CASE NOTES

"Caught in the Crosshairs": The Ninth Circuit Applies a Lenient Standard to a Finding of CAT Relief for Transgender Alien in *Avendano-Hernandez v. Lynch*

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I. OVERVIEW

Edin Avendano-Hernandez, a native and citizen of Mexico, was born male, but from an early age identified and presented herself to the world as female, and as a result was subjected to harassment, beatings, sexual assaults, death threats, and rape. She was singled out and taunted constantly at school, was molested by a teacher, and was regularly raped and beaten by her older brothers and cousins while her parents did nothing to intervene. After her mother died, she came to the United States for the first time and began openly living as a woman and taking hormones, but struggled with alcohol abuse. After serving time for a 2006 felony conviction for driving under the influence (DUI), she was removed to her home country. Back in Mexico, her abuse continued, and eventually she was brutally raped by uniformed armed Mexican police officers, after which point she attempted to make her second entry into the United States. At a border checkpoint, she was harassed by and forced to perform oral sex on another uniformed armed police officer as others watched and ridiculed her. She successfully reentered the United States in May 2008 but three years later was arrested for not reporting to her parole officer for her 2006 conviction.

While in immigration holding, Avendano-Hernandez applied for withholding of removal and for relief under the Convention Against Torture (CAT). The immigration judge (IJ) ruled that her 2006 felony conviction for driving under the influence was a "particularly serious crime" rendering her ineligible for withholding of removal, and that,

although the abuse she had suffered in the past constituted torture within the statutory definition, she was ineligible for relief under the CAT because she had not demonstrated that the Mexican government would more likely than not consent to or acquiesce in her torture if she was returned to Mexico. On appeal, the Board of Immigration Appeals (BIA) affirmed both conclusions. Avendano-Hernandez petitioned the Ninth Circuit to overturn the decision to deny her relief, arguing that the IJ and the BIA erred on both counts. The United States Court of Appeals for the Ninth Circuit *held* that the IJ and the BIA were within their discretion to determine that a felony DUI conviction was a particularly serious crime rendering Avendano-Hernandez ineligible for withholding of removal, but that both agencies erred in finding that she had not shown that the Mexican government acquiesced in her past torture and would likely acquiesce in future torture, and that she was therefore eligible for CAT relief. *Avendano-Hernandez v. Lynch*, 800 F.3d 1072 (9th Cir. 2015).

II. Background

An alien facing deportation from the United States may petition an immigration judge for withholding of removal as allowed by 8 U.S.C. § 1231, but is ineligible for a grant of that petition if they have been convicted of a crime designated by the Attorney General of the United States as "particularly serious."[1] A particularly serious crime is not fully defined by the statute,[2] but the BIA, as a delegate of the Attorney General of the United States, has jurisdiction to designate certain crimes as particularly serious on a case-by-case basis.[3] The statute provides that to make this determination in a case, the immigration judge or Board of Immigration Appeals must decide whether the alien "is a danger to the community."[4] Aggravated felonies punishable by imprisonment of at least five years are established as particularly serious crimes in the statute.[5]

1. 8 U.S.C. § 1231(b)(3)(B)(ii) (2012).
2. In *Delgado v. Holder*, the Ninth Circuit considered the statutory history of the "particularly serious crime" bar in 8 U.S.C. § 1231(b)(3)(B)(ii) to conclude that though the statute defined an aggravated felony as a per se particularly serious crime, it did not preclude the Attorney General or one of its delegates from considering whether a crime rose to the standard on a case-by-case basis. Delgado v. Holder, 648 F.3d 1095, 1101, 1105-07 (9th Cir. 2011).
3. *Id.* at 1097-98, 1102-04 (holding that the BIA's interpretation of the statute, allowing their determination of a particularly serious crime on a case-by-case basis, was "permissible").
4. Avendano-Hernandez, 800 F.3d at 1077 (quoting *Delgado*, 648 F.3d at 1107).
5. 8 U.S.C. § 1231(b)(3)(B); *see also Delgado*, 648 F.3d at 1102-03.

As an alternate route to avoid deportation, an alien may petition for relief under article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[6] Determinations under the CAT are governed by federal regulations, codified at 8 C.F.R. § 208—Procedures for Asylum and Withholding of Removal.[7] Courts have held that rape may constitute torture under this treaty, as it is "a form of aggression constituting an egregious violation of humanity."[8] Additionally, the Office of Immigration and Naturalization Services recognizes rape as a form of persecution.[9]

A. The BIA Has Discretion to Determine a "Particularly Serious Crime"

The BIA has discretion in determining what may or may not constitute a "particularly serious crime" under 8 U.S.C. § 1231(b)(3)(B)(ii) for purposes of granting or denying a petition for withholding of removal.[10] On appeal, a circuit court may review the BIA's determination of a particularly serious crime only for abuse of discretion.[11] Circuit courts may not review the evidence considered by the BIA and make their own factual determination.[12] However, a circuit court may remand a matter for further evidentiary consideration.[13]

The correct evidentiary standard for determining whether a crime is a "particularly serious crime" under 8 U.S.C. § 1231(b)(3)(B)(ii) was established by the BIA in *In re Frentescu*.[14] In *Frentescu*, the BIA introduced a set of factors to determine whether a crime is particularly serious: (1) the nature of the conviction, (2) the circumstances and underlying facts of the conviction, (3) the type of sentence imposed, and

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6. Known more generally as the Convention Against Torture (CAT). The treaty was opened for signature in 1984 and was signed by the United States in 1988. *See* 8 C.F.R. § 208.18 (2015); *Zubeda v. Ashcroft*, 333 F.3d 463, 471 (3rd Cir. 2003).

7. 8. C.F.R. § 208.1(a)(1).

8. *Zubeda*, 333 F.3d at 472; *see also, e.g.*, Lopez-Galarza v. I.N.S., 99 F.3d 954, 962-63 (9th Cir. 1996).

9. *Lopez-Galarza*, 99 F.3d at 963.

10. 8 U.S.C. § 1231(b)(3)(B)(ii) (2012); Delgado v. Holder, 648 F.3d 1095, 1098 (9th Cir. 2011); Arbid v. Holder, 700 F.3d 379, 383 (9th Cir. 2012).

11. *See* cases cited *supra* note 10.

12. Konou v. Holder, 750 F.3d 1120, 1127 (9th Cir. 2014) (internal citations omitted).

13. *See, e.g.*, R. Gomez-R v. Holder, 556 F. App'x 578 (9th Cir. 2014) (where court remanded alien's CAT claim back to the BIA for the Board to further consider the evidence that he would be tortured by police if returned to Mexico).

14. *In re* Frentescu, 18 I. & N. Dec. 244 (1982) (superseded by statute in other part, 8 U.S.C. § 1253(h) (1991), as recognized in Miguel-Miguel v. Gonzales, 500 F.3d 941, 946 (9th Cir. 2007)); *Delgado*, 648 F.3d at 1107; Anaya-Ortiz v. Holder, 594 F.3d 673, 679 (9th Cir. 2010).

(4) whether the type and circumstances of the crime indicate that the alien will be a danger to the community.[15] The BIA's establishment of these factors qualifies as "an agency's construction of the statute which it administers," and is entitled to deference.[16] Accordingly, circuit courts have applied this standard consistently thereafter.[17]

Courts may not reweigh the *Frentescu* factors after the BIA has done so, but may review the BIA's decision to determine whether they applied the correct standard. The court must accord deference to an agency decision that is "rational,"[18] but may not defer to an agency decision that is "arbitrary and capricious."[19] The Supreme Court has held that an agency decision is arbitrary and capricious

> if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[20]

B. Agencies and Courts Have Differed on the Strictness of Evidentiary Standard Required by Statute to Show Government Torture or Persecution

The BIA has interpreted the Convention Against Torture to require that the alien applying for CAT relief demonstrate express government acquiescence in their torture.[21] However, some circuit courts have held on appeal that when torture is inflicted by public officials, government involvement may be inferred. In *Baballah v. Ashcroft*, the Ninth Circuit reversed a BIA denial of asylum for a Muslim Israeli who had

15. *In re* Frentescu, 18 I. & N. Dec. 244.

16. 8 U.S.C. § 1231(b)(3)(B)(ii) (2012); I.N.S. v. Aguirre-Aguirre, 526 U.S. 415, 424 (1999) (quoting Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984)).

17. *See Anaya-Ortiz*, 594 F.3d at 679; Yousefi v. U.S. I.N.S., 260 F.3d 318, 328 (4th Cir. 2001); Hamama v. I.N.S., 78 F.3d 233, 239-40 (6th Cir. 1996); *Delgado*, 648 F.3d at 1107; Afridi v. Gonzales, 442 F.3d 1212, 1218-19 (9th Cir. 2006) (overruled in part on other grounds by Estrada-Espinoza v. Mukasey, 546 F.3d 1147, 1160 n. 15 (9th Cir. 2008)).

18. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983).

19. *Yousefi*, 260 F.3d at 329 (quoting *State Farm*, 463 U.S. at 43).

20. *State Farm*, 463 U.S. at 43.

21. *See R. Gomez-R v. Holder*, 556 F. App'x 578 (9th Cir. 2014) (where Ninth Circuit remanded the BIA's determination that alien had not proved that his past torture by police officers would resume if he were returned to Mexico); *Konou v. Holder*, 750 F.3d 1120 (9th Cir 2014) (where the BIA held that homosexual alien's evidence of laws criminalizing homosexuality in his home country were not sufficient to prove that those laws would be enforced).

demonstrated consistent abuse by Israeli Marines, holding that the Marines as government actors showed "government involvement" in the petitioner's abuse and harassment.[22] In *Silva-Rengifo v. Atty. Gen. of U.S.*, the United States Court of Appeals for the Third Circuit reversed a BIA denial of CAT relief to a Colombian immigrant after his conviction for cocaine possession, holding that "the alien need not establish actual knowledge by government officials of torturous conduct" and citing the Ninth Circuit's holding in *Zheng v. Ashcroft* that congressional intent for the evidentiary standard of the CAT was to require the alien to demonstrate the "willful blindness" of public officials to the torture of their citizens by third parties.[23] In *De La Rosa v. Holder*, the United States Court of Appeals for the Second Circuit held that the BIA applied an incorrect legal standard in disregarding the immigration judge's determination that the presence of corrupt government officials in the Dominican Republic who had ties to a drug trafficker was one of the evidentiary factors supporting a finding of government acquiescence in torture of an alien facing deportation after cooperating with prosecutors in a drug trafficking conspiracy.[24] However, the Fourth Circuit in *Suarez-Valenzuela v. Holder* held that an alien's past torture by a Peruvian government official was not sufficient to establish a claim for CAT relief even though the official had been assisted by a group of other officials, because those officials were considered "rogue" and because other government officials had condemned the perpetrating official's actions and had prosecuted and ultimately incarcerated him for his torture of Suarez-Valenzuela.[25]

III. COURT'S DECISION

In the noted case, the Ninth Circuit, finding no abuse of discretion, affirmed the BIA's decision to deny withholding of removal because Avendano-Hernandez's crime of driving under the influence resulting in

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22. Baballah v. Ashcroft, 367 F.3d 1067, 1077-79 (9th Cir. 2003).

23. Silva-Rengifo v. Att'y Gen. of U.S., 473 F.3d 58, 64-65 (3rd Cir. 2007) (citing Zheng v. Ashcroft, 332 F.3d 1186, 1194 (9th Cir. 2003)).

24. De La Rosa v. Holder, 598 F.3d 103, 106, 109-10 (2nd Cir. 2010) ("Without discussion, the BIA appears to have assumed that the activity of [persons within the government attempting to prevent De La Rosa's torture] overrides both the complicity of other government actors and the general corruption and ineffectiveness of the Dominican government in preventing unlawful killings. We have significant doubts about this view of what may constitute government acquiescence.").

25. Suarez-Valenzuela v. Holder, 714 F.3d 241, 248 (4th Cir. 2013).

injury to another was a "particularly serious crime,"[26] but held that the BIA's determination that Avendano-Hernandez had not demonstrated government acquiescence in her torture was not supported by the record.[27]

The Ninth Circuit noted that the BIA must consider "all evidence" relating to past or future torture.[28] In proceedings below, the BIA and the IJ did not question that Avendano-Hernandez's past assaults, including her rape at the hands of police officers, constituted torture.[29] But both agencies held that she had not proved either "that any Mexican public official ha[d] consented to or acquiesced in prior acts of torture committed against homosexuals or members of the transgender community," or that she was likely to suffer future torture if returned.[30]

The Ninth Circuit refuted both of these conclusions, finding neither of them supported by the evidence presented. First, the court disagreed with the high evidentiary standard set for Avendano-Hernandez by the BIA to prove government involvement in her torture. The court held that Avendano-Hernandez did not need to prove that the Mexican government explicitly condoned her torture, but rather that the clear fact, undisputed by the IJ and the BIA, that she was raped and assaulted on multiple occasions by police officers in uniform satisfied her burden.[31] Noting that "her torture was inflicted by public officials themselves," the Ninth Circuit held that a "plain reading" of the regulations implementing the CAT establishes that an alien may prove government involvement if her torture was committed by government officials.[32]

Second, the Ninth Circuit held that the BIA erred in finding that future torture was not likely, because it relied on laws passed in Mexico to protect gay and lesbian citizens as well as evidence that Mexican police corruption was limited to cases of drug trafficking and bribery.[33] Such laws offer no promise to protect Avendano-Hernandez, who, as a transgender woman, has needs that are distinct from gay or lesbian

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26. Avendano-Hernandez v. Lynch, 800 F.3d 1072, 1077-78 (9th Cir. 2015) (citing Anaya-Ortiz v. Holder, 594 F.3d 673, 679-80 (9th Cir. 2010) (holding that the BIA's designation of a DUI resulting in bodily injury to another as "particularly serious" was both within the BIA's discretion and outside the jurisdiction of the court to review) as justification for the BIA's determination).
27. *Avendano-Hernandez*, 800 F.3d at 1078-79.
28. *Id.* at 1079.
29. *Id.*
30. *Id.*
31. *Id.* at 1079-80.
32. *Id.* (citing 8 C.F.R. § 1208.18(a)(1)).
33. *Id.* at 1080-82.

persons.[34] The court pointed out the high rate of transgender murders and other sexual-identity-based hate crimes in Mexico, in stark contrast to the BIA's reasoning and support for its conclusion that Avendano-Hernandez had not proved she was likely to face future torture.[35] The court also noted that not only do transgender persons not benefit from laws enacted to protect gays and lesbians, but they are also often attacked and targeted for violent crime and harassment specifically because of their "public nonconformance with normative gender roles."[36] As to the BIA's determination regarding evidence that police corruption was limited only to drug trafficking crimes, the Ninth Circuit held that the BIA had misread the record, ignoring evidence showing that life in Mexico had in fact become more dangerous, not less, for many members of the gay, lesbian, and transgender communities in the wake of passage of protective laws purported to offer governmental protection.[37] As the Ninth Circuit succinctly explained, "Avendano-Hernandez's experiences reflect how transgender persons are caught in the crosshairs of both generalized homophobia and transgender-specific violence and discrimination."[38]

IV. ANALYSIS

The Ninth Circuit was correct to hold that they did not have jurisdiction to reweigh the evidence and factual determinations of the IJ and the BIA with respect to Avendano-Hernandez's request for withholding of removal.[39] The IJ and the BIA both concluded that Avendano-Hernandez's DUI conviction was a "particularly serious crime," and without reconsidering the evidence leading to that determination the Ninth Circuit could only review the decision for abuse of discretion.[40]

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34. Fifteen years earlier, in a slightly clumsy attempt at categorization, the Ninth Circuit held in *Hernandez-Montiel v. I.N.S.* that "gay men with female sexual identities" in Mexico constitute a "particular social group" who should be accorded protection from persecution, for purposes of asylum consideration. Hernandez-Montiel v. I.N.S., 225 F.3d 1084, 1091, 1094-95 (9th Cir. 2000). This particular description may apply to many transgender or gender-nonconforming individuals, but transgender identity just as often has little or nothing to do with homosexuality.

35. *Avendano-Hernandez*, 800 F.3d at 1081-82.

36. *Id.* at 1081.

37. The Ninth Circuit pointed out that the evidentiary record had, in fact, nothing to do with drug trafficking and bribery corruption ("The agency's focus on drug-related police corruption is inexplicable in light of the overwhelming record evidence of ineffective police protection of transgender persons."). *Id.* at 1082.

38. *Id.*

39. *See id.*, ("We cannot overturn this conclusion without reweighing the *Frentescu* factors, which we lack jurisdiction to do."); *see also* Anaya-Ortiz v. Holder, 549 F.3d 673 (9th Cir. 2010); Konou v. Holder, 750 F.3d 1127 (9th Cir. 2014).

40. *Avendano-Hernandez*, 800 F.3d at 1078.

However, the Ninth Circuit should have used their own discretion to find that the BIA "failed to consider an important aspect of the problem" that Avendano-Hernandez's DUI conviction presented in the context of determining whether her crime was particularly serious and whether she posed a danger to the community.[41] Avendano-Hernandez struggled with alcohol abuse brought on by the unspeakable trauma she suffered for years at the hands of her family and the authorities of her home country.[42] That abuse is what caused her to drive under the influence more than once. The DUI that resulted in her felony conviction and deportation proceedings, not her first such offense,[43] was not a premeditated action, but rather the action of a human being in deep pain who had succumbed to addiction.[44] The BIA should not have found Avendano-Hernandez's DUI to be a particularly serious crime, but should instead have recognized that an addict needs assistance more than they need punishment.[45] The BIA's determination would have sent Avendano-

41. *See* Motor Vehicle Mfrs. Ass'n v. State Farm, 463 U.S. 29, 42-43 (1983).

42. *See Avendano-Hernandez*, 800 F.3d at 1075-76, (detailing her "relentless abuse" from a young age); Carmen M. Cusack, *Kent Make-Up Their Minds: Juveniles, Mental Illness, and the Need for Continued Implementation of Therapeutic Justice Within the Juvenile Justice and Criminal Justice Systems*, 22 AM. U.J. GENDER SOC. POL'Y & L. 149, 150 (2013) ("Many juveniles [in the criminal justice system] have been traumatized by abuse and other environmental factors. [They] are not hardened criminals.").

43. Her earlier DUI had resulted in a misdemeanor conviction. *Avendano-Hernandez*, 800 F.3d at 1076.

44. *Cf. Konou v. Holder* (holding that where the BIA denied petition for withholding of removal for a homosexual alien who was convicted of assault with a deadly weapon with great bodily injury and battery with serious bodily injury due to a fight he had with his then-boyfriend).

45. Many scholars have pointed to high recidivism rates of drug crimes and the lack of easily accessible holistic support to show that a more traditional criminal system of punishment does not address the root cause of these offenses when they are fueled by addict behavior. *See, e.g.*, The Honorable Peggy Fulton Hora et. al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 448-49 (1999) ("[There is a] growing recognition on the part of judges, prosecutors, and defense counsel that the traditional criminal justice methods of incarceration, probation, or supervised parole have not stemmed the tide of drug use among criminals and drug-related crimes in America."); Steven Belenko, *The Challenges of Integrating Drug Treatment into the Criminal Justice Process*, 63 ALB. L. REV. 833, 838 (2000) ("Offenders tend to be from poor, minority communities that largely feed the criminal justice system and have limited resources or lack health insurance with which to access treatment on their own . . . . In particular, the special treatment needs of women offenders and members of minority groups are not often addressed."); Caitlinrose Fisher, *Treating the Disease or Punishing the Criminal?: Effectively Using Drug Court Sanctions to Treat Substance Use Disorder and Decrease Criminal Conduct*, 99 MINN. L. REV. 747, 748 (2014) ("Evidence suggests that drug courts can successfully reduce drug use and criminal behavior . . . [T]he drug court model has been replicated in a variety of 'problem-solving courts,' which address conditions, such as alcoholism and mental illness, that contribute to criminal activity.").

Hernandez back to her home country, having determined that she was a danger to people around her, to therefore presumably continue to drive under the influence unless she could somehow manage to access addiction treatment. This result makes little sense as a justification for actions affecting the global justice community.[46]

The Ninth Circuit was correct in reversing the BIA's denial of the second part of Avendano-Hernandez's petition, granting her CAT relief based on her evidence and testimony. In holding that Avendano-Hernandez had not shown government acquiescence in her torture, the BIA relied on reasoning that ran "counter to the evidence before the agency."[47] The BIA did not dispute the evidence that Mexican police officers and border officials, both public officials, had raped Avendano-Hernandez. As the Ninth Circuit explained, this evidence of torture committed by public officials is sufficient to satisfy the burden of proving government acquiescence. The BIA's conclusion, therefore, was not a "reasonable interpretation of the statute it administers"[48] and furthermore was "arbitrary and capricious" under the standard set by the Supreme Court in *Motor Vehicle Manufacturer's Ass'n of the U.S., Inc. v. State Farm Mutual Automobile Insurance Co.*[49]

The BIA would have required Avendano-Hernandez to show that the Mexican government expressly condoned her torture, which would have likely been next to impossible to prove since the government could easily disclaim the actions of her assaulters as the acts of "rogue officers."[50] Such a requirement, if upheld, would be extremely restrictive to CAT petitioners, and would thereby subject vulnerable persons to excessively high standards. In reversing this holding, the Ninth Circuit

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46. *See* Juliet Strumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 418, 419 ("Rather than viewing rehabilitation as a way of creating a more integrated citizenry, the view of the offender is as a profoundly anti-social being whose interests are fundamentally opposed to those of the rest of society . . . . As criminal sanctions for immigration-related conduct and criminal grounds for removal from the United States continue to expand, aliens become synonymous with criminals.").

47. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

48. Hamama v. I.N.S., 78 F.3d 233, 239 (6th Cir. 1996) (citing Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984)).

49. *State Farm*, 463 U.S. at 43 ("[A]n agency rule would be arbitrary and capricious if the agency has . . . offered an explanation for its decision that runs counter to the evidence before the agency.").

50. Indeed, the American government as the opposing party in this case effectively made this argument for them. *See* Avendano-Hernandez v. Lynch, 800 F.3d 1072, 1080 ("We reject the government's attempts to characterize these police and military officers as merely rogue or corrupt officials.").

applied a more lenient evidentiary standard for aliens petitioning for CAT relief, in keeping with the objective of the treaty which is to protect vulnerable people seeking safety from an abusive government.

The Ninth Circuit was also right to reject the BIA's argument that Mexico's recent laws protecting gay and lesbian citizens and legalizing same-sex marriage would serve to protect Avendano-Hernandez.[51] The needs, legal and otherwise, of transgender persons are often different from the needs of gay or lesbian persons.[52] In Mexico, this distinction displays itself in the facts that police officers frequently single out transgender persons for abuse and that Mexico has one of the highest documented number of transgender murders in the world.[53] It is essential that LGBT protections under the law be inclusive and intersectional—a government should not be able to say that merely by legalizing same-sex marriage and passing laws protecting gay and lesbian citizens, they have effectively extended protections over those who are transgender, intersex, or gender-nonconforming.[54]

Under the totality of circumstances, Avendano-Hernandez's petition should have been granted in full. The Ninth Circuit should have questioned the BIA's determination that Avendano-Hernandez was a "danger to the community of the United States"[55] under the underlying facts of her conviction under *Frentescu* and the "arbitrary and capricious" standard set by the Supreme Court in *State Farm*. However, the court was right to grant her appeal under the Convention Against Torture Act and to apply a lenient evidentiary standard for proving government acquiescence in torture for purposes of CAT relief.

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51. As the court wisely noted, "laws recognizing same-sex marriage may do little to protect a transgender woman like Avendano-Hernandez from discrimination, police harassment, and violent attacks in daily life." *Id.*

52. *Id.* at 1081.

53. *See id.*

54. *See id.* ("While the relationship between gender identity and sexual orientation is complex, and sometimes overlapping, the two identities are distinct.").

55. 8 U.S.C. § 1231(b)(3)(B)(ii) (2012).

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