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IN THE SUPREME COURT OF THE UNITED STATES

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ANDRE MARTELLO BARTON,)
Petitioner,)

v.) No. 18-725

WILLIAM P. BARR, ATTORNEY GENERAL,)
Respondent.)

- - - - -

Washington, D.C.

Monday, November 4, 2019

The above-entitled matter came on
for oral argument before the Supreme Court of
the United States at 10:06 a.m.

APPEARANCES:

ADAM G. UNIKOWSKY, ESQ., Washington, D.C.; on behalf
of the Petitioner.

FREDERICK LIU, Assistant to the Solicitor General,
Department of Justice, Washington, D.C.; on behalf
of the Respondent.

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1 P R O C E E D I N G S

2 (10:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 18-725,
5 Barton versus Barr.

6 Mr. Unikowsky.

7 ORAL ARGUMENT OF ADAM G. UNIKOWSKY

8 ON BEHALF OF THE PETITIONER

9 MR. UNIKOWSKY: Mr. Chief Justice, and
10 may it please the Court:

11 The question before the Court today
12 is, what does it mean for an offense to render
13 an alien inadmissible for purposes of the
14 stop-time rule? The Court should hold that an
15 offense renders an alien inadmissible if the
16 immigration judge finds that the offense renders
17 the alien inadmissible at the removal hearing
18 that precipitates the need to apply the
19 stop-time rule.

20 If the Court disagrees with that and
21 agrees with the Eleventh Circuit that
22 inadmissible is a status, it should hold that an
23 alien acquires that status when the alien is
24 capable of being charged with inadmissibility.

25 In this case, neither condition is

1 satisfied. Petitioner was not found
2 inadmissible. He wasn't capable of being found
3 inadmissible. Therefore, he was not rendered
4 inadmissible.

5 So I'd like to begin this morning with
6 a concession the government makes at pages 29
7 and 30 of its brief, which I think narrows the
8 issues in this case somewhat. So the government
9 concedes that when the words "inadmissible" and
10 "removable," which are the crucial words in the
11 stop-time rule, when those words are used in a
12 statute that has a connection to the alien's own
13 removal proceeding, they're a reference to the
14 charge against the alien at that proceeding.
15 They're not a status.

16 So the government agrees that in those
17 contexts, its proposed interpretation of the
18 words "inadmissible" and "removable" in the
19 stop-time rule is incorrect. So, in
20 Section 1226, the mandatory detention statute,
21 that says that an alien who is inadmissible by
22 reason of having committed an offense under
23 Section 1182 is subject to mandatory detention,
24 the government agrees there that "inadmissible"
25 is a reference to inadmissible at the

1 proceeding, not just the status of being
2 inadmissible.

3 The government says that's natural in
4 that context, and we agree, because that's a
5 statute with the relationship to the alien's
6 removal.

7 Same thing in Section 1252. That's
8 the jurisdiction-stripping statute. That says
9 that courts of appeals don't have jurisdiction
10 to hear petitions for review by an alien who is
11 removable for certain specified reasons. There,
12 too, the government reasons removable is not the
13 status; it's a reference to the actual charge at
14 the hearing, and they say that's natural in that
15 context because the statute has a connection to
16 the alien's removal proceeding.

17 So the question in this case boils
18 down to whether the government has put forward a
19 sufficient case for holding that the words
20 "inadmissible" and "removable" in the stop-time
21 rule mean something different from what it
22 concedes they mean in these adjacent or nearby
23 statutes addressing the same subject matter.

24 And I don't think the government has
25 put forward that case, because I think that many

1 of the contextual clues that apply in the nearby
2 statutes also apply in the stop-time rule, or at
3 least there isn't a sufficient reason for
4 construing those statutes differently.

5 So, first of all, I think it's
6 important to recognize that the stop-time rule
7 is applied only in the context of removal
8 proceedings after the immigration judge has just
9 decided whether an alien is inadmissible or
10 removable. So there's like two steps.

11 At step one, the immigration judge
12 decides whether an offense renders the alien
13 inadmissible or removable. And then the
14 immigration judge decides eligibility for
15 cancellation.

16 JUSTICE SOTOMAYOR: That's not quite
17 true, though. Some aliens concede removability
18 and are seeking cancellation.

19 MR. UNIKOWSKY: Yes, that's correct.

20 JUSTICE SOTOMAYOR: And then there are
21 some that are ordered -- who are found
22 inadmissible or removable not on the basis of a
23 crime at all.

24 MR. UNIKOWSKY: So that's true, but
25 in --

1 JUSTICE SOTOMAYOR: So you have two
2 classes of people that aren't covered by the way
3 you're reading admissibility now.

4 MR. UNIKOWSKY: No, but there's still
5 a threshold finding of inadmissibility or
6 removability. It's true there might not be a
7 hearing; there might be a concession. But, in
8 the most typical cases, it's based on an
9 offense, and in every case, there's just been a
10 holding, an adjudication, that for some reason
11 the alien is inadmissible or removable.

12 JUSTICE SOTOMAYOR: But --

13 JUSTICE ALITO: Mr. Unikowsky, could I
14 -- could I possibly get an argument off the
15 table? Do you really want to argue that the
16 concept of inadmissibility is not a status?

17 MR. UNIKOWSKY: I think that the word
18 varies depending on the context in which it's
19 being used. So I can't --

20 JUSTICE ALITO: Okay. Well, that's a
21 different question in -- but is -- is or is not
22 the concept of inadmissibility a status?

23 MR. UNIKOWSKY: I think that it can --
24 the word can mean two things. I mean, I agree
25 with you that the DLE sounds like a status at

1 least in some contexts. I can't -- I'm not
2 conceding -- I'm not going to argue something
3 that's obviously wrong.

4 There are certain contexts in which
5 the way using that word it sounds like a status.
6 So I agree, if you go to your lawyer before the
7 hearing and say, hey, I want to go to Niagara
8 Falls, am I inadmissible, in that context, it's
9 talking about a status. That's clear.

10 But I also think it's clear that in
11 certain contexts when you're talking about the
12 removal proceeding itself --

13 JUSTICE ALITO: Give me a -- give me
14 an example in ordinary speech where
15 inadmissibility is not a status. You just gave
16 the example of -- you just gave an example
17 yourself where it would be.

18 MR. UNIKOWSKY: Yeah.

19 JUSTICE ALITO: Somebody is in Europe
20 and is going to buy a ticket to come to the
21 United States. If that person does not
22 satisfy -- that person is inadmissible, that
23 person is inadmissible at the time when the
24 ticket is purchased --

25 MR. UNIKOWSKY: So I --

1 JUSTICE ALITO: -- or at the time when
2 the person gets on a bus in Central America to
3 come to the southern border, or if evidence is
4 inadmissible, it's inadmissible before the
5 attorney tries to admit it at trial, right?

6 MR. UNIKOWSKY: That -- so that's
7 true, but it seems to me that when you're using
8 the word in the context of talking about the
9 removal proceeding itself, what you really mean
10 is inadmissible at that proceeding. So, again,
11 I think 1226 is a perfect example of this.

12 JUSTICE ALITO: Okay. So --

13 MR. UNIKOWSKY: Yeah.

14 JUSTICE ALITO: -- that -- that's the
15 -- what I want to get off the table. So it is a
16 status when -- you may or may not agree with me,
17 I gather that you don't. But, if I think it is
18 a status, then the question is whether -- is the
19 context in which this status can be assessed,
20 right?

21 MR. UNIKOWSKY: I mean, I'm
22 comfortable calling it a status if we define the
23 relevant status as status of inadmissible at
24 that proceeding, as opposed to status of
25 theoretically --

1 JUSTICE ALITO: Okay. Then you have
2 to show why, in the context of a -- a removal
3 proceeding for an LPR who has not left the
4 country, there cannot be a -- an assessment of
5 inadmissibility of this status. You have to
6 show why that is so.

7 MR. UNIKOWSKY: So I think it's for
8 many of the same reasons why we agree with the
9 adjacent statute that that is so.

10 So, first of all, just contextually,
11 it seems to me it's quite natural when at step
12 one of the proceeding there's an adjudication.
13 Maybe it's conceded, but there's some kind of
14 adjudication that the alien is, in fact,
15 inadmissible or removable.

16 And then the next step, the
17 immigration judge is asked to decide, does this
18 offense render the alien inadmissible or
19 removable? I just think it's natural to talk
20 about what just happened, rather than this new
21 proceeding that imagines what would have
22 happened if the person had left and tried to
23 come back.

24 I also think that the -- the opening
25 stanza of the cancellation of removal statute is

1 actually quite good for us. It says something
2 to the effect of the attorney general may cancel
3 removal for an alien who is inadmissible or
4 deportable. That's actually quite a lot like
5 1226, the mandatory detention statute, in that
6 it has removal and then inadmissible and
7 deportable sort of in the same breath.

8 JUSTICE ALITO: Do you dispute the
9 fact that there are other provisions in the
10 immigration laws in which inadmissibility is
11 assessed at a time other than when an alien is
12 seeking admission to the country?

13 MR. UNIKOWSKY: So I -- yes, I do.
14 And let me walk through all of those because I
15 don't -- it's almost like the exception that
16 proves the rule in the cases that the government
17 addresses. So the primary example is adjustment
18 of status or adoption of a temporary status,
19 which I think is sort of a constructive
20 admission, like you don't have to leave the
21 country and come back.

22 JUSTICE ALITO: Well, I mean, when you
23 say it's a constructive admission,
24 "constructive" is a word that lawyers use in an
25 effort to show that something that is not

1 something else actually is that other thing,
2 right?

3 MR. UNIKOWSKY: Yeah, but the point is
4 you're -- you're trying to get into a new
5 status, which is sort of like trying to get into
6 a new country, like the status is as if you're
7 being admitted into a new -- it's not like a
8 latent -- the government says that in 1996 this
9 like latent status was conferred on him that
10 just stuck with him for all these years, which
11 is different from when you're affirmatively
12 seeking eligibility for a new status, which is
13 kind of like affirmatively seeking eligibility
14 to enter the country.

15 So I think that's just conceptually
16 different. And, by the way, that doesn't apply
17 to -- to LPRs like Petitioner. There actually
18 is no other concept -- context in which the
19 concept of inadmissibility has any relevance to
20 an LPR.

21 JUSTICE GINSBURG: When -- when --

22 MR. UNIKOWSKY: The government also
23 has --

24 JUSTICE GINSBURG: -- when can an LPR
25 fit the -- fit that status? You say if he

1 leaves the country for more -- more than 180
2 days.

3 MR. UNIKOWSKY: Yes.

4 JUSTICE GINSBURG: What other -- in
5 what other situations can a lawfully permanent
6 resident be subject to the status of
7 ineligibility?

8 MR. UNIKOWSKY: So there's --

9 JUSTICE GINSBURG: Inadmissibility?

10 MR. UNIKOWSKY: I'm sorry. So there's
11 several enumerated criteria. Probably the one
12 most relevant to this case is that the statute
13 provides that if you've committed a crime on the
14 inadmissibility list, under 1182, and then you
15 leave, you need to seek admission again.

16 Now there's one wrinkle on the
17 specific facts of this case, that that statute
18 doesn't apply to Petitioner because he committed
19 his crime before the -- IIRARA's enactment. But
20 in the general mine run -- and we're not relying
21 on that as the basis to decide this case.

22 JUSTICE GINSBURG: But what else
23 besides leaving the country and coming back?

24 MR. UNIKOWSKY: So leaving for 180
25 days, abandonment of the status. I think one of

1 them is committing a crime in a foreign country,
2 and -- and there's a couple of other ones.
3 There's like a list of enumerated criteria in
4 Section 1101.

5 JUSTICE SOTOMAYOR: Could you go back
6 and finish your answer to Justice Alito? I
7 understand he asked about the other
8 provisions --

9 MR. UNIKOWSKY: Yes.

10 JUSTICE SOTOMAYOR: -- that refer just
11 to a status.

12 MR. UNIKOWSKY: Yeah.

13 JUSTICE SOTOMAYOR: And you mentioned
14 the first one, and --

15 MR. UNIKOWSKY: Right.

16 JUSTICE SOTOMAYOR: -- that seems
17 somewhat logical. But how about the others?

18 MR. UNIKOWSKY: So I think that the
19 only other ones are these two, for these very
20 narrow classes for temporary aliens, like
21 certain entrance before 1982 and something about
22 special agricultural workers.

23 And, actually, those provisions in the
24 -- in the sections talking about adjustment of
25 status for those people, it also says that if

1 they're inadmissible, they also have to leave.

2 Their status is terminated.

3 Those statutes were enacted many
4 years -- I think in the '80s, many years before
5 IIRARA. So, I mean, it's different subject
6 matters. It's not about LPR. They're enacted
7 at different times. I think they're less
8 relevant in these cluster of statutes about
9 removal which were all or almost all enacted in
10 IIRARA itself. They all address the same
11 subject matter.

12 To me, if you're going to look at
13 consistent usage, those are the ones to use. I
14 actually think that our best argument on
15 consistent usage is maybe just the intro to the
16 cancellation of removal statute. And I -- I
17 mentioned a few minutes ago, but I'd just like
18 to elaborate a little bit.

19 It says the Attorney General may
20 cancel removal for an alien who is inadmissible
21 or removable -- or deportable, excuse me, and so
22 like that's just like 1226. You're talking
23 about removal and inadmissible in the same
24 sentence.

25 And so it just seems quite natural

1 that inadmissible is a reference to inadmissible
2 at the hearing, right? And you can't actually
3 cancel removable --

4 JUSTICE KAVANAUGH: But the point --
5 the point of the overall provision is to allow
6 cancellation of removal for those who've been in
7 the U.S. for a long time and have had clean
8 records. You agree so far?

9 MR. UNIKOWSKY: Well, clean -- it
10 doesn't have to be completely clean --

11 JUSTICE KAVANAUGH: Right.

12 MR. UNIKOWSKY: -- but yes.

13 JUSTICE KAVANAUGH: But generally
14 clean.

15 MR. UNIKOWSKY: Yes. Right.

16 JUSTICE KAVANAUGH: Okay. And on the
17 clean record point, the statute excludes those
18 who have aggravated felonies, right?

19 MR. UNIKOWSKY: Yes.

20 JUSTICE KAVANAUGH: And then it
21 excludes, arguably, two more categories, those
22 who have the list of crimes that make you
23 deportable or the list of crimes that make you
24 admissible.

25 So those are the three categories that

1 seem to suggest if -- if those have been
2 committed within the first seven years for those
3 latter two, right? The aggravated felony at any
4 time, but deportable crimes, seven years, the --
5 the inadmissible crime, seven years.

6 Why isn't that the overall structure
7 to look at that makes you ineligible for
8 cancellation of removal, if you understand the
9 structure?

10 MR. UNIKOWSKY: Well, I -- I think the
11 structure has a different conclusion. I think
12 it's -- it's quite relevant that for this
13 aggregated assault offense here, Congress has
14 actually decided that that's not a basis to
15 deport him, period.

16 So like it doesn't interrupt his
17 continuous residence in the literal sense, that
18 ICE can't come to his house and -- and deport
19 him for it. He -- Congress has decided he gets
20 to stay here, so --

21 JUSTICE KAVANAUGH: Right. But the --
22 the point is you're already been determined that
23 you're inadmissible or deportable.

24 MR. UNIKOWSKY: Yes.

25 JUSTICE KAVANAUGH: Now the question,

1 are you eligible for cancellation of that
2 removal, and the two things that Congress said
3 we should -- that IJs should look at are, have
4 you been here for a sufficient period of time
5 and have you not committed certain crimes:
6 aggregated felonies, deportable offenses within
7 seven years, inadmissible offenses within seven
8 years.

9 If you've committed anything within
10 those three categories, you're no longer going
11 to be eligible for cancellation of removal.

12 MR. UNIKOWSKY: See, I'm not sure
13 that's the right way to read the statute because
14 what it says is, to -- to stop the clock, it's
15 got to be a crime referred to in 1182, that's
16 the inadmissibility list, and then that renders
17 you inadmissible or removable.

18 So the way I -- I look at that is that
19 the first part of that referred to in 1182,
20 that's the category of crimes that's capable of
21 stopping the clock.

22 And then there's the second part of
23 the statute which has what we see as, okay, not
24 only does it have to be on this list of crimes,
25 that's the first part, but it has to have this

1 particular type of consequence, which is
2 rendering you inadmissible or -- or removable.

3 And, in fact, that leads to an
4 argument we make about -- about surplusage, that
5 it makes more sense to view the statute that way
6 than the government's way because, under the
7 government's position, at least until it filed
8 its brief in this case, it conceded that the
9 removable portion of the statute was total
10 surplusage.

11 JUSTICE SOTOMAYOR: The only way it
12 can keep to its current position is by
13 disavowing a BIA precedent, Garcia, correct?

14 MR. UNIKOWSKY: That's correct. And
15 not only does it disavow it, but, I mean, I -- I
16 don't think that that's a -- it's a -- it's a
17 very convoluted explanation. It's not very
18 plausible. I mean, the government's position
19 depends on this theory that what Congress was
20 trying to do was distinguish between crimes that
21 are expressly excepted from 1182 and that are
22 merely not listed in 1182 and the exceptions,
23 that's the -- the reason for the removal clause
24 is to get these exceptions in, right?

25 So 1182 says something like, all

1 aliens except juveniles who commit crimes
2 involving moral turpitude are inadmissible. The
3 government's view is that that's like very
4 different from just saying all adults, even
5 though those mean the same thing, because like
6 juveniles are in the exceptions clause and,
7 therefore, that stops the clock for purposes of
8 cancellation of removal. That's a very
9 convoluted scheme.

10 And especially -- and it's somewhat
11 unlikely that the removable clause, which seems
12 to be talking about removable aliens, was
13 actually put in to get in those exceptions, it
14 seems to me, now that the government has
15 abandoned Chevron deference and what we're doing
16 is just kind of lining up the two
17 interpretations next to each other and seeing
18 which one's better.

19 I mean, our understanding of why the
20 statute's written the way it is, is more
21 plausible. We say it's a --

22 JUSTICE ALITO: You make a -- before
23 you get to that, you make a fleeting reference
24 to Chevron in your reply brief. So do you want
25 us to defer to something? Do you want us to

1 defer to the BIA --

2 MR. UNIKOWSKY: On the --

3 JUSTICE ALITO: -- on anything --

4 MR. UNIKOWSKY: Yes. On --

5 JUSTICE ALITO: -- or just on the
6 decision that you like?

7 MR. UNIKOWSKY: Just on the decision
8 that we like, Your Honor.

9 (Laughter.)

10 JUSTICE SOTOMAYOR: Well, that's what
11 --

12 MR. UNIKOWSKY: So --

13 JUSTICE SOTOMAYOR: -- the government
14 is doing.

15 MR. UNIKOWSKY: Yes. So --

16 JUSTICE SOTOMAYOR: It likes this
17 decision --

18 MR. UNIKOWSKY: I have a -- I have a
19 --

20 JUSTICE SOTOMAYOR: -- but it doesn't
21 like Garcia.

22 MR. UNIKOWSKY: -- I have a principal
23 reason for that, Your Honor. First of all --

24 JUSTICE ALITO: I'm sure.

25 (Laughter.)

1 MR. UNIKOWSKY: -- the government
2 expressly waives Chevron deference --

3 JUSTICE ALITO: Uh-huh.

4 MR. UNIKOWSKY: -- on the quest -- on
5 this Jurado case, and so that's -- that's good
6 for us. I mean, it makes it much easier for us
7 that now there's no Chevron deference. And we
8 walk through in our brief that the arguments
9 given in this Jurado case are clearly wrong. So
10 this Court's cases hold that even if a statute's
11 ambiguous, you don't defer to an agency decision
12 that's clearly wrong, which I think is true for
13 this Jurado case. The government doesn't even
14 try to defend it, they bury it in a footnote.

15 JUSTICE GINSBURG: Well, what about
16 the simple, but it has a certain appeal,
17 argument the government is making, this is a
18 very dense statute, that if we ask why would
19 Congress -- why wouldn't Congress want the clock
20 to stop when an alien has committed a qualifying
21 offense showing that he has abused the
22 hospitality of the United States?

23 MR. UNIKOWSKY: Yeah. So I'd like to
24 turn to purpose actually. It might be a good
25 time to do that. I think that, actually, our

1 interpretation makes sense and we have very good
2 reasons for why Congress would have wanted to do
3 what it did.

4 So, first of all, I think it -- it's
5 at least somewhat relevant that Congress made
6 the express decision that he shouldn't be
7 deported for this offense. It's true that he's
8 deportable for other offenses, but Congress has
9 also made the express decision that those other
10 offenses shouldn't foreclose cancellation of
11 removal.

12 So, if both of those things are true,
13 if you have this one offense which Congress
14 didn't even think was serious enough to deport
15 him at all, and then the other offenses which do
16 make him deportable, Congress has decided to
17 leave the door open a crack for cancellation of
18 removal, to me, that sounds like Congress kind
19 of wanted this person to be eligible for
20 discretionary relief. He doesn't have to get it
21 but at least have the door open.

22 Rather than the scheme where, as the
23 government contends, this conviction, which
24 wasn't even serious enough to make him eligible
25 for deportation simpliciter, kind of pops back

1 into relevance and springs over the crimes for
2 which he is deportable and becomes the basis for
3 saying that he's subject to -- to mandatory
4 deportability.

5 And just one other thing about --

6 JUSTICE KAVANAUGH: I'm not really
7 understanding that.

8 MR. UNIKOWSKY: Yes.

9 JUSTICE KAVANAUGH: So there's a
10 serious offense that makes you deportable.

11 MR. UNIKOWSKY: Yes.

12 JUSTICE KAVANAUGH: Okay. Now the
13 question is, are you eligible for
14 cancellation --

15 MR. UNIKOWSKY: Yes.

16 JUSTICE KAVANAUGH: -- of removal. And
17 in looking at that, any blemish, even if it
18 doesn't rise to the level of something that
19 might have made you deportable is a problem,
20 Congress suggested, by broadening the list of
21 things that could make you ineligible for
22 cancellation of removal beyond those things that
23 just make you deportable in the first instance.

24 Why isn't that a better way to look at
25 it?

1 MR. UNIKOWSKY: Because it didn't do
2 that. The reason that we're all here today is
3 that the crimes that made him deportable,
4 Congress decided that they actually don't
5 foreclose eligibility for -- for discretionary
6 relief. That's why we're only looking at this
7 crime that didn't make him deportable.

8 JUSTICE KAVANAUGH: They don't on
9 their own --

10 MR. UNIKOWSKY: But you don't --

11 JUSTICE KAVANAUGH: -- but if you have
12 something else --

13 MR. UNIKOWSKY: No, but the scheme is
14 it's not like it's an aggravating characteristic
15 based on other things. Like, there's -- you
16 apply a test and there's certain convictions
17 that apply and then you can certainly use the
18 same conviction for both in principle, it's not
19 like you take one crime and then you look at
20 what other crimes he has.

21 And so it just -- the -- the crimes
22 that stop the clock just don't include the
23 crimes for which he was found deportable. So
24 it's -- it's just a little bit strange. Like,
25 you'd think that -- so he has this firearms

1 conviction and the aggravated assault conviction
2 and you'd think that, you know, either one is
3 worse -- either one's worse than the other or
4 they're the same level of bad from the purposes
5 of the immigration system.

6 But it's hard to imagine why a
7 rational legislator and you decide, okay, for
8 step one, for just removability, we're going to
9 say that the firearms conviction is worse than
10 the aggravated assault conviction, but at step
11 two, for the same alien in the same case, the
12 sort of rank order of badness is flipped. In
13 step two, it's now the aggravated assault that's
14 enough to foreclose discretionary relief, but
15 not the firearms conviction. That's a pretty
16 common --

17 JUSTICE KAVANAUGH: Well, it's because
18 the timing --

19 JUSTICE KAGAN: Mister --

20 JUSTICE KAVANAUGH: -- it was because
21 of the timing.

22 MR. UNIKOWSKY: No, but that's
23 actually not the case because both those
24 convictions -- it's the same day and the same
25 incident. It's just the firearms conviction

1 just -- because it's not in 1182, so it just --
2 it's not within the class of convictions that
3 stops the clock.

4 JUSTICE KAGAN: Well, why do you
5 think, Mr. Unikowsky, if -- if -- if you're
6 right that this statute is set up to look to the
7 proceeding that's just happened, whether it's
8 the inadmissibility proceeding or the
9 deportability proceeding, why is it that it's --
10 that the statute is written just in terms of the
11 inadmissibility grounds? Like --

12 MR. UNIKOWSKY: So that --

13 JUSTICE KAGAN: -- well, why wouldn't
14 you have something where the inadmissibility
15 people have admissibility grounds and the
16 deportability people have deportability grounds
17 if there's this basic dichotomy in the statute?

18 MR. UNIKOWSKY: It's a little hard to
19 explain, Your Honor. I mean, that aspect of the
20 statute is something that has puzzled the BIA as
21 well because it -- the first part has only one
22 and then the second part has both.

23 But -- I mean, you know, that's -- the
24 BIA has said we have to construe that literally.
25 Congress did this -- it was very clear that

1 they're asymmetric. The first part is just
2 one-half and the second part is both halves.
3 They could easily have just put in 1182 or 1227
4 in the first part, and then we wouldn't be here
5 because you -- the firearms conviction would
6 foreclose.

7 JUSTICE KAGAN: I guess my -- my
8 thinking, though, is that it's -- it's a puzzle.
9 It's a puzzle for both sides, but it's a little
10 bit more of a puzzle for you because you
11 emphasize so much the way the statute separates
12 out two different classes of people.

13 MR. UNIKOWSKY: Well, that's true,
14 but, I mean, the -- it's the second -- I mean,
15 the second half of the statute that -- that does
16 that. I mean, I -- it's hard to know what to
17 make of that statement. So there's this BIA
18 decision that holds that firearms convictions
19 like Petitioner's doesn't trigger the stop-time
20 rule. The BIA -- actually, the government in
21 that case said that's crazy; it's just clear
22 that's the purpose. And then the BIA said, no,
23 look, it's not clear exactly how the statute got
24 to be written this way, but Congress required
25 this asymmetry in which the first part, the

1 referred to part, the category of offenses only
2 has some. And Congress evidently decided that
3 only some offenses, and not all, should even be
4 capable of stopping the clock, just like it
5 decided that just aggravated felonies should be
6 capable of foreclosing cancellation. And then,
7 in the second part, it talked -- looked at the
8 effect on the alien.

9 I just want to say one more thing
10 about that. I think it makes a certain kind of
11 sense to say that like if you're being deported
12 for a particular crime, then that -- you can't
13 use the time after that crime to be -- for
14 purposes of continuous residence because, in a
15 sense, it's just sort of bureaucratic delay,
16 right? You've committed the crime, and then
17 you're waiting for the conviction and then
18 you're waiting for the deportation proceeding.

19 But sort of the die is cast when
20 you've committed the crime. And so there's
21 certain logic to stopping the clock as of the
22 commission of the crime that really doesn't work
23 here where Congress isn't even capable of
24 deporting you based on this aggravated assault
25 crime. So the delay after the crime has nothing

1 to do with bureaucratic delay; it's just
2 exclusively based on the fact that Congress
3 decided not to deport the person. So it --

4 JUSTICE SOTOMAYOR: Could you tell me
5 why you didn't rely on Lara-Terrazas?

6 MR. UNIKOWSKY: On what, Your Honor?

7 JUSTICE SOTOMAYOR: Lara-Terrazas, the
8 Capitol Area Immigration Rights Coalition said
9 the BIA read this provision pretty much as your
10 second alternative previously.

11 MR. UNIKOWSKY: Well, I mean, I think
12 that -- so we think the BIA has not decided
13 the -- on the second question, so the -- Jurado
14 clearly is inconsistent with our -- our -- our
15 first --

16 JUSTICE SOTOMAYOR: No, but
17 Lara-Terrazas appears to have held exactly as
18 you wanted.

19 MR. UNIKOWSKY: I -- I -- I don't
20 think that's a published decision that
21 specifically resolved the question.

22 JUSTICE SOTOMAYOR: Well, maybe not
23 specifically, but the government's relying on
24 unpublished opinions too.

25 MR. UNIKOWSKY: Yeah, I mean, we -- we

1 -- I mean, there's a published decision -- I
2 mean, obviously, in this case, there's an
3 unpublished decision rejecting my -- my client's
4 claim. So I, you know -- and Jurado is the
5 primary published decision that -- that's on
6 point. We acknowledge that it's inconsistent
7 with our reading, but we said it just shouldn't
8 be deferred to because it's irrational. The
9 government agrees with that. And so that
10 obviously makes this case easier for Petitioner.

11 I will say that if the Court concludes
12 the statute is ambiguous but nonetheless
13 construes it our way, then, under the Brand X
14 case, the BIA would be capable of reaching the
15 contrary conclusion and the Court would be able
16 to defer to that if it holds that the agency's
17 reasoning is -- is reasonable. That's what the
18 Brand X case holds.

19 But, you know, of course, if the Court
20 holds that it's unambiguous, then the agency
21 wouldn't be capable of doing that. But, on the
22 record currently before the Court, when there's
23 no Chevron -- no precedential decision that the
24 government is even willing to defer to or is
25 willing to -- to defend and rely on, it's just

1 like a criminal statute or any other statute
2 where there's no layer of deference to the
3 agency, the Court should just decide what it
4 thinks it means in the first instance.

5 JUSTICE KAVANAUGH: What do you do
6 with the government's argument that it would
7 have been very easy for Congress to write the
8 statute to link the stop-time offense to the
9 offense charged in the removal proceeding?

10 MR. UNIKOWSKY: I mean, I think the
11 statute could have been clearer both ways. I
12 mean, just looking at this good moral character
13 provision, which is something we talk about in
14 our brief, it's like a model of -- of
15 draftsmanship and how clearly it could have been
16 written our way. I mean, that statute says that
17 if you have committed a crime during the
18 continuous residence period, that puts you into
19 the classes of persons described in 1182, then
20 the clock -- then you can't be eligible for
21 cancellation, whether inadmissible or not.

22 So that's like the clearest
23 conceivable way of saying that if you're in the
24 category of 11 -- of people under 1182, which
25 the government says Petitioner is, regardless of

1 whether you're charged with inadmissibility,
2 you're not eligible.

3 So Congress said that was a
4 requirement only for non-LPRs to seek
5 cancellation of removal and not LPRs. And this
6 isn't just a matter of differently worded
7 statutes. It's as differently worded as they
8 could conceivably be. You have, like -- for
9 non-LPRs, it says in the classes of persons in
10 1182, whether inadmissible or not, and then, for
11 the stop-time rule, which also applies to LPRs,
12 it requires that it renders the alien
13 admissible.

14 So just to answer your question, I
15 mean, yeah, certainly you could have written it
16 much more clearly our way, and, of course, we
17 wish it was, but it seems to me that when -- you
18 know, when there's just a crystal-clear statute
19 that would have accomplished exactly what the
20 government wants, which Congress applied only to
21 non-LPRs and not LPRs --

22 JUSTICE ALITO: Why would the -- why
23 would the good time rule clearly resolve this --
24 never mind.

25 CHIEF JUSTICE ROBERTS: Finish.

1 JUSTICE ALITO: Oh, why would it
2 clearly resolve this -- this question? It
3 doesn't say whether seeking admission or not.
4 It says whether inadmissible or not.

5 MR. UNIKOWSKY: Yeah, so it doesn't
6 matter -- so we don't think Petitioner is
7 inadmissible. But it applies to the alien
8 whether inadmissible or not, as long as he's in
9 the classes of people in 1182, which he clearly
10 is.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Mr. Liu.

14 ORAL ARGUMENT OF FREDERICK LIU
15 ON BEHALF OF THE RESPONDENT

16 MR. LIU: Mr. Chief Justice, and may
17 it please the Court:

18 The statutory text alone is enough to
19 resolve this case. The question is whether
20 Petitioner has committed an offense that renders
21 him inadmissible under Section 1182(a)(2).

22 To find the answer, we look to the
23 text of Section 1182(a)(2), and it says that any
24 alien who is convicted of a crime involving
25 moral turpitude is inadmissible. There's no

1 dispute in this case that Petitioner has -- has
2 been convicted of a crime involving moral
3 turpitude. Therefore, he has been -- he has
4 committed an offense that renders him
5 inadmissible under Section 1182(a)(2), and that
6 should be the end of the matter.

7 Now Petitioner says there's an added
8 requirement in the statute, that requirement
9 being that he must be seeking admission. But
10 that requirement can't be found in the text of
11 Section 1182(a)(2). It can't be found in the
12 text of the stop-time rule itself. Rather, the
13 stop-time rule ties the operation of the rule
14 to an alien's status as inadmissible,
15 independent of whether he is seeking admission
16 or not.

17 And in that respect, the stop-time
18 rule operates in the same way as many other
19 provisions of the INA. My friend described some
20 of those provisions as obscure, but I think
21 they're anything but. For example, we cite a
22 number of them on pages 17 to 19 of our brief.

23 One of them is 8 U.S.C.
24 Section 1255(a). This was a major part of the
25 Immigration Reform and Control Act of 1986; 1.7

1 million aliens applied for relief under this
2 section. And what that section says is that
3 those aliens would be ineligible for relief if
4 they had the status of being inadmissible. And
5 that's so even if those aliens were already
6 admitted and not seeking admission.

7 Moreover, that same section says, if,
8 after being granted amnesty under that
9 provision, those aliens then committed an act
10 that made them inadmissible, that amnesty status
11 would -- would have been terminated. So it
12 works just like the stop-time rule in this case
13 and, indeed, mirrors the operation of that rule.

14 Another example is Section 1160.
15 That's another major part of that same Act.
16 That said that -- that gave special temporary
17 resident status to a certain group of
18 agricultural workers; 1.3 million agricultural
19 workers applied for relief under that section.
20 It operates the same way.

21 Even if those aliens had already been
22 admitted and were not seeking admission,
23 inadmissibility as a status was a cry -- was a
24 criterion for their eligibility for that status.

25 CHIEF JUSTICE ROBERTS: Well, your --

1 your friend on the other side, of course, cites
2 statutes that are to the opposite effect in
3 terms of how the term is used. So it strikes me
4 that this business about this is how they use it
5 in other places, it's almost a wash.

6 MR. LIU: I don't think so, Mr. Chief
7 Justice. In our view, the word "inadmissible"
8 means the same thing throughout the INA. Every
9 time the word "inadmissible" appears, it is
10 referring to an alien's status under
11 Section 1182(a)(2).

12 What the stat -- what the statute does
13 in other provisions is tie different
14 consequences to that status. So my friend
15 mentions the judicial review provision in
16 Section 1252(a)(2)(C).

17 What that provision says is, if an
18 alien's status is inadmissible, has the
19 consequence of leading to a decision about his
20 removal, then there's no judicial review in the
21 courts of appeals.

22 So, in other words, that -- that
23 statute does exactly what the stop-time rule
24 doesn't. It refers specifically to the decision
25 to remove and -- and -- and ties the operation

1 of the rule to that.

2 Same with the mandatory detention
3 provision. This is 8 U.S.C. Section 1226(a) and
4 (c). There's an explicit reference there to the
5 decision whether the alien is to be removed.
6 And what the statute says is, if the alien's
7 status as inadmissible would result in that
8 particular consequence, then that alien can be
9 detained on a mandatory basis.

10 JUSTICE BREYER: All right. But, look
11 -- look, the -- the main argument as I
12 understand it -- and this statute is as obscure
13 as any I've seen. All right. Look, let's read
14 it.

15 When the alien has committed an
16 offense referred to in Section 1182(a)(2) of
17 this title, so we go look and see. Has he
18 committed an offense referred to? Yes.

19 Now then what? An offense that, A --
20 I put in the A -- renders the alien inadmissible
21 or, B, removable under 1227(a). Now, if you are
22 right, there was no need for that clause, the
23 second clause, because the first thing you do is
24 look to 1182.

25 1182, if his offense isn't there,

1 forget it. It doesn't apply at all. And if his
2 offense is there, well, under your view, remove
3 him. That's the end of it.

4 So what in heaven's name is removable
5 from the U.S. under 1227(a) doing there? Now he
6 has an answer to that question. He says, I'll
7 tell you what, the history of immigration law is
8 that we treat differently applications for
9 admission, even people we found in the United
10 States, by the way, who never applied for
11 admission, okay? Those are the inadmissible
12 ones. And those are the ones that what I called
13 A applies to.

14 And now what B applies to is everybody
15 else. They were properly admitted, yes, yes,
16 and then they committed a crime deportable
17 under. Now he happens to fall, his client,
18 within what seems to me is a tremendous fluke,
19 that is, somebody who actually did something
20 that is listed in 82(a) and yet, at least in his
21 view, is not listed in 1227.

22 I didn't know there was such a person.
23 But, lo and behold, he comes up with this
24 exceptions clause, et cetera, and says his
25 client is there.

1 Okay. Now what do you say to that
2 main argument, that there is A and there is B,
3 and on your view, B serves next to no purpose?

4 MR. LIU: When Congress wanted to make
5 A and B an either/or, it said so expressly in
6 the Act, so --

7 JUSTICE BREYER: I know, but I can't
8 think -- that isn't going to be an answer
9 because they'd say, sometimes they do say A/B,
10 sometimes they don't say A/B, it wasn't a genius
11 who drafted this and he forgot the A and the B
12 and he -- but he did put in the or. And so, all
13 right, I've got that point. What's your next
14 point?

15 MR. LIU: My next point is I think --
16 well, I guess two points. One is we don't think
17 the renders removable clause is superfluous when
18 the referred to in Section 1182(a)(2) clause is
19 given its proper meaning, but -- and I had to
20 get into that. Even if you don't buy that, and
21 you think there's some sort of question left --

22 JUSTICE BREYER: Well, you're talking
23 about the ones who are the -- the -- the under
24 18 and the -- and the -- there's an -- I -- I
25 think I got that argument.

1 MR. LIU: Okay.

2 JUSTICE BREYER: And I can think that
3 if -- I think I have it. You're right about it.

4 JUSTICE KAGAN: Okay. Even if we
5 don't buy that?

6 MR. LIU: Even if you don't buy that,
7 I don't think surplusage should be the be all,
8 end all in interpreting this statute. Even
9 under Petitioner's reading, the cross reference
10 to Section 1227(a)(4) was pure surplusage from
11 19 --

12 JUSTICE KAGAN: But, Mr. -- Mr. Liu,
13 this is more than your typical case of
14 surplusage. I mean, obviously, surplusage
15 sometimes gives way to other things. But this
16 whole statute, like the structure and the
17 content of this statute, is all written to -- to
18 refer to this essential dichotomy that Justice
19 Breyer just set out. I mean, basically, the
20 back two-thirds of the statute is all about,
21 well, the people who have been rendered
22 inadmissible, and, on the other hand, the people
23 who have been rendered deportable.

24 And -- and you have to think that they
25 wrote it that way because they were thinking of

1 these two groups of people, each of which would
2 be subject to different consequences and each of
3 which should be looked to separately.

4 MR. LIU: I -- I don't think so,
5 Justice Kagan. And I'll just reemphasize the
6 point I made to Justice Breyer, which is, when
7 Congress did want to create that dichotomy, it
8 wrote that dichotomy into the statute. So --

9 JUSTICE KAGAN: But by doing what?
10 You said by saying either/or. I mean, this
11 statute says or. You know, any writer would
12 tell you, sometimes you put in an "either,"
13 sometimes you just use an "or." Either way,
14 it's disjunctive.

15 MR. LIU: It's much more explicit than
16 that. If you look at the page -- the top of
17 page 35A of our statutory appendix, you have
18 Congress defining the meaning of the word
19 "removable." And we acknowledge decisions to
20 remove are the main kind -- well, I think the
21 only context in which Congress wrote into the
22 statute this either/or.

23 And how did it do it? It did so by
24 defining "removable" as "in the case of an alien
25 not admitted to the United States, that the

1 alien is inadmissible, or, B, in the case of an
2 alien admitted to the United States, that the
3 alien is deportable." That's how explicit
4 Congress is. It's not just --

5 JUSTICE KAGAN: Well, it's how --

6 MR. LIU: -- either/or.

7 JUSTICE KAGAN: -- explicit Congress
8 could be, and, sure, that might be a model of
9 legislative drafting which we can all assume
10 this statute is not.

11 But this statute does very clearly use
12 the disjunctive as to two large clauses, one of
13 which talks about inadmissible aliens and the
14 other of which talks about removable or
15 deportable, whatever word you want, aliens.

16 MR. LIU: And I think Congress was
17 also clear in the cross reference to -- to
18 Section 1182(a)(2) and the renders inadmissible
19 clause that any alien who is convicted of a
20 crime involving moral turpitude is inadmissible.

21 There are many ways Congress could
22 have written that provision to get to the result
23 Petitioner would like us to get to. There are
24 other provisions in 1182 that tie the status of
25 inadmissible to an alien who is at that time

1 applying for admission or seeking admission.

2 But, in 1182(a)(2) itself, Congress
3 left those words out. And I think usually this
4 Court presumes that Congress acts intentionally
5 and purposefully when it does something like
6 that.

7 JUSTICE SOTOMAYOR: Go back to the
8 point that the Chief Justice made. You're
9 cherry-picking. What Congress has not been is
10 very consistent, except in what your adversary
11 points to in the basic structure that
12 inadmissibility applies to people who have not
13 been admitted, deportability applies to people
14 who have been admitted.

15 And each side is given a different set
16 of rights. Each side is given a different set
17 of burdens. Each side is given a different set
18 of benefits or lack thereof.

19 And I don't see what's illogical to
20 say that what Congress was thinking about is, if
21 you're in removal proceedings, you're eligible
22 for cancellation of removal for those crimes
23 that make you eligible, meaning, if you have to
24 be mandatorily deported, you have to be
25 mandatorily deported.

1 But you've been here a long time.
2 Whether a piece of it was in -- in BIA custody
3 or not is irrelevant. You get the same benefits
4 for being a long-time resident as you do in all
5 parts of the INA.

6 You have to prove certain things in
7 LPR status. There are certain benefits given to
8 LPR. Why is that incongruous here?

9 MR. LIU: Well, I -- I -- I --

10 JUSTICE SOTOMAYOR: Especially when
11 the structure of the very next provision, the
12 mandatory detention section, is talking also
13 about removability?

14 MR. LIU: I -- I want to be very
15 clear. I do not think we're cherry-picking at
16 all. We are giving the word "inadmissible" the
17 same consistent meaning throughout the INA. We
18 are then reading the -- the language around that
19 provision and sometimes that language points to
20 a specific circum- -- a specific consequence of
21 that status.

22 This provision --

23 JUSTICE SOTOMAYOR: There is a
24 consequence.

25 MR. LIU: -- attaches some

1 additional.

2 JUSTICE SOTOMAYOR: There is a
3 consequence. Both of them are tied around
4 removability. There is a consequence.
5 You're -- or at least the ability to ask for
6 cancellation.

7 MR. LIU: But the -- but the
8 consequence here, which is termination of the
9 period of continuous residence, is tied only to
10 the status of inadmissibility. Congress could
11 have written even the stop-time provision itself
12 in many different ways that would have captured
13 Petitioner's reading.

14 In fact, the predecessor version of
15 this statute, former Section 1244(a), said if
16 the alien commits an act constituting a ground
17 of deportation, that person is eligible for --

18 JUSTICE BREYER: I -- I accept that
19 you can read the word "inadmissible" -- I'm not
20 saying you have to, but you could say this
21 individual in front of us, he's not
22 inadmissible.

23 It's -- he's been admitted. How could
24 he be inadmissible? They admitted him. Ahh,
25 you mean he would have been inadmissible had he

1 not been admitted. Okay?

2 (Laughter.)

3 JUSTICE BREYER: Now, that's a
4 possible reading of it. And that's why just
5 looking at the word "inadmissible" doesn't tell
6 us whether we should read it with a "he would
7 have been" or whether we should read it as
8 "would be now" or -- there are 15 -- not 15,
9 okay, got that. Now, once we're into that bog,
10 we then go back to the original question of why
11 in heaven's name, if all you had to do was first
12 you look at 1182 and see if his crime fits
13 there, and then you see if it made him
14 inadmissible, for everybody. Well, of course,
15 it did. It -- I mean, you know, there we are.

16 And -- and what's this second part
17 doing there? Unless it picks up --

18 MR. LIU: Yeah.

19 JUSTICE BREYER: -- that traditional
20 history. Now, that's the same question I asked
21 before, same question Justice Kagan asked, and
22 -- and that's, I think --

23 MR. LIU: This --

24 JUSTICE BREYER: -- what's bothering
25 me.

1 MR. LIU: This is what we think
2 Congress was thinking. Everyone agrees that
3 Congress began with the universe of offenses
4 referred to in Section 1182(a)(2). Everyone
5 agrees that's -- that's text in the statute, you
6 can't have a 1227 offense unless that stops the
7 time, unless it's referred to in
8 Section 1182(a)(2).

9 And we think what Congress was trying
10 to do was it looked across the INA and it said,
11 look, we have identified in Section 1182(a)(2) a
12 set of criminal and related offenses. We think,
13 in general, those are the offenses that rise to
14 the level of being an abuse of the country's
15 hospitality such that the alien's time would
16 stop.

17 And then Congress thought: Well,
18 certainly if those offenses are serious enough
19 to render the alien inadmissible, those should
20 be given stop-time effect.

21 JUSTICE KAGAN: But --

22 MR. LIU: And so --

23 JUSTICE KAGAN: -- why wouldn't you
24 just say, you know, a person convicted of an
25 offense listed in the following sections? You

1 don't need all this hullabaloo about people
2 being rendered inadmissible --

3 MR. LIU: So --

4 JUSTICE KAGAN: -- and people being
5 rendered deportable unless you're talking about
6 some kind of proceeding in which people have
7 been rendered inadmissible or people have been
8 rendered deportable. Otherwise, you could just
9 say offenses listed in whatever statutes you
10 wanted to say.

11 MR. LIU: Well, because I think, as --
12 as I was saying, Congress -- Congress did start
13 out with the set of offenses it thought would
14 generally be serious enough. Those are the
15 offenses referred to in Section 1182.

16 Congress thought, well, if they're
17 serious enough to render the alien inadmissible,
18 they should certainly qualify as stop-time
19 effect. But, at the same time, Congress
20 recognized that there were exceptions in
21 Section 1182, juvenile offenses --

22 JUSTICE KAGAN: Yeah, but the
23 exceptions --

24 MR. LIU: -- petty offenses, that
25 wouldn't be --

1 JUSTICE KAGAN: I mean, the idea that
2 the exceptions would be picked up somehow if you
3 just said listed in the -- it doesn't transform
4 an exception. An exception would remain the
5 exception. It's just the actual offenses that
6 are listed in that statute.

7 MR. LIU: Well, I think that is what
8 the "referred to" clause. The "referred to"
9 clause refers to just the offenses, some of the
10 generic elements-based understanding of the
11 offenses in the statute.

12 The problem is I think Congress
13 realized Section 1182(a)(2) contains a bunch of
14 circumstance-specific exceptions to those --

15 JUSTICE KAGAN: Yeah, and --

16 MR. LIU: -- to those provisions.

17 JUSTICE KAGAN: I guess it seems
18 really counterintuitive to me that Congress
19 could have -- could have sort of looked down the
20 road and said some insane judge is going to pick
21 up these exceptions and transform them into
22 actual grounds for disqualifying somebody from
23 removal. So the exceptions would remain the
24 exceptions. You don't need --

25 MR. LIU: No --

1 JUSTICE KAGAN: -- all this statutory
2 language to do that.

3 MR. LIU: No, that -- that's my point,
4 Justice Kagan, is that because of those
5 exceptions, that's why you need the renders --

6 JUSTICE KAGAN: Yes, that's your --

7 JUSTICE BREYER: If you --

8 JUSTICE KAGAN: -- point --

9 JUSTICE BREYER: Look, if --

10 JUSTICE ALITO: Can I take you back to
11 Justice Breyer's intriguing question about the
12 meaning of inadmissibility? The Eleventh
13 Circuit had some very colorful examples about
14 status and words that end in a-b-l-e or i-b-l-e,
15 and one of them had to do with rotten fish. So
16 if a fish rots and it is inedible, they say,
17 well, it was inedible before the person ate it.

18 But under Justice Breyer's
19 interpretation of admissibility, suppose this
20 person eats the fish and then goes to the
21 emergency room to have his stomach pumped, would
22 the doctor say, well, the fish wasn't actually
23 inedible because he ate it?

24 (Laughter.)

25 MR. LIU: No, no, you wouldn't,

1 because the fish has the status of being
2 inedible, whether someone has --

3 JUSTICE KAGAN: No --

4 MR. LIU: -- eaten it --

5 JUSTICE KAGAN: -- but Mr. Liu --

6 MR. LIU: -- or is trying to eat it or
7 not.

8 JUSTICE KAGAN: -- this -- this really
9 is dependent on context because you wouldn't say
10 is car is immovable if the car has just been
11 moved. And so too here, it's not clear that you
12 would say an alien is inadmissible if the alien
13 has just been admitted.

14 So, you know, it could; it couldn't.
15 The -- the -- the real question is not what
16 inadmissible means in the abstract. The real
17 question is look at this statute and say why
18 does anybody write a statute that looks like
19 this, unless what the drafter is doing is to try
20 to refer to two different categories of people
21 who have just gone through two different kinds
22 of removal proceedings?

23 MR. LIU: And I -- and I don't think
24 it's an embarrassment for our position that,
25 under our view, the "renders removable" clause

1 has only a modest role to play. Again, if you
2 read the -- the text of the stop-time rule, you
3 begin only with offenses referred to in
4 Section 1182(a)(2).

5 If Congress had wanted Section 1227 to
6 play a sort of major role in the stop-time rule,
7 it could have said offenses referred to in
8 Section 1182(a)(2) or referred to in
9 Section 1227.

10 But already Congress is cutting off
11 the application of 1227. This is an
12 inadmissibility-focused provision. Two of the
13 three provisions are about Section 1182(a)(2).
14 I think it's only logical to read the third
15 provision, which doesn't mention
16 Section 1182(a)(2), as doing the relatively
17 modest role, admittedly, of just picking up the
18 things that aren't referred to or render an
19 alien inadmissible.

20 JUSTICE BREYER: I -- I -- before you
21 leave this -- I -- I'll think about the fish.
22 I'm not sure I got the fish, but I'll -- I'll
23 think about the fish.

24 (Laughter.)

25 JUSTICE BREYER: But I'm back in what

1 in heaven's name is that clause doing there?

2 You know, the second clause.

3 MR. LIU: Right.

4 JUSTICE BREYER: If you're right,
5 okay. So you've had very brilliant people going
6 over this, and the best they've come up with, it
7 seems to me -- tell me -- is, well, you see,
8 there are exceptions in 1182, and there are --
9 those exceptions are not in 1227. And they put
10 1227 in to be sure those exceptions didn't stop
11 a person from being deported.

12 Okay. So I look at the exceptions.
13 The only exceptions I can find that are relevant
14 are those contained in (a)(1), (a)(2),
15 (a)(ii)(I)(2). Those are the ones you're
16 talking about. And, by the way, it took me five
17 seconds to put all those numbers in. But it
18 takes a Congressman or a drafter only three
19 seconds to read them.

20 And I would have said "including those
21 listed in" and then I would have put in that
22 number. Do you see? That would have done it.
23 Including those listed in. And I would have put
24 that number in. And then there would have been
25 no problem, and then you would have thought of

1 no reason at all.

2 Now, I've never seen a statute
3 drafted, so many words, to cover removing so
4 small an exception.

5 MR. LIU: But we know Congress wasn't
6 working on that level of granularity, because
7 when it came to 1227(a)(4), there was nothing in
8 20 -- 1227(a)(4) that's referred to in
9 Section 1182.

10 I think the only way to understand
11 what Congress was thinking is to think of what
12 Congress was thinking at a more general level.
13 And the more general level is we have these
14 offenses referred to in 1182(a)(2). These are
15 bad offenses. If they're serious enough to
16 render you inadmissible, that is confer that
17 status, then they stop the time. But if they
18 also happen to be serious enough to render you
19 removable, those will stop the time too.

20 That doesn't mean that you -- you
21 don't apply the Section 1182 "renders
22 inadmissible" language even in cases when aliens
23 are admitted because Congress had written
24 provisions in many other places of the INA where
25 inadmissibility is indeed relevant, even when

1 the alien is admitted.

2 So Congress did not think there was
3 some sort of disjunct between saying an alien
4 was already admitted and yet he's inadmissible.
5 It wrote the statute in exactly that way.
6 That's confirmed by the language of 1182, which
7 says any alien convicted of "a crime involving
8 moral turpitude" is inadmissible. It doesn't
9 say any alien who is convicted and then seeks
10 admission.

11 It's clear from the other provisions,
12 adjustment of status, temporary protected
13 status, the two major parts of the Immigration
14 Reform Act of 1986 that I mentioned at the
15 outset. It's even clear if you look at a
16 provision of 1227. 1227(2)(a) -- (2)(a) --
17 1227(a)(1)(A), deportable aliens, this is at 20a
18 of our petition appendix, talks about aliens who
19 at the time of entry or adjustment of status
20 were within one of the classes of aliens
21 inadmissible.

22 There's no adjudication of
23 admissibility at that point. The whole point of
24 this deportability provision is that the
25 immigration officer failed to adjudicate that

1 person as inadmissible.

2 And yet, the statute refers to that
3 person as having that status of inadmissible
4 such that another consequence can be attached to
5 it later on, in this case deportability.

6 We think the stop-time rule works in
7 the same way.

8 JUSTICE SOTOMAYOR: I know that
9 everybody -- I think Justice Kavanaugh and you
10 seem to think that these minor offenses, like a
11 person who possesses a small amount of
12 marijuana, can -- that can make you
13 inadmissible.

14 But not deportable because there is an
15 exception under deportability. If it's a
16 juvenile offense, you can't be deported. But
17 what you're now saying is that these minor
18 offenses stop you from getting the benefits,
19 potential benefits, of cancellation of removal
20 and that that was clearly Congress's intent.

21 I don't know why I should think that
22 is clearly Congress's intent, given that the LP
23 -- that the INA throughout gives more solicitude
24 to long-time -- to permanent residents.

25 I mean, I -- I just don't see how we

1 can turn the presumption on its head and say
2 that they weren't intending to limit the
3 stop-time rule to those who were in an
4 admissibility status; covers small numbers of
5 LPRs, the ones that have left the country and
6 are seeking readmission, and others, but I --
7 I'm -- I'm just not quite sure I understand why
8 your reading is consistent with the solicitude
9 that Congress has showed LPRs throughout the
10 INA.

11 MR. LIU: I think it has to do with
12 the very narrow issue in front of this Court.
13 No one -- no one thinks that marijuana
14 possession conviction alone can render an LPR
15 removable.

16 No one thinks a mere marijuana
17 conviction alone can even render an LPR
18 categorically ineligible for cancellation of
19 removal.

20 The only question here is a question
21 of the operation of how long after having
22 convicted that offense can that -- can that
23 alien continue to claim credit for being in the
24 United States. That's a very narrow question.

25 And --

1 JUSTICE SOTOMAYOR: But --

2 MR. LIU: -- and our answer is simply

3 --

4 JUSTICE SOTOMAYOR: The -- the problem
5 really is, no, it's not so simple because they
6 didn't or wouldn't have to worry about a small
7 amount of marijuana generally, even an admission
8 of it without a criminal conviction, and so why
9 should the time stop under those circumstances?

10 MR. LIU: Well --

11 JUSTICE SOTOMAYOR: Other than your
12 strange reading of -- of this provision.

13 MR. LIU: Well, I think the text does
14 favor us. But if you look at the cancellation
15 of removal --

16 JUSTICE SOTOMAYOR: If it doesn't,
17 where do we end up? If it's ambiguous --

18 MR. LIU: If it's --

19 JUSTICE SOTOMAYOR: -- where do we end
20 up?

21 MR. LIU: If it's ambiguous, I think
22 there would have to be some grievous ambiguity
23 for the Court even -- to even care about that.
24 I think the traditional tools of construction
25 continue --

1 JUSTICE SOTOMAYOR: How about --

2 MR. LIU: -- continue to apply.

3 JUSTICE SOTOMAYOR: -- if it's an
4 equipoise?

5 MR. LIU: If it is an equipoise, I
6 still think the Court's duty should be to reach
7 what it believes to be the best reading of the
8 statute. I don't think --

9 JUSTICE SOTOMAYOR: And so by ignoring
10 surplusage completely?

11 MR. LIU: No. I think surplusage is a
12 problem for both of our interpretations. I
13 mean, even under --

14 JUSTICE SOTOMAYOR: He is a lot less.
15 He gives meaning to everything except the
16 reference to 1227(a)(4). But doesn't 1227 -- it
17 wasn't -- it was an empty category back then?

18 MR. LIU: Yes. It's --

19 JUSTICE SOTOMAYOR: I forgot that. It
20 was an earlier version.

21 MR. LIU: Well, since the stop-time
22 rule was enacted in 1996, all the way until
23 2004, 1227(a)(4) was an empty category. And
24 even today, it's a largely redundant category
25 because Congress has said in cases of certain

1 permanent residents and non-LPRs under
2 1229(b)(a) and (b)(1), if you have a conviction
3 under (a)(4) you're just categorically
4 ineligible. It's not -- it's not even a matter
5 of stopping time. If you have an (a)(4)
6 conviction, you can't get cancellation right off
7 the bat.

8 So even today, that provision is not
9 doing a ton of work.

10 JUSTICE KAGAN: Mr. Liu, could you
11 make sense of the verb tenses for me? Because I
12 would think that you would have an extremely
13 good argument if the tenses were subjunctive,
14 you know, if it said -- if it would render the
15 alien inadmissible, but it doesn't say that. It
16 says renders the alien inadmissible, which seems
17 not to refer to something that could happen in
18 the future if the alien, again, tried to gain
19 admission.

20 MR. LIU: Right. And I -- I -- I
21 think the renders inadmissible, the present
22 tense, just reinforces our interpretation
23 because if you look at the text of 1182 itself,
24 it says any alien convicted of "a crime
25 involving moral turpitude" is inadmissible.

1 So for the tenses to match, the
2 present tense in 1182 itself to match with the
3 stop-time rule, I think the present tense makes
4 a lot of sense. And I think this -- this is in
5 partial response to Justice Breyer's question.

6 Our -- our position is not a
7 hypothetical alien would be inadmissible and,
8 therefore, time stops for this alien. Our
9 position very much is, for this particular
10 alien, this offense renders him inadmissible.
11 And that just follows --

12 JUSTICE KAGAN: I mean, it --

13 MR. LIU: -- from text --

14 JUSTICE KAGAN: -- just is a kind of
15 odd thing to say when we know the alien has been
16 admitted and could be -- you know, could live
17 here indefinitely if he hadn't gotten into other
18 trouble, right?

19 MR. LIU: I don't --

20 JUSTICE KAGAN: Nobody walks around
21 going, oh, you've been admitted, but, you know,
22 let's -- let's -- let's try to figure out
23 whether you're inadmissible if you try to -- if
24 you try to gain admission the next time around?

25 MR. LIU: I mean, I don't think that's

1 right. If I were a lawyer representing a client
2 who had already been admitted, I would
3 definitely describe the consequences of his
4 status as inadmissible after he had committed a
5 crime like this.

6 And I would use the present tense to
7 be exceptionally clear about those consequences.
8 I think there is a different verb tense change
9 here between "alien has committed" and "renders
10 inadmissible," but that -- that just, I think,
11 dovetails with our understanding as well because
12 the "rendering inadmissible" always has to occur
13 after the alien has committed the offense.

14 JUSTICE KAVANAUGH: Is your point
15 about (a)(4) because it's an aggravated felony?

16 MR. LIU: No, no.

17 JUSTICE KAVANAUGH: What's your (a)(4)
18 point?

19 MR. LIU: 1227(a)(4) covers
20 security-related grounds --

21 JUSTICE KAVANAUGH: Yeah.

22 MR. LIU: -- for deportability. So,
23 if someone has engaged in terrorist activity,
24 for example, he would come within the scope of
25 (a)(4). If you look at 1229b(c)(4), this is on

1 page 37 of our petition appendix, it says an
2 alien who is ... deportable under Section
3 1227(a)(4) is simply categorically
4 acknowledgeable for cancellation of removal.
5 And that applies to two types of cancellation,
6 not all the types, but the two types that we
7 have been discussing here today.

8 Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Five minutes, Mr. Unikowsky.

12 REBUTTAL ARGUMENT OF ADAM G. UNIKOWSKY

13 ON BEHALF OF THE PETITIONER

14 MR. UNIKOWSKY: Thank you, Mr. Chief
15 Justice.

16 I'd like to begin by a comment that my
17 colleague made that they are giving the word
18 "inadmissible" the same consistent meaning
19 across the statute. That's just not accurate.

20 So, in the mandatory detention
21 statute, it says that an alien who is
22 inadmissible by reason of having committed an
23 offense under 1182 is subject to mandatory
24 detention.

25 Giving that meaning -- word the same

1 consistent meaning, it would apply to any alien
2 who merely has the status of inadmissible even
3 if you've already been admitted. That's what
4 they say "inadmissible" means in the stop-time
5 rule.

6 They conceded that can't be right. An
7 already admitted alien can't be inadmissible for
8 purposes of that statute. So they are giving it
9 a different meaning.

10 Now the Chief Justice posed a question
11 saying that, well, it seems to be on both sides
12 and so it's a wash. I think if it is a wash,
13 that it's very good for us because there's all
14 the other stuff. There's the surplusage,
15 there's the comparison to good moral character,
16 and there's the structure of the INA and
17 everything else.

18 But I'd just like to push back a
19 little bit on the idea that it is a wash because
20 it seems to that me the statutes we're comparing
21 it to are more relevant than the ones they are.
22 So like this mandatory detention statute, it's
23 covering removal procedures. It was enacted in
24 IRRARA along with the stop-time rule just a
25 couple sections over. That strikes me as more

1 relevant than provisions that were enacted many
2 years earlier that don't apply to LPRs at all,
3 which is what the government is relying upon.

4 So I actually think that the
5 consistent usage canon favors us, especially
6 when you look at just the intro to the
7 cancellation of removal statute that says, the
8 attorney general may cancel removal for an alien
9 who is inadmissible or removable. Like, that's
10 using "inadmissible" in the way we say and it's
11 the same statute. In fact, like the stop-time
12 rule is just a definitional provision under that
13 umbrella.

14 So the second thing I'd like to turn
15 to is this question about the fish, which was a
16 colorful question by -- by Justice Alito that
17 the Eleventh Circuit relied on similar
18 arguments.

19 Look, we're not denying that it's --
20 that you can -- B-L-E words sometimes sound like
21 a status. Clearly, that's true, but it's just
22 as clear that sometimes it's obvious that when
23 you're talking about the removal proceeding
24 itself, the word "inadmissible" refers to what
25 happened at the removal proceeding.

1 So I just think it's -- it's just
2 inescapable that you have to look at the context
3 in which the word appears. I don't think that
4 the Eleventh Circuit's comparison to undrinkable
5 really can answer the question presented. And
6 in the context of the statute, which applies
7 only during removal proceedings in which all the
8 surrounding provisions seem to conceptualize
9 this dichotomy between inadmissible and
10 deportable, I think the context which you -- you
11 just kind of have to look at ultimately favors
12 our position.

13 I'd also like just to say a word about
14 surplusage, which I understand occupied a
15 portion of the -- of the -- of my colleague's
16 argument. So, first on this narrow issue of
17 1227(a)(4), just to be clear, it's not as though
18 the government's interpretation gives that
19 meaning that ours doesn't, right? So 1227(a)(4)
20 was really an empty category at the time because
21 it didn't have any cross references to 1182.

22 That's true on both sides. So it's
23 not -- it's not one of those cases where both
24 sides give one word meaning that the other side
25 doesn't. Like for both sides, it's not clear

1 why Congress included that, except for the
2 purpose of subsequent amendments which actually
3 did ultimately materialize. But the surplusage
4 on the government side is a lot more significant
5 in the hope that the removal clause isn't there.

6 It's not just a matter that there's
7 surplusage. I mean, surplusage is generally
8 bad. But I think here it's more than that. You
9 see the words inadmissible and removable paired
10 with each other. And I think that just implies
11 that Congress is thinking that those are the two
12 things that can happen to you. And if you're
13 inadmissible, you fall in one bucket, and if
14 you're removable, you are in another bucket.
15 And we see all over the adjacent statutes this
16 concept of inadmissibility and deportability
17 together with an or in between. And it's --
18 it's clear in all those contexts that that's why
19 that's -- that's why they're there because those
20 are the -- the two true outcomes.

21 So just in -- in the intro of the
22 cancellation removal statute, where it says the
23 attorney general may cancel removal of an alien
24 is inadmissible or deportable. Clearly the
25 reason those two things are paired together is

1 that those are the two things that can happen to
2 you. And so that's why they're both there.

3 And the same in just the general
4 statute governing removal procedures, 1229a,
5 that says that the immigration judge shall
6 decide the inadmissibility or deportability of
7 an alien, it's clear why those two words are
8 there with the or in between, because those are
9 the two things that can happen. So you go to
10 the stop-time rule which after all is just like
11 a buried definitional provision in the
12 cancellation of removal statute itself and you
13 have inadmissible or removable. And the natural
14 inference is that the reason those are there is
15 that those are the two things that can happen.

16 That fits our interpretation perfectly
17 because, if you're found inadmissible, then
18 you're in the admissible category. And if
19 you're found deportable, then you're in the
20 deportable category, or removal category.
21 Excuse me. I think that's a lot more persuasive
22 than this rather convoluted argument from the
23 government which apparently the government
24 didn't think of until its brief in this case
25 because it explicitly did -- did not make this

1 argument in an en banc petition filed less than
2 a year ago. Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel. The case is submitted.

5 (Whereupon, at 11:06 a.m., the case
6 was submitted.)

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