No. _____

In The

Supreme Court of the United States

GUILLERMO PEREZ-AGUILAR,

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, Guillermo Perez-Aguilar, 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. Perez-Aguilar's petition for review of a decision from the Board of Immigration Appeals ("BIA") is an unpublished Memorandum Decision reported at *Perez-Aguilar v. Holder*, No. 13-70534, 2014 U.S. App. LEXIS 21276 (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. Perez-Aguilar's case. The February 17, 2014 denial of Mr. Perez-Aguilar's petition for panel and en banc reconsideration is unreported. *See* App. 18. The February 7, 2013 opinion of the BIA dismissing Mr. Perez-Aguilar's appeal is unpublished and unreported. *See* App. 5. The oral decision of the Immigration Judge ("IJ"), dated October 4, 2012, ordering Mr. Perez-Aguilar's removal, is also unpublished and unreported. *See* App. 9.

JURISDICTION

The Ninth Circuit entered the original judgment on November 6, 2014, and denied rehearing en banc

on February 17, 2015. *See* App. 1, 18. 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

Guillermo Perez-Aguilar is a native and citizen of Mexico. He came to the United States without inspection in 1996 and has remained in the United States continuously since that date. *See* App. 1. He is married to Ms. Lourie Ann Gonzalez, a United States citizen, and together they have five U.S. citizen children. Ms. Gonzalez filed an I-130, Petition for Alien Relative, for her husband, which was approved on October 30, 2009. However, Mr. Perez-Aguilar cannot gain legal status through his wife because of his unlawful entry. He is the sole source of financial support for his family.

On April 26, 2009, the Department of Homeland Security ("DHS") served Mr. Perez-Aguilar with a Notice to Appear, charging him with removability under 8 U.S.C. § 1182(a)(6)(A)(i) as a person present in the United States without being admitted or paroled. These initial proceedings were not concluded. *See* App. 1. Mr. Perez-Aguilar was released from his detention at Eloy Detention Center on bond on May 8, 2009 and his case was transferred to the Phoenix Immigration Court.

On January 11, 2012, Mr. Perez-Aguilar was convicted of one count of endangerment, a class six felony under Ariz. Rev. Stat. § 13-1201, and one count of misdemeanor driving under the influence pursuant to Ariz. Rev. Stat. § 28-1381(A)(1). The state court did not impose any jail time for these convictions. Instead, Mr. Perez-Aguilar received eighteen months of

probation. Thereafter, on July 30, 2012, DHS re-initiated Mr. Perez-Aguilar's removal proceedings. *See* App. 1.

Mr. Perez-Aguilar admitted that he did not have legal authorization to be in the United States but sought to apply for Cancellation of Removal under 8 U.S.C. § 1229b(b), a form of relief that allows noncitizens who have been in the United States for at least ten years to acquire lawful permanent residence if they can show that their removal would cause exceptional and extremely unusual hardship to a family member. Under 8 U.S.C. § 1229b(b)(3), in order to qualify for cancellation of removal, an applicant must demonstrate that he is not inadmissible to the United States because of a conviction of a crime involving moral turpitude ("CIMT"). In the alternative, Mr. Perez-Aguilar requested voluntary departure under 8 U.S.C. § 1229b(c)(1). *See* App. 9.

At Mr. Perez-Aguilar's individual hearing on the merits of his application for cancellation of removal, the DHS orally moved to pretermit his application explicitly based on *Matter of Leal*, 26 I&N Dec. 20 (BIA 2012) a recent, published Board of Immigration Appeals ("BIA") decision. *See* App. 1. In *Matter of Leal*, Mr. Leal was deemed not eligible for cancellation of removal because his conviction for Arizona's endangerment statute qualified as a CIMT. The BIA concluded that a person who fails to perceive a risk because he is voluntarily intoxicated "is no less culpable than an actor who consciously disregards a known risk" and thus found that mere voluntary

intoxication could provide the scienter necessary for a CIMT. *Id.* at 23. In *Matter of Leal*, the BIA did not discuss the fact that Mr. Leal's offense only involved simple driving under the influence, which the BIA itself had held was not a CIMT. *See Matter of Lopez-Meza,* 22 I&N Dec. 1188, 1194 (BIA 1999).

In an oral decision, the IJ who adjudicated Mr. Perez-Aguilar's case granted the DHS's motion to pretermit Mr. Perez-Aguilar's cancellation of removal application, denied him voluntary departure, and ordered removal to Mexico. The IJ explicitly stated that the analysis in Mr. Perez-Aguilar's case was controlled by the BIA's decision in *Matter of Leal. See* App. 9.

Mr. Perez-Aguilar timely filed a notice of appeal of the IJ's decision to the BIA, contending that endangerment is not a CIMT. In an unpublished decision, dated February 7, 2013, the BIA dismissed Perez-Aguilar's appeal, again specifically stating that *Matter of Leal* was controlling. *See* App. 5.

Mr. Perez-Aguilar then filed a timely petition for review to the Ninth Circuit. In an unpublished Memorandum Decision, the Ninth Circuit denied Mr. Perez-Aguilar's 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. The Ninth Circuit applied the same analysis in denying Mr. Perez-Aguilar's petition. *See* App. 1.

Mr. Perez-Aguilar filed a timely petition for panel and en banc reconsideration, as did Mr. Leal. Both Petitioners renewed their arguments from below and Mr. Leal also contended that the CIMT statute, as interpreted by the BIA in *Leal*, was unconstitutionally void for vagueness. 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 Mr. Perez-Aguilar's, and Mr. Leal's, petitions for rehearing; this petition for certiorari followed. *See* App. 18.

SUMMARY OF THE ARGUMENT

Similar to Mr. Leal's proceedings, at every stage of Mr. Perez-Aguilar's 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 non-fraudulent 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. Perez-Aguilar, 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. 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 and Mr. Perez-Aguilar'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. Perez-Aguilar both showed that Arizona frequently applies its endangerment statute to simple driving under the influence. Mr. Leal, and Mr. Perez-Aguilar, 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. Thus, by "point[ing] to

[1] Mr. Leal as well as Mr. Perez-Aguilar 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)).

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, with Mr. Perez-Aguilar's case being just one example.

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 232. 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. Perez-Aguilar, 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. Because the term "crime involving moral turpitude" therefore did not provide Mr. Perez-Aguilar, 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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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GUILLERMO PEREZ-AGUILAR, Petitioner, v. ERIC H. HOLDER, Jr., Attorney General, Respondent.	No. 13-70534 Agency No. A095-782-642 MEMORANDUM* (Filed Nov. 6, 2014)

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

Argued and Submitted October 7, 2014
Phoenix, Arizona

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

Guillermo Perez-Aguilar ("Perez-Aguilar") petitions for review of the Board of Immigration Appeals' ("BIA") dismissal of his appeal of a final order of removal. The BIA held that Perez-Aguilar had been convicted of a crime involving moral turpitude ("CIMT") and was thus ineligible for cancellation of removal. We have jurisdiction pursuant to 8 U.S.C. § 1252, and we deny the petition.

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

Perez-Aguilar is a native and citizen of Mexico, born in 1978, who entered the U.S. in 1996 without inspection. On April 26, 2009, the Department of Homeland Security ("DHS") served Perez-Aguilar with a Notice to Appear, charging him with removability under 8 U.S.C. § 1182(a)(6)(A)(I) as a person present in the United States without being admitted or paroled, although these initial proceedings were not concluded. In July 2011, Perez-Aguilar pled guilty to felony endangerment in Arizona under Arizona Revised Statute § 13-1201 and misdemeanor driving under the influence of intoxicating liquor or drugs under Arizona Revised Statute § 28-1381(A)(1). DHS thereafter re-initiated the removal proceedings on July 30, 2012, due to Perez-Aguilar's conviction. Perez-Aguilar conceded removability, but filed an Application for Cancellation of Removal and Adjustment of Status of Certain Nonpermanent Residents ("Application"). On October 4, 2012, DHS moved the immigration judge ("IJ") to pretermit Perez-Aguilar's Application, and the IJ granted the request. Perez-Aguilar timely appealed the IJ's decision to the BIA, which dismissed his appeal in an unpublished opinion on February 7, 2013, relying explicitly on the BIA's recent decision in *Matter of Leal,* 26 I. & N. Dec. 20 (BIA 2012), which held felony endangerment was categorically a CIMT.

Where the BIA's decision is unpublished, but directly controlled by a published opinion, as here, we must defer to the BIA's conclusion so long as it is a "permissible construction of the INA." *Marmolejo-Campos*

v. Holder, 558 F.3d 903, 913 (9th Cir. 2009) (en banc). In an opinion filed contemporaneous with this memorandum, we upheld the BIA's decision in *Matter of Leal* as a reasonable interpretation of the INA under the *Chevron* framework, *Leal v. Holder,* ___ F.3d ___ (9th Cir. **[Date]**, 2014). Our opinion in that case is controlling here.[1]

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 actual substantial risk of imminent death, as is required for felony endangerment, *State v. Carreon,* 107 P.3d 900, 909 (Ariz. 2005) (en banc), is

[1] We reject Perez-Aguilar's argument that applying *Leal* to this matter is an impermissible retroactive enforcement of a new agency rule. A question of retroactivity arises only where there is an explicit change in the law. *See James B. Beam Distilling Co. v. Georgia,* 501 U.S. 529, 534 (1991) ("It is only when the law changes in some respect that an assertion of nonretroactivity may be entertained, the paradigm case arising when a court expressly overrules a precedent upon which the contest would otherwise be decided differently and by which the parties may previously have regulated their conduct."). Prior to *Leal,* the BIA had never determined in a published opinion whether felony endangerment in Arizona is categorically a CIMT and had instead issued conflicting decisions in non-precedential, unpublished decisions. *Compare Matter of Valles-Moreno,* 2006 WL 3922279 (BIA 2006), *with Matter of Lopez-Orosco,* 2010 WL 5635156 (BIA 2010). Thus, the BIA's decision in *Leal* does not constitute a change in the law that triggers the retroactivity analysis.

"base, vile, and depraved conduct" that qualifies this crime as a CIMT, *Nunez v. Holder*, 594 F.3d 1124, 1131 (9th Cir. 2010) (internal quotation marks omitted). 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). Thus, the BIA's decision was based on a permissible construction of the statute.

PETITION FOR REVIEW DENIED.

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A095 782 642 – Eloy, Arizona

Date: FEB – 7 2013

In re: GUILLERMO PEREZ-AGUILAR

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Katharine E. Ruhl, Esquire

ON BEHALF OF DHS: Daniel Crimmins
Assistant Chief Counsel

CHARGE:

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

APPLICATION: Cancellation of removal; voluntary departure

The respondent appeals from an Immigration Judge's October 4, 2012, decision pretermitting his application for cancellation of removal and denying the respondent's request for the privilege of voluntary departure under section 240B(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229c(b). The Department of Homeland Security ("DHS") opposes the appeal. The respondent's 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). The respondent's application for relief was filed after May 11, 2005, and is thus subject to the statutory amendments made by the REAL ID Act of 2005. *Matter of S-B-,* 24 I&N Dec. 42 (BIA 2006).

The Immigration Judge pretermitted the respondent's application for cancellation of removal because the respondent's January 11, 2012, felony endangerment conviction in violation of Arizona law, for which he received an 18-month sentence, is categorically a crime involving moral turpitude (I.J. at 6). *See Matter of Leal,* 26 I&N Dec. 20 (BIA 2012) (holding that a violation of A.R.S section 13-201 is categorically a crime involving moral turpitude). As articulated by the Immigration Judge, the cancellation application was denied because respondent did not establish that he had not been convicted of an offense under section 212(a)(2) of the Act or 237(a)(2) of the Act – namely, a crime involving moral turpitude (I.J. at 2, 3). *See* section 240A(b)(1)(C) of the Act; I.J. at 7; Exh. 14 at Tabs A-D; *see Matter of Leal, supra.* Additionally, the respondent was precluded from demonstrating good moral character due to this conviction (I.J. at 7). *See* section 101(f) of the Act, 8 U.S.C. § 1101(f).

The respondent does not challenge his Arizona conviction, but argues that he did not have the requisite intent because recklessness is insufficient intent under Arizona law and does not constitute a crime involving moral turpitude. The respondent urges us to apply *Fernandez-Ruiz v Gonzales,* 468 F.3d 1159 (9th Cir. 2006) as the controlling precedent in his case, and claims that our decision in *Leal* is inconsistent with *Matter of Silva-Trevino.*

We disagree with the respondent's assertions. *See Matter of Leal, supra*; *see also Matter of Silva-Trevino, supra; see also* 8 C.F.R. § 1003.1(d)(3)(ii). Our decision in *Leal* examined the identical statute under which the respondent was convicted in this case, and *Leal* specifically examined the recklessness aspect of the statute under *Silva-Trevino.* The respondent further contends that *Matter of Silva-Trevino* was wrongly decided and should not be followed (Respondent's Br. at 4 n.1). While we recognize that courts of appeals are divided as to whether to accept all aspects of the methodology in that decision. *See Bobadilla v. Holder,* 679 F.3d 1052 (8th Cir. 2012) (collecting cases and deferring to *Silva-Trevino*), we are bound to apply *Matter of Silva-Trevino* since the Ninth Circuit has not rejected it. *See* 8 C.F.R. § 1003.1(d)(1)(i) (2012). We agree with the Immigration Judge that our precedent in *Leal* is controlling in this case (I.J. at 6-7). *See Matter of Leal, supra*; *cf. Fernandez-Ruiz, supra,* (holding a misdemeanor assault statute did not categorically qualify as a crime involving moral

turpitude); *cf. Latter-Singh v. Holder,* 668 F.3d 1156 (9th Cir. 2012).

The respondent has the burden to prove that he satisfies the applicable eligibility requirements and merits a favorable exercise of discretion under sections 240(c)(4)(A)-(D) of the Act, 8 U.S.C. §§ 1229a(c)(4)(A)-(D). We agree with the Immigration Judge's conclusion that the respondent did not establish that he had not been convicted of an offense under section 212(a)(2) of the Act or 237(a)(2) of the Act (I.J. at 6-7). *See* 8 C.F.R. § 1003.1(d)(3)(ii). We also agree with the Immigration Judge that the respondent is precluded from demonstrating good moral character within the last ten years (I.J. at 7; Exh. 14 at Tabs A-D). *See* 8 C.F.R. § 1240.8(d); *see* section 240A(b)(1)(B) of the Act. Therefore, we affirm the Immigration Judge's conclusion that the respondent is ineligible for cancellation of removal. *See* sections 240A(b)(1)(B), and (C) of the Act.

Lastly, because the respondent failed to demonstrate that he had good moral character for the requisite statutory period (within the last five years), he also does not qualify for the privilege of voluntary departure. *See* section 240B(b)(1)(B) of the Act.

Accordingly, the following order will be entered:

ORDER: The respondent's appeal is dismissed.

/s/ [Illegible]
FOR THE BOARD

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

File: A095-782-642 October 4, 2012

In the Matter of

GUILLERMO PEREZ-AGUILAR	)	IN REMOVAL
	)	PROCEEDINGS
RESPONDENT	)	

CHARGES: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act

APPLICATIONS: Cancellation of removal for a nonpermanent resident under Section 240A(b)(1) of the Immigration and Nationality Act, and post-conclusionary voluntary departure under Section 240B(b)of the Immigration and Nationality Act

ON BEHALF OF RESPONDENT: DARIUS AMIRI, ESQUIRE

ON BEHALF OF DHS: DANIEL G. CRIMMINS, ESQUIRE, ASSISTANT CHIEF COUNSEL

ORAL DECISION OF THE IMMIGRATION JUDGE

The Respondent is a 34-year-old married male, native and citizen of Mexico. The United States Department of Homeland Security has brought these removal proceedings against the Respondent under the authority of the Immigration and Nationality Act. Proceedings were commenced with the filing of the Notice to Appear with the Immigration Court. See Exhibit #1.

The Respondent admitted the allegations as contained the Notice to Appear in the Form I-261. See Exhibit 1 and 1A. The Respondent also conceded the sole charge of removability under Section 212(a)(6)(A)(i) of the Immigration and Nationality Act. Based on Respondent's admissions and concessions, the Court does sustain the sole charge of removability.

The Respondent applied for relief from removal in the form of cancellation of removal for certain nonpermanent residents under Section 240A(b)(1) of the Act, and in the alternative, voluntary departure under Section 240B(b) of the Act. Respondent bears the burden of proof and persuasion on his request for relief.

The Respondent's Form EOIR-42B application for cancellation is contained in the record at Exhibit 16. Prior to the admission of the application, the Respondent was given an opportunity to make any necessary corrections, and then swore or affirmed before this Court that the contents of the application were true and correct to the best of his knowledge.

EVIDENTIARY RECORD

The Court has considered the Record of Proceedings as a whole, including Exhibits 1 through 20, even if not specifically referenced in the below analysis and findings.

STATEMENT OF LAW

Burden of Proof and Credibility

The provisions of the REAL ID Act of 2005 apply to the Respondent's application as it was filed on or after May 11, 2005. See Sections 240(c)(4)(B) and (C) of the Immigration and Nationality Act.

Cancellation of Removal for Nonpermanent Residents Under Section 240A(b)(1)

To be eligible for cancellation of removal under Section 240A(b)(1), an applicant must prove that: (1) they have been physically present in the United States for a continuous period of not less than 10 years immediately preceding service of the charging document and up to the time of application; (2) has been a person of good moral character for 10 years prior to a final administrative order; (3) has not been convicted of an offense under certain specified sections of the Act (Sections 212(a)(2), 237(a)(2), or 237(a)(3) of the Act); and (4) establishes that removal would result in exceptional and extremely unusual hardship to the applicant's spouse, parent or child who is a United States citizen or lawful permanent resident.

To establish exceptional and extremely unusual hardship, an applicant must demonstrate that a qualifying relative would suffer hardship that is substantially different from, or beyond, that which would ordinarily be expected to result from the alien's deportation, but need not show that such hardship

would be unconscionable. The hardship must be beyond that which was required in Suspension of Deportation cases. Hardship factors relating to the applicant may be considered only insofar as they might affect the hardship to a qualifying relative. *Matter of Recinas,* 23 I&N Dec. 467 (BIA 2002); *Matter of Andazola,* 23 I&N Dec. 319 (BIA 2002); *Matter of Monreal,* 23 I&N Dec. 56 (BIA 2001).

Voluntary Departure at Conclusion of Proceedings

At the conclusion of removal proceedings, the Court may grant voluntary departure in lieu of removal. Section 240B(b) of the Immigration and Nationality Act. The alien bears the burden to establish both that he is eligible for relief, and that he merits a favorable exercise of discretion. See *Matter of Arguelles,* 22 I&N Dec. 811 (BIA 1999), and *Matter of Gamboa,* 14 I&N Dec. 244 (BIA 1972). To establish eligibility, the alien eligibility, the alien must prove that he: (1) has been physically present in the United States for at least one year immediately preceding service of the Notice to Appear; (2) is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure; (3) is not removable under Section 237(a)(2)(A)(iii) or Section 237(a)(4) of the Immigration and Nationality Act; and (4) has established by clear and convincing evidence that he has the means to depart the United States, and intends to do so. *Matter of Aguelles* [sic], supra. The alien must be in possession of a valid travel document. 8 C.F.R. Section

1240.26(c). The alien must also post a voluntary departure bond in an amount necessary to ensure that he'll depart. The amount must be at least $500, and must be posted within five days of the voluntary departure order, unless such a grant is under safeguards.

An alien who has previously been granted voluntary departure after having been found inadmissible for entering the United States without inspection is ineligible for voluntary departure. See Section 240B(c) of the Immigration and Nationality Act.

Certain aliens described in Section 101(f) of the Immigration and Nationality Act cannot be found to be persons of good moral character. Even if the alien is not barred by Section 101(f) of the Immigration and Nationality Act, the Immigration Judge retains the discretion to evaluate the alien's moral character by weighing the negative against the favorable factors.

To determine whether a favorable exercise of discretion is warranted as to a request for voluntary departure, the Court must weigh the relevant adverse and positive factors, including the alien's prior immigration history, criminal history, if any, length of his residence in the United States, and extent of his family, business and societal ties in the United States. *Matter of Gamboa,* 14 I&N Dec. at 248, *Matter of Arguelles,* supra, at 817, *Matter of Thomas,* 21 I&N Dec. 20 (BIA 1995).

ANALYSIS AND FINDINGS

Cancellation of Removal for a Nonpermanent Resident

The government moved to pretermit and deny Respondent's application for cancellation of removal for a non-lawful permanent resident. Their motion is based upon Respondent's conviction for endangerment on January 11, 2012, in violation of Arizona Revised Statute Sections 13-1201, 28-3001, 3304, 3305, 3315, and 13-701, 702, 801, which was committed on January 31, 2009. This was a class six felony for which Respondent received probation for 18 months.

The Board of Immigration Appeals in *Matter of Leal,* 26 I&N Dec. 20 (BIA 2012), held that endangerment in violation of the Arizona Revised Statutes is categorically a crime involving moral turpitude. In *Matter of Leal,* supra, this conviction of endangerment precluded that Respondent from being eligible for cancellation of removal for a nonpermanent resident, as it's a removable offense for a crime involving moral turpitude under Section 212(a)(2)(A)(i)(I). As such, the Respondent in the instant case has been convicted of an inadmissible offense under Section 212(a)(2)(A)(i)(I), and is ineligible for cancellation of removal for that conviction under the third prong of eligibility under Section 240A(b)(1) of the Immigration and Nationality Act. In addition, the Respondent's conviction for endangerment would also preclude him from establishing good moral character within the last 10 years. As such, Respondent would

also be ineligible for this form of relief under the second prong required for cancellation of removal. Therefore, this Court does grant the government's Motion to Pretermit, and deny Respondent's application for cancellation of removal for non-lawful permanent resident, as he is statutorily ineligible for same relief. See *Matter of Leal.*

Post-Conclusionary Voluntary Departure
Under Section 240B(b) of the Act

The Respondent's conviction for endangerment was on January 11, 2012. This offense was committed on January 31, 2009. As this offense is an inadmissible offense under Section 212(a)(2)(A)(i)(I), it comes under the purview of Section 101(f) of the Immigration and Nationality Act in regards to good moral character. This also was committed within the last five years, and the petty crime exception would not apply for this offense. See *Matter of Leal,* at page 22. Accordingly, Respondent is statutorily ineligible for post-conclusionary voluntary departure, as he cannot establish good moral character within the last five years.

The Respondent also inquired in regards to pre-conclusionary voluntary departure. This matter was set for a Merits hearing today at the last Master Calendar date of August 21, 2012. Today's date is beyond the 30 days. This case was initially set from a Master Calendar hearing for this Merits hearing date. As such, this Court may not grant voluntary

departure beyond that 30-day period after the Master Calendar hearing for which it is initially calendared for its Merits hearing. See 8 C.F.R. Section 1240.26(2). The only exception to this is contained in 8 C.F.R. Section 1240.26(b)(2). (b)(2) provides that any time prior to completion of removal proceedings, the Service counsel may stipulate to a grant of voluntary departure under Section 240B(a) and (b). In this matter, the Service, or ICE, counsel will not stipulate to a grant of voluntary departure. Therefore, this Court does not have any authority to grant pre-conclusion voluntary departure.

ORDERS

IT IS HEREBY ORDERED that the Respondent's application for cancellation of removal for a nonpermanent resident under Section 240A(b)(1) of the Immigration and Nationality Act is hereby PRETERMITTED and DENIED.

IT IS HEREBY ORDERED that the Respondent's request for post-conclusionary voluntary departure under Section 240B(b) of the Immigration and Nationality Act is hereby DENIED.

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

JAMES DEVITTO
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE JAMES DEVITTO, in the matter of:

GUILLERMO PEREZ-AGUILAR

A095-782-642

ELOY, 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/ Sandra Levkoff
SANDRA LEVKOFF
(Transcriber)

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November 21, 2012
(Completion Date)

snl/mab

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GUILLERMO PEREZ-AGUILAR, Petitioner, v. ERIC H. HOLDER, Jr., Attorney General, Respondent.	No. 13-70534 Agency No. A095-782-642 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.