No. 17-313

IN THE

Supreme Court of the United States

SALOMON LEDEZMA-COSINO,

Petitioner,

v.

JEFFERSON B. SESSIONS, ATTORNEY GENERAL,

Respondent.

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

REPLY BRIEF OF PETITIONER

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INTRODUCTION

The en banc Ninth Circuit here held that the actual language that Congress uses in a statute is "irrelevant" to whether the statute survives rational basis review. Pet. App. 14a; *see also* Pet App. 20a-21a. The government's brief in opposition confirms that is the government's position as well: Although the statute at issue in this case declares non-citizens who suffer from alcoholism inherently lacking in "good moral character," the government contends that "[t]he rationality of Congress's judgment about the 'moral character' of individuals who habitually abuse alcohol … is … beside the point" under the Equal Protection Clause. BIO 13. The Ninth Circuit's holding and the government's position that courts may ignore Congress's actual language and chosen statutory structure when conducting rational basis review is inconsistent with this Court's precedent and directly contrary to decisions of two other Courts of Appeals. The government identifies no reason this Court should not grant review here to resolve the split.

The government's brief also confirms that the "habitual drunkard" provision is unconstitutionally vague. The government does not and cannot argue that the en banc majority's interpretation of the provision is consistent with the one offered by the Immigration Judge or the Board of Immigration Appeals (BIA). And of course the three-judge panel decision, the en banc dissent, and Judge Watford's en banc concurrence offer still more possible interpretations. The inability of any reviewing body to settle on a consistent definition of "habitual drunkard" leads to the inevitable conclusion that the statute does not provide

adequate notice of the conduct it proscribes. The government also relies on the standard for vagueness applicable in civil cases, thereby potentially implicating the Court's pending decision in *Sessions v. Dimaya*. This Court should thus hold the petition pending disposition of *Dimaya*.

ARGUMENT

I. The Government's Brief Confirms This Case Presents A Fundamental Question About Rational Basis Review That Has Divided The Circuits.

The en banc plurality's decision turns on its holding about "the nature of the equal protection inquiry." Pet. App. 14a. Because "the constitutional inquiry" under rational basis review is "limited to assessing congressional action," the en banc plurality concluded that the actual statutory language Congress used "has no significance under rational basis review." Pet. App. 14a. In his concurrence, Judge Kozinski noted that the plurality's decision "reads the statute's 'good moral character' language to mean nothing." Pet. App. 20a-21a. He agreed that "[s]uch interpretive gerrymandering may be necessary to preserve the constitutionality of a statute that operates in the domestic sphere," even though he would have upheld the law based on the broader proposition that immigration laws must be reviewed under a standard that is even more deferential than standard rational basis review. Pet. App. 21a.

The plurality's determination that the actual language of a statute is "of no constitutional moment"

and "mean[s] nothing" under rational basis review, Pet. App. 15a, 21a, therefore, constitutes the narrowest thread of reasoning that garnered the support of a majority of judges on the court. It is, as Judge Kozinksi said, the holding of the "majority." Pet. App. 15a, 20a-21a. Accordingly, all future Ninth Circuit panels confronting equal protection challenges will be bound to disregard the actual statutory language as "irrelevant" in conducting rational basis review. Pet. App. 14a-15a. *See Marks v. United States*, 430 U.S. 188, 193 (1977); *see also Bradley v. Henry*, 518 F.3d 657 (9th Cir. 2008), *amending* 510 F.3d 1093 (9th Cir. 2007) (applying the *Marks* rule to an en banc decision of the Ninth Circuit).

a. The government's brief does not dispute any of this. Instead, the government's principal argument that certiorari is not warranted is that the Ninth Circuit was right. Echoing the Ninth Circuit's reasoning, the government contends that "the fact that Congress chose to achieve its objective through the intermediate step of a 'good moral character' provision in no way suggests that classifying habitual drunkards as ineligible for discretionary relief is unconstitutional." BIO 12. The statute's "good moral character" language, the government declares, is, from the standpoint of rational basis review, "beside the point." BIO 13.

In arguing for that position, the government replicates the flawed analysis shared by the Ninth Circuit plurality and the other circuit court that has aligned itself with the Ninth Circuit on this issue. According to the government, the actual statutory language of a provision is irrelevant under rational basis

review because this Court once observed that "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993). But, as we noted in our petition, while rational basis review may not entail probing the legislative history to determine what "actually motivated the legislature," it does not follow that courts must ignore the actual language and structure of the statute that Congress enacted in conducting rational basis review. Pet. 19-22. The bar against scrutinizing what "actually motivated the legislature" is rooted in "judicial restraint," *Beach Commc'ns, Inc.*, 508 U.S. at 314-15, but there is nothing restrained about upholding a statute by treating its actual language as "beside the point."

b. The government only secondarily argues that the courts are not split on this question. The government acknowledges that the cases cited in our petition show a circuit split, but contends that this split "turned on the courts' different answers to whether economic protectionism, without more, can form a rational basis for state legislation." BIO 17. That is wrong. Both the Fifth and Sixth Circuits have struck down laws on rational basis review where the state's "hypothesized footings for the challenged law" failed to account for the "actual structure of the challenged law." *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013); *Craigmiles v. Giles*, 312 F.3d 220, 227 (6th Cir. 2002). The Tenth Circuit explicitly "part[ed] company with the Sixth Circuit's *Craigmiles* decision," while acknowledging that the decision involved "a nearly identical … statute." *Powers v. Harris*, 379 F.3d 1208, 1223 (10th Cir. 2004).

The Tenth Circuit explained that its "disagreement" with the Sixth Circuit's *Craigmiles* decision could "be reduced to three points." *Id*. One of these three points did, as the government notes, involve the legitimacy of economic protectionism as a government purpose. BIO 17. But another—and the one that the court discussed at by far the greatest length—involved a disagreement with the Sixth Circuit's determination that rational basis review demands "*both* an analysis of the legislation's *articulated* objective *and* the method that the legislature employed to achieve that objective." *Powers*, 379 F.3d at 1223 (quoting *Brown v. Barry*, 710 F. Supp. 352, 355 (D.D.C. 1989)) (emphasis in original). That determination, the Tenth Circuit observed, derived from the court's reading of *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985). Hence, the Tenth Circuit in *Powers* went to considerable lengths to cabin this Court's *Cleburne* decision, limiting it to its facts by suggesting that it might be "merely [an] exception[] to traditional rational basis review fashioned by the Court to correct perceived inequities unique to [that] case[]." 379 F.3d at 1224.

The government's contention that the split between these cases turned exclusively on disagreement about the legitimacy of state economic protectionism, therefore, is wrong. The Tenth Circuit attributed its disagreement to a rejection of the proposition that rational basis review requires courts to look at both a statute's articulated objective and the method by which it achieves that objective. The en banc Ninth Circuit in this case likewise held that the method of rendering those deemed "habitual drunkards" ineligi-

ble for discretionary relief is "of no constitutional moment." Pet. App. 15a. The government, in its brief in opposition, takes the exact same position. Because this question goes to the heart of equal protection doctrine, will recur in many contexts, and has divided the circuits, it warrants this Court's review.

c. Lastly, the government contends that, even if the courts are split on this question, this case is not a suitable vehicle for resolving it. The government notes that Judge Watford argued in his concurrence that "petitioner would lose even under an approach that considered whether Congress chose rational means to achieve its permissible goals." BIO 18-19. Only two other judges joined Judge Watford's concurrence, however. Indeed, the "interpretive gerrymandering" that characterizes the plurality opinion clearly indicates that a majority of the judges did *not* believe that the statute would survive normal rational basis review if its blanket moral denunciation of people struggling with alcoholism could not be dismissed as constitutionally irrelevant. The government further contends this case presents a poor vehicle because it arises in the immigration context, and invokes Judge Kozinski's concurrence. This Court has never held, however, as Judge Kozinski argues, that "something less than ordinary rational basis review applies" to immigration laws. Pet. App. 20a-21a. The government's contention that the Ninth Circuit might have reached the same outcome had it embraced an as-of-yet unrecognized standard of review does not establish a "vehicle problem."

II. The Habitual Drunkard Standard Is Unconstitutionally Vague.

The government further contends that certiorari is unwarranted because no court has found the habitual drunkard provision vague. But that is par for the course in vagueness cases, and this Court has granted review in the absence of a vagueness split. The government also defends the en banc majority's interpretation by relying on a weaker standard and relying on sources that do not lend help in any event. The statute provides no notice of proscribed conduct, and the en banc dissent recognized that Ledezma would prevail under at least one plausible interpretation. The Court should thus grant review and find the statute unconstitutionally vague. Alternatively, the Court should hold the petition for resolution of *Sessions v. Dimaya*, which may require vacatur and remand.

a. The government suggests that review is unnecessary because "[n]o court has held … that the term [habitual drunkard] is vague." BIO 20. That has not stopped this Court's intervention in the past. In *Johnson v. United States*, for instance, this Court reached the vagueness of the statute in question even though not even the petition argued that the statute was vague. *See* Petition for Writ of Certiorari, *Johnson v. United States*, No. 13-7120, 2013 WL 8292541 (U.S. Oct. 28, 2013); *see also Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015) (noting Court originally granted certiorari to interpret Armed Career Criminal Act residual clause, and Court later requested reargument on whether clause was unconstitutionally vague). Similarly, this Court has

found vague a statute—which applied in the deportation context—even though "[t]he question of vagueness was not raised by the parties nor argued before this Court." *Jordan v. De George*, 341 U.S. 223, 229 (1951). As the petition explains (at 23-25), "habitual drunkard" has taken on new meaning at every step of review, leading to the unavoidable conclusion that it does not "convey[] sufficiently definite warning as to the proscribed conduct" and rendering it vague. *Jordan*, 341 U.S. at 231-32.

The government also downplays the discord below over the correct interpretation of "habitual drunkard." BIO 20. It notes that "nine judges of the en banc court agreed that the term 'habitual drunkard' in Section 1101(f)(1) means 'a person who regularly drinks alcoholic beverages to excess.'" *Id.* But while Judges Watford, McKeown, and Clifton joined that majority definition, Pet. App. 6a n.1, they nonetheless offered a *different* definition in their concurrence, concluding that habitual drunkards "are those who have allowed themselves to become so addicted to alcohol that they can no longer control their habit of drinking to excess." Pet. App. 24a. Unlike the en banc majority's definition, the concurrence's focuses not on the immigrant's conduct but on his inability *to control* the conduct, which is fundamentally different. That three judges thought the term lent itself to two different meanings underscores how indeterminate it is. In any event, the government does not deny that Chief Judge Thomas's dissent, the three-judge panel majority opinion, the BIA opinion, and the Immigration Judge's opinion all offered competing definitions. Thus, no matter the number of judges who joined the en banc majority, it

is undeniable that after "four layers of review … the term 'habitual drunkard' has taken on a new meaning at each step." Pet. 22.

b. The sources the government relies on to vindicate the en banc majority's interpretation cut against it. As the government agrees, the 1951 version of Black's Law Dictionary defines "habitual drunkard" as "one whose habit it is to get drunk; whose inebriety has become habitual." BIO 21 (quoting Black's Law Dictionary 587 (4th ed. 1951)). That definition, focusing on a person's "habit" and not just the frequency of his conduct, is squarely at odds with the en banc majority's definition. So too is the BIA's interpretation in *In re H-*, 6 I. & N. Dec. 614 (BIA 1955), which the government also cites. BIO 21. There, a doctor testified that the immigrant "had been a chronic alcoholic" for more than a year; the BIA found that the immigrant "clearly comes within" the definition of habitual drunkard "[o]n the basis of this testimony." *In re H-* at 616. The government's reliance on sources that offer competing definitions to the en banc majority's again highlights the uncertain meaning of the term.

c. The government next claims that "even if marginal cases could be imagined … petitioner's conduct … would clearly qualify as habitual drunkenness under any definition of the term." BIO 23. That assertion is irreconcilable with Chief Judge Thomas's dissent, which concluded that "there was not sufficient evidence to sustain the determination of ineligibility for cancellation or voluntary departure based on the 'habitual drunkard' clause" under his preferred definition of the term. Pet. App. 42a.

d. Finally, the government maintains that "no reason exists to hold" the petition for this Court's decision in *Sessions v. Dimaya*, No. 15-1498 (reargued Oct. 2, 2017). BIO 23. But just a page earlier, the government stresses the distinction between the standard for vagueness in criminal and civil cases. BIO 22. And the government's emphasis that the habitual drunkard provision is "[a] civil statute," *id.*, as well as its failure to cite *Johnson*—this Court's most recent vagueness decision—suggests that the difference matters. The government's lead argument in *Dimaya*, meanwhile, is that "immigration removal laws are not subject to the standard of vagueness applicable to criminal laws." Brief for the Petitioner at 13, *Sessions v. Dimaya*, No. 15-1498 (U.S. Nov. 14, 2016). *Dimaya* thus may shed light on the appropriate standard to be applied here, and this Court should—at the very least—hold the petition pending its decision in *Dimaya*.

III. The Government's Bare Speculation That The Agency Might Have Reached The Same Decision Based On Alternative Grounds Does Not Create A "Vehicle Problem."

As its final argument against certiorari, the government contends that this case is a "poor vehicle for considering either of the questions presented," citing two alternative grounds for denial of discretionary relief from removal that the government posits the agency might have invoked to reach the same result. BIO 23. Neither of these alternative grounds for denial of discretionary relief formed any basis for either the Board of Immigration Appeals' decision or the Ninth Circuit's en banc

decision. The government's bald speculation that the Board *might* have found some other, unrelated basis for denying Ledezma discretionary relief, and that therefore the outcome here "did not *necessarily* depend on application of the 'habitual drunkard' provision," does not establish a "vehicle problem." BIO 23 (emphasis added). Both the Board's decision and the Ninth Circuit's affirmance of it rested exclusively on the habitual drunkard provision, and there is no question that Ledezma properly preserved both his equal protection and vagueness challenges to the provision.

Furthermore, of the two alternative grounds that the government identifies, one is extremely weak, while the other is altogether hypothetical. In addition to the habitual drunkard provision, the Immigration Judge did conclude, very briefly, that Ledezma was also ineligible for discretionary relief from removal because he "has not established continuity of ten years physical presence." Pet. App. 84a. But before the Board, Ledezma vigorously disputed the government's contention that he voluntarily departed from the United States for approximately a week in 2001 or 2002, and the Board's decision said nothing about the issue. Second, the government suggests that, although the Immigration Judge based his decision on the habitual drunkard provision, "the immigration judge could have reached the same conclusion under the catchall provision of 8 U.S.C. § 1101(f), which states that the enumerated grounds for finding a lack of moral character are not exclusive." BIO 24. But neither the Immigration Judge nor the Board ever mentioned the catchall provision. The assertion that the agency might have reached a

different decision than the one it actually reached, based on a different provision that it never mentioned, does not create a "vehicle problem."

Indeed, the Board's exclusive reliance on the habitual drunkard provision indicates that the validity of that provision is very likely outcome determinative here. Pet. App. 75a. Ledezma has lived in this country for three decades, and during that time he has proven himself a devoted father to eight children, five of whom are U.S. citizens, and a diligent worker. The Board found him ineligible to even seek discretionary relief purely because it could "discern no clear error" in "the Immigration Judge's findings regarding his alcoholism," even though he has now been sober for seven and a half years. *Id*. And the Ninth Circuit ultimately rejected Ledezma's constitutional challenges to the habitual drunkard provision, but only by engaging in "interpretive gerrymandering" that treats the actual language of a statute as "irrelevant" under rational basis review, and only after adopting a series of inconsistent definitions of what exactly a "habitual drunkard" means. Because both questions presented were squarely addressed in the lower court's decision, were likely outcome determinative here, and have implications well beyond this case, they warrant this Court's review.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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