No. 18-725

IN THE
Supreme Court of the United States

ANDRE MARTELLO BARTON,
Petitioner,

v.

WILLIAM P. BARR, ATTORNEY GENERAL,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

BRIEF OF PETITIONER

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QUESTION PRESENTED

Whether a lawfully admitted permanent resident who is not seeking admission to the United States can be "render[ed] … inadmissible" for the purposes of the stop-time rule, 8 U.S.C. § 1229b(d)(1).

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The decision of the Eleventh Circuit (Pet. App. 1a) is reported at 904 F.3d 1294. The decision of the Board of Immigration Appeals (Pet. App. 20a) is unreported. The decision of the immigration judge (Pet. App. 25a) is unreported.

JURISDICTION

The Eleventh Circuit entered its judgment on September 25, 2018. The petition for a writ of certiorari was granted on April 22, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

8 U.S.C. § 1229b(a) provides:

> The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—
>
> (1) has been an alien lawfully admitted for permanent residence for not less than 5 years,
>
> (2) has resided in the United States continuously for 7 years after having been admitted in any status, and
>
> (3) has not been convicted of any aggravated felony.

8 U.S.C. § 1229b(d)(1) provides:

> For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end (A) except in the case of an alien who applies for cancellation of removal under subsection (b)(2), when the alien is served a notice to appear under section 1229(a) of this title, or (B) when the alien has

committed an offense referred to in section 1182(a)(2) of this title that 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, whichever is earliest.

STATEMENT

A. Statutory Background

This brief begins by presenting the principles of immigration law relevant to this case.

1. Inadmissibility and Deportability

"Federal immigration law governs both the exclusion of aliens from admission to this country and the deportation of aliens previously admitted." *Judulang v. Holder*, 565 U.S. 42, 45 (2011). Before the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, "these two kinds of action occurred in different procedural settings, with an alien seeking entry (whether for the first time or upon return from a trip abroad) placed in an 'exclusion proceeding' and an alien already here channeled to a 'deportation proceeding.'" *Judulang*, 565 U.S. at 45 (citation omitted). Since the passage of IIRIRA, "the Government has used a unified procedure, known as a 'removal proceeding,' for exclusions and deportations alike." *Id.* at 46 (citations omitted). IIRIRA also introduced a change in nomenclature: rather than "excludable," "the term the statute now uses" is "inadmissible." *Id.* (internal quotation marks omitted).

At a removal proceeding, the alien can be charged with either inadmissibility or deportability. 8 U.S.C. § 1229a(a)(1), (2). If an alien seeks admission, defined as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer," *id.* § 1101(a)(13), then the immigration judge determines whether the alien is inadmissible. *Id.* § 1229a(e)(2).[1] If the alien has already been admitted and is not seeking admission, the immigration judge determines whether the alien is deportable. *Id.*

Removal proceedings differ depending on whether the alien is charged with inadmissibility or deportability. Procedurally, the alien bears the burden of proving admissibility, but the government bears the burden of proving deportability. *See id.* § 1229a(c)(2), (c)(3).

Substantively, the statutory grounds for inadmissibility and deportability are different. The immigration laws provide a list of grounds for inadmissibility, *id.* § 1182(a), and a separate list of grounds for deportability, *id.* § 1227(a). The two lists are "sometimes overlapping and sometimes divergent." *Judulang*, 565 U.S. at 46. In most cases, the

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[1] Aliens must seek admission not only when they physically enter the United States, but also when they are already physically present within the United States without having been "admitted" by an immigration officer. This can occur when an alien enters without inspection, or when the Attorney General "paroles" an alien into the United States without formally "admitting" that alien. 8 U.S.C. § 1101(a)(13)(B). Aliens who seek to adjust from one status to another, such as from nonimmigrant temporary status to permanent residency status, must also be "admitted" into the new status. Thus, in that scenario as well, an immigration judge determines whether the aliens are "admissible." *See id.* § 1255(a).

"inadmissibility" list is broader than the "deportability" list. For instance, a person who is convicted of, or who admits to committing, a single "crime involving moral turpitude" ("CIMT") is inadmissible, unless a statutory exception for certain petty offenses applies. 8 U.S.C. § 1182(a)(2)(A)(i)(I), (ii). By contrast, an alien is not deportable based on a CIMT unless the alien was convicted of the crime (admitting to it is not enough), and the crime was committed within five years of admission and carries a statutory maximum sentence of at least one year. *Id.* § 1227(a)(2)(A)(i). In some ways, however, the "inadmissibility" list is narrower than the "deportability" list. For example, virtually any firearm offense is a ground for deportability, *id.* § 1227(a)(2)(C), whereas there is no analogous basis for inadmissibility in section 1182.

2. Removal Proceedings for Lawful Permanent Residents

The United States is home to millions of lawful permanent residents ("LPRs"), commonly known as "green card" holders. Bryan Baker, Dep't of Homeland Security, *Population Estimates: Lawful Permanent Resident Population in the United States: January 2015* at 1 (May 2019), https://www.dhs.gov/sites/default/files/publications/lpr_population_estimates_january_2015.pdf. LPRs are non-citizens who are lawfully authorized to live permanently within the United States. Unlike other non-citizens, their permission to live here does not expire after a fixed time period, nor is it tied to holding a particular job or attending a particular school. *Compare* 8 U.S.C. § 1101(a)(20), *with id.* § 1101(a)(15)(M), (O). Like all aliens, LPRs seeking

admission can be charged with inadmissibility, and LPRs not seeking admission can be charged with deportability.

An alien must be "lawfully admitted" for permanent residence. *Id.* § 1101(a)(13)(C). But unlike other aliens, LPRs who depart the United States and seek to re-enter do not ordinarily need to be formally re-admitted. *Id.* There are six situations, however, when LPRs who leave and seek to re-enter do need to be re-admitted. *Id.* One of those situations is that the alien "has committed an offense identified in section 1182(a)(2) of this title." *Id.* § 1101(a)(13)(C)(v). In other words, if section 1101(a)(13)(C)(v) is applicable,[2] the commission of an offense "identified in section 1182(a)(2)" would trigger *both* the necessity of seeking re-admission, *and* an adjudication of inadmissibility.

3. Cancellation of Removal and the Stop-Time Rule

The Attorney General has long possessed discretionary authority to grant relief to aliens who are inadmissible (formerly known as "excludable") or deportable from the United States. Before IIRIRA's enactment, section 212(c) of the Immigration and Naturalization Act ("INA") gave the Attorney General

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[2] Section 1101(a)(13)(C)(v) was enacted as part of IIRIRA. Before IIRIRA, an LPR who took a brief trip abroad and attempted to re-enter was not subject to the grounds of exclusion (the former name for "inadmissibility"). *See Rosenberg v. Fleuti*, 374 U.S. 449 (1963). In *Vartelas v. Holder*, 566 U.S. 257 (2012), this Court assumed—without deciding—that section 1101(a)(13)(C)(v) had abrogated *Fleuti* prospectively. *Id.* at 262 n.2. But this Court held that section 1101(a)(13)(C)(v) did not apply to aliens who committed their crimes before IIRIRA's enactment. *Id.* at 261.

discretion to admit otherwise-excludable LPRs who were "returning to a lawful unrelinquished domicile of seven consecutive years." *Judulang*, 565 U.S. at 46 n.1. Administrative and judicial decisions ultimately extended this discretionary authority to LPRs who had never left the United States. *Id.* at 47-48. Under former INA section 244(a), non-LPRs were eligible for a similar discretionary remedy known as "suspension of deportation."

In 1996, Congress repealed sections 212(c) and 244(a) and substituted "a new discretionary remedy, known as 'cancellation of removal,' which is available in a narrow range of circumstances to excludable and deportable aliens alike." *Judulang*, 565 U.S. at 48; *see* 8 U.S.C. § 1229b. Cancellation of removal is available both to LPRs, 8 U.S.C. § 1229b(a), and non-LPRs, *id.* § 1229b(b). *See* H.R. Rep. No. 104-469, pt. 1, at 231-32 (1996) (explaining how cancellation of removal replaces former INA sections 212(c) and 244(a)-(d)).

LPRs are eligible for cancellation of removal if three criteria are met: the alien "(1) has been an alien lawfully admitted for permanent residence for not less than 5 years, (2) has resided in the United States continuously for 7 years after having been admitted in any status, and (3) has not been convicted of any aggravated felony." 8 U.S.C. § 1229b(a). This new "cancellation of removal" remedy thus left intact one aspect of the preexisting regime: the requirement of continuous residence in the country for seven years after admission.[3]

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[3] For non-LPRs, the alien must have been physically present for ten years to be eligible for cancellation of removal. 8 U.S.C. § 1229b(b)(1)(A).

But Congress altered the seven-year residency requirement in an important respect. Before IIRIRA's enactment, criminal convictions could not stop the residency clock. Thus, even time in jail could count toward the residency requirement. *See* S. Rep. No. 104-48, at 2 (1995) (noting that "[t]ime spent in the U.S., whether it is in a prison, a jail, on bond or under community supervision, may count toward the 7 year residency requirement").

In IIRIRA, Congress enacted the "stop-time rule." As relevant here, the rule provides that the residency clock is stopped

> when the alien has committed an offense referred to in section 1182(a)(2) of this title that 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[.]

8 U.S.C. § 1229b(d)(1). This case concerns the proper interpretation of the stop-time rule.

B. Factual Background

Petitioner Andre Martello Barton is an LPR and a citizen of Jamaica. Pet. App. 3a, 26a. He and his mother were lawfully admitted to the United States on B-2 visitor visas on May 27, 1989, when he was a minor. *Id.* 3a, 22a, 31a, 34a. Petitioner became an LPR in June 1992. *Id.* 22a. Unless the stop-time rule applies, Petitioner would have satisfied the requirement of having "resided in the United States continuously for 7 years after having been admitted in any status" on May 27, 1996. 8 U.S.C. § 1229b(a).

In January 1996, when Petitioner was 18 years old and just a "few months shy" of his seventh year in this country, he was arrested and charged with three counts of aggravated assault, as well as counts of criminal damage to property and first-degree possession of a firearm during the commission of a felony. Pet. App. 3a, 34a. He was ultimately convicted of those offenses in July 1996. *Id.* In 2007 and 2008, Petitioner was convicted of violating the Georgia Controlled Substances Act. Pet. App. 3a-4a.

Subsequently, Petitioner was charged with deportability and served with a notice to appear in removal proceedings. *Id.* 4a. The Immigration Judge sustained two grounds of deportability: Petitioner's 2007 and 2008 drug convictions, *see* 8 U.S.C. § 1227(a)(2)(B)(i), and Petitioner's 1996 firearm conviction, *see id.* § 1227(a)(2)(C). Pet. App. 4a.

Petitioner applied for cancellation of removal. *Id.* His application precipitated the present dispute over whether the stop-time rule prevented him from satisfying the seven-year residency requirement.

It was undisputed that neither of the grounds for deportability triggered the stop-time rule. Petitioner's 2007 and 2008 drug crimes did not trigger the stop-time rule because they were committed long after the seven-year anniversary of his admission. Pet. App. 3a. Petitioner's 1996 firearm conviction did not trigger the stop-time rule because it is not "referred to in section 1182(a)(2) of this title," as the stop-time rule requires. 8 U.S.C. § 1229b(d)(1). This is because section 1182 contains no provision analogous to section 1227(a)(2)(C), which makes virtually all firearm offenses a ground for

deportability. *See Matter of Campos-Torres*, 22 I. & N. Dec. 1289, 1293 (B.I.A. 2000); *see also* Pet. App. 23a (citing *Campos-Torres*).

The government nonetheless took the position that the residency clock stopped based on Petitioner's 1996 aggravated assault offenses. Pet. App. 6a.[4] Crucially, however, the government was not capable of charging Petitioner with being deportable on the basis of those offenses, as the government has repeatedly conceded. *See* Pet. App. 5a-6a; BIO 4 n.1. This is because Congress did not deem these offenses to be a sufficient basis to deport an LPR. A CIMT is a ground for deportability only if (among other requirements) it is committed within five years of an alien's admission. 8 U.S.C. § 1182(a)(2)(A)(i)(I), (a)(2)(A)(ii)(I). Here, Petitioner committed his crimes more than five years after his admission. Pet. App. 3a. An alien can also be deportable based on "two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct." 8 U.S.C. § 1227(a)(2)(A)(ii). But here, Petitioner's three aggravated assault convictions arose

[4] The government took the position that these offenses stopped the clock because they were *committed* in January 1996 (before the seven-year anniversary of Petitioner's admission), even though Petitioner was *convicted* in July 1996 (after the seven-year anniversary of his admission). Pet. App. 3a, 5a. The government's position was consistent with *Matter of Perez*, 22 I. & N. Dec. 689, 693-94 (B.I.A. 1999), which held that the date of the crime's *commission*, not of the *conviction*, is the relevant date for purposes of the stop-time rule. Four Members dissented in *Perez*. Petitioner assumes in this brief that *Perez*'s holding is correct, although this Court has not decided that question.

out of a single scheme of criminal misconduct (indeed, a single incident and a single arrest). Pet. App. 3a.

Congress made a different choice, however, regarding the effect of these offenses on aliens seeking admission. Had a hypothetical alien with Petitioner's criminal record been seeking admission, Petitioner's 1996 aggravated assault convictions would have been a ground for inadmissibility. They are CIMTs, and a single CIMT is sufficient to establish inadmissibility (subject to an inapplicable statutory exception). 8 U.S.C. § 1182(a)(2)(A)(i)(I). Based on that fact, the government argued that the aggravated assault convictions rendered Petitioner *inadmissible*. Pet. App. 6a. According to the government, Petitioner had "committed an offense referred to in section 1182(a)(2) of this title"—*i.e.*, the aggravated assault offenses—that "renders the alien inadmissible to the United States under section 1182(a)(2) of this title." 8 U.S.C. § 1229b(d)(1); *see* Pet. App. 6a.

Of course, Petitioner was not—and could not have been—charged with inadmissibility, because he had already been admitted. The government's argument thus relied on a counterfactual: if Petitioner were to find himself seeking admission in a hypothetical removal proceeding, then he *could* have been found inadmissible by the aggravated assault convictions. Pet. App. 6a. The Immigration Judge agreed with the government's argument and ruled that Petitioner was ineligible for cancellation of removal. *Id.* 6a, 34a-36a.

The Immigration Judge nonetheless made clear that she "would have granted [Petitioner's] application for cancellation of removal" if Petitioner could satisfy the

seven-year residency requirement. *Id.* 36a. The Immigration Judge recited the following facts: Petitioner graduated from technical college in 2009 and now runs a local Meineke car shop that is owned by his mother. *Id.* 31a-32a. Petitioner has four young children, all of whom are U.S. citizens, and a fiancée here in the United States. *Id.* Petitioner's mother still resides in this country, as do most of his relatives. *Id.* 31a. Petitioner is also the primary provider for his family. *Id.* 32a-33a. The Immigration Judge concluded that "considering the fact that his last arrest was over 10 years ago," Petitioner "is clearly rehabilitated," and "the testimony from both [Petitioner], his mother, and his fiancée is also telling, that his family relies on him and would suffer hardship if he were to be deported to Jamaica." *Id.* 36a.

The Board of Immigration Appeals (BIA) dismissed Petitioner's appeal in a non-precedential single-member decision. *Id.* 20a-24a. It reasoned that Petitioner's "conviction for aggravated assault" is a "ground of inadmissibility," thus triggering the stop-time rule. *Id.* 23a. The Eleventh Circuit denied Petitioner's petition for review. *Id.* 2a-3a. The Eleventh Circuit agreed with the BIA that Petitioner had been "rendered inadmissible" by his 1996 convictions, even though Petitioner was not adjudicated as inadmissible or even capable of being adjudicated as such. *Id.* 12a.

SUMMARY OF ARGUMENT

Under the stop-time rule, an alien's period of continuous residence is stopped

> when the alien has committed an offense referred to in section 1182(a)(2) of this title that 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[.]

8 U.S.C. § 1229b(d)(1). This case requires the Court to decide what it means for an offense to "render[] the alien inadmissible." *Id.*

I. The correct interpretation of the stop-time rule is straightforward. An offense "renders the alien inadmissible" if the offense actually triggers an adjudication of inadmissibility during the alien's removal proceeding. The government's contrary interpretation—that an offense "renders the alien inadmissible" if it could hypothetically have triggered an adjudication of inadmissibility in a hypothetical removal proceeding—is incorrect.

Petitioner's interpretation follows from the plain text of the statute. In a removal proceeding, the immigration judge "decid[es] the inadmissibility or deportability of an alien." *Id.* § 1229a(a)(1). Thus, an offense "renders the alien inadmissible" if it is the actual basis for that decision with respect to the alien himself. The government's interpretation would improperly rewrite the phrase "renders the alien inadmissible" as "could render a hypothetical alien inadmissible."

Petitioner's interpretation also makes sense in context. The stop-time rule is applied only when an alien is adjudicated as removable and seeks cancellation of removal. And in *every* case when an alien seeks cancellation of removal following a determination of inadmissibility or deportability based on a criminal offense, the immigration judge will have *just* decided

whether that criminal offense renders the alien inadmissible or deportable. Thus, the phrase "renders the alien inadmissible" is naturally understood as referring to the decision the immigration judge has just made, rather than the result of a hypothetical adjudication.

There are two other contextual clues that Petitioner's interpretation is correct. First, under the government's interpretation, an offense could trigger *mandatory* deportation even though Congress decided it should not be the basis for *non-mandatory* deportation. Second, the government's interpretation would force immigration judges to restart removal proceedings from scratch solely for the purpose of computing the alien's period of continuous residency. It is improbable that Congress enacted a scheme that is simultaneously so irrational and inefficient.

Petitioner's interpretation also fits the two-clause structure of the stop-time rule. By its terms, the first clause of the stop-time rule—"has committed an offense referred to in section 1182(a)(2) of this title"—requires the immigration judge to consider the alien's *offense*. The second clause—"that 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"—requires the immigration judge to consider the *immigration consequences* of that offense. Petitioner's interpretation respects that two-part structure, but the government's does not. Under the government's interpretation, any conviction for an offense "referred to in section 1182(a)(2) of this title" *inherently* "renders the alien

inadmissible to the United States under section 1182(a)(2)." This results in numerous textual difficulties for the government, including substantial surplusage that does not exist under Petitioner's position.

Petitioner's interpretation also vindicates the canon of consistent usage. The stop-time rule was enacted alongside the statutes establishing removal procedures and defining the criteria for cancellation of removal. In those statutes, inadmissibility and deportability are mutually exclusive categories that refer to the outcome of an actual adjudication by an immigration judge. Under Petitioner's view, the same is true in the stop-time rule. By contrast, under the government's view, for purposes of the stop-time rule only, inadmissibility and deportability transform into overlapping categories that refer to the outcome of hypothetical adjudications.

Statutory history, too, supports Petitioner's interpretation. For decades before the stop-time rule's enactment, the BIA construed the phrase "is deportable" in precisely the manner Petitioner advocates.

The BIA has rejected Petitioner's interpretation. *See Matter of Jurado-Delgado*, 24 I. & N. Dec. 29, 31 (B.I.A. 2006). But the Court should not give *Chevron* deference to *Jurado* because the BIA's interpretation conflicts with the unambiguous text of the statute. Even if the statute were ambiguous, *Jurado* is so poorly reasoned that it does not merit deference.

II. If the Court declines to adopt Petitioner's interpretation, and endorses the Eleventh Circuit's view that inadmissibility is a type of abstract "status," Petitioner still prevails. Even if inadmissibility is a

"status," Petitioner never occupied that status because, at all relevant times, it was legally impossible for him to be charged with inadmissibility. As a lawfully admitted permanent resident within the United States, Petitioner was only capable of being adjudicated as deportable. Thus, to the extent Petitioner occupied any status prior to his removal proceeding, it was the status of "deportable," not "inadmissible"—because if placed in removal proceedings, he would be found deportable, not inadmissible. This alternative interpretation avoids surplusage and other textual pitfalls of the government's position.

The government takes the view that Petitioner occupied the status of "inadmissible" because if, in a counterfactual world, he needed to be readmitted, he would have hypothetically been found inadmissible. This is an implausible understanding of an alien's "status." A "status" refers to a person's current legal condition, not a hypothetical legal condition. IIRIRA's mandatory-detention statute confirms this intuition: that statute makes perfect sense under Petitioner's view, but would make no sense if "inadmissible" referred to a status that already-admitted aliens could occupy.

Finally, even if *Jurado* warranted deference, Petitioner's alternative interpretation of the stop-time rule is fully consistent with *Jurado*.

ARGUMENT

Under the stop-time rule, an alien's period of continuous residence or continuous physical presence is stopped "when the alien has committed an offense referred to in section 1182(a)(2) of this title that 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." 8 U.S.C. § 1229b(d)(1). As explained above, section 1182(a)(2) enumerates grounds for inadmissibility, and sections 1227(a)(2) and 1227(a)(4) enumerate grounds for deportability.

It is undisputed that Petitioner's 1996 aggravated assault convictions satisfy the stop-time rule's first clause—*i.e.*, the offenses are "referred to in section 1182(a)(2) of this title." The question presented is whether they satisfy the second clause—*i.e.*, whether they "render[] 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."

The answer is no. As explained in Part I, the correct interpretation of this statute is straightforward: an offense "renders the alien" "inadmissible" or "removable" if it *actually* renders the alien inadmissible or removable at the alien's own removal hearing. Alternatively, if the Court rejects that interpretation, it should adopt the interpretation in Part II: an offense "renders the alien" "inadmissible" or "removable" if it *could* trigger an adjudication of inadmissibility or removability. Here, however, Petitioner's 1996 aggravated assault convictions were never even *capable* of rendering Petitioner "inadmissible" or "removable" at his removal proceeding. The offenses therefore did not trigger the stop-time rule. The Court should reject the government's contrary view—that a conviction "renders the alien inadmissible" if it could be the basis for finding

the alien inadmissible if he hypothetically sought admission, even though he never actually did.

I. An Offense "Renders" An Alien "Inadmissible" If It Triggers The Alien's Adjudication Of Inadmissibility.

A. Overview of parties' positions.

The Court should hold that an 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" if that offense triggers an adjudication of inadmissibility or removability under those sections in the alien's own removal proceeding.

Thus, suppose an alien has already been admitted and is charged with being removable under section 1227(a)(2) or 1227(a)(4) based on a prior offense.[5] If the immigration judge finds that the alien is removable based on that offense, then that offense "renders" the alien "removable." If that offense also satisfies the stop-time rule's requirement that it is "referred to in section 1182(a)(2) of this title," then the offense triggers the stop-time rule. For instance, if an alien is found removable based on possession of a controlled substance,

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[5] Under the INA, "removable" is an umbrella term that means "inadmissible" (for aliens who have not been admitted), or "deportable" (for aliens who have been admitted). 8 U.S.C. § 1229a(e)(2). Thus, all aliens who are inadmissible or deportable are, by definition, removable. The stop-time rule, however, uses the phrase "removable from the United States *under section 1227(a)(2) or 1227(a)(4) of this title*." *Id.* § 1229b(d)(1) (emphasis added). In that context, "removable" means deportable, because section 1227(a) defines grounds for deportability, not inadmissibility.

see 8 U.S.C. § 1227(a)(2)(B), that offense would trigger the stop-time rule because it is also "referred to in section 1182(a)(2)." *See id.* § 1182(a)(2)(A)(i)(II).

Alternatively, suppose an alien seeks admission—*i.e.*, "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer," *id.* § 1101(a)(13)(A)—and is charged with being inadmissible under section 1182(a)(2) based on a prior offense. If the immigration judge finds that the alien is inadmissible based on that offense, then the offense "renders" the alien "inadmissible." For an LPR, such an adjudication would occur in the six statutorily-enumerated circumstances where an LPR is "regarded as seeking an admission into the United States." *Id.* § 1101(a)(13)(C). One of those circumstances is that the LPR "has committed an offense identified in section 1182(a)(2) of this title." *Id.* § 1101(a)(13)(C)(v). Thus, if an LPR seeks to re-enter and section 1101(a)(13)(C)(v) is applicable, the commission of an offense under section 1182(a)(2) could simultaneously trigger both the need to be re-admitted, and the adjudication of inadmissibility. In that scenario, the offense would "render[] the alien inadmissible under section 1182(a)(2)."

Under this interpretation, Petitioner prevails. Petitioner's 1996 aggravated assault convictions did not "render[]" him "inadmissible" or "removable" because he was not charged with, or found to be, inadmissible or removable on the basis of those convictions.

The Eleventh Circuit took a different view. The Eleventh Circuit concluded that Petitioner's 1996 aggravated assault convictions "render[ed]" him "inadmissible." Petitioner was not charged, and could

not have been charged, with inadmissibility—because he was already admitted, he was charged with deportability instead. Nonetheless, the Eleventh Circuit conceptualized "inadmissible" as an abstract legal "*status* that an alien assumes by virtue of his having been convicted of a qualifying offense under § 1182(a)(2)." Pet. App. 12a. It reasoned that if Petitioner had *hypothetically* sought admission and had *hypothetically* been charged with inadmissibility, then his aggravated assault convictions would have rendered him inadmissible because aggravated assault constitutes a CIMT under section 1182(a)(2)(A)(i). *Id.* 12a-13a. In particular, the Eleventh Circuit reasoned that if, hypothetically, Petitioner had "abandoned" his LPR "status," left the United States for more than 180 days, or engaged in illegal activity after departing the United States, then he would have been placed into a proceeding to determine inadmissibility.[6] Pet. App. 12a-13a. And, at that hypothetical proceeding, he would have been adjudicated as inadmissible. Thus, the Eleventh Circuit concluded, Petitioner was "render[ed] … inadmissible" even though such an adjudication was legally impossible at Petitioner's own removal hearing.

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[6] The Eleventh Circuit did not suggest that Petitioner's 1996 aggravated assault convictions would have triggered the application of section 1101(a)(13)(C)(v) if Petitioner left the United States and sought to re-enter. As noted above, this Court has held that section 1101(a)(13)(C)(v) does not apply to pre-IIRIRA convictions. *Supra*, at 5 n.2. Petitioner's 1996 convictions occurred before IIRIRA's effective date, so section 1101(a)(13)(C)(v) does not apply to those convictions. *See Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 35 (2006) (IIRIRA's effective date is April 1, 1997).

As explained below, the Eleventh Circuit's interpretation, which the government endorses in this Court, is incorrect. Although the BIA has rejected Petitioner's interpretation, its reasoning is so weak that *Chevron* deference is unwarranted.

B. An offense "renders" an alien "inadmissible" or "removable" if it triggers the adjudication of inadmissibility or removability.

The correct interpretation of the stop-time rule is straightforward. If an alien is charged with, and found to be, inadmissible or removable based on an offense, the offense "renders" the alien "inadmissible" or "removable." Text, context, statutory structure, and statutory history support this conclusion.

1. The plain meaning of "render," "the alien," and "inadmissible" support Petitioner's interpretation.

Petitioner's interpretation follows from the plain text of the statute. First, "render" means "cause to be or to become." Pet. App. 10a (citing *Webster's Second New International Dictionary* 2109 (1944)). Moreover, the stop-time rule uses the word "renders"—not "could have rendered." Thus, for the stop-time rule to apply, the offense must *in fact* cause the alien to be (rather than be theoretically capable of causing the alien to be) inadmissible or removable.

Second, the stop-time rule uses the phrase "the alien." Its use of the definite article demonstrates that it refers to the actual alien seeking cancellation of removal, not some hypothetical alien. *See Nielsen v.*

Preap, 139 S. Ct. 954, 965 (2019) (relying on use of definite article).

Third, the stop-time rule uses the word "inadmissible." "Inadmissible" is a term of art in immigration law. It refers to a type of adjudication that an immigration judge is authorized to make. In a removal proceeding, the alien "may be charged with any applicable ground of inadmissibility under section 1182(a) of this title or any applicable ground of deportability under section 1227(a) of this title." 8 U.S.C. § 1229a(a)(2). After the alien is charged, the "immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien." *Id.* § 1229a(a)(1). Only "[a]t the conclusion of the proceeding" does the immigration judge "decide whether an alien is removable," *i.e.*, inadmissible or deportable. *Id.* § 1229a(c)(1)(A), (e).

Thus, putting the pieces together, an offense "renders the alien inadmissible" under the stop-time rule if the offense *in fact* "renders" (not "could render") "the alien" *himself* (not "any alien") inadmissible to the United States. And because the immigration judge "decid[es] the inadmissibility … of an alien," *id.* § 1229a(a)(1), an offense "renders the alien inadmissible" if it is, in fact, the actual basis for that decision with respect to the alien himself.

The government's interpretation, by contrast, would nullify Congress's choice of language. According to the government, Petitioner was rendered inadmissible because a hypothetical alien seeking admission could have been found inadmissible based on Petitioner's 1996 aggravated assault convictions. Thus, according to the

government, the statute would mean the exact same thing if it recited "offense that could render any hypothetical alien inadmissible" rather than "offense that renders the alien inadmissible." The Court should reject this interpretation and give effect to the words Congress used.

2. Petitioner's interpretation makes sense in context, while the government's does not.

Petitioner's interpretation makes sense in the statutory context for three reasons.

First: The stop-time rule is applied in only one context: when an alien seeks cancellation of removal. And in *every* case when an alien seeks cancellation of removal following a determination of inadmissibility or deportability based on a criminal offense, the immigration judge will have *just* decided whether that criminal offense renders the alien inadmissible or deportable. Thus, when the immigration judge is directed to consider whether the alien's offense "renders the alien" "inadmissible" or "removable," it is natural for the immigration judge to analyze *what just happened*, rather than some hypothetical removal proceeding.

To give an example, consider the word "liable." In isolation, "liable" might mean "potentially liable." One might say, for instance, "after defrauding his client, John is definitely liable for malpractice," even if John has not yet been sued. But in the context of a statute that applies only after a fact-finder decides liability (*e.g.*, a statute that multiplies damages), the word "liable" would naturally refer to whether the person was actually *found* liable. Thus, suppose a statute said: "If an attorney's fraud renders him liable for malpractice,

the judge may award treble damages." Because that statute necessarily applies only after a fact-finder has determined the attorney's liability, the natural interpretation of that statute is that it applies only if the attorney was *actually* found liable for malpractice. If the attorney were found liable for some other tort, the judge presiding over that trial would not award treble damages, even if the judge concluded that the attorney would be found liable for malpractice in some theoretical different proceeding.

So too here. The immigration judge is instructed to decide whether an offense renders the alien "inadmissible" or "removable" immediately after making a threshold finding that the alien is inadmissible or removable. Thus, when the immigration judge is asked to decide whether an offense renders the alien inadmissible or removable for purposes of the stop-time rule, he is being asked whether he has, in fact, just found that the offense renders the alien inadmissible or removable.

Consider another example from IIRIRA itself. Under 8 U.S.C. § 1252(a)(2)(C), subject to certain exceptions, "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or [certain subsections within section 1227(a)]." The natural interpretation of this statute is that it applies to aliens who are *found* removable on the specified grounds. The phrase "is removable by reason of having committed a criminal offense" is not a reference to the abstract status of being "removable" "by reason of" a specified offense.

As such, the statute would not apply if the alien's actual order of removal is entered on a basis not specified in the statute, but the alien could have been found removable on a specified basis in a hypothetical different proceeding. Rather, an alien "is removable by reason of having committed a criminal offense covered in" the specified subsections only if the immigration judge has just *found* the alien removable on that basis.

The government has recently taken that exact position in this Court: "Under Section 1252(a)(2)(C), the only relevant question is whether an immigration judge has made a finding of removability because of a relevant conviction. That leads to a straightforward inquiry: Was the alien charged with removability because of the relevant crime, and did the IJ correctly sustain that charge?" Brief in Opposition at 11, *Shabo v. Barr*, No. 18-827 (U.S. Apr. 3, 2019), 2019 WL 1489044 (citations, internal quotation marks, ellipses, brackets, and ellipses omitted).

This interpretation makes sense because the jurisdiction-stripping statute inherently applies after a removal proceeding. Thus, the question of whether the alien "is removable by reason of" an offense is a reference to the decision the immigration judge has just made. The same is true here: because cancellation of removal inherently applies only when the immigration judge has found the alien inadmissible or removable, whether an offense "renders" the alien inadmissible or removable is a reference to the decision the immigration judge has just made.

Second: Petitioner's interpretation makes sense in view of the point of the stop-time rule: to decide whether an alien is subject to mandatory removal.

Under the INA, different crimes lead to different immigration consequences. Some crimes make the alien subject to removal, but also eligible for cancellation of removal. Other crimes make the alien subject to mandatory removal. Logically, one would expect the second category of crimes to be a subset of the first category—in other words, any crime serious enough to lead to the harsher consequence of *mandatory* removal should also be serious enough to lead to the less harsh consequence of *non-mandatory* removal.

Under Petitioner's interpretation, an offense triggers the stop-time rule (and hence leads to mandatory removal) only if it *actually* renders the alien inadmissible or deportable, and therefore, by definition, is capable of rendering him inadmissible or deportable. But as this case illustrates, that is not what happens under the government's rule. According to the government, Petitioner's firearm and controlled-substance offenses make him subject to deportation—but not mandatory deportation. By contrast, Congress did not deem Petitioner's 1996 aggravated assault convictions serious enough to make him subject to deportation. But because Petitioner is deportable for a different reason, these convictions suddenly become serious enough to make that deportation mandatory. It is difficult to discern any rational justification for this scheme.

Third: The government's position would lead to the unexpected outcome that immigration judges must

conduct two separate removal hearings for a single alien. Under Petitioner's approach, applying the stop-time rule is straightforward. The immigration judge need only determine the date and nature of the offense that was the actual ground for inadmissibility or deportability. This straightforward analysis is consistent with every other criterion for cancellation of removal, which each require a mechanical inspection of dates and prior convictions.

Under the government's approach, by contrast, the immigration judge will have to conduct two removal hearings: first, the actual adjudication, and second, the hypothetical one. Sometimes, as in this case, determining inadmissibility is a simple matter of determining whether the alien has a particular prior conviction. But in many cases, adjudicating inadmissibility requires complex factual determinations. *See, e.g.*, 8 U.S.C. § 1182(a)(2)(I)(i) (alien is inadmissible when "consular officer or the Attorney General knows, or has reason to believe," that alien has engaged or will engage in money laundering). It is improbable that, buried in a provision for computing the time period for continuous residency, Congress inserted a requirement for immigration judges to effectively restart removal proceedings from scratch.

3. The two-part structure of the stop-time rule demonstrates that Petitioner's interpretation is correct.

A close analysis of the relationship between the first and second clauses of the stop-time rule demonstrates that Petitioner's position is correct.

The first clause of the stop-time rule requires that the alien "has committed an offense referred to in section 1182(a)(2) of this title." The second clause requires that the 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." Under any plausible interpretation of the stop-time rule, neither clause can be superfluous. *Corley v. United States*, 556 U.S. 303, 314 (2009) (noting the "basic interpretive canon[]" that superfluities should be avoided). Thus, the fact that the alien "has committed an offense referred to in section 1182(a)(2) of this title" cannot, in and of itself, be sufficient to "render[] the alien inadmissible to the United States under section 1182(a)(2)"—otherwise, the entire second clause would be superfluous.

Petitioner's understanding of the relationship between the two clauses reflects a natural interpretation of the text. Under Petitioner's view, the first clause requires the alien to have committed a particular type of *offense*—"an offense referred to in section 1182(a)(2) of this title." The second clause requires the offense to have a particular immigration *consequence*—it triggers an adjudication of inadmissibility or deportability for that alien.

Under the government's reading, however, an alien's conviction for an "offense referred to in section 1182(a)(2) of this title" invariably "renders the alien inadmissible" for purposes of the stop-time rule, and hence automatically satisfies *both* clauses. This creates a problem for the government's reading. Why, then, would Congress have identified two conditions—one

corresponding to the nature of the offense, the other to the immigration consequence of the offense—if a conviction for an "offense referred to in section 1182(a)(2)" automatically satisfies both clauses simultaneously?

The Eleventh Circuit's explanation was that the second clause was intended to clarify that only a conviction, or admission to, certain crimes could stop the clock. According to the Eleventh Circuit, the first clause applies to any alien who "has committed" an offense referred to in section 1182(a)(2), and might thus theoretically be broad enough to encompass crimes for which the defendant was never convicted and never admitted to committing. Pet. App. 15a-16a. But, the Eleventh Circuit observed, under section 1182(a)(2)(A), an alien can only be "render[ed] … inadmissible" if he is convicted of (or admits to) a CIMT or a controlled substance offense. *Id.* 15a-16a. Therefore, the Eleventh Circuit concluded, the second clause is not superfluous because it narrows the scope of the first clause. *Id.* 16a-17a.

This explanation does not work for three reasons. It is unnatural; it does not account for the difference in verb tense between the two clauses; and, most fundamentally, it does not actually solve the superfluity problem.

Unnatural. The Eleventh Circuit's explanation is unnatural. According to the Eleventh Circuit, the second clause imposes the requirement that the immigration judge assess whether a conviction for (or admission to) a crime occurred, such that it could be the basis for a charge of inadmissibility against a

hypothetical alien. It does not require any particularized analysis of the immigration consequences of a conviction to the alien himself; so long as the conviction for (or admission to) the crime *exists*, the immigration judge's inquiry under the second clause is at an end.

This is a strange reading of the phrase "renders the alien inadmissible." On its face, that phrase does not merely demand an inquiry as to whether, at some point after the offense was committed, a conviction or admission occurred. Rather, it demands an assessment of the immigration consequences of an offense to "the alien." And that is precisely what Petitioner's proposed interpretation provides: the immigration judge must determine whether the crime triggered an adjudication for *that alien* of inadmissibility or deportability.

Indeed, the Eleventh Circuit's position is that the second clause applies to any alien meeting the criteria of section 1182(a)(2), regardless of whether there are any immigration consequences resulting from meeting those criteria. But when Congress wants to untether the criteria of section 1182(a)(2) from the consequences, it says so. For instance, one requirement for a non-LPR to obtain cancellation of removal is that the non-LPR show "good moral character" during a specified period. 8 U.S.C. § 1229b(b)(1)(B). A person is deemed not to have "good moral character" if he is "a member of one or more of the classes of persons, *whether inadmissible or not*, described in paragraphs (2)(D), (6)(E), and (10)(A) of section 1182(a) of this title; or subparagraphs (A) and (B) of section 1182(a)(2) of this title and subparagraph (C) thereof of such section … if the offense described therein, for which such person was convicted or of which

he admits the commission, was committed during such period." *Id.* § 1101(f)(3) (emphasis added).

Similar language would have accomplished the result the government now seeks: the second clause could have applied to any "member of one or more of the classes of persons, whether inadmissible or not, described in section 1182(a)(2) of this title." But Congress instead required that the offense actually *render* the alien inadmissible. The Court should take Congress at its word.

Verb tense. The Eleventh Circuit's interpretation also cannot account for the change in verb tense between the first and second clauses. The stop-time rule applies "when the alien *has committed* an offense referred to in section 1182(a)(2) of this title that *renders* the alien inadmissible … or removable." *Id.* § 1229b(d)(1). "[H]as committed" is in present perfect tense, used to describe a completed action, but "renders" is in simple present tense. The natural inference is that "has committed" refers to an event in the past and "renders" refers to an event in the present. That conforms to Petitioner's interpretation: the offense that the alien "has committed" is in the past, but the offense "renders" the alien inadmissible in the present, *i.e.*, at the removal hearing where the alien seeks cancellation of removal. By contrast, the Eleventh Circuit concluded that the offense caused the alien to enter the status of "inadmissible" at the time of his conviction, which is also in the past. If that were so, "renders" would not have been in simple present tense.

Superfluity. Finally, and most fundamentally, the Eleventh Circuit's theory does not solve the superfluity

problem. Even under the Eleventh Circuit's understanding of how the "renders" clause narrows the statute, the statute would still mean the exact same thing if it recited: "when the alien has committed an offense ~~referred to in section 1182(a)(2) of this title~~ that 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~~." Those superfluities do not exist under Petitioner's interpretation.

To begin with the second crossed-out phrase: Under the government's reading, there is no scenario in which that phrase does any independent work. This point is not in dispute: the government has recently acknowledged this superfluity in a filing approved by the Solicitor General. As just explained, the Eleventh Circuit took the view that the "renders" clause is not superfluous because, for CIMTs or controlled-substance offenses, section 1182(a)(2)(A) requires a conviction or admission to the offense. Pet. App. 16a. But, for CIMTs or controlled-substance offenses, deportability *also* requires a conviction. 8 U.S.C. § 1227(a)(2)(A)(i)(I), (a)(2)(B)(i). So any time an alien is convicted of one of those offenses and is therefore rendered deportable, the alien will, according to the government, *also* be rendered inadmissible. Thus, under the government's reading, the "removable" clause never does any independent work: any time an alien is "removable" for an offense that also is "referred to" in section 1182(a)(2), the alien will *also* be "inadmissible" under section 1182(a)(2).

As noted above, the government has acknowledged this superfluity in a recent petition for rehearing en

banc. The government correctly explained that its "reading does leave surplusage in the ['removable'] clause" because "there is no clear example of when an individual could be rendered removable/deportable — but not inadmissible — by commission of an offense referred to in § 1182(a)," "which leaves the ['removable'] clause with no apparent role to play." Respondent's Petition for Rehearing or Rehearing En Banc at 13, *Nguyen v. Whitaker*, No. 17-70251 (9th Cir. Nov. 7, 2018), ECF No. 38 ("Pet. for Reh'g in *Nguyen*").

Moreover, under the government's reading, the first crossed-out phrase is also superfluous. There is no need to specify that the offense is "referred to in section 1182(a)(2)"; that requirement is necessarily satisfied if the offense "renders the alien inadmissible to the United States under section 1182(a)(2)."

By contrast, under Petitioner's interpretation, neither crossed-out phrase is superfluous. In any case where an alien is charged with deportability, both crossed-out phrases do work: the first phrase specifies the category of offenses that may stop the clock, and the second specifies that the offense must cause the deportability determination.

To explain this problem away, the government's filing in *Nguyen* pointed to the fact that the following underlined words would have been superfluous at the time of the stop-time rule's enactment under *either* party's view—"removable from the United States under section 1227(a)(2) **or 1227(a)(4)** of this title." This is so for an unrelated reason: At that time, section 1227(a)(4) did not identify any offenses that satisfied the first clause's requirement that the offense be "referred to" in

section 1182(a)(2).[7] Pet. for Reh'g in *Nguyen* at 14. Therefore, the argument goes, one can presume that Congress did not care about superfluities, so the Court can go ahead and ignore the far broader superfluity created by the government's position.

This is not the way statutory interpretation should work. While the stop-time rule may not be a model of draftsmanship, the Court should ensure that the various parts of the statute are given independent effect to the greatest possible extent, rather than discarding the ordinary tools of statutory interpretation on the assumption that Congress did not know what it was doing. "[T]he Court is obliged to give effect, if possible, to every word Congress used." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 632 (2018) (citation omitted). As such, an interpretation that gives meaning to the "removable" clause is superior to an interpretation that nullifies it altogether.

The government also theorized that "[a]ny surplusage could be explained by congressional intent to accommodate future amendments." Pet. for Reh'g in *Nguyen* at 14. Of course, surplusage could *always* be explained that way—a hypothetical amendment could theoretically remove any superfluity. The better

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[7] Section 1227(a)(4) now does include one cross-reference to section 1182(a)(2). *See* 8 U.S.C. § 1227(a)(4)(E). We observe, however, that the reference to section 1227(a)(4) does little or no work under either party's view for a different reason: persons who are deportable under section 1227(a)(4) are not eligible for cancellation of removal anyway, making the stop-time rule irrelevant. *Id.* § 1229b(c)(4), (b)(2)(A)(iv). *But cf. Campos-Torres*, 22 I. & N. Dec. at 1298 (Cole, B.M., dissenting) (outlining theoretical scenario in which reference to section 1227(a)(4) "may … not be a redundancy").

reading is one that gives the "removable" clause meaning as written.

Moreover, this case is a particularly strong candidate for applying the canon against superfluity. This is not a case where Congress was simply being wordy; there is a straightforward explanation for Congress's insertion of the "removable" clause. The second clause encompasses *both* aliens who are rendered "inadmissible," *and* aliens who are "removable from the United States under section 1227(a)(2) or 1227(a)(4)" (*i.e.*, deportable). Why would Congress have specified both classes of aliens? There is an immediately intuitive answer: because aliens can be *either* inadmissible *or* deportable, and Congress wanted to cover both categories. That intuition conforms perfectly to Petitioner's interpretation: an offense can *either* trigger an inadmissibility adjudication *or* a deportability adjudication, and the alien is "rendered" inadmissible in the former scenario and "rendered" deportable in the latter.

By contrast, the government's theory is that all aliens who are deportable and may be affected by the stop-time rule are *also* inadmissible, and that Congress threw in the clause about deportability to accommodate hypothetical unspecified amendments that have not occurred in the intervening 23 years. This theory strains reason.

4. The canon of consistent usage supports Petitioner's interpretation.

Petitioner's interpretation also vindicates the canon of consistent usage. That canon provides that when the same term is used in related provisions enacted at the same time, they are presumed to carry the same

meaning. *See, e.g.*, *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007).

Two related provisions are relevant here. The first is the statute identifying the criteria for cancellation of removal. 8 U.S.C. § 1229b(a). The second is the statute defining removal procedures. 8 U.S.C. § 1229a. Both were enacted as part of IIRIRA. And both make clear that "inadmissible" and "deportable" are mutually exclusive categories that reflect what actually happens, rather than what could hypothetically happen, to the alien. The Court should interpret the stop-time rule the same way.

Begin with the provision identifying the criteria for cancellation of removal. Under section 1229b(a), "[t]he Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien," among other requirements, "has resided in the United States continuously for 7 years after having been admitted in any status." In that context, "inadmissible or deportable" does not refer to an abstract immigration status. Rather, it means that the alien has been *adjudicated* as inadmissible or deportable—because aliens who have been adjudicated as inadmissible or deportable are, by definition, the only aliens who need cancellation of removal, and for whom the Attorney General is even capable of cancelling removal. Moreover, it is clear here why Congress used both "inadmissible" and "deportable"—because an alien could be found either inadmissible or deportable (not both), and Congress wanted to make sure both categories of aliens were eligible for cancellation of removal.

The canon of consistent usage applies with uniquely strong force here because section 1229b(d)(1), the stop-time rule, is joined at the hip to section 1229b(a)—the stop-time rule's function is to explain what the continuous-residence requirement in 1229b(a) *means*. Thus, in the stop-time rule, "inadmissible" should be construed to mean the same thing—an alien is "inadmissible" if he is *in fact* found to be inadmissible. And, if so, then an offense "renders" the alien "inadmissible" if it *in fact* causes the alien to be found inadmissible. And, as in section 1229b(a), the reason Congress included the "removable" clause in the stop-time rule is that Congress knew that inadmissibility and deportability were mutually exclusive categories, and wanted the stop-time rule to apply to aliens in both categories. Thus, the Court should reject the government's interpretation, under which "inadmissible" refers to a hypothetical adjudication, and aliens can be "inadmissible" and "removable" simultaneously.

The immediately adjacent statute defining "[r]emoval proceedings," 8 U.S.C. § 1229a, supports a similar conclusion. Two points are pertinent. First, as previously explained, that statute provides that the "immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien," and that this decision is made only after those proceedings occur. *Id.* § 1229a(a)(1), (c)(1)(A). Second, inadmissibility and deportability are mutually exclusive categories, where the first category applies to aliens seeking admission and the second category applies to aliens not seeking admission. For instance, the term "removable" is defined to mean: "(A) in the case of an

alien not admitted to the United States, that the alien is inadmissible under section 1182 of this title, or (B) in the case of an alien admitted to the United States, that the alien is deportable under section 1227 of this title." *Id.* § 1229a(e)(2). Likewise, the subsection entitled "Removal proceedings" provides: "An alien placed in proceedings under this section may be charged with any applicable ground of inadmissibility under section 1182(a) of this title or any applicable ground of deportability under section 1227(a) of this title." *Id.* § 1229a(a)(2). It then defines different procedures depending on whether the alien is charged with inadmissibility or deportability. *Compare id.* § 1229a(c)(2)(A) (burden of proof for inadmissibility), *with id.* § 1229a(c)(3)(A) (burden of proof for deportability).

Once again, this is a particularly strong case for applying the canon of consistent usage: not only are sections 1229a and 1229b adjacent to each other in the U.S. Code, but the stop-time rule is invariably applied in the context of the very removal proceedings addressed by section 1229a. And once again, that canon supports Petitioner. Petitioner's interpretation of the stop-time rule respects the immigration judge's authority to "decide[] the inadmissibility or deportability of an alien," *id.* § 1229a(a)(1), by providing that an offense "renders" the alien inadmissible or deportable when that decision is made. And Petitioner's interpretation treats inadmissibility and deportability as mutually exclusive categories.

By contrast, under the government's view, Petitioner was *both* inadmissible *and* deportable, even

before the removal proceeding started. Thus, although the statute provides that the immigration judge "decid[es]" the alien's inadmissibility or deportability, the government contends that Petitioner was "render[ed]" deportable even before that decision was made, and was also "render[ed]" inadmissible even though that decision was *never* made. And the government's position would treat those two categories as overlapping rather than mutually exclusive.

5. Statutory history provides further support for Petitioner's interpretation.

Statutory history supports Petitioner's interpretation as well. Before IIRIRA's passage, the BIA had construed the INA's suspension of deportation provision—one of the statutory predecessors for modern-day cancellation of removal—in this same way. Under former INA section 244(a), suspension of deportation was unavailable to an alien who "is deportable" as a narcotics violator. In *Matter of Ching*, 12 I. & N. Dec. 710 (B.I.A. 1968), the question before the BIA was whether this phrase applies only to an alien who "is charged with and found deportable," or whether it applies where the alien was not so charged, but "the record establishes that had deportability been charged … it would have been sustained." *Id.* at 712. Emphasizing that a "determination of deportability may emerge only from a record made in a proceeding before a special inquiry officer," the BIA concluded that an alien is "deportable" by a narcotics offense only if he has been found to be deportable by that offense. *Id.*; *see also Matter of T-*, 5 I. & N. Dec. 459 (B.I.A. 1953) (same

interpretation of "deportable" under different portion of INA).

"[W]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) (internal quotation marks and citations omitted)). Here, nothing in IIRIRA suggests that Congress intended to disavow this longstanding view. Thus, the Court should similarly hold that an offense renders an alien "inadmissible" or "removable" for purposes of cancellation of removal if the alien is in fact found inadmissible or removable based on that offense.

C. The BIA's *Jurado* Decision Does Not Warrant *Chevron* Deference.

The BIA has rejected Petitioner's interpretation in a precedential opinion. In *Matter of Jurado-Delgado*, 24 I. & N. Dec. 29, 31 (B.I.A. 2006), the BIA held that "an alien need not actually be charged and found inadmissible or removable on the applicable ground in order for the criminal conduct in question to terminate continuous residence in this country."

For the reasons stated above, however, *Jurado* conflicts with the unambiguous text of the stop-time rule. Under *Chevron*, the Court "owe[s] an agency's interpretation of the law no deference unless, after employing traditional tools of statutory construction," the Court is "unable to discern Congress's meaning." *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018)

(citation omitted). Here, the traditional tools of statutory construction are a sufficient basis to discern Congress's meaning.

Further, even if the stop-time rule is ambiguous, *Jurado*'s explanation is so weak that it is not entitled to *Chevron* deference. *See Mellouli v. Lynch*, 135 S. Ct. 1980, 1989 (2015) (declining to give *Chevron* deference to BIA's interpretation that makes "scant sense"); *Judulang*, 565 U.S. at 52 n.7 (stating that *Chevron* deference is unwarranted when an agency interpretation is "arbitrary or capricious in substance" (quotation marks omitted)).

In *Jurado*, the BIA offered three justifications for its position. First, the BIA acknowledged that before IIRIRA, discretionary relief was unavailable for "an alien who 'is deportable' by reason of having committed a specified offense." 24 I. & N. at 31. And the BIA had "long held that an alien must be charged and found deportable where Congress has used the phrase 'is deportable.'" *Id.* (citation omitted). But in the stop-time rule, "Congress used the word 'renders.'" *Id.* The BIA "assume[d] that [Congress] intended a different meaning by the use of that word." *Id.* And it inferred that the stop-time rule "requires only that an alien 'be or become' inadmissible or removable, i.e., be potentially removable if so charged." *Id.*

The BIA's reasoning is plainly incorrect. The fact that Congress used the verb "renders" rather than "is" did not transform the meaning of "inadmissible" from "actually inadmissible" to "potentially inadmissible if so charged." Rather, this verb change reflects the fact that the subject of the phrase is "offense" rather than "alien,"

and the phrase "the offense is inadmissible" would have been unidiomatic. Indeed, to the extent *either* of those linguistic formulations refers to an alien's status, it is presumably the formulation where the alien himself is the subject and focal point of the sentence. Thus, there is no rational explanation for the BIA's view that the phrase "alien is inadmissible" is *not* a reference to an alien's status, but the phrase "offense renders an alien inadmissible" *is* a reference to the alien's status.

Second, the BIA found it "unlikely that Congress would have wished to make the application of the 'stop-time' rule for accruing continuous residence dependent on whether the DHS opted to invoke an alien's commission of certain enumerated offenses as grounds for the alien's removal." *Jurado*, 24 I. & N. Dec. at 31. It did not explain why this was "unlikely," and this is not "unlikely" at all. Whether an alien is *removable* is determined entirely by whether the DHS "opted to invoke an alien's commission of certain enumerated offenses as grounds for the alien's removal." *Id.* It makes perfect sense that this charging decision would also determine eligibility for cancellation of removal.

Third, the BIA observed that an alien need not be *convicted* of a crime to be found inadmissible under 8 U.S.C. § 1182(a)(2); an alien can be found inadmissible if he merely *admits* to having committed the crime. *Jurado*, 24 I. & N. Dec. at 31 (citing 8 U.S.C. § 1182(a)(2)(A)(i)). Therefore, the BIA reasoned, "there is no reason to believe that Congress intended that an alien must have been charged with such an offense as a ground of inadmissibility or removability in order for the

provision to stop the alien's accrual of continuous residence." *Id.*

This analysis is inscrutable. True, the BIA may find an alien inadmissible based on the alien's mere admission to the elements of a crime. This point is irrelevant to whether an alien must be found inadmissible for the stop-time rule to apply. Section 1182(a)(2)(A)(i) includes explicit language stating that mere admission to a crime is enough for an immigration judge to find an alien inadmissible; the stop-time rule includes no language suggesting that an offense "renders the alien inadmissible" even if an immigration judge does *not* find the alien inadmissible.

Further, any deference to the BIA should be tempered by "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (internal quotation marks and citations omitted). That principle rests on the observation that "deportation is a drastic measure and at times the equivalent of banishment o[r] exile"; as such, even when the government's interpretation "might find support in logic," the Court "will not assume that Congress meant to trench on [aliens'] freedom beyond that which is required by the narrowest of several possible meanings of the words used." *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948).

This principle applies with special force in the context of cancellation of removal, when ruling for the alien will not afford the alien the right to remain in the United States, but will instead confer on the Attorney General the discretion to cancel removal. As such, only

applicants who independently deserve cancellation of removal would benefit from a ruling in Petitioner's favor. *See Moncrieffe v. Holder*, 569 U.S. 184, 204 (2013) (narrowly construing provision that would limit eligibility for cancellation of removal, based in part on observation that the Attorney General may still "deny relief if he concludes the negative equities outweigh the positive equities of the noncitizen's case").

While these immigration canons are helpful to Petitioner, they are unnecessary to decide this case. Even without these canons, the BIA's interpretation conflicts with the unambiguous text of the stop-time rule. And even without these canons, the BIA's explanation is so weak that it is unsustainable.

II. Alternatively, An Offense "Renders" An Alien "Inadmissible" If It *Could* Trigger An Adjudication Of Inadmissibility At The Alien's Removal Hearing.

In the decision below, the Eleventh Circuit concluded that the term "inadmissible" referred to an abstract legal status. The BIA took the same view in *Jurado*. Even if the Eleventh Circuit and the BIA are correct that "inadmissible" refers to a status that does not require an actual adjudication of inadmissibility, Petitioner would still prevail, because he never occupied that status.

A. Overview of parties' positions.

If the Court concludes that the term "inadmissible" refers to a status, it should hold that an alien enters into that status if he *could* be adjudicated as inadmissible if so charged. Thus, if an alien outside the United States

has a conviction under section 1182(a)(2), that offense "renders" the alien "inadmissible" because the alien *could* be charged and found inadmissible on that basis.

This interpretation is broader than the interpretation in Part I. Suppose an alien has two different convictions that are grounds for inadmissibility under 8 U.S.C. § 1182(a)(2). The first would trigger the stop-time rule and preclude cancellation of removal but the second would not (for instance, because it was committed more than seven years after an LPR's admission). The alien leaves the United States, seeks to re-enter, and is put in removal proceedings. Although the immigration authorities would have the option of charging the alien with inadmissibility on the basis of either (or both) prior convictions, they elect to charge the alien with inadmissibility only on the basis of the second conviction. Under Petitioner's interpretation in Part I, the first conviction would not "render[] the alien inadmissible" because it was not the basis for the finding of inadmissibility, even though it theoretically could have been. By contrast, under this proposed interpretation, the first crime "rendered" the alien "inadmissible" because it *could have* triggered an adjudication of inadmissibility at the removal hearing, even though it in fact did not.

Under this alternative view, when Petitioner was convicted of his firearm offense in 1996 (which did *not* satisfy the stop-time rule's first clause), that offense "render[ed]" Petitioner "removable … under section 1227(a)(2) … of this title"—*i.e.*, he entered the immigration status of "removable." (Equivalently, he entered the immigration status of "deportable," because

section 1227(a)(2) defines grounds of deportability.) This is because, starting in 1996, *if* Petitioner was put in removal proceedings, the offense was capable of triggering an adjudication of deportability—even though he was not actually put in removal proceedings for two more decades.

But, under this alternative view, Petitioner still prevails. It is undisputed that Petitioner's 1996 aggravated assault convictions—the sole offenses that satisfied the stop-time rule's first clause—did not "render" him "removable" under sections 1227(a)(2) and (a)(4), because the immigration authorities were incapable of charging him with deportability on the basis of those convictions. *Supra*, at 8-9. The Court should hold that those convictions also did not "render" him "inadmissible," because the immigration authorities were also incapable of charging him with inadmissibility on the basis of those convictions. This is because he had already been admitted and was not seeking admission, so he could be charged only with deportability, not inadmissibility. *See* 8 U.S.C. § 1229a(c)(1)(A) (immigration judge "decide[s] whether an alien is removable"); *id.* § 1229a(e)(2) ("removable" means "inadmissible" only "in the case of an alien not admitted to the United States").

The government takes a broader view of the "status" of inadmissibility. It contends that an offense "renders the alien inadmissible" if the alien could be found inadmissible on the basis of that offense in a *theoretical* removal proceeding. The government is wrong. Petitioner's alternative interpretation makes more sense of the statutory text, and it comports with *Jurado*.

B. An alien cannot be rendered "inadmissible" if it is legally impossible for him to be charged with inadmissibility.

Even if "inadmissible" referred to a status, Petitioner never occupied that status because it was never legally possible for him to be charged with inadmissibility.

1. Petitioner's alternative view is more consistent with the text than the government's.

First and foremost, Petitioner's alternative interpretation is more consistent with the statutory text and structure than the government's interpretation. As explained in Part I, the government's interpretation suffers from numerous flaws. Petitioner's alternative interpretation avoids several of those flaws:

- Petitioner's alternative interpretation requires an analysis of whether an offense renders *the alien himself*—not some hypothetical alien—subject to inadmissibility or removability if placed in removal proceedings. As such, it adheres to the requirement that the offense render "*the* alien"—not "*any* alien"—inadmissible or removable. *Supra*, at 20-22.

- Petitioner's alternative interpretation makes sense in context because it ensures that an offense triggers the stop-time rule (and hence leads to mandatory removal) only if it is capable of leading to non-mandatory removal. *Supra*, at 25.

- Petitioner's alternative interpretation avoids the superfluity of the phrase "removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title." Because Petitioner's alternative interpretation treats inadmissibility and deportability as mutually exclusive categories—an alien is only *capable* of being charged with inadmissibility or deportability, but not both—that phrase would come into play whenever the alien is charged with deportability. *Supra*, at 30-34.

- Petitioner's alternative interpretation adheres to the canon of consistent usage by ensuring that inadmissibility and deportability are mutually exclusive categories, just as they are in neighboring provisions. *Supra*, at 34-38.

2. The government's understanding of an alien's "status" is wrong.

The government's view is also fundamentally inconsistent with the concept of a "status." The general legal definition of a "status" is "[a] person's legal condition, whether personal or proprietary; the sum total of a person's legal rights, duties, liabilities, and other legal relations." *Black's Law Dictionary* 1703 (11th ed. 2019). A person does not have the "legal condition" of being "inadmissible" merely because of a latent risk he might someday be found inadmissible in a proceeding that is, based on the current facts on the ground, legally impossible.

Of course, those facts could change: an alien can become inadmissible if he abandons LPR status or takes

any other steps that require him to seek a fresh admission. In that scenario, the alien's status changes. This makes perfect sense—intuitively, an LPR who has a conviction under section 1182 on his record, but who can nonetheless freely and permanently reside in the United States, occupies a different immigration "status" than one who is outside the United States and is not entitled to re-enter.

The Eleventh Circuit's linguistic reasoning does not support a contrary conclusion. The Eleventh Circuit observed that water can be "undrinkable" even if a person subjectively did not want to drink it, and offered various similar metaphors. Pet. App. 11a-12a. At most, this analogy shows that Petitioner entered the status of "removable" (or "deportable") by his 1996 firearm conviction, even though he did not subjectively want to enter removal proceedings, and in fact did not enter removal proceedings for two more decades. Just as water would be found "undrinkable" if someone tried to drink it, Petitioner would have been found "removable" if the government tried to remove him. But that analogy does not support the proposition that Petitioner was rendered "inadmissible." The relevant point is not that Petitioner did not subjectively *want* to be charged with inadmissibility. The point is that the inadmissibility charge was legally impossible.

The government's view is especially implausible given that Petitioner enjoyed a procedural advantage in his removal proceeding precisely because he is a previously-admitted LPR who continues to reap the benefit of his preceding adjudication of admissibility. An alien seeking admission bears the burden of establishing

he is not inadmissible. 8 U.S.C. § 1229a(c)(2)(A). By contrast, it is the government that bears the burden of proving deportability. *Id.* § 1229a(c)(3)(A). Here, because Petitioner had previously been found admissible (and hence been admitted), the latter statute applied to Petitioner's removal proceeding. Thus, to the extent Petitioner occupied a "status" for purposes of federal immigration law, it was a privileged status conferred by the prior admissibility determination. Framed in terms of the definition from *Black's Law Dictionary*, Petitioner's "legal rights, duties, liabilities, and other legal relations" in his removal proceeding stem entirely from his *prior* admission. The fact that he would now be "inadmissible" in a *hypothetical* removal proceeding has no impact on his legal rights at his *actual* removal proceeding. This makes it incongruous to speak of Petitioner being in the "status" of "inadmissible." If anything, it is more accurate to state that he is in the "status" of "admissible" (or "admitted") given that he retains the benefit of the prior admissibility determination.

3. The government's position conflicts with surrounding provisions.

As explained above, because the stop-time rule inherently applies following a removal adjudication, the phrase "renders the alien inadmissible" is best understood as a reference to the adjudication that just occurred. *Supra*, at 22-24.

The word "inadmissible" also appears in a provision of IIRIRA that applies prior to a removal proceeding: IIRIRA's mandatory-detention provision. *See generally Nielsen v. Preap*, 139 S. Ct. 954 (2019). In the

mandatory-detention provision, "inadmissible" is not a reference to the outcome of an already-completed adjudication; it is a reference to the outcome of a future adjudication. But, even in that context, it is clear that the relevant future adjudication is the one that will *actually* occur, not a hypothetical adjudication that would occur if the alien exited the country and re-entered. This is consistent with Petitioner's alternative interpretation, under which an alien is "inadmissible" if he would *actually* be found inadmissible if put into removal proceedings.

The mandatory-detention statute provides, *inter alia*:

> The Attorney General shall take into custody any alien who—
>
> (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,
>
> …
>
> (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence [d] to a term of imprisonment of at least 1 year, or
>
> …
>
> when the alien is released ….

8 U.S.C. § 1226(c)(1).

It is clear in context that an alien does not have to be *found* inadmissible at a removal proceeding for an alien to be "inadmissible" under subsection A—the whole point of the statute is to detain aliens before the removal proceeding occurs. *Id.* § 1226(a).

Equally clear, however, is that "inadmissible" encompasses only aliens who have not been admitted (such as aliens who entered the United States without inspection, *see supra* at 3 n.1). It does not encompass already-admitted aliens. As a word of background: Section 1182(a)(2)(A) provides that any alien convicted of (or admitting to) a CIMT, subject to an exception for certain petty offenses, is inadmissible. Subsection A of the mandatory-detention statute provides that all aliens who are inadmissible based on "any offense covered in section 1182(a)(2) of this title," including a CIMT, are subject to mandatory detention. Meanwhile, section 1227(a)(2)(A)(i) of the INA provides that aliens convicted of a narrower category of CIMTs[8] are deportable. Finally, subsection C of the mandatory-detention statute provides that for aliens satisfying the criteria of section 1227(a)(2)(A)(i), an even narrower subcategory—aliens receiving a sentence of at least one year—are subject to mandatory detention.

In context, subsection A of the mandatory-removal statute plainly refers only to aliens who have not been admitted. If already-admitted aliens could occupy the "status" of "inadmissible" under subsection A, then subsection A would stretch far too broadly. For one, this interpretation would subject *all* already-admitted aliens who are *deportable* based on a CIMT to mandatory detention—wiping out Congress's choice in subsection C to limit mandatory detention to only a subcategory of those aliens. For another, this interpretation would

[8] Unlike section 1182(a)(2)(A), section 1227(a)(2)(A)(i) requires that the CIMT be committed within five years of admission and carry a statutory maximum sentence of at least one year.

seemingly subject already-admitted aliens who occupy the "status" of inadmissible, but who are not deportable for *any* reason, to mandatory detention—a nonsensical result. Thus, it is plain in context that subsection A is a reference to the outcome of the alien's *own removal hearing*—in other words, if an alien *in fact* faces an adjudication of inadmissibility, detention is mandatory. As such, an already-admitted alien not seeking admission cannot be "inadmissible" under this provision. The same is true for the stop-time rule: an already-admitted alien not seeking admission cannot be "inadmissible."

C. The BIA is not entitled to *Chevron* deference.

In selecting between Petitioner's alternative interpretation and the government's interpretation, the Court should not defer to the BIA because the BIA has never decided between these two interpretations in a precedential decision.

The agency decision below is not entitled to *Chevron* deference because it is a non-precedential, single-judge order. *See* Pet. App. 17a-18a n.5. The same is true for every other BIA decision addressing the question presented here: as the government acknowledged at the certiorari stage, "the Board itself has yet to address the issue in a precedential opinion." BIO 12. Numerous courts have held that "[w]hen issuing a single-member, nonprecedential opinion, the BIA is not exercising its authority to make a rule carrying the force of law, and thus the opinion is not entitled to *Chevron* deference." *Martinez v. Holder*, 740 F.3d 902, 909-10 (4th Cir. 2014) (collecting cases from Second, Seventh, Ninth, Tenth, and Eleventh Circuits); *see also Dhuka v. Holder*, 716

F.3d 149, 154-56 (5th Cir. 2013) (holding that non-precedential decisions by three-member panels are not entitled to *Chevron* deference because they do not "bind third parties").

Further, *Jurado* did not decide between Petitioner's alternative interpretation and the government's interpretation. Rather, it merely held that "an alien need not actually be charged and found inadmissible or removable on the applicable ground in order for the criminal conduct in question to terminate continuous residence in this country." 24 I. & N. Dec. at 31; *see* Pet. App. 17a-18a n.5 (Eleventh Circuit's acknowledgment that *Jurado* does not resolve this case); BIO 12 (same, in the government's brief in opposition).

To the extent *Jurado* has any relevant analysis on this question, it supports Petitioner's interpretation. The BIA found it "unlikely that Congress would have wished to make the application of the 'stop-time' rule for accruing continuous residence dependent on whether the DHS opted to invoke an alien's commission of certain enumerated offenses as grounds for the alien's removal." 24 I. & N. Dec. at 31. This suggests that the stop-time rule applies to any offense that the DHS is *capable* of invoking, regardless of whether it opts to do so—*i.e.*, the interpretation posited by Petitioner.

Thus, adopting this interpretation would *both* avoid many of the textual pitfalls of the government's interpretation, *and* accommodate the BIA's concern in *Jurado*—that eligibility for cancellation of removal should not turn on the government's charging decision.

CONCLUSION

The judgment of the Eleventh Circuit should be reversed.

Respectfully submitted,

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