SUPREME COURT
OF THE UNITED STATES

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.   )

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Pages: 1 through 70

Place: Washington, D.C.

Date: November 4, 2019

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5   v.   ) No. 18-725

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9   Washington, D.C.

10   Monday, November 4, 2019

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12   The above-entitled matter came on

13   for oral argument before the Supreme Court of

14   the United States at 10:06 a.m.

15

16   APPEARANCES:

17

18   ADAM G. UNIKOWSKY, ESQ., Washington, D.C.; on behalf

19   of the Petitioner.

20   FREDERICK LIU, Assistant to the Solicitor General,

21   Department of Justice, Washington, D.C.; on behalf

22   of the Respondent.

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1   C O N T E N T S

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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 agrees 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 -- could I possibly get an argument off

15   the 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: Yeah, 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 the status. You have to show

6   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 -- I also think that the -- the

25   opening stanza of the cancellation of removal

 1   statute is actually quite good for us. It says

 2   something to the effect of the attorney general

 3   may cancel removal for an alien who is

 4   inadmissible or deportable. That's actually

 5   quite a lot like 1226, the mandatory detention

 6   statute, in that it has removal and then

 7   inadmissible and deportable sort of in the same

 8   breath.

 9   JUSTICE ALITO: Do you dispute the

10   fact that there are other provisions in the

11   immigration laws in which inadmissibility is

12   assessed at a time other than when an alien is

13   seeking admission to the country?

14   MR. UNIKOWSKY: So I -- yes, I do.

15   And let me walk through all of those because I

16   don't -- it's almost like the exception that

17   proves the rule in the cases that the government

18   addresses. So the primary example is adjustment

19   of status or adoption of a temporary status,

20   which I think is sort of a constructive

21   admission, like you don't have to leave the

22   country and come back.

23   JUSTICE ALITO: Well, I mean, when you

24   say it's a constructive admission,

25   "constructive" is a word that lawyers use in an

 1   effort to show that something that is not

 2   something else actually is that other thing,

 3   right?

 4   MR. UNIKOWSKY: Yeah, but the point is

 5   you're -- you're trying to get into a new

 6   status, which is sort of like trying to get into

 7   a new country, like the status is as if you're

 8   being admitted into a new -- it's not like a

 9   latent -- the government says that in 1996 this

10   like latent status was conferred on him that

11   just stuck with him for all these years, which

12   is different from when you're affirmatively

13   seeking eligibility for a new status, which is

14   kind of like affirmatively seeking eligibility

15   to enter the country.

16   So I think that's just conceptually

17   different. And, by the way, that doesn't apply

18   to -- to LPRs like Petitioner. There actually

19   is no other concept -- context in which the

20   concept of inadmissibility has any relevance to

21   an LPR.

22   JUSTICE GINSBURG: When -- when --

23   MR. UNIKOWSKY: The government also

24   has --

25   JUSTICE GINSBURG: -- when can an LPR

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1    fit -- fit that status?  You say if he leaves

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

3              MR. UNIKOWSKY:  Yes.

4              JUSTICE GINSBURG:  What other sit --

5    in what other situations can a lawfully

6    permanent 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
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 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 like 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 -- 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 --

19   MR. UNIKOWSKY: Yes.

20   JUSTICE KAVANAUGH: -- right? And

21   then it excludes, arguably, two more categories,

22   those 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 crimes, 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   aggravated 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 aggravated 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 principled

23   reason for that, Your Honor. First of all --

24   JUSTICE ALITO: I'm sure.

25   (Laughter.)

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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

21   it, 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 a 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 -- the

14   scheme is it's not like it's an aggravating

15   characteristic based on other things. Like,

16   there's -- you apply a test and there's certain

17   convictions that apply and then it -- you can

18   certainly use the same conviction for both in

19   principle. It's not like you take one crime and

20   then you look at 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 -- 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 a -- 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 -- I -- it's hard to know what

17   to make of that statement.

18   So there's this BIA decision that

19   holds that firearms convictions like

20   Petitioner's doesn't trigger the stop-time rule.

21   The BIA -- actually, the government in that case

22   said that's crazy; it's just clear that's the

23   purpose. And then the BIA said, no, look, it's

24   not clear exactly how the statute got to be

25   written this way, but Congress required this

1   asymmetry in which the first part, the referred

2   to part, the category of offenses only has some.

3   And Congress evidently decided that only some

4   offenses, and not all, should even be capable of

5   stopping the clock, just like it decided that

6   just aggravated felonies should be capable of

7   foreclosing cancellation, and then, in the

8   second part, it talked -- looked at the effect

9   on the alien.

10   I just want to say one more thing

11   about that. I -- I think it makes a certain

12   kind of sense to say that like if you're being

13   deported for a particular crime, then that --

14   you can't use the time after that crime to be --

15   for purposes of continuous residence because, in

16   a sense, it's just sort of bureaucratic delay,

17   right? You've committed the crime, and then

18   you're waiting for the conviction, and then

19   you're waiting for the deportation proceeding.

20   But sort of the die is cast when

21   you've committed the crime. And so there's

22   certain logic to stopping the clock as of the

23   commission of the crime that really doesn't work

24   here, where Congress isn't even capable of

25   deporting you based on this aggravated assault

1   crime. So the -- the delay after the crime has

2   nothing to do with bureaucratic delay; it's just

3   exclusively based on the fact that Congress has

4   decided not to deport the person. So it --

5   JUSTICE SOTOMAYOR: Could you tell me

6   why you didn't rely on Lara-Terrazas?

7   MR. UNIKOWSKY: On -- on what, Your

8   Honor?

9   JUSTICE SOTOMAYOR: Lara-Terrazas.

10   The Capitol Area Immigration Rights Coalition

11   said the BIA read this provision pretty much as

12   your second alternative previously.

13   MR. UNIKOWSKY: Well, I mean, I think

14   that -- so we think the BIA has not decided

15   the -- on the second question, so the -- Jurado

16   clearly is inconsistent with our -- our -- our

17   first --

18   JUSTICE SOTOMAYOR: No, but

19   Lara-Terrazas appears to have held exactly as

20   you wanted.

21   MR. UNIKOWSKY: I -- I -- I don't

22   think that's a published decision that

23   specifically resolved the question.

24   JUSTICE SOTOMAYOR: Well, maybe not

25   specifically, but the government's relying on

 1   unpublished opinions too.

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

 3   -- I mean, there's a published decision -- I

 4   mean, obviously, in this case, there's an

 5   unpublished decision rejecting my -- my client's

 6   claim. So I, you know -- and Jurado is the

 7   primary published decision that -- that's on

 8   point. We acknowledge that it's inconsistent

 9   with our reading, but we said it just shouldn't

10   be deferred to because it's irrational. The

11   government agrees with that. And so that

12   obviously makes this case easier for Petitioner.

13   I will say that if the Court concludes

14   the statute is ambiguous but nonetheless

15   construes it our way, then, under the Brand X

16   case, the BIA would be capable of reaching the

17   contrary conclusion and the Court would be able

18   to defer to that if it holds that the agency's

19   reasoning is -- is reasonable. That's what the

20   Brand X case holds.

21   But, you know, of course, if the Court

22   holds that it's unambiguous, then the agency

23   wouldn't be capable of doing that. But, on the

24   record currently before the Court, when there's

25   no Chevron -- no precedential decision that the

 1   government is even willing to defer to or is

 2   willing to -- to defend and rely on, it's just

 3   like a criminal statute or any other statute

 4   where there's no layer of deference to the

 5   agency, the Court should just decide what it

 6   thinks it means in the first instance.

 7   JUSTICE KAVANAUGH: What do you do

 8   with the government's argument that it would

 9   have been very easy for Congress to write the

10   statute to link the stop-time offense to the

11   offense charged in the removal proceeding?

12   MR. UNIKOWSKY: I mean, I think the

13   statute could have been clearer both ways. I

14   mean, just looking at this good moral character

15   provision, which is something we talk about in

16   our brief, it's like a model of -- of

17   draftsmanship and how clearly it could have been

18   written our way. I mean, that statute says that

19   if you have committed a crime during the

20   continuous residence period, that puts you into

21   the classes of persons described in 1182, then

22   the clock -- then you can't be eligible for

23   cancellation, whether inadmissible or not.

24   So that's like the clearest

25   conceivable way of saying that if you're in the

 1   category of 11 -- of people under 1182, which

 2   the government says Petitioner is, that

 3   regardless of whether you're charged with

 4   inadmissibility, you're not eligible.

 5   So Congress said that was a

 6   requirement only for non-LPRs to seek

 7   cancellation of removal and not LPRs. And this

 8   isn't just a matter of differently worded

 9   statutes. It's as differently worded as they

 10   could conceivably be. You have, like -- for

 11   non-LPRs, it says in the classes of persons in

 12   1182, whether inadmissible or not, and then, for

 13   the stop-time rule, which also applies to LPRs,

 14   it requires that it renders the alien

 15   admissible.

 16   So, just to answer your question, I

 17   mean, yeah, certainly, you could have written it

 18   much more clearly our way, and, of course, we

 19   wish it was, but it seems to me that when -- you

 20   know, when there's just a crystal-clear statute

 21   that would have accomplished exactly what the

 22   government wants, which Congress applied only to

 23   non-LPRs and not LPRs --

 24   JUSTICE ALITO: Why would the -- why

 25   would the good time rule clearly resolve this --

1   never mind.

2   CHIEF JUSTICE ROBERTS: Finish.

3   JUSTICE ALITO: Oh, why would it

4   clearly resolve this -- this question? It

5   doesn't say whether seeking admission or not.

6   MR. UNIKOWKSY: It --

7   JUSTICE ALITO: It says whether

8   inadmissible or not.

9   MR. UNIKOWSKY: Yeah, so it doesn't

10   matter -- so we don't think Petitioner is

11   inadmissible. But it applies to the alien

12   whether inadmissible or not, as long as he's in

13   the classes of people in 1182, which he clearly

14   is.

15   CHIEF JUSTICE ROBERTS: Thank you,

16   counsel.

17   Mr. Liu.

18   ORAL ARGUMENT OF FREDERICK LIU

19   ON BEHALF OF THE RESPONDENT

20   MR. LIU: Mr. Chief Justice, and may

21   it please the Court:

22   The statutory text alone is enough to

23   resolve this case. The question is whether

24   Petitioner has committed an offense that renders

25   him inadmissible under Section 1182(a)(2).

        1   To find the answer, we look to the

        2   text of Section 1182(a)(2), and it says that any

        3   alien who is convicted of a crime involving

        4   moral turpitude is inadmissible. There's no

        5   dispute in this case that Petitioner has -- has

        6   been convicted of a crime involving moral

        7   turpitude. Therefore, he has been -- he has

        8   committed an offense that renders him

        9   inadmissible under Section 1182(a)(2), and that

       10   should be the end of the matter.

       11   Now Petitioner says there's an added

       12   requirement in the statute, that requirement

       13   being that he must be seeking admission. But

       14   that requirement can't be found in the text of

       15   Section 1182(a)(2). It can't be found in the

       16   text of the stop-time rule itself. Rather, the

       17   stop-time rule ties the operation of the rule to

       18   an alien's status as inadmissible, independent

       19   of whether he is seeking admission or not.

       20   And in that respect, the stop-time

       21   rule operates in the same way as many other

       22   provisions of the INA. My friend described some

       23   of those provisions as obscure, but I think

       24   they're anything but. For example, we cite a

       25   number of them on pages 17 to 19 of our brief.

1   One of them is 8 U.S.C.

2 Section 1255(a). This was a major part of the

3 Immigration Reform and Control Act of 1986; 1.7

4 million aliens applied for relief under this

5 section. And what that section says is that

6 those aliens would be ineligible for relief if

7 they had the status of being inadmissible. And

8 that's so even if those aliens were already

9 admitted and not seeking admission.

10   Moreover, that -- that same section

11 says, if, after being granted amnesty under that

12 provision, those aliens then committed an act

13 that made them inadmissible, that amnesty status

14 would -- would have been terminated. So it

15 works just like the stop-time rule in this case

16 and, indeed, mirrors the operation of that rule.

17   Another example is Section 1160.

18 That's another major part of that same Act.

19 That said that -- that gave special temporary

20 resident status to a certain group of

21 agricultural workers; 1.3 million agricultural

22 workers applied for relief under that section.

23 It operates the same way.

24   Even if those aliens had already been

25 admitted and were not seeking admission,

     1   inadmissibility as a status was a cry -- was a

     2   criterion for their eligibility for that status.

     3   CHIEF JUSTICE ROBERTS: Well, your --

     4   your friend on the other side, of course, cites

     5   statutes that are to the opposite effect in

     6   terms of how the term is used. So it strikes me

     7   that this business about this is how they use it

     8   in other places, it's almost a wash.

     9   MR. LIU: I don't think so, Mr. Chief

    10   Justice. In our view, the word "inadmissible"

    11   means the same thing throughout the INA. Every

    12   time the word "inadmissible" appears, it is

    13   referring to an alien's status under

    14   Section 1182(a)(2).

    15   What the stat -- what the statute does

    16   in other provisions is tie different

    17   consequences to that status. So my friend

    18   mentions the judicial review provision in

    19   Section 1252(a)(2)(C).

    20   What that provision says is, if an

    21   alien's status as inadmissible, has the

    22   consequence of leading to a decision about his

    23   removal, then there's no judicial review in the

    24   courts of appeals.

    25   So, in other words, that -- that

1   statute does exactly what the stop-time rule

2   doesn't. It refers specifically to the decision

3   to remove and -- and -- and ties the operation

4   of the rule to that.

5   Same with the mandatory detention

6   provision. This is 8 U.S.C. Section 1226(a) and

7   (c). There's an explicit reference there to the

8   decision whether the alien is to be removed.

9   And what the statute says is, if the alien's

10   status as inadmissible would result in that

11   particular consequence, then that alien can be

12   detained on a mandatory basis.

13   JUSTICE BREYER: Well, but, look --

14   look, the -- the main argument as I understand

15   it -- and this statute is as obscure as any I've

16   seen. All right. Look, let's read it.

17   When the alien has committed an

18   offense referred to in Section 1182(a)(2) of

19   this title, so we go look and see. Has he

20   committed an offense referred to? Yes.

21   Now then what? An offense that, A --

22   I put in the A -- renders the alien inadmissible

23   or, B, removable under 1227(a). Now, if you're

24   right, there was no need for that clause, the

25   second clause, because the first thing you do is

1   look to 1182.

2   1182, if his offense isn't there,

3   forget it. It doesn't apply at all. And if his

4   offense is there, well, under your view, remove

5   him. That's the end of it.

6   So what in heaven's name is removable

7   from the U.S. under 1227(a) doing there? Now he

8   has an answer to that question. He says, I'll

9   tell you what, the history of immigration law is

10   that we treat differently applications for

11   admission, even people we found in the United

12   States, by the way, who never applied for

13   admission, okay? Those are the inadmissible

14   ones. And those are the ones that what I called

15   A applies to.

16   And now what B applies to is everybody

17   else. They were properly admitted, yes, yes,

18   and then they committed a crime deportable

19   under. Now he happens to fall, his client,

20   within what seems to me is a tremendous fluke,

21   that is, somebody who actually did something

22   that is listed in 82(a) and yet, at least in his

23   view, is not listed in 1227.

24   I didn't know there was such a person.

25   But, lo and behold, he comes up with this

1   exceptions clause, et cetera, and says his

2   client is there.

3   Okay. Now what do you say to that

4   main argument, that there is A and there is B,

5   and on your view, B serves next to no purpose?

6   MR. LIU: When Congress wanted to make

7   A and B an either/or, it said so expressly in

8   the Act, so --

9   JUSTICE BREYER: I know, but I can't

10   think -- that isn't going to be an answer

11   because they'd say, sometimes they do say A/B,

12   sometimes they don't say A/B, it wasn't a genius

13   who drafted this and he forgot the A and the B

14   and he -- but he did put in the or. And so, all

15   right, I've got that point. What's your next

16   point?

17   MR. LIU: My next point is I think --

18   well, I guess two points. One is we don't think

19   the renders removable clause is superfluous when

20   the referred to in Section 1182(a)(2) clause is

21   given its proper meaning, but -- and I'm happy

22   to get into that. Even if you don't buy that

23   and you think there's some sort of question left

24   --

25   JUSTICE BREYER: Well, you're talking

 1   about the ones who are the -- the -- the under

 2   18 and the -- and the -- there's an -- I -- I

 3   think I got that argument.

 4   MR. LIU: Okay.

 5   JUSTICE BREYER: And I can think that

 6   if -- I think I have it. You're right about it.

 7   JUSTICE KAGAN: Okay. Even if we

 8   don't buy that?

 9   MR. LIU: Even if you don't buy that,

10   I don't think surplusage should be the be all,

11   end all in interpreting this statute. Even

12   under Petitioner's reading, the cross-reference

13   to Section 1227(a)(4) was pure surplusage from

14   19 --

15   JUSTICE KAGAN: But, Mr. -- Mr. Liu,

16   this is more than your typical case of

17   surplusage. I mean, obviously, surplusage

18   sometimes gives way to other things. But this

19   whole statute, like the structure and the

20   content of this statute, is all written to -- to

21   refer to this essential dichotomy that Justice

22   Breyer just set out. I mean, basically, the

23   back two-thirds of the statute is all about,

24   well, the people who have been rendered

25   inadmissible, and, on the other hand, the people

 1   who have been rendered deportable.

 2   And -- and you have to think that they

 3   wrote it that way because they were thinking of

 4   these two groups of people, each of which would

 5   be subject to different consequences and each of

 6   which should be looked to separately.

 7   MR. LIU: I -- I don't think so,

 8   Justice Kagan. And I'll just re-emphasize the

 9   point I made to Justice Breyer, which is, when

10   Congress did want to create that dichotomy, it

11   wrote that dichotomy into the statute. So --

12   JUSTICE KAGAN: But by doing what?

13   You said by saying either/or. I mean, this

14   statute says or. You know, any writer would

15   tell you, sometimes you put in an "either,"

16   sometimes you just use an "or." Either way,

17   it's disjunctive.

18   MR. LIU: It's much more explicit than

19   that. If you look at the page -- top of page

20   35A of our statutory appendix, you have Congress

21   defining the meaning of the word "removable."

22   And we acknowledge decisions to remove are the

23   main con -- well, I think the only context in

24   which Congress wrote into the statute this

25   either/or.

1   And how did it do it? It did so by

2   defining "removable" as "in the case of an alien

3   not admitted to the United States, that the

4   alien is inadmissible, or, B, in the case of an

5   alien admitted to the United States, the alien

6   is deportable." That's how explicit Congress

7   is. It's not just --

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

9   MR. LIU: -- either/or.

10   JUSTICE KAGAN: -- explicit Congress

11   could be, and, sure, that might be a model of

12   legislative drafting which we can all assume

13   this statute is not.

14   But this statute does very clearly use

15   the disjunctive as to two large clauses, one of

16   which talks about inadmissible aliens and the

17   other of which talks about removable or

18   deportable, whatever word you want, aliens.

19   MR. LIU: And I think Congress was

20   also clear in the cross-reference to -- to

21   Section 1182(a)(2) and the renders inadmissible

22   clause that any alien who is convicted of a

23   crime involving moral turpitude is inadmissible.

24   There are many ways Congress could

25   have written that provision to get to the result

 1   Petitioner would like us to get to. There are

 2   other provisions in 1182 that tie the status of

 3   inadmissible to an alien who is at that time

 4   applying for admission or seeking admission.

 5   But, in 1182(a)(2) itself, Congress

 6   left those words out. And I think usually this

 7   Court presumes that Congress acts intentionally

 8   and purposefully when it does something like

 9   that.

10   JUSTICE SOTOMAYOR: Go back to the

11   point that the Chief Justice made. You're

12   cherry-picking. What Congress has not been is

13   very consistent, except in what your adversary

14   points to in the basic structure, that

15   inadmissibility applies to people who have not

16   been admitted, deportability applies to people

17   who have been admitted.

18   And each side is given a different set

19   of rights. Each side is given a different set

20   of burdens. Each side is given a different set

21   of benefits or lack thereof.

22   And I don't see what's illogical to

23   say that what Congress was thinking about is, if

24   you're in removal proceedings, you're eligible

25   for cancellation of removal for those crimes

1   that make you eligible, meaning, if you have to

2   be mandatorily deported, you have to be

3   mandatorily deported.

4   But you've been here a long time.

5   Whether a piece of it was in -- in BIA custody

6   or not is irrelevant. You get the same benefits

7   for being a long-time resident as you do in all

8   parts of the INA.

9   You have to prove certain things in

10   LPR status. There are certain benefits given to

11   LPR. Why is that incongruous here?

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

13   JUSTICE SOTOMAYOR: Especially when

14   the structure of the very next provision, the

15   mandatory detention section, is talking also

16   about removability?

17   MR. LIU: I -- I want to be very

18   clear. I do not think we're cherry-picking at

19   all. We are giving the word "inadmissible" the

20   same consistent meaning throughout the INA. We

21   are then reading the -- the language around that

22   provision and sometimes that language points to

23   a specific circum- -- a specific consequence of

24   that status.

25   This provision --

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 1              JUSTICE SOTOMAYOR:  There is a
 2    consequence.
 3              MR. LIU:  -- attaches additionals.
 4              JUSTICE SOTOMAYOR:  There is a
 5    consequence.  Both of them are tied around
 6    removability.  There is a consequence.
 7    You're -- or at least the ability to ask for
 8    cancellation.
 9              MR. LIU:  But the -- but the
10    consequence here, which is termination of the
11    period of continuous residence, is tied only to
12    the status of inadmissibility.  Congress could
13    have written even the stop-time provision itself
14    in many different ways that would have captured
15    Petitioner's reading.
16              In fact, the predecessor version of
17    this statute, former Section 1244(a), said, if
18    the alien commits an act constituting a ground
19    of deportation, that person is eligible for --
20              JUSTICE BREYER:  I -- I accept that
21    you can read the word "inadmissible" -- I'm not
22    saying you have to, but you could say this
23    individual in front of us, he's not
24    inadmissible.
25              It's -- he's been admitted.  How could
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1   he be inadmissible? They admitted him. Ahh,

2   you mean he would have been inadmissible had he

3   not been admitted. Okay?

4   (Laughter.)

5   JUSTICE BREYER: Now that's a possible

6   reading of it. And that's why just looking at

7   the word "inadmissible" doesn't tell us whether

8   we should read it with a "he would have been" or

9   whether we should read it as "would be now" or

10   -- there are 15 -- not 15, okay, got that.

11   Now, once we're into that bog, we then

12   go back to the original question of, why, in

13   heaven's name, if all you had to do was first

14   you look at 1182 and see if his crime fits

15   there, and then you see if it made him

16   inadmissible, for everybody. Well, of course,

17   it did. It -- I mean, you know, there we are.

18   And -- and what's this second part

19   doing there? Unless it picks up --

20   MR. LIU: Yeah.

21   JUSTICE BREYER: -- that traditional

22   history. Now that's the same question I asked

23   before, same question Justice Kagan asked, and

24   -- and that's, I think --

25   MR. LIU: This --

         1   JUSTICE BREYER: -- what's bothering
         2   me. Yeah.
         3   MR. LIU: -- this is what we think
         4   Congress was thinking. Everyone agrees that
         5   Congress began with the universe of offenses
         6   referred to in Section 1182(a)(2). Everyone
         7   agrees that's -- that's text in the statute, you
         8   can't have a 1227 offense unless -- that stops
         9   the time, unless it's referred to in
        10   Section 1182(a)(2).
        11   And we think what Congress was trying
        12   to do was it looked across the INA and it said,
        13   look, we have identified in Section 1182(a)(2) a
        14   set of criminal and related offenses. We think,
        15   in general, those are the offenses that rise to
        16   the level of being an abuse of the country's
        17   hospitality such that the alien's time would
        18   stop.
        19   And then Congress thought: Well,
        20   certainly, if those offenses are serious enough
        21   to render the alien inadmissible, those should
        22   be given stop-time effect.
        23   JUSTICE KAGAN: But --
        24   MR. LIU: And so --
        25   JUSTICE KAGAN: -- why wouldn't you

         1   just say, you know, a person convicted of an

         2   offense listed in the following sections? You

         3   don't need all this hullabaloo about people

         4   being rendered inadmissible --

         5   JUSTICE BREYER: That's the point.

         6   JUSTICE KAGAN: -- and people being

         7   rendered deportable unless you're talking about

         8   some kind of proceeding in which people have

         9   been rendered inadmissible or people have been

        10   rendered deportable. Otherwise, you could just

        11   say offenses listed in whatever statutes you

        12   wanted to say.

        13   MR. LIU: Well, because I think, as --

        14   as I was saying, Congress -- Congress did start

        15   out with the set of offenses it thought would

        16   generally be serious enough. Those are the

        17   offenses referred to in Section 1182.

        18   Congress thought, well, if they're

        19   serious enough to render the alien inadmissible,

        20   they should certainly qualify as stop-time

        21   effect. But, at the same time, Congress

        22   recognized that there were exceptions in

        23   Section 1182, juvenile offenses --

        24   JUSTICE KAGAN: Yeah, but the

        25   exceptions --

1   MR. LIU: -- petty offenses, that

2   wouldn't be --

3   JUSTICE KAGAN: -- I mean, the idea

4   that the exceptions would be picked up somehow

5   if you just said listed in the -- it doesn't

6   transform an exception. An exception would

7   remain the exception. It's just the actual

8   offenses that are listed in that statute.

9   MR. LIU: Well, I think that is what

10   the "referred to" clause. The "referred to"

11   clause refers to just the offenses, the sort of

12   the generic elements-based understanding of the

13   offenses in the statute.

14   The problem is I think Congress

15   realized Section 1182(a)(2) contains a bunch of

16   circumstance-specific exceptions to those --

17   JUSTICE KAGAN: Yeah, and --

18   MR. LIU: -- to those provisions.

19   JUSTICE KAGAN: -- I guess it seems

20   really counterintuitive to me that Congress

21   could have -- could have sort of looked down the

22   road and said some insane judge is going to pick

23   up these exceptions and transform them into

24   actual grounds for disqualifying somebody from

25   removal. So the exceptions would remain the

 1   exceptions. You don't need --

 2   MR. LIU: No --

 3   JUSTICE KAGAN: -- all this statutory

 4   language to do that.

 5   MR. LIU: No, that -- that -- that's

 6   my point, Justice Kagan, is that because of

 7   those exceptions, that's why you need the

 8   renders --

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

10   JUSTICE BREYER: If you --

11   JUSTICE KAGAN: -- point --

12   JUSTICE BREYER: Look, if --

13   JUSTICE ALITO: Can -- could -- could

14   I take you back to Justice Breyer's intriguing

15   question about the meaning of inadmissibility?

16   The -- the Eleventh Circuit had some very

17   colorful examples about status and words that

18   end in a-b-l-e or i-b-l-e, and one of them had

19   to do with rotten fish. So, if a fish rots and

20   it is inedible, they say, well, it was inedible

21   before the person ate it.

22   But, under Justice Breyer's

23   interpretation of admissibility, suppose this

24   person eats the fish and then goes to the

25   emergency room to have his stomach pumped, would

1   the doctor say, well, the fish wasn't actually

2   inedible because he ate it?

3   (Laughter.)

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

5   because the fish has the status of being

6   inedible, whether someone has --

7   JUSTICE KAGAN: No --

8   MR. LIU: -- eaten it --

9   JUSTICE KAGAN: -- but, Mr. Liu --

10   MR. LIU: -- or is trying to eat it or

11   not.

12   JUSTICE KAGAN: -- this -- this really

13   is dependent on context because you wouldn't say

14   is car is immovable if the car has just been

15   moved. And so too here, it's not clear that you

16   would say an alien is inadmissible if the alien

17   has just been admitted.

18   So, you know, it could; it couldn't.

19   The -- the -- the real question is not what

20   "inadmissible" means in the abstract. The real

21   question is look at this statute and say, why

22   does anybody write a statute that looks like

23   this, unless what the drafter is doing is to try

24   to refer to two different categories of people

25   who have just gone through two different kinds

1   of removal proceedings?

2   MR. LIU: And I -- and I don't think

3   it's an embarrassment for our position that,

4   under our view, the "renders removable" clause

5   has only a modest role to play. Again, if you

6   read the -- the text of the stop-time rule, you

7   begin only with offenses referred to in

8   Section 1182(a)(2).

9   If Congress had wanted Section 1227 to

10   play a sort of major role in the stop-time rule,

11   it could have said offenses referred to in

12   Section 1182(a)(2) or referred to in

13   Section 1227.

14   But already Congress is cutting off

15   the application of 1227. This is an

16   inadmissibility-focused provision. Two of the

17   three provisions are about Section 1182(a)(2).

18   I think it's only logical to read the third

19   provision, which doesn't mention

20   Section 1182(a)(2), as doing the relatively

21   modest role, admittedly, of just picking up the

22   things that aren't referred to or render an

23   alien inadmissible.

24   JUSTICE BREYER: I -- I -- before you

25   leave this -- I -- I'll think about the fish.

1   I'm not sure I got the fish, but I'll -- I'll

2   think about the fish.

3   (Laughter.)

4   JUSTICE BREYER: But -- but I'm back

5   in what in heaven's name is that clause doing

6   there? You know, the second clause.

7   MR. LIU: Right.

8   JUSTICE BREYER: If you're right,

9   okay. So you've had very brilliant people going

10   over this, and the best they've come up with, it

11   seems to me -- tell me -- is, well, you see,

12   there are exceptions in 1182, and there are --

13   those exceptions are not in 1227. And they put

14   1227 in to be sure those exceptions didn't stop

15   the person from being deported.

16   Okay. So I look at the exceptions.

17   The only exceptions I can find that are relevant

18   are those contained in (a)(1), (a)(2),

19   (a)(ii)(I)(2). Those are the ones you're

20   talking about. And, by the way, it took me five

21   seconds to put all those numbers in, but it

22   takes a Congressman or a drafter only three

23   seconds to read them.

24   And I would have said "including those

25   listed in" and then I would have put in that

1 number. You see? That would have done it.

2 Including those listed in. And I would have put

3 that number in. And then there would have been

4 no problem, and then you would have thought of

5 no reason at all.

6   Now I've never seen a statute drafted,

7 so many words, to cover removing so small an

8 exception.

9   MR. LIU: But we know Congress wasn't

10 working at that level of granularity, because

11 when it came to 1227(a)(4), there was nothing in

12 20 -- 1227(a)(4) that's referred to in

13 Section 1182.

14   I think the only way to understand

15 what Congress was thinking is to think of what

16 Congress was thinking at a more general level.

17 And the more general level is we have these

18 offenses referred to in 1182(a)(2). These are

19 bad offenses. If they're serious enough to

20 render you inadmissible, that is, confer that

21 status, then they stop the time. But, if they

22 are also happen to be serious enough to render

23 you removable, those will stop the time too.

24   That doesn't mean that you -- you

25 don't apply the Section 1182 "renders

 1   inadmissible" language even in cases when aliens

 2   are admitted because Congress had written

 3   provisions in many other places of the INA where

 4   inadmissibility is indeed relevant, even when

 5   the alien is admitted.

 6   So Congress did not think there was

 7   some sort of disjunct between saying an alien

 8   was already admitted and yet he's inadmissible.

 9   It wrote the statute in exactly that way.

10   That's confirmed by the language of 1182, which

11   says any alien convicted of "a crime involving

12   moral turpitude" is inadmissible. It doesn't

13   say any alien who is convicted and then seeks

14   admission.

15   It's clear from the other provisions,

16   adjustment of status, temporary protected

17   status, the two major parts of the Immigration

18   Reform Act of 1986 that I mentioned at the

19   outset. It's even clear if you look at a

20   provision of 1227. 1227(2)(a) -- (2)(a) --

21   1227(a)(1)(A), deportable aliens, this is at 20a

22   of our petition appendix, talks about aliens who

23   at the time of entry or adjustment of status

24   were within one of the classes of aliens

25   inadmissible.

 1   There's no adjudication of

 2   admissibility at that point. The whole point of

 3   this deportability provision is that the

 4   immigration officer failed to adjudicate that

 5   person as inadmissible.

 6   And yet, the statute refers to that

 7   person as having that status of inadmissible

 8   such that another consequence can be attached to

 9   it later on, in this case, deportability.

10   We think the stop-time rule works in

11   the same way.

12   JUSTICE SOTOMAYOR: I know that

13   everybody -- I think Justice Kavanaugh and you

14   seem to think that these minor offenses, like a

15   person who possesses a small amount of

16   marijuana, can -- that can make you inadmissible

17   but not deportable because there's an exception

18   under deportability. If it's a juvenile

19   offense, you can't be deported.

20   But what you're now saying is that

21   these minor offenses stop you from getting the

22   benefits, potential benefits, of cancellation of

23   removal and that that was clearly Congress's

24   intent.

25   I don't know why I should think that

 1   is clearly Congress's intent, given that the LP

 2   -- that the INA throughout gives more solicitude

 3   to long-time -- to permanent residents.

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

 5   can turn the presumption on its head and say

 6   that they weren't intending to limit the

 7   stop-time rule to those who were in an

 8   admissibility status; covers small numbers of

 9   LPRs, the ones that have left the country and

10   are seeking re-admission, and others, but I --

11   I'm -- I'm just not quite sure I understand why

12   your reading is consistent with the solicitude

13   that Congress has showed LPRs throughout the

14   INA.

15   MR. LIU: I think it has to do with

16   the very narrow issue in front of this Court.

17   No one -- no one thinks that a marijuana

18   possession conviction alone can render an LPR

19   removable. No one thinks a mere marijuana

20   conviction alone can even render an LPR

21   categorically ineligible for cancellation of

22   removal.

23   The only question here is a question

24   of the operation of how long after having

25   convicted that offense can that -- can that

1   alien continue to claim credit for being in the

2   United States. That's a very narrow question.

3   And --

4   JUSTICE SOTOMAYOR: But --

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

6   --

7   JUSTICE SOTOMAYOR: -- the -- the

8   problem really is, no, it's not so simple

9   because they didn't or wouldn't have to worry

10   about a small amount of marijuana generally,

11   even an admission of it without a criminal

12   conviction, and so why should the time stop

13   under those circumstances?

14   MR. LIU: Well, there --

15   JUSTICE SOTOMAYOR: Other than your

16   strange reading of -- of this provision.

17   MR. LIU: Well, I think the text does

18   favor us. But if you look at the cancellation

19   of removal --

20   JUSTICE SOTOMAYOR: If it doesn't,

21   where do we end up? If it's ambiguous --

22   MR. LIU: If it --

23   JUSTICE SOTOMAYOR: -- where do we end

24   up?

25   MR. LIU: If it's ambiguous, I think

1   there would have to be some grievous ambiguity

2   for the Court even -- to even care about that.

3   I think the traditional tools of construction

4   continue --

5   JUSTICE SOTOMAYOR: How about --

6   MR. LIU: -- continue to apply.

7   JUSTICE SOTOMAYOR: -- if it's in

8   equipoise?

9   MR. LIU: If it's in equipoise, I

10   still think the Court's duty should be to reach

11   what it believes to be the best reading of the

12   statute. I don't think --

13   JUSTICE SOTOMAYOR: And so by ignoring

14   surplusage completely?

15   MR. LIU: No. I think surplusage is a

16   problem for both of our interpretations. I

17   mean, even under --

18   JUSTICE SOTOMAYOR: He is a lot less.

19   He gives meaning to everything except the

20   reference to 1227(a)(4). But doesn't 1227 -- it

21   wasn't -- it was an empty category back then?

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

23   JUSTICE SOTOMAYOR: All right, I

24   forgot that. It was an earlier version.

25   MR. LIU: Well, since the stop-time

 1   rule was enacted in 1996, all the way until

 2   2004, 1227(a)(4) was an empty category. And

 3   even today, it's a largely redundant category

 4   because Congress has said in cases of certain

 5   permanent residents and non-LPRs under

 6   1229(b)(A) and (b)(1), if you have a conviction

 7   under (a)(4), you're just categorically

 8   ineligible. It's not -- it's not even a matter

 9   of stopping time. If you have an (a)(4)

10   conviction, you can't get cancellation right off

11   the bat. So, even today, that provision is not

12   doing a ton of work.

13   JUSTICE KAGAN: Mr. Liu, could you

14   make sense of the verb tenses for me? Because I

15   would think that you would have an extremely

16   good argument if the tenses were subjunctive,

17   you know, if it said -- if it would render the

18   alien inadmissible. But it doesn't say that.

19   It says renders the alien inadmissible, which

20   seems not to refer to something that could

21   happen in the future if the alien, again, tried

22   to gain admission.

23   MR. LIU: Right. And I -- I -- I

24   think the "renders inadmissible," the present

25   tense, just reinforces our interpretation

1   because, if you look at the text of 1182 itself,

2   it says any alien convicted of "a crime

3   involving moral turpitude" is inadmissible.

4   So, for the tenses to match, the

5   present tense in 1182 itself to match with the

6   stop-time rule, I think the present tense makes

7   a lot of sense. And I think this -- this is in

8   partial response to Justice Breyer's question.

9   Our -- our position is not a

10   hypothetical alien would be inadmissible and,

11   therefore, time stops for this alien. Our

12   position very much is, for this particular

13   alien, this offense renders him inadmissible.

14   And that just follows --

15   JUSTICE KAGAN: I mean, it --

16   MR. LIU: -- from the text --

17   JUSTICE KAGAN: -- just is a kind of

18   odd thing to say when we know the alien has been

19   admitted and could be -- you know, could live

20   here indefinitely if he hadn't gotten into other

21   trouble, right?

22   MR. LIU: I don't --

23   JUSTICE KAGAN: Nobody walks around

24   going, oh, you've been admitted, but, you know

25   -- you know, let's -- let's -- let's -- let's

 1   try to figure out whether you're inadmissible if

 2   you try to -- if you try to gain admission the

 3   next time around?

 4   MR. LIU: I mean, I -- I don't think

 5   that's right. If I were a lawyer representing a

 6   client who had already been admitted, I would

 7   definitely describe the consequences of his

 8   status as inadmissible after he had committed a

 9   crime like this.

10   And I would use the present tense to

11   be exceptionally clear about those consequences.

12   I think there is a different verb tense change

13   here between "alien has committed" and "renders

14   inadmissible," but that -- that just, I think,

15   dovetails with our understanding as well,

16   because the "rendering inadmissible" always has

17   to occur after the alien has committed the

18   offense.

19   JUSTICE KAVANAUGH: Is your point

20   about (a)(4) because it's an aggravated felony?

21   MR. LIU: No, no.

22   JUSTICE KAVANAUGH: What was your

23   (a)(4) point?

24   MR. LIU: 1227(a)(4) covers

25   security-related grounds --

1   JUSTICE KAVANAUGH: Yeah.

2   MR. LIU: -- for deportability. So,

3   if someone has engaged in terrorist activity,

4   for example, he would come within the scope of

5   (a)(4). If you look at 1229b(c)(4), this is on

6   page 37 of our petition appendix, it says an

7   alien who is ... deportable under Section

8   1227(a)(4) is simply categorically ineligible

9   for cancellation of removal. And that applies

10 to two types of cancellation, not all the types,

11 but the two types that we have been discussing

12 here today.

13   Thank you.

14   CHIEF JUSTICE ROBERTS: Thank you,

15 counsel.

16   Five minutes, Mr. Unikowsky.

17   REBUTTAL ARGUMENT OF ADAM G. UNIKOWSKY

18   ON BEHALF OF THE PETITIONER

19   MR. UNIKOWSKY: Thank you, Mr. Chief

20 Justice.

21   I'd like to begin by a comment that my

22 colleague made that they are giving the word

23 "inadmissible" the same consistent meaning

24 across the statute. That's just not accurate.

25   So, in the mandatory detention

 1   statute, it says that an alien who is

 2   inadmissible by reason of having committed an

 3   offense under 1182 is subject to mandatory

 4   detention.

 5   Giving that meaning -- word the same

 6   consistent meaning, it would apply to any alien

 7   who merely has the status of inadmissible even

 8   if you've already been admitted. That's what

 9   they say "inadmissible" means in the stop-time

10   rule.

11   They conceded that can't be right. An

12   already admitted alien can't be inadmissible for

13   purposes of that statute. So they are giving it

14   a different meaning.

15   Now the Chief Justice posed a question

16   saying that, well, it seems to be on both sides

17   and so it's a wash. I think if it is a wash,

18   that it's very good for us because there's all

19   the other stuff. There's the surplusage,

20   there's the comparison to good moral character,

21   and there's the structure of the INA and

22   everything else.

23   But I'd just like to push back a

24   little bit on the idea that it's a wash because

25   it seems to me that the statutes we're comparing

 1   it to are more relevant than the ones they are.

 2   So like this mandatory detention statute, it's

 3   covering removal procedures. It was enacted in

 4   IRRARA along with the stop-time rule just a

 5   couple sections over. That strikes me as more

 6   relevant than provisions that were enacted many

 7   years earlier that don't apply to LPRs at all,

 8   which is what the government is -- is relying

 9   upon.

10   So I actually think that the

11   consistent usage canon favors us, especially

12   when you look at just the intro to the

13   cancellation of removal statute that says the

14   attorney general may cancel removal for an alien

15   who is inadmissible or removable. Like, that's

16   using "inadmissible" in the way we say and it's

17   the same statute. In fact, like the stop-time

18   rule is just a definitional provision under that

19   umbrella.

20   So the second thing I'd like to turn

21   to is this question about the fish, which was a

22   colorful question by -- by Justice Alito that

23   the Eleventh Circuit relied on similar

24   arguments.

25   Look, we're not denying that it's --

 1 that you can -- b-l-e words sometimes sound like

 2 a status. Clearly, that's true, but it's just

 3 as clear that sometimes it's obvious that when

 4 you're talking about the removal proceeding

 5 itself, the word "inadmissible" refers to what

 6 happened at the removal proceeding.

 7   So I just think it's -- it's just

 8 inescapable that you have to look at the context

 9 in which the word appears. I don't think that

10 the Eleventh Circuit's comparison to undrinkable

11 really can answer the question presented. And

12 in the context of the statute, which applies

13 only during removal proceedings in which all the

14 surrounding provisions seem to conceptualize

15 this dichotomy between inadmissible and

16 deportable, I think the context which you -- you

17 just kind of have to look at ultimately favors

18 our position.

19   I'd also like just to say a word about

20 surplusage, which I understand occupied a

21 portion of the -- of the -- of my colleague's

22 argument. So, first, on this narrow issue of

23 1227(a)(4), just to be clear, it's not as though

24 the government's interpretation gives that

25 meaning that ours doesn't, right? So 1227(a)(4)

 1   was really an empty category at the time because

 2   it didn't have any cross-references to 1182.

 3   That's true on both sides. So it's

 4   not -- it's not one of those cases where both

 5   sides give one word meaning that the other side

 6   doesn't. Like for both sides, it's not clear

 7   why Congress included that, except for the

 8   purpose of subsequent amendments which actually

 9   did ultimately materialize. But the surplusage

10   on the government side is a -- is a lot more

11   significant in the hope that the removal clause

12   isn't there.

13   It's not just a matter that there's

14   surplusage. I mean, surplusage is generally

15   bad. But I think here it's more than that. You

16   see the words "inadmissible" and "removable"

17   paired with each other. And I think that just

18   implies that Congress is thinking that those are

19   the two things that can happen to you. And if

20   you're inadmissible, you fall in one bucket, and

21   if you're removable, you're in another bucket.

22   And we see all over the adjacent statutes this

23   concept of inadmissibility and deportability

24   together with an "or" in between. And it's --

25   it's clear in all those contexts that that's why

1   that's -- that's why they're there, because

2   those are the -- the two true outcomes.

3   So just in -- in the intro of the

4   cancellation of removal statute, where it says

5   the attorney general may cancel removal of an

6   alien who is inadmissible or deportable.

7   Clearly, the reason those two things are paired

8   together is that those are the two things that

9   can happen to you. And so that's why they're

10   both there.

11   And the same in just the general

12   statute governing removal procedures, 1229a,

13   that says that the immigration judge shall

14   decide the inadmissibility or deportability of

15   an alien, it's clear why those two words are

16   there with the "or" in between, because those

17   are the two things that can happen.

18   So you go to the stop-time rule,

19   which, after all, is -- is just like a buried

20   definitional provision in the cancellation of

21   removal statute itself, and you have

22   "inadmissible" or "removable." And the natural

23   inference is that the reason those are there is

24   that those are the two things that can happen.

25   That fits our interpretation perfectly

1 because, if you're found inadmissible, then

2 you're in the admissible category. And if

3 you're found deportable, then you're in the

4 deportable category, or removal category.

5 Excuse me. I think that's a lot more persuasive

6 than this rather convoluted argument from the

7 government which apparently the government

8 didn't even think of until its brief in this

9 case because it explicitly did -- did not make

10 this argument in an en banc petition filed less

11 than a year ago.

12   Thank you.

13   CHIEF JUSTICE ROBERTS: Thank you,

14 counsel. The case is submitted.

15   (Whereupon, at 11:06 a.m., the case

16 was submitted.)

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