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 MOMODOULAMIN JOBE AND THE IMMIGRANT DEFENSE PROJECT AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI[1]

Amicus curiae **Momodoulamin Jobe** is a Gambian citizen and long-time lawful permanent resident who was denied eligibility for cancellation of removal under the stop-time rule even though he did not seek admission and so was not capable of being "render[ed] … inadmissible" until *after* he had resided continuously and lawfully in the United States for more than the required seven-year period.

[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici curiae and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

Amicus curiae **Immigrant Defense Project** is a not-for-profit immigrant rights organization, including a legal resource and training center that provides immigrants and their attorneys with expert legal advice on issues involving the interplay between criminal and immigration law. In this capacity, it advises individuals like Jobe, whom the government is seeking to deny eligibility for cancellation of removal even though they too accrued seven years of residence in the United States before being rendered inadmissible or deportable.

Jobe's case, and others like it, implicate two closely-related issues addressed by the Eleventh Circuit on which the "circuits have divided." *Barton* v. *U.S. Attorney General*, 904 F.3d 1294, 1295 (11th Cir. 2018). Petitioner's brief addresses the first issue: Whether a lawfully admitted permanent resident can be "render[ed] … inadmissible" at a time when he remains lawfully admitted and is not required to seek admission. Pet. Br. *i*. Amici agree with Petitioner that a lawfully admitted permanent resident is not "render[ed] … inadmissible" unless and until it is "legally possible" for the government to charge him with inadmissibility. *Id.* 48; *see also id.* 43-53.

This brief primarily focuses on the second issue: For a lawful permanent resident who (like Jobe, but unlike Petitioner) is eventually rendered inadmissible *after* seven years have elapsed, does the clock stop at the time that he commits a section 1182(a)(2) offense or when that offense renders him inadmissible? Because the stop-time rule, by its plain terms, "is triggered by *two* events," the more natural reading is that continuous residence continues to accrue until a lawful permanent resident *both* commits a section 1182(a)(2) offense *and* is rendered inadmissible. *Nguyen* v. *Sessions*, 901 F.3d 1093, 1096 (9th Cir. 2018) (emphasis added). The Elev-

enth Circuit nonetheless opined that the "period of continuous residence is deemed to terminate on the date [the resident] initially committed th[e] offense." *Barton*, 904 F.3d at 1301 n.3. In his brief, Petitioner "assumes" the correctness of this view, while also emphasizing that this Court has never decided the question. Pet. Br. 9 n.4. Because these two questions arise from the same statutory text and are deeply intertwined, it is necessary to consider both questions together to properly interpret the statute and avoid the harsh and anomalous consequences highlighted by stories like Jobe's. Amici urge this Court to reject the Eleventh Circuit's countertextual reading of the statute with respect to this second, closely-related issue, or to at least reserve it for a case that more squarely presents the issue.

This amicus brief explains why the Eleventh Circuit's resolution of both issues is erroneous. And it highlights the stories of lawful permanent residents who, like Jobe, committed minor criminal offenses that did not subject them to removal on *any* ground and who thereafter continued to reside in the United States, accruing more than seven years of lawful residence. During those seven-plus years, it was *legally impossible* for the government to remove these individuals. They built lives here in reliance on their status as lawfully admitted permanent residents—maintaining employment, contributing to their communities, paying taxes, and starting families. Many years later, they traveled abroad for various reasons and found, on their return, that the years during which they lived in this country without even the possibility of being removed did not "count" for purposes of the stop-time rule. As these stories illustrate, the interpretation of the stop-time rule adopted by the Eleventh Circuit creates harsh and anomalous consequences that Congress never intended.

SUMMARY OF ARGUMENT

A lawfully admitted permanent resident who is removable from the United States may seek cancellation of removal if, among other things, he has resided in the United States continuously for at least seven years. 8 U.S.C. §1229b(a)(2). But that seven-year period "shall be deemed to end" under certain circumstances. *Id.* §1229b(d)(1). This is commonly referred to as the "stop-time" rule. *See Pereira* v. *Sessions*, 138 S. Ct. 2105, 2109 (2018).

As relevant here, the stop-time rule is triggered by two events: (1) "commi[ssion] [of] an offense referred to in section 1182(a)(2)," and (2) the offense's effect of "render[ing]" the permanent resident either "inadmissible … or … removable." 8 U.S.C. §1229b(d)(1). As noted above, the question presented in this case primarily concerns the second triggering event: Whether a lawful permanent resident who is not seeking admission to the United States and so cannot possibly be removed on inadmissibility grounds can nonetheless be "render[ed] … inadmissible" for purposes of the stop-time rule, *id.*

In its opinion below, the Eleventh Circuit also addressed another closely related issue: For a lawful permanent resident who is eventually rendered inadmissible or removable *after* the seven-year period, does the resident stop accruing continuous residence at the moment that he "commits an offense referred to in section 1182(a)(2)" or as of the moment the offense "renders [him] inadmissible" or "removable"? 8 U.S.C. §1229b(d). For lawful permanent residents like Jobe, the choice between these two options makes all the difference.

Jobe, a Gambian citizen, lawfully entered the United States in November of 2003. Five years later, having married a United States citizen, he adjusted his status to lawful permanent resident. For many years, Jobe lived in Connecticut, contributing to his community by forming close friendships, maintaining steady employment, and consistently paying his taxes. Motion for Stay 4, *Jobe* v. *Whitaker*, No. 17-284 (2d Cir. Jan. 30, 2017).

Jobe had no criminal convictions until January of 2010, when he pleaded guilty to possession of a small amount of marijuana. Pet. App. 26a, *Jobe* v. *Barr*, No. 18-1329 (U.S.). This conviction did not bring about any immediate change in Jobe's immigration status: As a lawfully admitted permanent resident, Jobe had no need to seek admission and thus could not be charged with inadmissibility. *See* Pet. Br. 3 & n.1 (explaining when admission is required). And Jobe's offense is one that Congress expressly exempted from deportation, *see* 8 U.S.C. §1227(a)(2)(B)(i), because Congress "believe[d] that aliens convicted of a minor possession offense involving marihuana do not pose a significant threat to society or U.S. citizens," H.R. Rep. No. 100-882, at 43 (1988). As a result, after pleading guilty to marijuana possession, Jobe continued to reside in the United States as a lawfully admitted permanent resident until well past the seven-year threshold of eligibility for cancellation of removal. Throughout those seven-plus years, it was *legally impossible* for the government to remove Jobe from the United States on any ground.

But that all changed in 2012 when—after nine years of continuous and lawful residence in the United States—Jobe took a brief trip abroad to Gambia, where his mother and teenage daughter were living. Pet. App. 26a, *Jobe* v. *Barr*, No. 18-1329 (U.S.); Administrative Record 55, *Jobe* v. *Whitaker*, No. 17-284 (2d Cir. Feb. 13, 2018). Im-

migration law ordinarily permits a lawfully admitted permanent resident to briefly travel outside the United States without seeking readmission upon return. *See* 8 U.S.C. §1101(a)(13)(C). But the Board of Immigration Appeals (BIA) and the Second Circuit have interpreted section 1101(a)(13)(C) to require a permanent resident to "seek formal admission—even if returning from a brief trip abroad" in six situations, including "if he has committed a drug offense." *Heredia* v. *Sessions*, 865 F.3d 60, 64 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 677 (2018) (citation and quotation marks omitted). And in contrast to the statutory provision setting forth grounds for *deportability* (section 1227), the provision delineating grounds for *inadmissibility* (section 1182) contains no exception for minor marijuana-possession convictions. 8 U.S.C. §1182(a)(2)(A)(i)(II). The upshot of these provisions, as interpreted, is that a traveling lawful permanent resident, such as Jobe, who has a single minor marijuana conviction, is required to seek admission when he attempts to return to the United States and, at that point, he may be deemed inadmissible.[2]

Jobe's trip is what, for the first time in nine years, required him to seek a new admission and exposed him to removal on inadmissibility grounds. It would therefore be natural to peg the *trip* as the moment when Jobe was "render[ed] … inadmissible." And because Jobe had been unremovable until that trip, it would also be natu-

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[2] Prior to enactment of IIRIRA, this Court held that a brief, casual, and innocent trip abroad, like Jobe's, did not subject a lawful permanent resident to the grounds of exclusion (the former name for "inadmissibility"). *See Rosenberg* v. *Fleuti*, 374 U.S. 449, 462 (1963). The BIA and Second Circuit have construed 8 U.S.C. §1101(a)(13)(C)(v) to abrogate *Fleuti* prospectively. *Heredia*, 865 F.3d at 64. This Court, however, has expressly declined to decide that question. *See Vartelas* v. *Holder*, 566 U.S. 257, 262 n.2 (2012).

ral to credit him with having continuously resided in the United States for the entire preceding nine years during which he had lived here lawfully. Instead, the BIA and the Second Circuit held that Jobe stopped accruing continuous residence when he *committed* the marijuana offense in September 2009, even though that offense did not render him deportable, and even though he had no need to seek admission at that time and so could not possibly have been rendered inadmissible. *Jobe* v. *Whitaker*, 758 F. App'x 144, 148 (2d Cir. 2018), *petition for cert. filed*, No. 18-1329 (U.S. Apr. 19, 2019) (citing *Heredia*, 865 F.3d at 68-69 (which adopted this construction of the stop-time rule)). As a result, the nine years that Jobe had resided continuously in the United States, during which it was legally impossible to remove him on *any* ground, were transformed into less than six years of "continuous residence."

The Eleventh Circuit endorsed the same rule in a footnote of the decision under review here. Like the Second Circuit, the Eleventh Circuit took the view that, no matter when a lawful permanent resident is rendered inadmissible, the "period of continuous residence is deemed to terminate on the date he initially committed th[e] offense." *Barton*, 904 F.3d at 1301 n.3.

The Eleventh Circuit's fleeting consideration of this issue is troubling: Cases like Jobe's starkly demonstrate the strange results that flow from the court's reading of the stop-time rule—treating a lawful permanent resident as having been "render[ed] … inadmissible" at a time when he remains lawfully admitted to the United States, and disregarding years or even decades during which he continued to reside in the United States without being subject to removal on either deportability or inadmissibility grounds. Amici urge this Court either to reject this anomalous and

countertextual reading of the statute or to at least reserve it for a case that squarely presents the issue.[3]

ARGUMENT

The Eleventh Circuit erred in two respects. *First*, as demonstrated by Petitioner, the court's conclusion that a noncitizen can be rendered inadmissible even though he remains lawfully admitted and cannot possibly be charged with inadmissibility disregards the text and structure of the statute. *See* Pet. Br. 43-53. *Second*, the text, context, and purposes of the statute also foreclose the Eleventh Circuit's view that continuous residence terminates on the date of the statute's first triggering event (commission of a section 1182(a)(2) offense), rather than on the date of the second triggering event (when the offense renders the resident inadmissible). *See Barton*, 904 F.3d at 1301 n.3. As the Ninth Circuit has explained, the statute creates two triggering events, not just one, and so both events must occur before continuous residence stops accruing. *Nguyen* v. *Sessions*, 901 F.3d 1093, 1096 (9th Cir. 2018).

I. A LAWFULLY ADMITTED PERMANENT RESIDENT CANNOT BE RENDERED "INADMISSIBLE" UNLESS AND UNTIL IT IS LEGALLY POSSIBLE FOR HIM TO BE CHARGED WITH INADMISSIBILITY

Petitioner Barton was not "render[ed] … inadmissible" by his 1996 conviction for a single crime involving moral turpitude. At the time of his conviction, he had already been admitted to the United States and had no need to be readmitted in order to continue to reside

[3] Jobe has presented this issue to the Court in his petition for certiorari, which remains pending. *See* Case No. 18-1329. This Court should also grant Jobe's petition.

lawfully in this country. 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 Barton's conviction did not do that: A single crime involving moral turpitude committed outside the first five years of an immigrant's admission does not render the immigrant deportable. *See* 8 U.S.C. §1227(a)(2)(A). And, since Barton had been "lawfully admitted" and had no need to seek readmission, he also was not "render[ed] … inadmissible," because he could not be so "rendered" until he did something that required him to seek admission. Put another way: Barton was never "render[ed] … inadmissible" because it was never legally possible for the government to remove him on inadmissibility grounds. *See* Pet. Br. 43-53.

The Eleventh Circuit advanced the view that the word "inadmissible," "[b]y [its] very nature" as a word ending in "-ible," "connote[s] a person's or thing's character, quality, or status[,] which … exists independent of any particular facts on the ground." *Barton* v. *U.S. Attorney General*, 904 F.3d 1294, 1299 (11th Cir. 2018). The Second Circuit shared a similar view in *Heredia*, concluding that an immigrant "'becomes inadmissible'" when he is "'*potentially* removable if so charged.'" 865 F.3d at 68 (emphasis added).

But, as the Ninth Circuit recognized, neither Barton nor Jobe were "potentially removable" at the time of their convictions: "Lawful permanent residents—who have been 'admitted'—are under most circumstances subject to the grounds of removability, not inadmissibility." *Nguyen*, 901 F.3d at 1097; *see also* 8 U.S.C. §1229a(e)(2) (defining "removable," for purposes of sections 1229a and 1229b, as "in the case of an alien not admitted to the United States, that the alien is in-

admissible … or … in the case of an alien admitted to the United States, that the alien is deportable"); *Landon* v. *Plasencia*, 459 U.S. 21, 28 (1982). And, as discussed above *supra* pp. 5, 9, neither Jobe nor Barton were convicted of offenses that met the requirements of deportability. Accordingly, it was only once Jobe traveled abroad and sought to return that he was required to seek admission and became potentially removable if charged with inadmissibility. *See* 8 U.S.C. §1101(a)(13)(C)(v). It was at that point, not earlier, that Jobe was rendered inadmissible. As for Barton, having never travelled abroad, he never became subject to the grounds of admissibility and thus never became inadmissible. *Nguyen*, 901 F.3d at 1100 ("[A] lawful permanent resident cannot be 'rendered inadmissible' unless he is seeking admission.").

The Eleventh Circuit's interpretation conflicts with the specialized meaning that "admission" and "admitted" carry in the immigration statute. Under the statute, "admission" and "admitted" are defined terms, and section 1182—to which section 1229b(d)(1) refers—uses the term "inadmissible" no less than 70 times. As the Ninth Circuit explained, nowhere does the statute "divorce 'inadmissibility' from the admissions context." *Nguyen*, 901 F.3d at 1098.

It defies logic to think that Congress would have singled out "inadmissibility" in the stop-time rule to carry some anomalous meaning. "After all, it is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Pereira* v. *Sessions*, 138 S. Ct. 2105, 2115 (2018) (quotation marks omitted). Yet, as Petitioner explains (Br. 35), the Eleventh Circuit's view would assign different meanings to the word "inadmissible" not only within the same act, but in inter-

locking provisions of the same simultaneously-enacted *section*. Subsection (a) of section 1229b authorizes the Attorney General to "cancel removal in the case of an alien who is inadmissible or deportable." 8 U.S.C. §1229b(a). "[A]n alien who is inadmissible" plainly refers to one who the government *could* remove on inadmissibility grounds. After all, the only noncitizens who need, or could conceivably receive, cancellation are those who are legally removable. But in subsection (d) of section 1229b (the stop-time rule), the Eleventh Circuit would read "inadmissible" "alien[s]" to include noncitizens who it is legally impossible to remove on inadmissibility grounds. No principle of statutory construction justifies such a divergent interpretation of the same term across a single section.

The Eleventh Circuit's construction also "violates the cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant." *Kungys* v. *United States*, 485 U.S. 759, 778 (1988) (Scalia, J., concurring). Section 1229b(d)(1) identifies three clock-stopping scenarios: (i) service of a notice to appear; (ii) commission of an offense "referred to in section 1182(a)(2) … that renders the alien inadmissible … under section 1182(a)(2)"; and (iii) commission of an offense "referred to in section 1182(a)(2) … that renders the alien … removable … under section 1227(a)(2) or 1227(a)(4)." Yet as the government just recently conceded in its en banc rehearing petition to the Ninth Circuit, its preferred reading makes the third scenario superfluous of the second. *See* Petition for Rehearing 13, *Nguyen* v. *Sessions*, No. 17-70251 (9th Cir. Nov. 7, 2018). Even the government acknowledges that there is no offense "referred to in section 1182(a)(2)" that would not render a noncitizen "inadmissible" (as the government understands the term) but that would render the

noncitizen "removable." *See id.*; *see also* Pet. Br. 30-34. That "immigration statutes … can be difficult to harmonize," *Calix* v. *Lynch*, 784 F.3d 1000, 1006 (5th Cir. 2015), is no excuse to "read superfluousness into a statute when applying the traditional rules of statutory construction leads to a perfectly reasonable reading," *Nguyen*, 901 F.3d at 1099.

All of this indicates that a lawful permanent resident is "render[ed] … inadmissible to the United States under section 1182(a)(2)," not by mere conviction or confession, but only once the resident takes some further step, such as traveling abroad and seeking to return to the United States, that requires him to seek admission and thus makes an inadmissibility charge "legally possible." Pet. Br. 48.

II. CONTINUOUS RESIDENCE CONTINUES TO ACCRUE UNTIL A PERMANENT RESIDENT IS RENDERED INADMISSIBLE OR REMOVABLE

The Eleventh Circuit further erred in holding that continuous residence ends before a lawful permanent resident is rendered inadmissible or removable. As the Ninth Circuit explained, "the stop-time rule is triggered by two events." *Nguyen*, 901 F.3d at 1096. Continuous residence thus continues to accrue until the resident both commits a section 1182(a)(2) offense (the first event) and that offense renders the resident inadmissible or removable (the second event). *See id.* The contrary reading adopted by the Eleventh and Second Circuits—that the clock stops upon the first triggering event alone—conflicts with the relevant text, statutory

context, and statutory purposes, and produces harsh and unintended consequences.[4]

A. The Plain Text Of The Statute Instructs The Clock To Stop When Two Events Have Occurred

The stop-time rule provides that a lawful permanent resident's period of continuous residence "shall be deemed to end … when the alien has committed an offense … that renders the alien inadmissible … or removable." 8 U.S.C. §1229b(d)(1). "When" here means "[a]t the time that." *American Heritage Dictionary English Language* 1971 (5th ed. 2016). And the phrase following "when" identifies *two* distinct events, indicating that the clock "shall" stop "at the time that" *both* events have come to pass.

The plain language of the statute compels this interpretation. If a parent tells his child, "you will understand parenting when you have had a child that refuses to go to bed," he does not mean that understanding will arrive when the grandchild is born. He means that understanding will come once that grandchild resists bedtime. Similarly, if a store pledges that it "shall provide a refund when you have bought a stainless-steel pot that rusts," it is promising to provide a refund when the pot rusts, not when it is first purchased. So too, a statute that assesses fines against a contractor who "has built a structure that collapses": It authorizes fines upon collapse, not construction.

The stop-time rule has the same linguistic structure as these sentences and so conveys the same mean-

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[4] Petitioner assumes the correctness of the Eleventh Circuit's holding in his briefing, while emphasizing that this Court has never addressed the issue. Pet. Br. 9 n.4.

ing. The rule combines the future perfect tense—"any period of continuous residence … shall be deemed to end"—with the present perfect tense "has committed" and the present tense "renders." 8 U.S.C. §1229b(d)(1). This indicates that the "deem[ing]" *will be completed* (future perfect tense) *at the same time as* the "render[ing]" (present tense), which in turn must *follow the completion of* the "commi[ssion]" (present perfect tense). In other words, as the above examples demonstrate, continuous residence stops accruing only once both triggering events occur: (1) the alien "has committed" the requisite offense; and (2) the offense later "renders the alien inadmissible … or removable." *Id.*

Resisting this straightforward reading, the Second Circuit (whose analysis the Eleventh Circuit endorsed) took the position that the "'renders' clause does not impose a separate temporal requirement," but rather only "'limit[s] and defin[es] the types of offenses which cut off the accrual of further time.'" *Heredia*, 865 F.3d at 69 (quoting *In re Perez*, 22 I&N Dec. 689, 693 (BIA 1999)); *Barton*, 904 F.3d at 1301 n.3 (endorsing the Second Circuit's reading).

That reading cannot be squared with the statutory text. The stop-time rule points twice to the exact same statutory subsection: first, in requiring the noncitizen to have "committed an offense *referred to in section 1182(a)(2)*," and second, in requiring that the offense "render[] the alien inadmissible *under section 1182(a)(2)*." 8 U.S.C. §1229b(d)(1) (emphases added). To avoid redundancy, the rule's second reference to section 1182(a)(2) must therefore do something beyond limiting the *types* of clock-stopping offenses. And indeed it does. It identifies a distinct *event* that must occur before the clock stops: the moment when the offense "renders the alien inadmissible"—that is, the

moment when it becomes legally possible for the government to seek to remove him on inadmissibility grounds. *See supra* pp. 11-12.

Moreover, the Eleventh and Second Circuits are wrong that this distinct inadmissibility event somehow "'relates back' … to the date of the crime's commission." *Barton*, 904 F.3d at 1301 n.3; *Heredia*, 865 F.3d at 70-71. To achieve its reading, the Eleventh Circuit mangled the statute's chronology, concluding that, "as long as a qualifying offense later *does* render the non-citizen inadmissible … the date of the *commission* of the offense governs." *Barton*, 904 F.3d at 1301 n.3. It is telling that this restatement required the court to ignore the statute's verb tenses and even add the word "later." Such a tortured reading is entirely unnecessary when a plain-text interpretation is available. The requirement that the offense "render[] the alien inadmissible" is "attached to, and an integral part of" the phrase defining "when" the clock stops. *Perez*, 22 I&N Dec. at 702 (Guendelsberger, BIA Member, dissenting). The text plainly mandates that both triggering events "must have occurred before accrual of residence ends." *Id.*

The statute's broader context further confirms this reading. Under the reading adopted by the Eleventh and Second Circuits, there are only two possible continuous-residence endpoints (i.e., times at which the clock stops running): when a noncitizen (1) receives a notice to appear, or (2) commits a section 1182(a)(2) offense. *See Heredia*, 865 F.3d at 69. But the stop-time rule ends with an instruction that continuous residence stops accruing upon "whichever [endpoint] is *earliest*." 8 U.S.C. §1229b(d)(1) (emphasis added). By using the superlative "earliest" rather than the comparative "earlier," Congress indicated that the rule lays out at least three, not just two, possible endpoints. Indeed, no

provision of the United States Code uses the phrase "whichever is earliest" to refer to a two-endpoint scenario.[5] Yet the Second and Eleventh Circuit's reading gives no effect to this legislative choice. By contrast, the reading set forth above gives full effect to Congress's use of the term "earliest" by identifying three possible endpoints: when the noncitizen (1) receives a notice to appear, (2) becomes inadmissible, or (3) becomes removable.

B. Terminating Continuous Residence Before A Resident Is Rendered Inadmissible Or Removable Produces Harsh And Unintended Consequences

Even beyond these textual and contextual cues, there are other good reasons to doubt that Congress intended continuous residence to stop accruing before a lawful permanent resident is rendered inadmissible or removable. As the examples described below demonstrate, stopping the clock earlier deprives many lawful permanent residents of full credit for years—or even decades—during which they continued to live lawfully

[5] The phrase "whichever is earliest" appears only seven other times in the U.S. Code. All seven involve a choice between three possible endpoints. *See* 5 U.S.C. §8343(a)(1) (rate compounded annually to date of payment, separation, or transfer, "whichever is earliest"); 31 U.S.C. §776(b)(2) (annuity ends when the child becomes 18 years of age, marries, or dies, "whichever is earliest"); 50 U.S.C. §1805 (surveillance shall terminate when information is obtained, application is denied, or after 7 days, "whichever is earliest"); *see also id.* §§1824, 1861, 1881b, 1881c. As these examples demonstrate, while the phrase "whichever is earliest" does not require that every application of the statute present all three options (e.g., that every child will turn 18, marry, *and* die), it certainly requires that at least some applications of the statute present all three options (e.g., that a child *could* marry, turn 18, and die)—a requirement that the government's construction in no way satisfies.

in the United States and *were unremovable*. Such a rule also threatens to deprive residents of discretionary relief based solely on decades-old conduct for which the resident was neither arrested nor convicted. Neither the Eleventh nor Second Circuits pointed to any indication that Congress intended the stop-time rule to produce such harsh and anomalous consequences.

1. The Eleventh Circuit's interpretation cuts off continuous residence years—or decades—before lawful permanent residents like Jobe become removable

As Jobe's own case illustrates, certain—often minor—offenses preclude a noncitizen from *admission* to the United States but do not subject a noncitizen that has already been admitted to *deportation* from the United States. *Compare, e.g.*, 8 U.S.C. §1227(a)(2)(B)(i) *with id.* §1182(a)(2)(A)(i)(II); *see also Judulang* v. *Holder*, 565 U.S. 42, 46 (2011) (categories of deportability and inadmissibility "sometimes diverge[]"). Accordingly, after conviction of one of these offenses, a lawful permanent resident may continue to reside lawfully in the United States and the government *cannot* seek to remove him. Only if the lawful permanent resident travels abroad and attempts to return does removal based on the offense even become possible. At that point—but not until that point—he may be charged with inadmissibility and be subjected to possible removal.

According to the Eleventh Circuit, however, the stop-time rule erases years—or even decades—during which the resident lived lawfully in the United States without even the possibility of being removed by "relat[ing] back" to when the resident committed his offense. *Barton*, 904 F.3d at 1301 n.3.

The cases of Amicus **Jobe** (discussed *supra* pp. 5-7), **Tomas Mendez, and Hoxquelin Gomez Heredia** (described below) illustrate how years of continued residence as unremovable lawful permanent residents are disregarded under the interpretation adopted by the Eleventh and Second Circuits.

Tomas Mendez was already married to his U.S. citizen wife when he entered the United States in January 2004 as a conditional permanent resident. He received full permanent resident status in July 2006. Over the next decade, Mendez developed significant ties to the United States, and raised two daughters, one a U.S. citizen and one a lawful permanent resident.

In October 2010, Mendez pleaded guilty to one count of misprision of felony for failing to notify authorities that he had learned of someone else's crime. The government sought no jail time, and Mendez was sentenced to one year of probation, which he successfully completed. A single conviction for misprision of a felony, which the BIA held is a "crime involving moral turpitude," does not subject a lawful permanent resident to deportation unless committed within the first five years of admission. 8 U.S.C. §1227(a)(2)(A)(i)(I). Accordingly, like Jobe, Mendez continued to reside in the United States as a lawfully admitted permanent resident for years longer.[6]

All that changed, however, when Mendez took a two-week trip to the Dominican Republic in 2016—by which point he had resided continuously in the United States for 12 years without being subject to removal on *any* ground. Unlike deportability, inadmissibility is

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[6] *See* Brief for Petitioner 5-8, *Mendez* v. *Sessions*, No. 18-801 (2d Cir. July 30, 2018).

triggered by a single crime involving moral turpitude even if committed more than five years after admission. *Compare* 8 U.S.C. §1182(a)(2)(A)(i) (inadmissibility), *with id.* §1227(a)(2)(A)(i)(I) (deportability triggered by two crimes involving moral turpitude or one within five years of admission). Accordingly, assuming Mendez's conviction was a crime involving moral turpitude, it was a ground for *inadmissibility* under section 1182, even though it had not been a ground for *deportability* under section 1227. As a result, Mendez's trip required him to seek a new admission and he was—at that point—deemed inadmissible. And because Mendez had committed that offense six years and nine months after entering this country (rather than a full seven years), he was also denied eligibility for cancellation of removal. The twelve years that Mendez had resided continuously in the United States, during which it was legally impossible to remove him, were transformed into just less than seven years of "continuous residence."[7]

Hoxquelin Gomez Heredia entered the United States as a lawful permanent resident in August 1997 when he was approximately 20 years old. For two decades, Heredia has been in a committed relationship with a U.S. citizen, with whom he has raised her two U.S. citizen children from a previous relationship, as well as their three U.S. citizen children (one of whom is now deceased).

In 2015, upon his return from a family trip to the Dominican Republic, Heredia was charged as inadmissible and removal proceedings were initiated against him. Ultimately, the BIA determined that Heredia was removable based on a 2010 conviction. The BIA further concluded that Heredia was ineligible for cancellation

[7] *See id.* at 8-9, 11-12.

of removal based on a 1999 conviction for possession of less than thirty grams of marijuana, even though he remained unremovable for over a decade following that conviction. Thus, after building a life, raising a family, and even losing a child in the United States over the course of two decades—half of his life—a mistake Heredia made in his 20s has come back to separate him from his home, his partner, and his children without even the opportunity for discretionary relief.[8]

Under the Eleventh Circuit's reading of the stop-time rule, a minor marijuana offense can erase not just years, but decades spent living in this country as a lawfully admitted and unremovable permanent resident. While **Jobe**, **Mendez**, and **Heredia** had resided here for 9, 12, and 13 years before becoming removable on any ground, there is no limiting principle to the Eleventh and Second Circuit's reading of the statute. Indeed, a lawful permanent resident could reside in the United States for fifty years without any possibility of removal and yet be deemed ineligible for cancellation of removal for an offense committed as a teenager five decades earlier.

2. Lawful permanent residents may lose eligibility for discretionary relief even for decades-old conduct for which they were never arrested or convicted

Even decades-old conduct for which a resident was never arrested or convicted can deprive the resident of eligibility for cancellation of removal under the Eleventh and Second Circuit's reading of the statute. Unlike deportation, inadmissibility can be triggered not only by a conviction but also by admitting to having

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[8] *See* Petition 10-13, *Heredia* v. *Sessions*, No. 17-661 (U.S. Oct. 25, 2017).

once committed an offense. 8 U.S.C. §1182(a)(2)(A)(i) ("[A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of [certain crimes] is inadmissible."). A lawful permanent resident returning from a trip abroad who merely admits, for example, to having smoked marijuana as a teenager is thus exposed to removal on inadmissibility grounds—even if he smoked marijuana only once and was never arrested. And if that youthful indiscretion occurred within seven years of admission to the United States, that confession will also make the lawful permanent resident ineligible for cancellation of removal, under the reading embraced by the Eleventh and Second Circuits.

That consequence is not only inexplicably harsh; it also threatens to transform cancellation of removal hearings into inquisitions at which an immigrant's honesty is a liability. Speaking candidly about their pasts is precisely what noncitizens are expected to do at cancellation of removal hearings. Indeed, one practitioner even describes the hearings as "confessionals." [9] And Immigration Judges advise noncitizens to "own up" to past mistakes. *See Hossain* v. *Attorney Gen. of U.S.*, 434 F. App'x 128, 130 (3d Cir. 2011) (recounting an IJ's admonishment to a lawful permanent resident seeking cancellation of removal that "'it is important to come to

[9] *See* Pennsylvania State Law School & Pennsylvania Immigration Resource Center, *Practitioner's Toolkit on Cancellation of Removal for Lawful Permanent Residents* (2016), https://tinyurl.com/y42nrgju (recounting one immigration law practitioner's view that "the client should be candid"); *see also* DOJ, Legal Orientation Program, *How to Apply for "Cancellation of Removal for Certain Lawful Permanent Residents"* 24 (2014), https://tinyurl.com/y58bre4k ("If you cannot admit you did something wrong, it does not help your case.").

the Court with clean hands [and] to own up to all failures that an individual causes himself' when seeking discretionary relief"). Yet, because merely admitting to certain offenses can become a basis for inadmissibility, the Eleventh and Second Circuits' rule that "inadmissibility 'relates back' … to the date of the crime's commission" puts noncitizens at risk of losing eligibility for cancellation of removal simply by faithfully fulfilling their obligation to speak candidly at their hearings.

The case of **Vu Minh Nguyen** illustrates how an admission during a cancellation of removal hearing can threaten to deprive a permanent resident of eligibility for cancellation of removal.

Vu Minh Nguyen was eighteen years old when he entered the United States as a lawful permanent resident in 2000. He lawfully resided in this country for fifteen years, raising his two U.S. citizen children in Washington State, where he lived with his U.S. citizen mother. In December 2015, Nguyen was convicted of criminal offenses for which he served 30 days in jail, after which he was taken into custody by immigration officials and placed into removal proceedings. Nguyen applied for cancellation of removal, for which he appeared to be eligible.[10]

At the August 2016 hearing on his application for cancellation of removal, however, Nguyen revealed, under cross-examination by counsel for the Department of Homeland Security, that he had experimented with cocaine at parties he attended in his early 20s. Nguyen was never arrested or charged for these youthful lapses. Nonetheless, the government seized on these

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[10] *See* Opening Brief for Petitioner 5-7, *Nguyen* v. *Sessions*, No. 17-70251 (9th Cir. Dec. 18, 2017).

candid admissions as grounds for pretermitting Nguyen's application. The immigration judge held that Nguyen was ineligible for cancellation, a holding that the Ninth Circuit eventually reversed.[11] The Eleventh Circuit expressly "disagree[d] with the Ninth" Circuit's holding, *Barton*, 904 F.3d at 1295; under its rule, Nguyen would have been ineligible for cancellation of removal, because the stop-time rule would have cut off Nguyen's continuous residence as of his commission of the offense in the early 2000s, even though he was never charged and did not admit to the offense until 2016, *id.* at 1299 n.1—*sixteen years* after his lawful admission to the United States.

3. These inequities are triggered by minor offenses that Congress elsewhere exempted from immigration consequences

These harsh consequences are visited exclusively upon lawful permanent residents with particularly minor offenses—offenses that Congress determined are not serious enough to trigger deportation and are sufficient only to trigger inadmissibility. As noted above, for example, Congress exempted minor marijuana offenders from deportation because it believed that such individuals "do not pose a significant threat to society or U.S. citizens" and therefore should be permitted to remain in the United States. H.R. Rep. No. 100-882, at 43 (1988). Because Congress deemed such offenses to be so minor, these individuals are able to remain in the United States after their convictions and build a life and family for themselves. Yet, under the Eleventh Circuit's view, once immigrants with minor marijuana convictions travel, they suddenly find that years or

[11] *See id.* at 7-8.

decades spent living in the United States as unremovable lawfully admitted permanent residents do not count as "continuous residence."

Edelinton Henry's story demonstrates the inequity of this reading.

Henry entered the United States in October 1986 at the age of fifteen after his mother successfully petitioned for him to receive lawful permanent resident status. Over the more than three decades that Henry has lived in the United States, he has developed deep ties to this country. In particular, Henry has shown himself to be a committed family man—he has been married to a U.S. citizen for nineteen years and has raised five U.S. citizen children. Henry has also provided for his family, maintaining steady employment in construction, and become a fixture of his community, playing an active role in his church.[12]

In 1993, when Henry was 22—six years and 50 weeks after he became a lawful permanent resident—he was arrested for possessing 19 grams of marijuana. Henry's subsequent conviction for that offense had no consequence for his immigration status. Now, however, at age 48, Henry faces removal from the United States and separation from his family, due to a second marijuana conviction in 1998. Henry has had no further criminal convictions since that second marijuana conviction *over twenty years ago* and, as noted, has built ties and contributed to this country in precisely the ways that should trigger cancellation of removal. Yet under the reading adopted by the Eleventh and

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[12] *See* Letter from Christopher Setz-Kelly, Staff Attorney, Nationalities Service Center to Amy Lishinski, Associate, Wilmer Cutler Pickering Hale and Dorr (July 1, 2019) (on file with Wilmer Cutler Pickering Hale and Dorr).

Second Circuits, the stop-time rule was triggered just two weeks shy of seven years, rendering him ineligible for cancellation of removal due to a minor marijuana offense he committed in his 20s, notwithstanding the years that he continued to live in this country as a lawfully admitted and unremovable permanent resident.[13]

The consequences of imposing such burdens on minor marijuana offenders, such as Jobe, Heredia, and Henry, are tremendous. Hundreds of thousands of people are arrested for marijuana possession every year.[14] Moreover, as more states and municipalities have moved to "pseudo-decriminaliz[e] marijuana by lowering the consequences of possessing small amounts of marijuana for personal use without making personal use affirmatively legal," it is entirely unsurprising that lawful permanent residents who have spent decades of their lives in this country could end up with such convictions. Cunnings, *Nonserious Marijuana Offenses and Noncitizens: Uncounseled Pleas and Disproportionate Consequences*, 62 UCLA L. Rev. 510, 526 (2015). Because these crimes are often misdemeanors or civil infractions, the lawful permanent resident may be unrepresented in these proceedings and thus never made aware that the state's decision to pseudo-legalize marijuana has no bearing on the severe consequences that await, should the lawful permanent resident set foot outside the United States. *Cf. Padilla* v. *Kentucky*, 559 U.S. 356 (2010) (holding that noncitizen criminal defendants have a Sixth Amendment right to advice regarding immigration consequences of criminal charges).

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[13] *See id.*

[14] *See* FBI, Crime Data Explorer: *Arrest Data–Reported Number of Drug Arrests*, https://crime-data-explorer.fr.cloud.gov/downloads-and-docs (last accessed July 2, 2019).

This "world of disquieting consequences," in which a lawful permanent resident can be uprooted "even many years after" committing a minor (and even uncharged) marijuana offense, requires "far stronger textual support" than that amassed by the Eleventh and Second Circuits. *Maslenjak* v. *United States*, 137 S. Ct. 1918, 1927 (2017).

4. The government's interpretation impedes lawful permanent residents' right to travel, a right of fundamental importance to lawful permanent residents

The reading adopted by the Eleventh and Second Circuits elevates the consequences of travel in circumstances like Jobe's from possible removal to near-certain removal. For lawful permanent residents who make their lives in the United States, the "[l]oss of the ability to travel" is, as this Court has recognized, an especially "harsh penalty" because it often "means enduring separation from close family members living abroad." *Vartelas* v. *Holder*, 566 U.S. 257, 268 (2012).[15]

This Court's case law has recognized the importance of the ability to travel internationally. In *Kent* v. *Dulles*, 357 U.S. 116 (1958), the Court discussed the long pedigree of the right to travel, noting that it "was emerging at least as early as the Magna Carta" and was "deeply engrained in our history," *id.* at 125-126. Freedom of movement across frontiers, the Court observed,

[15] "[T]he punitive consequence of subsequent excludability," following a short trip abroad, was precisely what motivated this Court to conclude that "no rational policy support[ed] application of a re-entry limitation in all cases in which a resident alien crosses an international border for a short visit." *Fleuti*, 374 U.S. at 461. This Court has expressly declined to decide whether *Fleuti* has been abrogated prospectively. *See Vartelas*, 566 U.S. at 262 n.2 (2012).

"was a part of our heritage." *Id.* at 126. And beyond its historical roots, the freedom to travel abroad retained crucial importance in the modern world: "Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values." *Id.* The Court further acknowledged the "social value[]" of international travel, acknowledging that travel promotes education and serves purposes "close to the core of personal life—marriage, reuniting families, spending hours with old friends." *Id.* (quotation marks omitted).

International travel is especially important for lawful permanent residents. For many permanent residents, losing the ability to travel means permanent separation from their family: Family abroad may be unable to travel to the United States for health or personal reasons, or unable to obtain a visa.[16] Even where a visa is theoretically available, the wait time may be enormous: As of June 2019, the wait time for spouses and minor children of lawful permanent residents is two years.[17] Moreover, a loss of travel deprives lawful permanent residents of the ability to travel for educational pursuits, business relationships, or religious pilgrimages.

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[16] For lawful permanent residents, some categories of relatives—e.g., parents—are statutorily ineligible for immigration based on a family relationship. *See* 8 U.S.C. §§1151, 1153.

[17] *See* U.S. Department of State, *Visa Bulletin for June 2019* (2019). For permanent residents' unmarried children age twenty-one or older, the wait is even longer: twenty-one years for relatives in Mexico, twelve for those in the Philippines, and six for those in all other countries.

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In sum, the reading of the stop-time rule adopted by the Eleventh and Second Circuits creates a nightmarish state of affairs for lawful permanent residents. Under that reading, a noncitizen who arrived lawfully in the United States as a child and resided in the United States for his entire life—marrying, raising children, and establishing a life—could be stripped of his status and even his eligibility for discretionary relief merely by traveling to visit family abroad and admitting to a border agent upon his return that he once smoked marijuana as a teenager—even if he was never arrested or charged with a crime, and despite the many years living in this country without even the possibility of being removed on any ground.[18] Nothing in the text, structure, or history of the statute indicates that Congress intended such a harsh result.

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[18] The risk that a noncitizen will admit to minor, uncharged criminal activity is far from remote: Law enforcement officers are specifically trained to question arriving immigrants in order to elicit confessions. *See* Hunsucker, Senior Instructor, Federal Law Enforcement Training Center, *Criminal Without Conviction – Prosecuting the Unconvicted Arriving Alien Under Section 212(a)(2)(A) of the Immigration and Nationality Act*, 2 Q. Rev. (2d ed. 2001), https://tinyurl.com/y3xqobbe (providing "practical advice to the law enforcement officer on how to obtain an admission of criminal activity sufficient to support a finding of inadmissibility under [8 U.S.C. §1182(a)(1)(A)(i)]"). "[A]rriving aliens are often not … savvy … [and] must answer law enforcement questions to gain admission to the United States," making them "much more likely to confess their criminal acts." *Id.* at 1.

C. Pegging The Stop-Time Rule To Inadmissibility Or Removability Best Aligns With Congress's Purposes

Congress in no way intended the stop-time rule to produce such harsh and anomalous impacts. To the contrary, while the legislative history indicates that Congress has, over the last 60 years, layered additional requirements onto discretionary relief from removal, those requirements have been designed to address specific issues. And nothing in the history of the Immigration and Nationality Act (INA) or the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) indicates that Congress intended to discount the years of meaningful residence that lawful permanent residents accumulate after committing minor offenses (such as possession of a small amount of marijuana) for which Congress specifically exempted them from deportation.

For nearly seven decades, immigration law has keyed discretionary relief for lawful permanent residents to seven years of lawful residence in the United States. Even before enactment of the INA, the same seven-year requirement that persists to this day cabined the Attorney General's discretion to admit otherwise excludable noncitizens. 8 U.S.C. §136(p) (1946). Both the INA and IIRIRA retained that same seven-year requirement for discretionary relief. *See* Pub. L. No. 82-414, 66 Stat. 163, 187 (1952); 8 U.S.C. §1229b(a).

In enacting the INA, however, Congress—concerned that discretionary relief was available "even though the alien had never been lawfully admitted to the United States"—added a requirement that the individual be lawfully admitted for permanent residence. S. Rep. No. 82-1137, at 12 (1952); *see also* Pub. L. No. 82-414, 66 Stat. at 187. That is, faced with a specific

concern (namely, that immigrants were able to secure relief from removal without ever having resided lawfully), Congress enacted a solution tailored to that concern: It added a requirement that the immigrant be lawfully admitted for permanent residence.

Similarly, as this Court explained just last Term in *Pereira*, in enacting IIRIRA, Congress was motivated by a very specific concern, namely, that immigrants were "exploiting administrative delays to 'buy time' during which they accumulate periods of continuous presence." 138 S. Ct. at 2119 (citing H.R. Rep. No. 104-469, pt. 1, at 122 (1996)). To address this concern, Congress again enacted a specific solution: the stop-time rule. Nothing in the enactment of the stop-time rule suggests, however, that Congress set out to more dramatically reform the basic seven-year requirement by depriving lawful permanent residents of full credit for years or decades of continuous residence, during which they were *unremovable* from the United States. To the contrary, IIRIRA was designed to avoid "punishing [immigrants] living in the United States legally." *Presidential Statement on Signing the Omnibus Consolidated Appropriations Act 1997*, reprinted in 1 *Legislative History of the Omnibus Consolidated Appropriations Act of 1997 P.L. 104-208*, at 1937 (1997).[19]

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[19] Petitioner suggests that Congress may have had a second concern, namely, that "[t]ime spent in … prison … may count toward the 7 year residency requirement." S. Rep. No. 104-48, at 2 (1995) *quoted in* Pet. Br. 7. It is unclear whether this discussion of "criminal aliens … obtain[ing] U.S. Citizenship" (*id.*) refers to the stop-time rule, which plays no part in naturalization, but in any event, it certainly does not refer to immigrants who, like Jobe, are not removable during the many years that they continue to live in this country. *See id.* at 1 (defining "criminal aliens" as "non-U.S. citizens residing in the U.S. who commit serious crimes *for which*

Pegging continuous residence to the moment a permanent resident is *chargeable* as inadmissible or removable fully addresses Congress's gamesmanship concerns by disconnecting eligibility for discretionary relief from the administrative process and thereby eliminating any incentive "to delay proceedings until 7 years have accrued." H.R. Rep. No. 104-469, pt. 1, at 122.

The Eleventh and Second Circuits' interpretation of the stop-time rule, by contrast, cuts off continuous residence far earlier than necessary to achieve that objective. And in doing so, their reading flouts Congress's longstanding commitment to fully credit noncitizens for years spent residing as lawful permanent residents. By depriving unremovable lawful permanent residents of stop-time-rule eligibility without regard for years, or even decades, of lawful residence, the rule adopted by the Eleventh and Second Circuits flips Congress's clear intent on its head.

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they may be deportable" (emphasis added)). As for immigrants who are rendered removable, to the extent Congress intended to stop continuous residence from accruing while the immigrant served time for a deportable offense, Congress achieved that goal with yet another specific fix: cutting off accrual "when the alien is *convicted* of an offense that renders the alien deportable." H.R. Conf. Rep. No. 104-828, at 214 (1996) (emphasis added). Tellingly, this legislative history shows that Congress understood continuous residence to stop accruing upon *conviction* of a deportable offense, not *commission*—the opposite of the reading adopted by the Eleventh Circuit below.

CONCLUSION

For these reasons and the reasons stated in Petitioner's brief, the decision of the Court of Appeals should be reversed.

Respectfully submitted.

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