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UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

In the Matter of)
)
)
Carlos CASTILLO-PEREZ)
)
In Removal Proceedings)
)
)

AMICUS BRIEF OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

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OTHER AUTHORITIES

Alan I. Leshner, <i>Addiction Is a Brain Disease, and It Matters</i> , 278 Science 45 (1997)	12, 13, 14
Am. Med. Ass’n, <i>Proceedings of the House of Delegates, 136th Annual Meeting</i> 348 (1987).....	14
American Psychiatric Association, <i>Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition</i> 483–84 (2013).....	12, 13, 14
Amnesty International, <i>Jailed Without Justice: Immigration Detention in the USA</i> 29-43 (2009), available at http://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf (last visited Feb. 25, 2019).....	18
Deborah A. Dawson et al., <i>Recovery from DSM-IV Alcohol Dependence: United States, 2001 – 2002</i> , 100 <i>Addiction</i> 281 (2005).....	14
California Judicial Council, <i>Trial Court Records Manual 93</i> , available at https://www.courts.ca.gov/documents/ceac-20151105-meeting-materials.pdf (last visited Feb. 25, 2019).....	18
<i>Complaint, Southern Poverty Law Center v. United States Department of Homeland Security, et al.</i> , No. 1:18-cv-00760 (D.D.C. Apr. 4, 2018)	18
Colorado Judicial Branch, <i>Records Retention Manual 2</i> , available at https://www.courts.state.co.us/userfiles/file/Administration/JBITS/Court_Services/Retention%20 Manual%202017%20Posting.pdf (last visited Feb. 25, 2019)	18
Eric J. Nestler, <i>Molecular Neurobiology of Addiction</i> , 20 <i>Am. J. Addictions</i> 201, 201 (2001)	12, 13
Howard J. Shaffer et al., <i>The Epidemiology of Psychiatric Disorders Among Repeat DUI Offenders Accepting a Treatment-Sentencing Option</i> , 75 <i>J. Consulting & Clinical Psychol.</i> 795, 802 (2007).....	13

Ingrid V. Eagly & Steven Shafer, <i>A National Study of Access to Counsel in Immigration Court</i> , 164 U. Penn. L. Rev. 1, 16, 32 (2015).....	18
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John Fritze & David Jackson, <i>What’s Included in the Opioids Bill Signed by President Trump</i> , USA Today (3:56 PM Oct. 24, 2018), available at https://www.usatoday.com/story/news/politics/2018/10/24/donald-trump-opioids-bill-includes-changes-trafficking-treatment/1752329002/	15
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Memorandum from the Supreme Court of Ala. to Ala. Court of Officials and Personnel 2 (Apr. 7, 2009), available at http://tinyurl.com/AlabamaMemorandum (last visited Feb. 25, 2019).....	18
Nat’l Inst. Alcohol Abuse & Alcoholism, <i>Alcohol Alert Bulletin</i> (Oct. 1995), available at https://pubs.niaaa.nih.gov/publications/aa30.htm	13
Nat’l Inst. Health, Dep’t Health & Human Servs., <i>Biology of Addiction: Drugs and Alcohol Can Hijack Your Brain</i> , NIH News in Health, Oct. 2015, available at https://newsinhealth.nih.gov/sites/nihNIH/files/2015/October/NIHNIHOct2015.pdf	12, 14
Oregon Judicial Branch, Oregon State Trial Court Records Section 2.2 – Case Files 15-16, available at https://www.courts.oregon.gov/rules/Other%20Rules/Section_2.2_Case_Files.pdf (last visited Feb. 25, 2019).....	18
Patricia C. Kussmann, <i>What Constitutes Driving, Operating, or Being in Control of Motor Vehicle for Purposes of Driving while Intoxicated Statute or Ordinance—Being in Actual Physical Control—Factors and Circumstances Establishing Actual Physical Control; Miscellaneous Situations</i> , 96 A.L.R. 6th 355 (2014).....	9
Sandra C. Lapham et al., <i>Psychiatric Disorders in a Sample of Repeat Impaired-Driving Offenders</i> , 67 J. Stud. on Alcohol 707, 710–11 (2006).....	13
Sean Esteban McCabe et al., <i>Stressful Events and Other Predictors of Remission from Drug Dependence in the United States: Longitudinal Results from a National Survey</i> , 71 J. Substance Abuse Treatment 41 (2016)	14
Supreme Court of Hawaii, Retention Schedule for the District Courts, available at https://www.courts.state.hi.us/docs/sct_various_orders/order48.pdf (last visited Feb. 25, 2019).....	18

What Is Addiction?, Am. Psychiatric Ass'n, available at
<https://www.psychiatry.org/patients-families/addiction/what-is-addiction>
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INTRODUCTION

On December 3, 2018, the Acting Attorney General directed the Board of Immigration Appeals to refer this case to his office for review. *Matter of Castillo-Perez*, 27 I&N Dec. 495 (A.G. 2018). The Acting Attorney General invited the parties and interested amici to submit briefs relevant to his disposition of the case. The American Immigration Lawyers Association (AILA) hereby submits this amicus brief addressing the appropriate legal standard for immigration judges to use in the good moral character analysis for a cancellation of removal applicant with multiple driving under the influence convictions and the impact of such convictions in determining whether to grant cancellation of removal as a matter of discretion.

STATEMENT OF AMICUS INTEREST

AILA is a national association with more than 15,000 members throughout the United States and abroad, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security and before the Executive Office for Immigration Review, as well as before the United States District Courts, Courts of Appeal, and United States Supreme Court.

ISSUES CERTIFIED

- (1) In connection with an application for cancellation of removal under 8 U.S.C. §1229b(b), what is the appropriate legal standard for determining when an individual lacks “good moral character” under 8 U.S.C. § 1101(f)?

- (2) What impact should multiple convictions for driving while intoxicated or driving under the influence have in determining when an individual lacks “good moral character” under 8 U.S.C. § 1101(f)?
- (3) What impact should multiple such convictions have in determining whether to grant discretionary relief under 8 U.S.C. § 1229b(b)?

DISCUSSION

I. **The Attorney General Cannot Alter the Statutory Standard for Good Moral Character Under INA § 101(f) By Creating A New *Per Se* Bar or Presumption.**

The Attorney General lacks the authority to alter the statutory standard for good moral character by creating either a new *per se* bar or a presumption triggered by multiple convictions for driving under the influence. The good moral character statute has created a carefully calibrated standard for good moral character that includes eight *per se* bars and a catch-all provision. If the Attorney General amends this standard by establishing a new *per se* rule or a presumption, he would be acting *ultra vires*—beyond the limits of his delegated statutory authority—especially where statutory *per se* bars indicate a Congressional desire to preclude noncitizens with certain criminal and alcohol-related histories, making the omission of DUIs an indication of Congressional intent to not create such a *per se* bar for these offenses. *City of Arlington v. Fed Comm’n*, 569 U.S. 290, 297-98 (2013) (an agency’s power to act and how they act are authoritatively prescribed by Congress, and their actions are *ultra vires* when it exceeds their authority); *McClendon v. Jackson Television Inc.*, 603 F.2d 1174, 1177 (5th Cir. 1977) (agency action is *ultra vires* when it is clearly at odds with the specific language of the statute).

Amicus agrees with the DHS on the following points: The Attorney General should reaffirm existing case law on what constitutes a lack of good moral character, multiple DUIs do not categorically preclude a finding of good moral character, and multiple DUIs do not preclude a

cancellation of removal applicant from establishing that he or she merits a favorable exercise of discretion.

Amicus parts ways with DHS because it is too quick to assume that a single or multiple DUI potentially shifts the burden to noncitizens to prove that a good moral character bar does not apply. The DHS's proposed test is too one-sided, as it does not properly take into account the number of DUI offenses, how long ago those offenses occurred, the specific circumstances of an offense including the presence or absence of actual or potential harm, potential mitigating factors, and the automatic imposition of a heightened discretionary standard that again fails to take into account all of the relevant positive and negative discretionary factors.

When an adjudicator decides whether an applicant has good moral character under INA § 101(f), the first step is to ask whether the person is categorically barred from showing good moral character because she falls within one of eight enumerated classes of persons.² None of these categories includes DUIs.³ If the applicant does not fall within one of the eight categories, the adjudicator then proceeds to evaluate whether the person qualifies as having good moral character under the catch-all provision. *See* INA § 101(f) (noting that “[t]he fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character”). For purposes of a finding under the “catch-all” clause, the applicant’s entire record during the relevant time period is considered, including any convictions—like DUIs—that do not trigger one of the eight *per se* bars.⁴ In seeking to overcome negative

² Where one of the enumerated bars from § 101(f) may apply, the applicant for relief has the burden to establish by a preponderance of the evidence that they are not barred from the requisite good moral character finding. *See* 8 C.F.R. § 1240.8(d).

³ The *per se* bars do not include DUIs but instead encompass other types of offenses, including aggravated felonies, crimes involving moral turpitude, controlled substance offenses, gambling offenses, prolonged periods of incarceration due to convictions of any kind, and acts of torture, Nazi persecution, genocide, and extrajudicial killings. *Id.* at § 101(f)(3)-(5), (7)-(9).

⁴ Applicants for cancellation of removal for nonpermanent residents must establish that they have been a person of good moral character for the ten years leading up to the final administrative decision on their application. INA §

factors during the good moral character period, applicants can point to underlying circumstances of criminal conduct and highlight positive factors such as employment history, general compliance with laws, and evidence of support for and from family, friends, and other community members. *See Matter of K-*, 3 I&N Dec. 180 (BIA 1949).

The Attorney General's creation of a new, ninth bar to good moral character (or a presumption against good moral character) would violate the statute. The Attorney General's authority is limited to that authority delegated by statute. *Bayou Lawn & Landscape Servs. V. Secy. of Labor*, 713 F.3d 1080 (11th Cir. 2013); *City of Arlington v. Fed Commc 'ns Comm 'n*, 569 U.S. 290, 297-98 (2013) (an agency's power to act and how they act are authoritatively prescribed by Congress, and their actions are ultra vires when it exceeds their authority); *McClendon v. Jackson Television Inc.*, 603 F.2d 1174, 1177 (5th Cir. 1977) (agency action is ultra vires when it is clearly at odds with the specific language of the statute). Because the good moral character statute has eight bars, not nine, the creation of an additional bar would be ultra vires. The creation of a presumption against good moral character for people with DUI convictions would similarly go beyond the statute because Congress has already provided a mechanism for adjudicators to consider facts bearing on good moral character through the catch all provision.

Further evidence that Congress did not intend for DUIs to automatically preclude a finding of good moral character (or to create a presumption against it) lies in the fact that the statute precludes people considered "habitual drunkard[s]" from establishing good moral character. *Id.* at § 101(f)(1). The inclusion of the habitual drunkard bar indicates that Congress considered the impact of alcohol use on good moral character, but declined to draw the line at a single, or even multiple, DUI offense. Rather, Congress intended that applicants would have to exhibit habitual

240A(b)(1)(B); *Matter of Garcia*, 24 I&N Dec. 179 (BIA 2007); *Matter of Ortega-Cabrera*, 23 I&N Dec. 793, 797-798 (BIA 2005).

drunkenness before they would be unable to establish good moral character. *See Matter of H---*, 6 I& Dec. 614, 616 (BIA 1955) (person deemed habitual drunkard after drinking repeatedly to excess and escaping from hospital to drink); *see also Ledezma-Cosino v. Sessions*, 857 F.3d 1042, 1046 (9th Cir. 2017) (en banc) (defining a habitual drunkard as “a person who regularly drinks alcoholic beverages to excess”). Congress knew how to bar an applicant from establishing good moral character based on alcohol-related conduct and decided to bar habitual drunkards, not people with DUI offenses. Any attempt by the agency to create an additional bar through case law would contravene the plain language of statute. While multiple DUIs raise the issue of whether a noncitizen is a “habitual drunkard,” there is not a direct correlation and instead the adjudicator will need to consider the circumstances of the offenses and other factors.

Under Congress’ statutory framework, DUIs must be evaluated under the catch-all provision in the definition of good moral character. INA § 101(f) gives an adjudicator the flexibility to consider any adverse conduct, including DUI offenses, without making a *per se* determination that DUI offenses are always a bar to good moral character. A case-by-case evaluation of DUI offenses fits within the statutory framework, allowing an adjudicator to consider the severity of each individual offense, as well as evidence of repetitive or excessive alcohol consumption and any relevant medical diagnosis, when determining if an applicant is a person of good moral character. Within this framework, convictions for DUI offenses remain relevant, but not necessarily determinative, of the issue of good moral character.

II. Discretionary Determinations Cannot Include a *Per Se* Rule

Like the catch all provision of good moral character, the exercise of discretion in cancellation of removal cases must be flexible. *Matter of C-V-T-*, 22 I&N Dec. 7, 11 (BIA 1998); *Matter of L-*, 3 I&N Dec. 767, 770 (BIA, A.G. 1949). It has long been noted that it is undesirable

and difficult, if not impossible, to impose an inflexible standard in discretionary matters. *See C-V-T-*, 22 I&N Dec. at 11 (collecting cases). Each case must be judged on its own merits. *Id.* The Board has long noted both the undesirability of attempts to dictate outcomes of discretionary matters through rigid standards “. . . which may be applied in a stereotyped manner.” *Matter of L-*, 3 I&N Dec. 767, 770 (BIA, A.G. 1949). In determining whether an applicant for cancellation of removal merits the positive exercise of discretion, favorable considerations include family ties within the United States, duration of residence in the United States, evidence of hardship to the respondent and his family if deportation occurs, service in this country’s armed forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent’s good character. *Matter of C-V-T-*, 22 I&N Dec. 7, 11 (BIA 1998). Adverse factors may include the nature and underlying circumstances of the grounds of inadmissibility or deportability, additional significant violations of immigration laws, the nature and recency of any criminal record, and the presence of other evidence indicative of a respondent’s poor character or undesirability as a permanent resident. *Id.* The immigration judge must review the record as a whole and balance adverse factors against social and humane considerations to decide if the respondent’s particular circumstances call for the grant of relief.

Before an adjudicator reaches the discretionary component of an application for cancellation of removal for nonpermanent residents, the adjudicator will have already considered, and made favorable determinations on, many of the key factors required for a discretionary determination: lengthy residence in the U.S., good moral character, the already heightened exceptional and extremely unusual hardship standard, and the lack of any of the serious convictions that Congress has deemed disqualifying. *See* INA §§ 240A(b)(1)(A)-(D). It is thus unnecessary to

adopt the DHS's proposed heightened discretionary standard. Rather, it is more appropriate to provide guidance to adjudicators in terms of the types of documents and factors that may be appropriate to consider, depending on the specific facts of the matter before the adjudicator.

The Attorney General cannot alter this balancing test by creating a per se rule (or a presumption) for the denial of discretion in cancellation of removal cases. In *Matter of Silva Trevino*, 26 I&N Dec. 826 (BIA 2016), the Board considered whether an adjustment of status applicant with a conviction for sexual misconduct could be required to meet a heightened standard for the positive exercise of discretion, even though the conviction did not render the applicant inadmissible. The Board rejected DHS's contention that a heightened discretionary standard – reserved for those convicted of violent or dangerous crimes who also require a waiver of inadmissibility – should be applied to the adjustment applicant. *Id.* at 836-37. The Board held:

There is a well-established framework for evaluating discretionary determinations, under which Immigration Judges balance the positive and negative factors in the record and the applicant bears the ultimate burden of showing that he or she merits a favorable exercise of discretion. *See Matter of C-V-T-*, 22 I&N Dec. 7, 11-12 (BIA 1998); *Matter of Marin*, 16 I&N Dec. 581, 584-85 (BIA 1978); 8 C.F.R. § 1240.8(d) (2016). In cases where “negative factors grow more serious, it becomes incumbent upon the alien to introduce additional offsetting favorable evidence, which in some cases may have to involve unusual or outstanding equities.” *Matter of C-V-T-*, 22 I&N Dec. at 11-12; *see also Matter of Sotelo*, 23 I&N Dec. 201, 203 (BIA 2001); *Matter of Arai*, 13 I&N Dec. 494, 496 (BIA 1970). Furthermore, when an alien has a criminal record, any rehabilitation or lack of rehabilitation may be deemed a relevant factor in the analysis, depending on the evidence presented. *See Matter of C-V-T-*, 22 I&N Dec. at 12.

Silva Trevino, 26 I&N Dec. 836-37. The BIA concluded that “this framework is appropriate because it accounts for the particular evidence in each case.” *Id.* at 837.

As in *Matter of Silva Trevino*, the “well-established framework for evaluating discretionary determinations” in cancellation of removal cases already takes into “account[] ... the particular evidence in each case,” including DUI offenses. Adjudicators examine DUI offenses, like assaults, sex offenses, and crimes of fraud, on an individualized basis. When evaluating whether an exercise of discretion is merited, an adjudicator must be able to examine police reports and take testimony about the specific circumstances of a DUI offense. *Id.* This approach allows the judge to consider all relevant underlying circumstances, including whether mental illness or trauma played a role in the offense, whether the applicant sought and obtained appropriate mental health and other rehabilitative services, whether the offense involved any property destruction or harm to the applicant or other people, and whether the applicant’s other equities (family ties, hardship to family members, years of residence, gainful employment, community services, etc.) outweigh the severity of the DUI offense. A *per se* rule removes the most important tool an adjudicator has in these matters: the ability to investigate the individualized circumstances of each offense and each applicant. Immigration Judges and the Board have proven themselves up to the task of reviewing the full range of relevant factors in determining whether an applicant meets the good moral character requirement and merits a favorable exercise of discretion.

III. A *Per Se* Bar or Presumption Cannot Account for the Wide Range of Conduct That Is Punishable as a DUI

DUI convictions are particularly inappropriate as the basis of a *per se* bar or presumption because they encompass a wide variety of factual circumstances. DUIs may, or may not, involve driving, property damage or bodily injury, enhancements due to prior DUI offenses, or underlying mental illness or trauma. An individual can be charged with DUI even if they are not driving a

vehicle since “driving” is not an element of driving under the influence.⁵ Moreover, a number of jurisdictions have held that vehicles, under DUI laws, can include bicycles, snowmobiles, and even horses. *Everton v. District of Columbia*, 993 A.2d 595 (D.C. 2010) (Held that bicycle fits within the definition of vehicle in DUI statute); *State v. Barnes*, 987 P.2d 290 (Idaho 1999) (Held that snowmobile is a motor vehicle within meaning of DUI statute); *State v. Dellinger*, 327 S.E. 2d 609 (N.C. App. 1985) (Held that a horse was a “vehicle” within the meaning of a drunk driving statute and that the legislature intended horseback riding to fall within the scope of the statute). Differences in state law further exacerbate the *de minimus* conduct punishable as a DUI. Sleeping while drunk in a commercial parking lot in Nevada can lead to a DUI conviction, whereas it does not in New Mexico. *Compare Hoagland v. State*, 240 P.3d 1043 (Nev. 2010) with *State v. Sims*, 236 P.3d 642, 643 (N.M. 2010). Because of the vast differences in conduct underlying DUIs across states, Immigration Judges must be able to consider all the circumstances regarding DUI convictions to understand their bearing on moral character or discretion.

A. DUIs Include Minor Conduct Like Sleeping In A Car

Many state DUI laws prohibit a person from sleeping while intoxicated while in a car on their own property. *See, e.g., Sarafin v. Commonwealth*, 764 S.E.2d 71 (Va. 2014) (person was asleep in their driveway); *State v. Fleck* 777 N.W.2d 233, 235 (Minn. 2010) (person was drunk in front seat of their vehicle, in their own parking spot at their apartment complex, without engine running or any evidence of driving). A *per se* bar would treat a DUI conviction for sleeping while intoxicated in one’s driveway the same as a conviction for drunkenly speeding in a school zone. *E.g. State ex rel. McDougall v. Super. Ct. Maricopa*, 845 P.2d 508, 509 (Ariz. Ct. App. 1992)

⁵ See Patricia C. Kussmann, *What Constitutes Driving, Operating, or Being in Control of Motor Vehicle for Purposes of Driving while Intoxicated Statute or Ordinance—Being in Actual Physical Control—Factors and Circumstances Establishing Actual Physical Control; Miscellaneous Situations*, 96 A.L.R. 6th 355 (2014).

(DUI upheld where the person was asleep in their car in a private cabin parking lot, without their keys, despite undisputed evidence that person did not drive). In *Sarafin v. Commonwealth*, Mr. Sarafin was convicted of a DUI when police found him asleep in his car in his own driveway, never intending to leave it. *Sarafin v. Commonwealth*, 764 S.E.2d at 72-73. The key was in the ignition, but it was turned backward to turn the radio on. *Id.* The conviction was affirmed because the court found Mr. Sarafin had “actual physical control” of the vehicle. *Id.* at 74. *See also Williams v. City of St. Petersburg*, 217 S.E.2d 893 (Va. 1975) (person who realized he was too drunk to drive and slept in a parking lot in the driver’s seat of their vehicle with the heater on); *id.* at 897. (Harrison, J. dissenting) (remarking that the defendant “did exactly what others should do,” stop drinking and go to sleep).

Because DUI laws criminalize behavior such as “sleeping it off,” a *per se* rule treating multiple DUI convictions as a bar to a finding of good moral character or the positive exercise of discretion will sweep far too broad.

B. Driving in an Emergency, Such as Fleeing Domestic Violence, Can Result in a DUI

A *per se* rule fails to account for situations in which people drive under the influence to avoid other serious consequences. Courts sustain DUI convictions even when impaired driving is the result of an emergency. *See, e.g., Reeve v. State*, 764 P.2d 324 (Alaska Ct. App. 1988). A woman and her father went out drinking one evening. *Reeve v. State*, 764 P.2d 324 (Alaska Ct. App. 1988). The following morning, the father became violent and grabbed her by the throat. *Id.* The woman attempted to call for help and a ride, but fearing for her life, she panicked and drove her father’s car to flee the abuse. *Id.* While recognizing that she was in danger, the court convicted the woman for DUI. *Id.* at 325.

In Massachusetts, a man was convicted of a DUI after he drove to his girlfriend to the emergency room while intoxicated. *Com. v. Kendall*, 883 N.E.2d 269, 271 (Mass. 2008). His girlfriend had hit her head and was bleeding profusely. *Id.* Unable to stop the bleeding, and having no phone to call 911, the man drove his girlfriend to the hospital. A judge dissented from the majority's decision to convict the man, stating that the court was "punish[ing] a reasonable person for taking the 'lesser evil' of the unlawful but more effective alternative." *Id.* at 273.

C. DUI Laws Criminalize Driving While Using Prescribed Medicine, Such as Ambien

DUI laws criminalize operation of a vehicle when intoxicated by medications prescribed by a doctor. *See, e.g., Farmer v. State*, 411 S.W.3d 901 (Tex. Crim. App. 2013). Some states, like Texas, define "intoxicated" as "not having the normal use of mental or physical faculties" because of the consumption of alcohol, a controlled substance, a drug, or "*any other substance.*" Tex. Penal Code Ann. § 49.01(2)(A) (emphasis added). *See also* Miss. Code Ann. § 63-11-30(1)(c) (West 2015) (identical language stating it is unlawful to drive under the influence of "any other substance"); Ky. Rev. Stat. Ann. § 189A.010(1)(c) ("any other substance"); Okla. Stat. Ann. Tit. 47, § 11-902(A)(4) (West) ("any intoxicating substance"). As one Texas judge pointed out, broad DUI laws like these could support a prosecution for driving under the influence of "M & Ms." *Gray v. State*, 152 S.W.3d 125, 136 (Tex. Crim. App. 2004) (Cochran, J., dissenting). *See also* *Cruse v. Com.*, 712 S.W. 2d 356, 357 (Ky. Ct. App. 1986) (establishing the "Kentucky stewed prune rule" which holds that any substance, including prunes, can be the cause of intoxication).

A DUI conviction can be based on intoxication caused by the use of prescription medicines in accordance with a doctor's orders. *See, e.g., Hoffman v. State*, 743 So. 2d 130, 131 (Fla. Dist. Ct. App. 1999) (Florida DUI conviction for ingesting prescription medication). In Texas, the

Criminal Court of Appeals affirmed the DUI conviction of a man who was mistakenly under the influence of Ambien, a common sleep aid. *Farmer v. State*, 411 S.W.3d 901, 902 (Tex. Crim. App. 2013). Because DUI convictions do not always reflect morally reprehensible behavior, Immigration Judges must be able to consider the conduct underlying the conviction.

D. People with Multiple DUI Convictions Often Suffer from the Disease of Addiction, Which is Not a Character Trait

Making multiple DUI convictions a *per se* bar ignores the reality that driving while intoxicated is often a symptom of the disease of addiction and not a reflection of bad character. The *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (“DSM-5”) diagnostic standards include repeat instances of behavior like driving after drinking as a symptom of substance use disorder. See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* 483–84, 541 (2013) [hereinafter “DSM-5”]. Substance use disorders, which are often colloquially called addictions, are chronic diseases that are tied to changes in the chemical structure and function of an addicted person’s brain. See Eric J. Nestler, *Molecular Neurobiology of Addiction*, 20 *Am. J. Addictions* 201, 201 (2001); Alan I. Leshner, *Addiction Is a Brain Disease, and It Matters*, 278 *Science* 45, 46 (1997). The compulsive behaviors associated with addiction are caused by altered neural circuits. Nestler, *supra* at 201. Like diabetes, hypertension, and other chronic diseases, addiction is a treatable illness, not a character trait. *Id.* at 45, 46. Because the neurobiological changes associated with addiction result in compulsive behavior, a judge must be able to consider that DUI convictions do not necessarily reflect lack of good character. Further, because addiction is a treatable disease, a judge must be able to consider a person’s efforts to manage her addiction.

i. Multiple DUI Convictions Often Occur in the Context of Addiction

Driving under the influence is a symptom of substance use disorders. DSM-5, *supra* at 483–84. *See also* Nat'l Inst. Alcohol Abuse & Alcoholism, *Alcohol Alert Bulletin* (Oct. 1995), <https://pubs.niaaa.nih.gov/publications/aa30.htm>. Addiction is often defined in terms of behavior. Nestler, *supra* at 201. *See also* DSM-5, *supra* at 483–84 (defining and diagnosing substance abuse disorders based on the behaviors a person engages in). A person with more than one DUI conviction who manifests at least one other symptom has a substance use disorder. DSM-5, *supra* 491, 541. Indeed, people with multiple DUI convictions are particularly likely to suffer from substance use disorders.⁶

Scientists have traced the behaviors manifesting addiction to neurobiological changes in the brain. Nestler, *supra* at 201. Chronic exposure to drugs like alcohol, opiates, and amphetamines causes long-lasting cellular adaptations in the brain's neural circuitry. *Id.* at 202. These changes in the structure of the brain, in turn, cause the subsequent compulsive drug seeking behaviors we associate with addiction. *Id.* at 209. *See also* Leshner, *supra* at 45.

This understanding has two implications in the context of DUI convictions. First, it cautions that, when a person's multiple DUI convictions are related to addiction, his moral character must be considered in light of his efforts to successfully manage his addiction. *See* Leshner, *supra* at 45, 46. Second, it explains why multiple DUI convictions do not necessarily

⁶ *See* Howard J. Shaffer et al., *The Epidemiology of Psychiatric Disorders Among Repeat DUI Offenders Accepting a Treatment-Sentencing Option*, 75 *J. Consulting & Clinical Psychol.* 795, 802 (2007) (97.6% of people sampled from population of repeat DUI offenders met the DSM-IV definition for a lifetime alcohol use disorder, of those 56.9% meet the criteria for alcohol abuse and 40.7% meet the criteria for alcohol dependence); Sandra C. Lapham et al., *Psychiatric Disorders in a Sample of Repeat Impaired-Driving Offenders*, 67 *J. Stud. on Alcohol* 707, 710–11 (2006) (study of repeat DUI offenders finding “approximately 40% of subjects reported meeting criteria for lifetime nonalcohol drug dependence for at least one [drug] type” and “roughly 30% reported drug dependence for at least one drug type”).

indicate a lack of good moral character when the disease of addiction is the underlying cause of a driving while intoxicated behavior.

ii. Addiction is a Treatable Disease, Not a Character Trait

America's medical professionals and law-makers recognize that addiction is a disease, not a moral shortcoming. *See* Leshner, *supra* at 45; Nat'l Inst. Health, Dep't Health & Human Servs., *Biology of Addiction: Drugs and Alcohol Can Hijack Your Brain*, NIH News in Health, Oct. 2015, at 1–2, <https://newsinhealth.nih.gov/sites/nihNIH/files/2015/October/NIHNIHOct2015.pdf>; *What Is Addiction?*, Am. Psychiatric Ass'n, <https://www.psychiatry.org/patients-families/addiction/what-is-addiction> (last visited Jan. 28, 2019); 23 U.S.C. § 164 (2012) (requiring states to establish DUI sentencing practices that assess repeat DUI offenders for substance abuse disorders and provide treatment). For over thirty years, the American Medical Association has identified addiction as a disease and has urged medical providers and policy makers to develop treatments and policies that recognize addiction as a disease. Am. Med. Ass'n, *Proceedings of the House of Delegates, 136th Annual Meeting* 348 (1987). Today, a variety of treatments successfully help people with substance use disorders achieve remission. *See* Deborah A. Dawson et al., *Recovery from DSM-IV Alcohol Dependence: United States, 2001 – 2002*, 100 *Addiction* 281, 289–90 (2005); Sean Esteban McCabe et al., *Stressful Events and Other Predictors of Remission from Drug Dependence in the United States: Longitudinal Results from a National Survey*, 71 *J. Substance Abuse Treatment* 41, 43 (2016). Further, Congress and the legislatures of many states have created policies—like drug courts and treatment programs for DUI offenders—that treat people for addiction when they come into contact with the criminal justice system. *See* 23 U.S.C. § 164; Nat'l Ass'n Criminal Def. Lawyers, *supra* at 16–18. Recently, in response to the current opioid epidemic, Congress passed legislation to increase resources that help people with substance

use issues receive treatment. SUPPORT for Patients and Communities Act, Pub. L. 115–271 §§ 7001–8092, 8201–8222 (2018) (to be codified in scattered sections of 42 U.S.C.); John Fritze & David Jackson, *What’s Included in the Opioids Bill Signed by President Trump*, USA Today (3:56 PM Oct. 24, 2018), <https://www.usatoday.com/story/news/politics/2018/10/24/donald-trump-opioids-bill-includes-changes-trafficking-treatment/1752329002/> (reporting that the Act passed with nearly unanimous bipartisan support). The medical community and U.S. policy makers recognize both that addiction is a treatable disease and that the symptoms of addiction do not necessarily reflect a person’s character.

State legislatures, Congress, and the Supreme Court recognize that addiction is a disease, not a character trait. Legislative responses to DUIs and other substance abuse related crimes reflect that addiction is a disease often include sentencing options that provide treatment for substance abuse issues. *See e.g.*, Fla. Stat. § 316.193(5) (requiring substance abuse treatment for people convicted of DUI offenses). Over the past two decades, states have increasingly turned to drug courts to treat the substance abuse issues of people who come into contact with the criminal justice system. *See Nat’l Ass’n Criminal Def. Lawyers, supra* at 16–18. Congress too has recognized that addiction is a chronic disease which ought to be treated the same as other physical and mental health conditions by passing legislation that requires most private group health insurance plans to provide equal coverage for substance use disorders. *See* 29 U.S.C. §1185a. Further, Congress has enacted federal legislation that requires the states to conduct “assessment of [an] individual’s degree of abuse of alcohol and treatment as appropriate” for repeat DUI offenders. 23 U.S.C. § 164(a)(5)(B) (2012). The Supreme Court has recognized that addiction is a treatable “illness which may be contracted innocently or involuntarily” and which has more in common with mental illness,

leprosy, venereal disease, or the common cold than with criminal offenses. *Robinson v. California*, 370 U.S. 660, 667, nn.8 & 9 (1962).

A rule requiring Immigration Judges to treat multiple DUI convictions as a *per se* bar against a finding of good moral character or the positive exercise of discretion would result in people being punished, through a finding of lack of good moral character, for simply having a treatable disease. Addiction is a disease, and rates of substance use disorders are high among people with multiple DUI convictions. Medical and legislative consensus indicates that the symptoms of addiction, like the symptoms of diabetes or hypertension, do not universally reflect a lack of good moral character. Thus, the best rule is one that allows an Immigration Judge to consider all aspects of a person—including the number of DUI convictions he has, whether he suffers from an addiction, and whether he is seeking treatment for that addiction—in making a finding of good moral character or when making a discretionary determination.

IV. A heightened discretionary standard requiring production of documents from the convicting jurisdiction would hinge eligibility on state courts' records-retention policies and would particularly prejudice detained applicants

The Department suggests that cancellation applicants with multiple DUI offenses should be required to show, “at a minimum, several factors that might demonstrate the most extenuating circumstances that are both extraordinary and compelling” to depart from a proposed presumption that they do not deserve cancellation of removal as a matter of discretion. DHS Brief at 33. In the Department’s view, a lack of articulated standards “leads to inconsistent results among immigration judges.” *Id.* At 32. In response, the Department requests a requirement that the applicant provide evidence regarding (1) court-ordered rehabilitation and restitution; (2) whether the applicant has been arrested for any DUI offenses since NTA issuance; (3) whether the applicant has a second or subsequent DUI arrest with a suspended driver’s license; (4) whether the applicant

has a history of any DUI offenses designated as high blood alcohol content (BAC); (5) whether any DUI incident involved aggravating conduct; and (6) whether the applicant was sentenced to greater than the mandatory minimum. *Id.* At 33. While some or all these factors will be relevant a particular case, the blanket requirement proposed by DHS would strip the immigration judges of their ability to consider all relevant evidence required for a discretionary determination and would put a sometimes-impossible burden of evidence production on applicants.

The Department's proposed requirement of the production of evidence would result in discretionary denials based on state courts' record keeping practices. Criminal courts vary as to what documents they produce, create, and retain. The criminal records the Department's six-factor test would require an applicant to produce are often not never created in the first place. Misdemeanor courts, where DUI charges are generally filed, often do not generate reliable records. *See, e.g., Saucedo v. Lynch*, 819 F.3d 526, 530 n.5 (1st Cir. 2016) (noting that noncitizen was unable to obtain necessary criminal records because "the Superior Court of the county where [the noncitizen] was convicted does not, in misdemeanor cases, maintain copies of the documents he needed"). Some courts that hear misdemeanors "do not record proceedings (no audio, no court reporter, no video, and no record at all)." Jenny Roberts, *The Innocence Movement and Misdemeanors*, 98 B.U. L. Rev. 101, 137 (forthcoming 2018). *See also, e.g., United States v. White*, 606 F.3d 144, 146 (4th Cir. 2010) (In Virginia, for instance, the only record created for a criminal adjudication in "[g]eneral district court" is "the executed warrant of arrest as executed by the trial judge.")

Even criminal courts that do create relevant records may routinely destroy them. Colorado, for example, authorizes the destruction of certain misdemeanor records four years from "the date

of filing.”⁷ Kentucky and California courts both destroy certain misdemeanor records after five years.⁸ Hawaii permits destruction of complaints and orders in criminal cases after two years.⁹ In Oregon, certain misdemeanor records, including plea agreements, may be destroyed three years after the case is closed.¹⁰ Alabama authorizes destruction of many misdemeanor case files five years after final disposition.¹¹

In addition to problems posed by differing document creation and retention, the Department’s proposed document production requirement would prove exceedingly difficult for noncitizens who are not represented by counsel, detained, and/or non-English speaking. Most noncitizens in removal proceedings are not represented by counsel. *See* 8 U.S.C. § 1229a(b)(4)(A) (noncitizen in removal proceedings not entitled to appointed counsel). According to data drawn from 2007 to 2012, only 37 percent of all noncitizens, and only 14 percent of detained noncitizens, secured legal representation in their removal cases. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Penn. L. Rev. 1, 16, 32 (2015). Detained noncitizens in removal proceedings face additional challenges. They are held in prison-like facilities and face significant restrictions on visitation, movement, and external communication.¹²

⁷ Colorado Judicial Branch, Records Retention Manual 2, *available at* https://www.courts.state.co.us/userfiles/file/Administration/JBITS/Court_Services/Retention%20Manual%202017%20Posting.pdf (last visited Feb. 25, 2019).

⁸ Kentucky Court of Justice, Records Retention Schedule, *available at* <https://kdla.ky.gov/records/recretentionschedules/Documents/State%20Records%20Schedules/kycojccircuit-district1978-present.pdf> (last visited Feb. 25, 2019); California Judicial Council, Trial Court Records Manual 93, *available at* <https://www.courts.ca.gov/documents/ceac-20151105-meeting-materials.pdf> (last visited Feb. 25, 2019).

⁹ Supreme Court of Hawaii, Retention Schedule for the District Courts, *available at* https://www.courts.state.hi.us/docs/sct_various_orders/order48.pdf (last visited Feb. 25, 2019).

¹⁰ Oregon Judicial Branch, Oregon State Trial Court Records Section 2.2 – Case Files 15-16, *available at* https://www.courts.oregon.gov/rules/Other%20Rules/Section_2.2_Case_Files.pdf (last visited Feb. 25, 2019).

¹¹ Memorandum from the Supreme Court of Ala. to Ala. Court of Officials and Personnel 2 (Apr. 7, 2009), *available at* <http://tinyurl.com/AlabamaMemorandum> (last visited Feb. 25, 2019).

¹² *See, e.g., Complaint, Southern Poverty Law Center v. United States Department of Homeland Security, et al.*, No. 1:18-cv-00760 (D.D.C. Apr. 4, 2018); Amnesty International, *Jailed Without Justice: Immigration Detention in the USA 29-43* (2009), *available at* <http://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf> (last visited Feb. 25, 2019).

A rigid requirement that cancellation of removal applicants produce various documents related their arrest, conviction, sentencing, and probation from jurisdictions all around the country could effectively bar those on the detained docket from demonstrating they deserve the positive exercise of the immigration court's discretion, regardless of the other equities and evidence shown. Under the Department's proposed blanket document production requirement, the possibility of receiving the positive exercise of discretion would turn solely on the convicting jurisdictions' records-keeping policies. And even where documents are available, an inflexible requirement could doom the application for those in detention or otherwise unable to effectively communicate with the convicting jurisdictions.

CONCLUSION

For the foregoing reasons, the Attorney General should reject a call for *a per se* good moral character bar or a heightened discretionary standard for cancellation of removal applicants with DUI offenses.

Dated this 25th Day of February 2019,

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CERTIFICATE OF COMPLIANCE

This brief complies with the instructions of the Attorney General’s referred orders dated December 3, 2018, and January 29, 2019, because it was filed electronically to AGCertification@usdoj.gov, and mailed in triplicate on February 25, 2019, to:

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In compliance with the Attorney General’s request, this brief contains 6,076 words per the word count feature of Microsoft Word, excluding the cover page, Table of Contents, Table of Authorities, signature block, Certificate of Compliance, and Certificates of Filing and Service.

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CERTIFICATE OF SERVICE

I hereby Certify that today, February 25, 2018, in addition to submitting in triplicate in accordance with the request of the Attorney General, I caused to be delivered a true and correct copy of the foregoing AMICUS BRIEF OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION to:

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