THE CLINIC
Genevra W. Alberti, #63682
Rekha Sharma-Crawford, #58404
Michael Sharma-Crawford, #57287
515 Avenida Cesar E. Chavez
Kansas City, MO 64108
(816) 994-2300 (phone)
(816) 994-2310 (fax)
Attorneys for Respondent

DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
KANSAS CITY, MO

In the matter of	File No.: A [redacted]
[redacted],	
Respondent	
IN REMOVAL PROCEEDINGS	

Immigration Judge: [redacted] **Next Master Hearing:** [redacted]

RESPONDENT'S MOTION FOR BOND HEARING PURSUANT TO *MATTER OF JOSEPH*

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
KANSAS CITY, MO

In the matter of	
[redacted],	File No.: A [redacted]
Respondent	**DETAINED**
IN REMOVAL PROCEEDINGS	

RESPONDENT'S MOTION FOR BOND HEARING PURSUANT TO *MATTER OF JOSEPH*

COMES NOW Respondent, by and through the undersigned Counsel, and respectfully requests that this Court grant him a bond hearing pursuant to *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999). In support thereof, Respondent would offer the following:

INTRODUCTION

The Department of Homeland Security ("DHS") seeks to remove Respondent, [redacted], a lawful permanent resident since 2000, for having been convicted of two crimes involving moral turpitude (CIMTs) at any time after admission. The charge of removability is based on Respondent's 2013 conviction for sexual misconduct, and his two 2014 Missouri convictions for failure to register as a sex offender. DHS also alleges that Respondent is subject to mandatory immigration custody pursuant to INA §236(c), based on having more than one CIMT conviction.

This Court has jurisdiction to hold a hearing to determine whether DHS is "substantially unlikely to establish, at the merits hearing, the charge…that subject[s] the alien to mandatory detention." *Matter of Joseph*, 22 I&N Dec. at 800. If the Court agrees that DHS is "substantially unlikely" to prove a person is removable on the basis of the charges that also

would subject him or her to mandatory custody under INA §236(c), the person is not "properly included" in a mandatory detention category. *See* 8 CFR §1003.19(h)(2)(ii). Here, Respondent has not, in fact, been convicted of more than one CIMT. As such, Respondent is not properly included in a mandatory detention category, and requests a bond hearing.

ARGUMENT

I. The Missouri Crime of Failure to Register as a Sex Offender Does Not Constitute a CIMT

[redacted] was charged in two separate cases in Greene County, Missouri Circuit Court[1] with failure to register as a sex offender under RSMo § 589.425. He entered a guilty plea in both cases – one on January 6, 2014, and one on October 1, 2014. Under RSMo § 589.425, a person commits the crime of failure to register as a sex offender "when the person is required to register under [RSMo] sections 589.400 to 589.425 and fails to comply with any requirement of [RSMo] sections 589.400 to 589.425." The statute does not provide a required mens rea, and is a regulatory statute. Still, DHS argues that the convictions constitute CIMTs based on *Matter of Tobar-Lobo*, 24 I. & N. Dec. 143 (BIA 2007) – a case arising in the Ninth Circuit. Their argument is, however, untenable.

Though at first blush it seems like [redacted] case is just like that of the respondent in *Matter of Tobar-Lobo*, the two cases are not the same. In *Tobar-Lobo*, the respondent had been convicted in 1998 for failure to register as a sex offender in violation of California Penal Code section 290(g)(1). *See* 24 I&N Dec. at 143. At that time, CPC § 290(g)(1) stated, in relevant part, that "[a]ny person who is required to register under this section [as a sex offender]…who *willfully* violates any requirement of this section is guilty of a misdemeanor…." *Id.* at 145 n.3 (emphasis added). Distinguishably, in XXX

[1] Greene County Circuit Court case numbers [redacted] and [redacted]

case, the Missouri statute has been interpreted to include only a "knowingly" mens rea[2]. The law distinguishes "knowingly" and "willfully" because they represent two different "levels" of culpable mental states that can be required in a criminal statute.

The Board in *Tobar-Lobo* recognized that the "willfully" requirement in CPC § 290(g)(1) meant "a defendant must have had actual knowledge of the registration requirement and willfully failed to register." 24 I&N Dec. at 144-45 (citing *People v. Poslof*, 24 Cal. Rptr. 3d 262 (Cal. Ct. App. 2005)). In *People v. Poslof*, the California Court of Appeals favorably cited another California case finding that, under CPC § 290(g)(1), "willfully" requires that "the defendant have actual knowledge of the duty to register," and, essentially, that he have the specific intent to violate the law. 24 Cal. Rptr. 3d at 268. This level of culpability is not at all what is required in Missouri.

In *State v. Younger*, the Missouri court explained that "if the definition of any offense does not expressly prescribe a culpable mental state for any elements of the offense, a culpable mental state is nonetheless required and is established if the person acts purposefully or knowingly." 386 S.W.3d 848, 853 (Mo. Ct. App. 2012). The court also held that a person acts "knowingly" under RSMo § 589.425 "'when he is aware of the nature of his conduct…'". *Id.* at 858 (citing RSMo 562.021.3). As such, the "knowingly" mens rea attaches simply to a defendant's *conduct*, and "[does] not attach to whether he knowingly broke the law." 386 S.W.3d at 858. In other words, the person does not have to be aware of any sort of consequences of their actions when failing to register, nor do they have to be aware that they are breaking the law. This represents a crucial difference between "knowingly" and "willfully."

[2] *See State v. Jacobs*, 421 S.W.3d 507, 513-14 (Mo. App. Ct. 2013); *State v. Younger*, 386 S.W.3d 848, 853, 858 (Mo. App. Ct. 2012).

The U.S. Supreme Court has noted this same key difference between "knowingly" and "willfully." In *Bryan v. United States*, the Court stated "unless the text of the statute dictates a different result, the term 'knowingly' merely requires proof of knowledge of the facts that constitute the offense." 524 U.S. 184, 193 (1998). In contrast, the Court noted that "willfully", connotes a more culpable frame of mind:

> The word 'willfully' is sometimes said to be 'a word of many meanings' whose construction is often dependent on the context in which it appears. See, *e.g.*, *Spies v. United States*, 317 U.S. 492, 497…(1943). Most obviously it differentiates between deliberate and unwitting conduct, but in the criminal law it also typically refers to a culpable state of mind. As we explained in *United States v. Murdock*, 290 U.S. 389…(1933), a variety of phrases have been used to describe that concept. As a general matter, when used in the criminal context, a 'willful' act is one undertaken with a 'bad purpose.' In other words, in order to establish a 192 'willful' violation of a statute, 'the Government must prove that the defendant acted with knowledge that his conduct was unlawful.' *Ratzlaf v. United States*, 510 U.S. 135, 137…(1994).

Bryan v. United States, 524 U.S. 184, 191-92 (1998) (internal footnotes omitted).

[redacted] Missouri convictions only required him to be aware of his own actions, not of the fact that they were illegal; this does not represent the necessary level of scienter to be a CIMT.

Additionally, Respondent's conviction is not a CIMT because it is a regulatory offense. The Missouri Supreme Court has observed that, even though the Missouri sex offender registration statute is located within Title XXXVIII of the Missouri code, which deals with "Crimes and Punishment," "'the location and labels of a statutory provision do not by themselves transform a civil remedy into a criminal one.'" *In re RW*, 168 S.W.3d 65, 69 (2005) (quoting *Smith v. Doe*, 538 U.S. 84, 94 (2003)). Furthermore, "[w]hen a statute is 'an incident of the State's power to protect the health and safety of its citizens,' it will be considered 'as evidencing an intent to exercise that regulatory power, and not a purpose to add to the punishment.'" *In re*

RW, 168 S.W.3d at 69 (quoting *Smith v. Doe*, 538 U.S. at 93-94). "Along with any deterrent effect, the [Missouri] registration statutes also serve the regulatory purpose of assisting authorities with investigation of sex crimes" and "[t]he registration requirements are not retributive because all offenders are subject to lifetime registration." 168 S.W.3d at 70.

Since as early as 1943, The Board of Immigration Appeals has held many times that regulatory offenses typically do not involve moral turpitude. *See, e.g.*, *Matter of H-*, 1 I. & N. Dec. 394, 395 (BIA 1943) (running a retail liquor business without paying required special tax is not a CIMT); *Matter of Abreu-Semino*, 12 I&N Dec. 775, 776-77 (1968) (sale of drugs is regulatory offense and thus not CIMT); *Matter of L-V-C-*, 22 I&N Dec. 594 (BIA 1999) (structuring currency transactions to evade reporting requirements is not a CIMT); *see also Efagene v. Holder*, 642 F.3d 918, 922-23 (10th Cir. 2011) (discussing Board precedent on this issue, and finding *Tobar-Lobo*'s decision to be at odds with this long-standing precedent); *Totimeh v. Holder*, 666 F.3d 109, 116 (3rd Cir. 2012) ("[T]he BIA's interpretation of [the statute at issue] also contradicts its precedent of what constitutes a crime involving moral turpitude under the INA."). *Matter of Tobar-Lobo* departs inexplicably from this long-standing precedent, which is one of the reasons that several federal circuit courts of appeals refuse to apply *Tobar-Lobo*. *See, e.g.*, *Efagene v. Holder*, 642 F.3d at 922 ("'[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view.'") (quoting *INS v. Cardoza–Fonseca*, 480 U.S. 421, 446 n.30 (1987)); *see also Totimeh v. Holder*, 666 F.3d at 116 (quoting the same language from *Cardoza-Fonseca*).

[redacted] conviction under Missouri law is but a regulatory offense and therefore not a crime involving moral turpitude.

Tobar-Lobo not only conflicts with decades of Board precedent decisions, but it also incorrectly relies on several Ninth Circuit cases, as has been explained by the Ninth Circuit itself. For example, in *Plasencia-Ayala v. Mukasey*, 516 F.3d 738 (9th Cir. 2008) – a case concerning a Nevada sex offender registration statute, similar to the one at issue in *Tobar-Lobo* – the Ninth Circuit determined that *Tobar-Lobo*'s reliance on *Gonzalez-Alvarado v. INS*,[3] and other Ninth Circuit cases was misplaced, because those cases did not actually support the conclusion in *Tobar-Lobo*: "However, in each of those [Ninth Circuit cases cited in *Tobar-Lobo*], the statutes at issue served to protect 'vulnerable classes of citizens who are both directly and personally the victims of those crimes,'" whereas, in contrast, to be convicted under the sex offender registry statute, "no harm to any person need be shown, nor any intent to cause harm.'" 516 F.3d at 748 (quoting the dissenting opinion in *Matter of Tobar-Lobo*). The *Plasencia* court ultimately determined that, even if the respondent had willfully failed to register, the crime still would not be a CIMT because "it is the sexual offense that is reprehensible, not the failure to register," and that "[w]hile a sex offender's breach of the duty to notify may deprive law enforcement and others of valuable information, it does not demonstrate moral depravity." 516 F.3d at 748.

While the *Plasencia* decision was subsequently overturned on other grounds by *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009), the Ninth Circuit again echoed its concerns about the validity of *Tobar-Lobo* in *Pannu v. Holder*, 639 F.3d 1225 (9th Cir. 2011). In *Pannu*, the respondent had been convicted under the same sex offender registry statute as was at issue in *Tobar-Lobo*. The Board had determined Pannu's conviction was a CIMT, based on *Tobar-Lobo*. On appeal, the Ninth Circuit remanded the case to the Board and suggested that the

[3] 39 F.3d 245 (9th Cir. 1994).

Board "consider the additional analysis of the *Tobar–Lobo* decision contained in this court's earlier decision in *Plasencia–Ayala* and more recently by the Tenth Circuit in *Efagene v. Holder*, 642 F.3d 918 (10th Cir.2011), as the BIA did not have the benefit of these decisions at the time of its prior ruling." *Id.* at 1229 n.3. On remand, the Board vacated its prior decision and remanded to the IJ. *See In Re Pannu*, 2011 WL 6965202 (BIA 2011).

In addition to the Ninth Circuit, several other circuits have excoriated the *Tobar-Lobo* decision. For example, in *Efagene v. Holder*, the Tenth Circuit repeated the finding of the Ninth Circuit that the cases cited by the Board in *Tobar-Lobo* actually do not support its holding: "The conclusion that failing to register is one of the exceptional regulatory offenses classified as crimes involving moral turpitude is not supported by the cases cited by the BIA in *Tobar–Lobo.*" 642 F.3d 918, 922 (10th Cir. 2011). Even where a sex offender registry statute included a mens rea of "knowingly," the Tenth Circuit determined that "merely having knowledge as an element of the offense does not convert a regulatory crime into a crime involving moral turpitude under the BIA's own precedent…." *Id.* at 925 (citing to *Matter of H*, 1 I&N Dec. 394, 394-96).

Likewise, the Third and Fourth Circuits have also denounced *Tobar-Lobo*. In analyzing a Minnesota sex offender registration statute, the Third Circuit *in Totimeh v. Holder* similarly found that, though the underlying crimes that make a person subject to the registry statute are often vile and depraved, the registry statute "does not regulate a crime that of itself is inherently vile or intentionally malicious…. the independent act of failing to register or update a registration as a predatory offender is not, as a category of crime, an inherently despicable act." 666 F.3d 109, 116 (3rd Cir. 2012). The Fourth Circuit has also agreed with the logic set forth in *Totimeh* and *Efagene*, and likewise refused to defer to *Tobar-Lobo*, finding that it runs contrary to The Board's own well-established precedent and is its holding is not a reasonable

interpretation of the INA. *See Mohamed v. Holder*, 769 F.3d 885, 889 (4th Cir. 2014) (Finding that The Board in *Tobar-Lobo* "based its conclusion on the statute's *purpose* and not on the nature of a *conviction* under the statute. A conviction under the registration statute involves only administrative conduct, not the violation of a moral norm").

It is clear that failure to register is but regulatory offense and does not constitute a crime involving moral turpitude. DHS cannot prove otherwise. As such, [redacted] respectfully requests that he be given a bond hearing, as DHS cannot meet its burden of proving removability for commission of more than one CIMT, and thus he is not subject to mandatory custody.

Respectfully submitted this _____ day of July, 2015.

THE CLINIC

By: _____

Genevra W. Alberti, #63682
William M. Sharma-Crawford, #57287
Rekha Sharma-Crawford, #58404
515 Avenida Cesar E. Chavez
Kansas City, MO 64108
(816) 994-2300 (phone)
(816) 994-2310 (fax)
Attorneys for the Respondent

United States Department of Justice
Executive Office for Immigration Review
Immigration Court
Kansas City, MO

In the Matter of: [redacted] **File No.:** [redacted]

ORDER OF THE IMMIGRATION JUDGE

Upon Consideration of the RESPONDENT'S MOTION FOR BOND HEARING PURSUANT TO *MATTER OF JOSEPH*, it is HEREBY ORDERED that the Motion be [] **GRANTED** or [] **DENIED** because:

- ❑ DHS does not oppose the Motion.
- ❑ The respondent does not oppose the Motion.
- ❑ A response to the Motion has not been filed with the Court.
- ❑ Good cause has been established for the Motion.
- ❑ The Court agrees with the reasons stated in the opposition to the Motion.
- ❑ The Motion is untimely per _____.
- ❑ Other: _____.

Deadlines:

- ❑ The application(s) for relief must be filed by _____.
- ❑ The respondent must comply with DHS biometrics instructions by _____.

_____ _____
Date Immigration Judge

Certificate of Service

This document was served by: [ ] Mail [ ] Personal Service

To [ ] Alien [ ] Alien c/o Custodial Officer [ ] Alien's Atty/Rep [ ] DHS

Date:_____ By: Court Staff _____

[redacted]

CERTIFICATE OF SERVICE

This is to certify that on this _____day of July, 2015, I have served one copy of the foregoing RESPONDENT'S MOTION FOR BOND HEARING PURSUANT TO *MATTER OF JOSEPH* to: Office of Chief Counsel, Immigration & Customs Enforcement, 2345 Grand Blvd., Ste. 500, Kansas City, MO 64108, via email.

_____

THE CLINIC
Genevra W. Alberti, #63682
Rekha Sharma-Crawford, #58404
Michael Sharma-Crawford, #57287
515 Avenida Cesar E. Chavez
Kansas City, MO 64108
(816) 994-2300 (phone)
(816) 994-2310 (fax)
Attorneys for Respondent