reasoning in Government's opposition, this Court denied the motion to terminate and found that all three charges of removal had been sustained by clear and convincing evidence.

The respondent designated Mexico as the country of removal, but then desired to file an adjustment application with a 212(h) waiver. It was determined that the seven year requirement for the 212(h) waiver

had not been met, and the respondent submitted a memorandum of law in which they argued that because the respondent had been issued employment authorization prior to his lawful permanent residency, that that time should count in figuring the seven years.

The Government argued that time should not count when the respondent had employment authorization as employment authorization does not grant status to an individual who's in the United States. This Court, in its reading of the BIA case of *Matter of Rotimi,* 24 I&N Dec. 567 (BIA 2008), stands for the point that granting of employment authorization and a pending application does not grant any status, and the time, the seven years, does not start to run until the respondent actually gains status. The Court would find that the *Rotimi* decision is on point in this case, and therefore finds that the respondent is not eligible for a 212(h) waiver because he does not have the seven years residency requirement.

There being no further applications, the Court hereby enters the following order.

ORDER

IT IS HEREBY ORDERED that the respondent be removed from the United States to Mexico.

SCOTT M. JEFFERIES
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before SCOTT M. JEFFERIES, in the matter of:

BAUDEL VELASQUEZ-SOBERANES

A 079 220 140

Florence, Arizona

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/ Angelina Becerra
Angelina Becerra (Transcriber)

Deposition Services, Inc.
12321 Middlebrook Road, Suite 210
Germantown, Maryland 20874
(301) 881-3344

April 15, 2011
(Completion Date)

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
FLORENCE, ARIZONA

File: A079-220-140 August 26, 2011

In the Matter of

BAUDEL VELASQUEZ-SOBERANES,	)	IN REMOVAL PROCEEDINGS
	)	
RESPONDENT	)	

CHARGES: Section 237(a)(2)(E)(i), INA, domestic violence conviction.
Section 237(a)(2)(A)(ii), INA, two crimes involving moral turpitude, and Section 237(a)(2)(A)(i), INA, crime involving moral turpitude committed within five years, for which a sentence of one year or longer could have been imposed.

APPLICATIONS:

ON BEHALF OF RESPONDENT: BEN WESINGER

ON BEHALF OF DHS: ROBERT BARTLEMAY

ORAL DECISION OF THE IMMIGRATION JUDGE

This case was heard on a remand from the Board of. Immigration Appeals dated July 28, 2011. This Court had previously heard this case and made a decision on March 1, 2011, and found that the allegations had been sustained and that the charges of removal were sustained, and found that the respondent did not have relief from removability, and

ordered the respondent removed from the United States to Mexico.

The BIA decision indicated that the Immigration Judge did not provide comprehensive factual findings or legal analysis to sustain the removability charges, and because of the lack of sufficient factual findings and legal analysis, the record was remanded for further proceedings on whether the respondent is removable, and if so, whether he is eligible for relief.

This Court gave both parties an opportunity to submit any further evidence in this case or argument. The only further evidence submitted was a transcript of proceedings from the La Paz County, Arizona Superior Court, a judgment and sentencing, dated Tuesday, October 12, 2004 (*see* Exhibit 7).

The respondent admitted allegations 1 through 4 on the Notice to Appear, denied allegation 6 on the Notice to Appear, and denied the charge on the Notice to Appear. The respondent further denied all of the allegations and charges on the I-261 (*see* Exhibit 2).

The Government submitted documents to the Court to include an I-213 and conviction documents (*see* Exhibit 3).

The Court found by the documents in Exhibit 3 that the respondent was in fact convicted on May 25, 2008 in Lake Havasu City Justice Court, county of Mojave, state of Arizona, for assault/domestic violence, a class 1 misdemeanor, committed on August

24, 2008 in violation of Arizona Revised Statute 13-1203A(1).

Further, the Court found in the documents evidence that the respondent had been convicted on April 7, 2009 in Lake Havasu City Justice Court, Mojave County, Arizona for resisting arrest, a class 1 misdemeanor, committed on December 14, 2008 in violation of Arizona Revised Statute 13-2508.

Further, in Exhibit 3, the Court found that there was evidence that the respondent was convicted on September 19, 2008 in Lake Havasu City Justice Court, Mojave County, Arizona for the offense of attempted unlawful flight, a class 1 misdemeanor, committed on September 1, 2008 in violation of Section 28-622.01 of the Arizona Revised Statute.

Further, the Court found by documents in Exhibit 3 as well as Exhibit 7 that the respondent had been convicted on October 12, 2004 in La Paz County, Arizona Superior Count [sic] for endangerment, a class 6 felony committed on May 28, 2004, in violation of Arizona Revised Statute 13-1201A(1).

The Court continues to find that allegation 6 was not sustained.

Regarding the charges, the Court first of all finds that the charge under Section 237(a)(2)(E)(i) for a crime involving domestic violence is sustained by clear and convincing evidence. The Court finds that a conviction under Arizona Revised Statute 13-1203A(1) involves a domestic violence offense, and

therefore this charge is sustained by clear and convincing evidence.

Regarding the conviction for endangerment, the Court finds that the Arizona endangerment statute under which the respondent was convicted requires reckless conduct that necessarily involves the victim being placed in actual substantial risk of imminent death or physical injury. The Court finds that convictions under this statute involve in [sic] aggravating dimension that is serious enough to raise the offense to a crime involving moral turpitude, even without a showing of specific evil intent. The Court finds that this reckless conduct fits the requirements of *Silva-Trevino,* and that therefore, there is reprehensible behavior, and there is scienter, and therefore this is a crime involving moral turpitude, and it is categorically a crime involving moral turpitude.

Regarding the resisting arrest conviction, the Court finds that the case of *Estrada-Rodriguez v. Mukasey,* 512 F.3d 517 (9th Cir. 2007) is on point, in that the Ninth Circuit held that resisting arrest under ARS Section 13-2508 is a categorical crime of violence under 18 U.S.C. section 16(A). In reaching this conclusion, the Ninth Circuit recognized that a violation of this statute requires intentional action, and also naturally involves a risk that physical force may be used against an officer. The Court finds that this is reprehensible behavior and that scienter is involved, and therefore the requirements of *Silva-Trevino* are met, and it is a crime involving moral turpitude.

Regarding attempted unlawful flight, ARS Section 28-622.01 requires proof that the defendant was driving a motor vehicle, that he willfully fled or attempted to elude a pursuing official law enforcement vehicle, which was being operated with both lights and siren activated and that the law enforcement vehicle was appropriately marked, showing it to be an official law enforcement vehicle. Therefore, this meets the scienter requirement, because it was willful and in a BIA case in 2011, *Matter of Ruiz-Lopez,* at 25 I&N Dec. 551, the Board held that the crime of driving a vehicle in a manner indicating a wanton or willful disregard for the lives or property of others while attempting to elude a pursuing police vehicle, in violation of a Washington statute, was a crime involving moral turpitude. The Board stated that when a person deliberately flouts lawful authority and recklessly endangers the officer, other drivers, passengers, pedestrians or property, he or she is engaged in seriously wrongful behavior that violates the accepted rules of morality and the duties owed to society.

Therefore, the requirements of *Silva-Trevino* are also met by this violation of this statute, and it is categorically a crime involving moral turpitude.

The Court finds that there is no need to look into the conviction for assault/domestic violence in this case to determine whether or not it is a crime involving moral turpitude, because the Court has found that the respondent has been convicted of three crimes involving moral turpitude. Therefore, the

other two charges are sustained, the charge under Section 237(a)(2)(A)(ii) for two crimes involving moral turpitude and the charge under Section 237(a)(2)(A)(i) for a conviction for a crime involving moral turpitude committed within five years after admission, because the endangerment conviction occurred, based upon a commission of the offense on May 28, 2004, and the respondent obtained his lawful permanent residence on February 24, 2004, so it was well within the five year period.

Therefore, all charges of removal have been sustained by clear and convincing evidence.

The Court then looks at the possibility of relief in this case, and finds that the respondent is not eligible for cancellation of removal. Even though he is a lawful permanent resident and has been for at least five years, he cannot show that he has the seven years necessary of having been residing continuously in the United States after having been admitted in any status.

The respondent argues that because he had work authorization, that that time should count toward the accumulation of the seven years for purposes of a 212(h) waiver. The Court would find that his time is cut off for purposes of cancellation of removal for certain permanent residents, and that he does not have the necessary seven year residency requirement to receive a 212(h) waiver, because under a recent case in the Ninth Circuit Court of Appeals, *Guevara v. Holder,* the Ninth Circuit found that a receipt of

employment authorization does not constitute an admission under the Act.

Therefore, the respondent is not eligible for cancellation of removal or a 212(h) waiver.

The Court would not consider voluntary departure in this case, and therefore the Court would find that the respondent is not eligible for any relief from removal, and therefore enters the following order.

ORDER

IT IS HEREBY ORDERED that the respondent be removed from the United States to Mexico.

SCOTT M. JEFFERIES
United States Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE SCOTT M. JEFFERIES, in the matter of:

BAUDEL VELASQUEZ-SOBERANES

A079-220-140

FLORENCE, ARIZONA

is an accurate, verbatim transcript of the recording as provided by the Executive Office for Immigration Review and that this is the original transcript thereof

for the file of the Executive Office for Immigration Review.

/s/ Jack Balcom
JACK BALCOM (Transcriber)

DEPOSITION SERVICES, Inc.

OCTOBER 4, 2011
(Completion Date)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BAUDEL VELAZQUEZ-SOBERANES, Petitioner, v. ERIC H. HOLDER, Jr., Attorney General, Respondent.	No. 11-73668 Agency No. A079-220-140 ORDER (Filed Feb. 17, 2015)

Before: D.W. NELSON, SILVERMAN, and M. SMITH, Circuit Judges.

The members of the panel that decided this case voted unanimously to deny the petition for rehearing. Judges Silverman and Smith voted to deny the petition for rehearing en banc. Judge Nelson recommended denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed.R. App. P. 35.)

The petition for rehearing and the petition for rehearing en banc are denied.