No. 18-725

IN THE
Supreme Court of the United States

ANDRE MARTELLO BARTON,
Petitioner,

v.

WILLIAM P. BARR, ATTORNEY GENERAL,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The government concedes that there is a circuit split on whether a lawfully admitted permanent resident who is not seeking admission to the United States can be "render[ed] … inadmissible" for purposes of the stop-time rule, 8 U.S.C. § 1229b(d)(1). The government does not dispute that this is an ideal vehicle to resolve that circuit split.

The government's primary argument against certiorari is that the Board of Immigration Appeals (BIA) has yet to issue a precedential decision on this issue. But the BIA has had numerous opportunities to issue precedential decisions, yet it persistently declines to do so. The government offers no reason to believe that the BIA will change course. Moreover, as the government concedes, even a precedential decision by the BIA could not resolve the circuit split because the Ninth Circuit has held that the statutory text unambiguously supports Petitioner's interpretation, while the Eleventh Circuit has held that the statutory text unambiguously supports the government's interpretation. Because the circuit split can only be resolved by this Court, the Court should grant certiorari.

ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CIRCUIT SPLIT.

As the petition explained, there is a circuit split on whether a lawfully admitted permanent resident who is not seeking admission to the United States can be "render[ed] … inadmissible" for purposes of the stop-time rule, 8 U.S.C. § 1229b(d)(1). In the decision below, the Eleventh Circuit joined the Second and Fifth

Circuits in answering that question in the affirmative. Pet. 16-19; *see Calix v. Lynch*, 784 F.3d 1000 (5th Cir. 2015); *Heredia v. Sessions*, 865 F.3d 60 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 677 (2018).[1] Pet. 16-18. The Ninth Circuit reached the opposite conclusion in *Nguyen v. Sessions*, 901 F.3d 1093 (9th Cir. 2018). Pet. 14-16.

The government expressly concedes that there is a circuit split on the question presented. BIO 11, 12, 13. The government quibbles with the extent of the split: it asserts that the split is 2-1, not 3-1, in light of the Second Circuit's statement in *Heredia* that it need "not 'definitively decide'" the question. BIO 12 (quoting *Heredia*, 865 F.3d at 68). But even if the split is 2-1, certiorari is still warranted. This Court routinely grants certiorari to resolve 2-1 splits, and even 1-1 splits. *See, e.g.*, *Rotkiske v. Klemm*, No. 18-328, 2019 WL 886893 (U.S. Feb. 25, 2019) (granting certiorari to resolve 2-1 split); *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, No. 18-389, 2019 WL 166875 (U.S. Jan. 11, 2019) (granting certiorari to resolve 1-1 split); *Mission Product Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 397 (2018) (mem.) (granting certiorari to resolve 2-1 split); *Rimini Street, Inc. v. Oracle USA, Inc.*, No. 17-1625, 2019 WL 1005828 (U.S. Mar. 4, 2019) (resolving 2-1 split); *Jam v. Int'l Finance Corp.*, No. 17-1011, 2019 WL 938524 (U.S. Feb. 27, 2019) (resolving 2-1 split). The same course is warranted here.

Contrary to the government's suggestion (BIO 13), no further percolation is necessary. The courts of

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[1] The Third Circuit has reached the same conclusion in an unpublished opinion. Pet. 18-19; *Ardon v. Att'y Gen. of U.S.*, 449 F. App'x 116 (3d Cir. 2011).

appeals have thoroughly engaged with the question presented. The Fifth Circuit deemed the statute ambiguous, but found in favor of the government. *Calix*, 784 F.3d at 1005-07. The Ninth Circuit expressly disagreed with *Calix* and found that the statute unambiguously supported petitioner's interpretation. *Nguyen*, 901 F.3d at 1098-99. The Eleventh Circuit charted its own course, finding that the statute unambiguously supported the government's interpretation. Pet. App. 17a n.5. All possible interpretations of this statute have now been aired in the courts of appeals, and the issue is ripe for this Court's review.

This is an ideal vehicle to resolve the split. The immigration judge stated on the record that she "would have granted [Petitioner's] application for cancellation of removal" if he were eligible to seek that relief. Pet. App. 36a. Thus, the Eleventh Circuit's interpretation of the stop-time rule was outcome-determinative. Notably, the government identifies no vehicle problems and does not dispute that this is a perfect vehicle.

The government asserts that certiorari should be denied because the BIA has not yet addressed this issue in a precedential opinion. BIO 12. But the absence of a precedential BIA decision reflects the BIA's voluntary choice. In 2015, the Fifth Circuit explicitly refused to give *Chevron* deference to the Board because the Board's precedential decisions had not resolved this issue. *Calix*, 784 F.3d at 1009. Yet in *Heredia*, *Nguyen*, and the decision below—all of which involved BIA decisions postdating *Calix*—the BIA has persisted in resolving this issue in non-precedential decisions. The

government offers no reason that the BIA will change course, and the BIA's voluntary decision to avoid addressing this question in a precedential opinion should not allow the government to avoid certiorari.

Moreover, even a precedential BIA decision could not possibly resolve the circuit split. In the decision below, the Eleventh Circuit made clear that *Chevron* deference would be irrelevant because the statute unambiguously supported *the government*'s interpretation. Pet. App. 17a n.5. By contrast, in *Nguyen*, the Ninth Circuit made clear that *Chevron* deference would be irrelevant because the statute unambiguously supported *Petitioner*'s interpretation. *Nguyen*, 901 F.3d at 1098 ("[T]he statute is not ambiguous. … Because the BIA's interpretation impermissibly renders a portion of the rule superfluous, there is no ambiguity that would require us to exercise deference."). Thus, a BIA decision favoring *either* position would not resolve the circuit split.

The government does not dispute this point. Instead, it asserts that "if the Board issues a precedential opinion on the question presented, the Ninth Circuit may be willing to revisit the issue en banc in a future case. The en banc court in such a case would not be bound by the panel's conclusion in *Nguyen* that the statute unambiguously favors petitioner's interpretation." BIO 13. It makes this argument notwithstanding its acknowledgment that the Ninth Circuit has already denied the government's en banc petition on this issue. BIO 12-13. In other words, the government's theory is that certiorari should be denied because the BIA might hypothetically issue a precedential decision supporting

the government's interpretation, which might hypothetically induce the Ninth Circuit to grant a fresh petition for rehearing en banc and then issue a decision rejecting the panel's conclusion in *Nguyen*. But a similar argument could be made against certiorari in *any* case—it is always hypothetically possible that a circuit might grant rehearing en banc at some future point and reject a prior panel's conclusion. Such speculation is not a sufficient basis to avoid this Court's review, particularly in view of the BIA's own steadfast refusal to decide this issue in a precedential opinion.

II. THE ELEVENTH CIRCUIT'S DECISION IS WRONG.

The Eleventh Circuit erred in holding that Petitioner was "render[ed] inadmissible" by his 1996 offense. Because Petitioner had already been admitted, he could not have been rendered "inadmissible." A person who has already been admitted can be rendered *deportable*—*i.e.*, eligible to *lose* the status of a lawfully admitted permanent resident. But because he was already admitted, it was impossible for an immigration judge to adjudicate him as "inadmissible." As such, he was not "render[ed] inadmissible."

The government takes the view that Petitioner's 1996 conviction conferred upon him the "*status* of inadmissibility," even though there were no "*consequences* of that status." BIO 8. That is incorrect. Immigration authorities had previously adjudicated Petitioner to be *admissible*, thus allowing him to enter the status of lawfully admitted permanent resident. That status never changed; even after his 1996 conviction, he retained the benefits of the prior

admissibility adjudication. True, if Petitioner "abandoned or relinquished" his lawful-permanent-resident status, or need to be readmitted for some other reason, BIO 8, he would *at that point* be rendered inadmissible—because at that point, an immigration judge would be authorized to adjudicate him as inadmissible. But that never happened, so Petitioner was never "render[ed] inadmissible."

The Eleventh Circuit's interpretation also ignores the fact that the stop-time rule, by its terms, is triggered when two conditions are met: (1) "the alien has committed an offense referred to in section 1182(a)(2) of this title," and (2) that offense "renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title." *See* 8 U.S.C. § 1229b(d)(1)(B). Yet under the government's position, committing an offense "referred to in section 1182(a)(2) of this title," *id.*, *automatically* is sufficient to trigger the stop-time rule, regardless of whether the defendant is in a proceeding to determine admissibility or deportability. Thus, under the government's view, there is no need for any additional inquiry on whether that offense "renders the alien inadmissible to the United States under section 1182(a)(2) of this title." *Id.*

The government theorizes that the statute is written this way in order to make clear that the clock stops as of the date of the commission of the offense, but that the stop-time rule is triggered only if any other inadmissibility criteria imposed by § 1182(a)(2), which may (or may not) include a conviction for that offense,

have been satisfied. BIO 9-10. But the reasoning yields a different superfluity. Under the government's reading, the "removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title" language is superfluous: Petitioner is aware of no scenario in which an alien has "committed an offense referred to in section 1182(a)(2)," *has not* been rendered "inadmissible" (as the government understands that term), yet *has* been rendered "removable." 8 U.S.C. § 1229b(d)(1)(B). The better reading of the statute is that a court should first determine the nature of the alien's offense—*i.e.*, whether "the alien has committed an offense referred to in section 1182(a)(2) of this title," *id.*—and then determine the consequence of that offense *to that alien—i.e.*, whether he is inadmissible (in the context of a determination of admissibility) or removable (in the context of a determination of deportability).

Finally, the Eleventh Circuit's decision conflicts with the structure of federal immigration law. As the petition explained, there is no other section of the Immigration and Nationality Act where the status of being "inadmissible" is divorced from the context of an immigrant seeking admission to the United States. Pet. 23. In response, the government points to various statutes requiring immigration authorities to determine whether the alien was admissible *at the time of admission*, so as to assess whether a prior admissibility decision was erroneous. BIO 10-11. It also points to provisions requiring certain aliens who are physically present in the United States to establish their admissibility—such as aliens seeking to adjust their immigration status. BIO 11. But in this case, the government does not contend that Petitioner was

inadmissible at the time of his admission, and does not contend that Petitioner needed to be re-admitted. Rather, it contends that Petitioner acquired the "status" of "inadmissible" after he was admitted, and that this "status" must be determined outside the context of being admitted. That "status" analysis occurs in no other context in federal immigration law, and it would be incongruous for such an analysis to be required solely in the context of the stop-time rule.

Because the Eleventh Circuit's decision conflicts with the text and structure of the stop-time rule, it should be reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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