No. 18-725

IN THE
Supreme Court of the United States

ANDRE MARTELLO BARTON,
Petitioner,

v.

WILLIAM P. BARR, ATTORNEY GENERAL,
Respondent.

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

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

Petitioner's aggravated assault convictions did not "render[]" him "inadmissible … under section 1182(a)(2) of this title or removable … under section 1227(a)(2) or 1227(a)(4) of this title," and therefore did not trigger the stop-time rule. 8 U.S.C. § 1229b(d)(1). Congress made the policy decision that these convictions are *not* a basis for removability for Petitioner, a lawful permanent resident who was already admitted. As such, the government concedes that those convictions did not render him *removable*. Gov't Br. 6 n.1.

The government nonetheless contends that Petitioner's convictions rendered him *inadmissible*. But Petitioner was not charged with inadmissibility. He was not even capable of being charged with inadmissibility. A person who was not, and could not conceivably have been, found inadmissible has not been "render[ed] inadmissible."

The government characterizes "inadmissible" as a "status" that does not require a charge of inadmissibility. The government's primary textual argument squarely contradicts the BIA's on-point decision, which the government refuses to defend. On its merits, the government's interpretation is irreconcilable with neighboring provisions—where "inadmissible" refers to the actual charge against the alien—and would render much of the stop-time rule superfluous.

The judgment below should be reversed.

I. An Offense "Renders The Alien Inadmissible" If The Immigration Judge Finds That It Renders The Alien Inadmissible.

The Court should hold that an offense "renders the alien inadmissible to the United States under section 1182(a)(2) of this title" if that offense triggers the alien's adjudication of inadmissibility.

The textual analysis is simple. "Inadmissible" refers to the outcome of an adjudication. In a removal proceeding—the sole context in which the stop-time rule is applied—the alien "may be charged with any applicable ground of inadmissibility," and the "immigration judge shall conduct proceedings for deciding the inadmissibility … of an alien." 8 U.S.C. § 1229a(a)(1), (a)(2). Thus, the phrase "renders the alien inadmissible" is naturally understood to be a reference to that adjudication. If the immigration judge decides that the offense renders the alien inadmissible, then the offense renders the alien inadmissible. Pet. Br. 20-22.[1]

The government does not grapple with this straightforward analysis. Instead, it offers textual arguments that diverge from the BIA's view and only go to show why Petitioner's interpretation is correct. The government also cannot rebut the powerful textual support for Petitioner's position from the stop-time rule's two-part structure. Finally, the purpose and

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[1] Contrary to the government's passing suggestion (Gov't Br. 22), this argument is not waived. Petitioner has preserved his claim that an alien not seeking admission cannot be "render[ed] inadmissible"; this argument supports that claim. *See Yee v. City of Escondido*, 503 U.S. 519, 534 (1992).

history of the stop-time rule support Petitioner's interpretation.

A. The government's textual arguments are meritless.

The government offers three textual arguments in support of its position: one based on the text of section 1182(a)(2), one based on surrounding provisions of section 1182, and one based on Congress's use of "inadmissible" elsewhere in the INA. Each is meritless.

1. Text of section 1182(a)(2).

The government's lead argument is as follows. Section 1182(a)(2)(A)(i)(I) provides that an alien convicted of a crime involving moral turpitude "is inadmissible." Thus, an alien with such a conviction acquires the *status* of "inadmissible," even if he cannot be charged with inadmissibility. Gov't Br. 12-15.

This argument is irreconcilable with the BIA's reasoning and unpersuasive on its own terms. Moreover, the government's positions elsewhere in its brief demonstrate why this argument cannot be right.

a. The government asks the Court to interpret the stop-time rule without *Chevron* deference. Gov't Br. 39 n.2. This was unexpected. Petitioner's primary interpretation of the statute contradicts the BIA's precedential decision in *Matter of Jurado-Delgado*, 24 I. & N. Dec. 29 (B.I.A. 2006); the BIA's decision in this case relied on *Jurado*, Pet. App. 23a; and the government sought *Chevron* deference to *Jurado* in the Eleventh Circuit, C.A. Br. 19 n.9. Yet despite Petitioner's express concession that his interpretation conflicts with *Jurado* (Pet. Br. 39), the government abandons *Jurado*. Why?

Because the government's textual argument is *precisely* contrary to *Jurado*'s reasoning.

In *Jurado*, the BIA explained that before IIRIRA, discretionary relief was unavailable for "an alien who 'is deportable' by reason of having committed a specified offense." 24 I. & N. Dec. at 31. The BIA observed that in the INA, "Congress has employed the phrases 'is inadmissible,' 'is deportable,' or 'is removable' to describe certain limitations that exist on relief or on judicial review." *Id.* The BIA offered two examples, one of which was from the cancellation of removal statute: Section 240A(c)(4) of the INA, 8 U.S.C. § 1229b(c)(4), which provides that "[a]n alien who is inadmissible under section 1182(a)(3) of this title or deportable under section 1227(a)(4) of this title" is ineligible for cancellation of removal. *See Jurado*, 24 I. & N. Dec. at 31. The BIA then stated that it had "long held that an alien must be charged and found deportable where Congress has used the phrase 'is deportable.'" *Id.* (citation omitted). But it noted that in the stop-time rule, "Congress used the word 'renders.'" *Id.* The BIA "assume[d] that [Congress] intended a different meaning by the use of that word." *Id.* And it inferred that the stop-time rule "requires only that an alien 'be or become' inadmissible or removable, i.e., be potentially removable if so charged." *Id.*

Thus, the BIA's reasoning has two premises: (1) the phrases "is inadmissible," "is deportable," and "is removable"—including those phrases as used in the cancellation of removal statute—*do* require a charge and finding, and *are not* a reference to a status; and (2) because the stop-time rule uses the word "renders" and

hence is relevantly *different* from the phrase "is inadmissible," one can infer that it *does not* require a charge and finding, and *is* a reference to a status.

The government's new argument inverts both of those premises. The government now argues: (1) the phrase "is inadmissible" in section 1182(a)(2) *is* a reference to a status; and (2) because the stop-time rule's language is relevantly *similar* to the phrase "is inadmissible" in section 1182(a)(2), one can infer that it *also* is a reference to a status. Gov't Br. 12-15. It is no wonder that the government abandons *Chevron*.

b. The government's new argument is just as unpersuasive as its prior argument.

Section 1182(a)(2) must be viewed in conjunction with section 1229a, which sets forth the procedures for adjudicating inadmissibility. It provides that an alien may be "charged with any applicable ground of inadmissibility," following which the "immigration judge shall conduct proceedings for deciding the inadmissibility" of the alien. 8 U.S.C. § 1229a(a)(1), (a)(2). Viewed against that backdrop, section 1182(a)(2) merely instructs the immigration judge on what law to apply in those proceedings; it does not confer some latent status of "inadmissible" on the alien when those proceedings do not occur.

Section 1182(a)(2)'s wording reflects a drafting style that is common in the U.S. Code. Just as section 1182(a)(2) recites that a person who commits certain acts "is inadmissible," numerous criminal statutes recite that a person who commits certain acts "is guilty." For instance, the treason statute provides:

> Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined under this title but not less than $10,000; and shall be incapable of holding any office under the United States.

18 U.S.C. § 2381. Many less serious criminal statutes are worded similarly. *E.g.*, 16 U.S.C. § 5508(a) ("A person is guilty of an offense if the person commits" certain acts related to unlawful fishing).

In context, it is clear what these statutes mean. They define the elements of a crime, and if a jury finds that those elements are met, the defendant faces the stated consequences. The statutes do not mean that a person who commits the acts acquires the status of "guilty" even *without* being charged. And they do not mean that if the defendant is convicted of some different crime, the "status" of being "guilty" for the uncharged offense is suddenly activated and triggers a more severe sentence. The same is true here. Section 1182(a)(2) defines what the immigration judge must find for the alien to be rendered inadmissible. It does not mean that if an alien is charged with *deportability*, the "status" of being "inadmissible" is suddenly activated and triggers ineligibility for discretionary relief.[2]

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[2] The government's observation that "inadmissible" has the suffix "ble," like "immovable" and "inedible" (Gov't Br. 13-14), does not advance the government's case. It is natural to say that the adjudication renders the alien inadmissible or removable: it is the

c. The best evidence against the government's theory comes from the government's own arguments later in its brief.

The government's theory is that section 1182(a)(2) defines the "status" of inadmissible; so, when the word "inadmissible" appears elsewhere in the INA (such as the stop-time rule), one can assume Congress is referring to that status. But Petitioner pointed out two counterexamples. First, the mandatory-detention statute, 8 U.S.C. § 1226(c), uses the phrase "is inadmissible." In context, this *must* refer only to aliens who are charged with inadmissibility, and *cannot* encompass aliens not seeking admission who merely have the "status" of inadmissible. Pet. Br. 49-52. Second, the jurisdiction-stripping statute, 8 U.S.C. § 1252 uses the phrase "is removable." The government's theory that "inadmissible" refers to a status implies that "removable" refers to a status as well—it, too, is a "ble" word that appears in the stop-time rule next to "inadmissible." Yet in the jurisdiction-stripping statute, it is clear that "removable" refers to the outcome of the alien's actual adjudication, and is not a reference to a status. Pet. Br. 23-24.

In response, the government resorts to a *deus ex machina*. It acknowledges that in *those* contexts, "inadmissible" and "removable" do *not* refer to a "status." According to the government, in the mandatory-detention statute, the word "inadmissible" is

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immigration judge's decision that vests the government with the authority to deny entry to an alien or remove him. Unlike "inadmissible," "immovable" and "inedible" are not terms of art referring to adjudications.

"naturally understood" to refer to a "potential ground[] for removal" because the alien is detained pending the "decision on whether the alien is to be removed." Gov't Br. 30 (quotation marks omitted). Likewise, in the jurisdiction-stripping statute, the word "removable" is "naturally understood" to refer to the "subject matter"—the "final order of removal." *Id.* (quotation marks omitted). But, the government claims, the stop-time rule is different because its text "contains no reference to" any removal decision. Gov't Br. 29-30.

This is simply wrong. The stop-time rule clarifies the continuous-residence requirement for cancellation of removal, 8 U.S.C. § 1229b(a)(2), which is embedded in the statute defining the criteria for cancellation of removal. *Id.* § 1229b(a). That statute begins as follows: "The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States." *Id.* In that sentence, "removal" is, in fact, a reference to the alien's removal decision.

Moreover, contrary to the government's suggestion (Gov't Br. 25-26), that same sentence uses "inadmissible" in *exactly* the way Petitioner advocates. "Inadmissible or deportable" refers to aliens who have been *found* inadmissible or deportable, because those are the aliens who can obtain cancellation of removal.

Thus, the government's own contextual arguments establish that Petitioner prevails. If the phrase "is inadmissible" in section 1226 "naturally" refers to the alien's own removal hearing (as the government concedes), and the phrase "is removable" in section 1252 "naturally" refers to the alien's own removal hearing (as the government also concedes), then it follows that

"inadmissible" and "removable" in the stop-time rule "naturally" refer to the alien's own removal hearing, too.

Indeed, the Court should consider how strange the government's position is. Congress enacted a cluster of provisions governing what happens before, during, and after removal proceedings. In section 1226—which governs what happens before removal proceedings (mandatory detention)—all agree that "inadmissible" refers to the alien's own removal hearing. In section 1252—which governs what happens after removal proceedings (judicial review)—all agree that "removable" refers to the alien's own removal hearing. In section 1229b(a)—which defines the criteria for cancellation of removal—the words "removal," "inadmissible," and "deportable" refer to the alien's own removal hearing. Yet according to the government, in the stop-time rule—which is applied *only* during removal hearings, *immediately* after the immigration judge has *just* decided whether the alien is inadmissible or removable—"inadmissible" unaccountably transforms into a "status" untethered from the alien's own removal hearing. This reading is not plausible.

2. Surrounding provisions in section 1182(a).

The government's next argument is that "other provisions of Section 1182(a) do make conferral of inadmissibility contingent upon an alien's seeking admission." Gov't Br. 15. Thus, the government contends, when Congress does *not* expressly condition "conferral of inadmissibility … upon an alien's seeking admission," an alien can be "inadmissible" even when not seeking admission. *Id.*

The government misreads the provisions it cites. In the government's examples, Congress provided that the relevant inadmissibility ground would apply to a *subset of aliens seeking admission*, as opposed to *all aliens seeking admission*. Take the government's lead example: section 1182(a)(1), which provides that any alien "who seeks admission *as an immigrant*," and who fails to present evidence of vaccinations, "is inadmissible." 8 U.S.C. § 1182(a)(1)(A) (emphasis added); *see* Gov't Br. 16. This provision ensures that aliens who seek admission *as nonimmigrants*, such as tourists, are not turned back at the border because they fail to substantiate their vaccinations. Likewise, the government cites section 1182(a)(6)(B) (Gov't Br. 16), but that inadmissibility ground similarly refers to a *subset* of aliens seeking admission—any alien "who seeks admission to the United States within 5 years of" certain departures.[3]

The government then says this:

> And Section 1182(a)(9) provides that any alien "convicted of an aggravated felony" who "*seeks admission* * * * at any time" after having been previously removed "is inadmissible." 8 U.S.C. 1182(a)(9)(A)(i) (emphasis added).

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[3] The government also cites 8 U.S.C. § 1182(a)(7)(A)(i), which provides that any immigrant "at the time of application for admission" must possess a visa. Gov't Br. 16. The purpose of that phrase is to avoid the absurdity of aliens being deemed "ineligible to receive visas," 8 U.S.C. § 1182(a), because they have not *already* received a visa. Thus, that phrase distinguishes this inadmissibility ground from other inadmissibility grounds that apply at the time of an application *for a visa*. *E.g.*, 8 U.S.C. § 1182(a)(4)(A).

Gov't Br. 16. But that statute actually says that any alien who has been "ordered removed" and "who again seeks admission **within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or** at any time in the case of an alien convicted of an aggravated felony) is inadmissible." 8 U.S.C. § 1182(a)(9)(A)(i). The bolded portion, which is the portion replaced by an ellipsis in the government's brief, makes clear that the "at any time" language is included to contrast with the "5 years" and "20 years" provisions earlier in the same sentence—not to distinguish between aliens seeking admission and aliens not seeking admission.

The government also points to three provisions using the phrase "in the case of an alien seeking admission." Gov't Br. 16-17 (citing 8 U.S.C. §§ 1182(d)(11), 1182(d)(12)(B), 1184(r)(2)). This is a misleading partial quotation. In all three provisions, the words immediately after "seeking admission" refer to a subcategory of aliens seeking admission. *E.g.*, 8 U.S.C. § 1182(d)(12)(B) ("in the case of an alien seeking admission or adjustment of status under section 1151(b)(2)(A) of this title or under section 1153(a) of this title").

Thus, in the government's examples, the "seeks admission" or similar language makes clear that the relevant inadmissibility ground applies only to a *subset* of aliens seeking admission. This accords with Petitioner's position: When that phrasing does not appear, the inadmissibility ground applies to *all* aliens seeking admission. These examples do not support the

government's theory that an alien is "inadmissible" when *not* seeking admission.

3. Structure of the INA.

The government then points to the "structure of the INA" as evidence that aliens can be "inadmissible" without seeking admission. The government's theory is that "inadmissible" is a status that has numerous consequences for aliens not seeking admission, of which application of the stop-time rule is only one. But the government comes up virtually empty.

The government first points out that aliens seeking to adjust status to permanent residency must be admissible. Gov't Br. 17-18. Likewise, aliens seeking to obtain "temporary protected status" must be admissible. Gov't Br. 18. These examples merely show that the INA sometimes treats an alien's request for a change in formal status as a kind of constructive admission, and requires the alien to be admissible to gain that formal status. They do not support the government's contention that Petitioner acquired a latent "status" of "inadmissible" in 1996, untethered from any request for actual or constructive admission.

The government also points out that an alien who was inadmissible *at the time of admission or adjustment of status* may later have the admission or status revoked. Gov't Br. 18-19. This only goes to show that "inadmissibility" is tied to the proceeding in which the alien seeks admission.

The government comes up with only two provisions anywhere in the INA where "inadmissible" has any significance for aliens not seeking admission or a new

status. Gov't Br. 18 (citing 8 U.S.C. §§ 1160(a)(3)(B)(ii), 1255a(b)(2)(B)). Neither provision is anything like the stop-time rule. Both pertain to narrow classes of temporary aliens: one to "special agricultural workers," and the other to "certain entrants before January 1, 1982." 8 U.S.C. § 1160(a)(3)(B)(ii); *id.* § 1255a(b)(2)(B). Both say that inadmissible aliens in those categories are ineligible to adjust status to permanent residency. Both then say, in their next breath, that if the alien commits an act that "makes the alien inadmissible," then the alien's "temporary resident status" may be terminated. In other words, if aliens falling within these narrow classes have committed an act that makes them incapable of adjusting status, they must also leave the country.

And that is it. These two obscure provisions—which say that certain narrow classes of aliens who imminently need to adjust status, and will be incapable of doing so, must leave—form the entire basis of the government's case that "inadmissible" is a "status" that affects aliens not seeking admission or adjustment of status. The government's assertion that "an alien's inadmissibility thus has consequences well beyond the specific context of admission itself" (Gov't Br. 19), is thus a gross exaggeration. For LPRs, or any other aliens not currently or imminently needing to adjust status, it has *no* consequences. It is unlikely that Congress would have created an immigration "status" for such aliens that manifests in the stop-time rule and nowhere else.

B. The two-part structure of the stop-time rule demonstrates that Petitioner is correct.

Rather than looking to far-flung provisions in the INA, the Court should focus its analysis on the stop-time rule's text. As the opening brief explained, Petitioner's position aligns with the stop-time rule's two-part structure. Under Petitioner's interpretation, the first part requires a particular type of *offense*; the second part requires a particular type of immigration *consequence*. Pet. Br. 26-27. By contrast, the government's effort to reconcile its interpretation with the two-part structure introduces surplusage; is inconsistent with the criteria for non-LPRs to obtain cancellation of removal; and ignores Congress's use of verb tense. Pet. Br. 27-34. The government does not adequately address these points.

Surplusage. Under the government's position, the stop-time rule would mean the same thing if it recited: "when the alien has committed an offense ~~referred to in section 1182(a)(2) of this title~~ that renders the alien inadmissible to the United States under section 1182(a)(2) of this title ~~or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title~~." Pet. Br. 30-34. The second crossed-out phrase is superfluous because anyone who is "removable" and potentially affected by the stop-time rule would *also* be "inadmissible" under the government's view—leaving the "removable" clause with no role to play. *Id.* And the first crossed-out phrase is superfluous because any crime that "renders the alien inadmissible … under section 1182(a)(2)" is necessarily also "referred to in section 1182(a)(2)." *Id.* Under Petitioner's position, by

contrast, there is no surplusage because an alien who is "removable under section 1227(a)(2) or 1227(a)(4)"—*i.e.*, deportable[4]—cannot *also* be inadmissible. Thus, any time an alien is charged with deportability, both crossed-out phrases do work: the first narrows the category of offenses that may trigger the stop-time rule, and the second specifies that the offense must cause the deportability finding. Pet. Br. 30-34.

The government responds with a convoluted theory for avoiding surplusage that contradicts both its own prior position and a precedential BIA decision. The government's theory is as follows: Section 1182(a)(2) includes certain *exceptions* stating that some petty or juvenile offenses are *not* grounds for inadmissibility. *See* 8 U.S.C. § 1182(a)(2)(A)(ii)(II). According to the government, these offenses are literally "referred to" in Section 1182(a)(2)—*i.e.*, in the "exceptions" clause. So, the theory goes, there is a class of offenses that *are* "referred to" in Section 1182, *do not* render the alien inadmissible, but *do* render the alien "removable"—thus eliminating the surplusage. Gov't Br. 34. The government acknowledges that this position contradicts the BIA's precedential decision in *Matter of Garcia*, 25 I. & N. Dec. 332 (B.I.A. 2010), as well as a brief approved

[4] As the opening brief explained (Pet. Br. 17 n.5), "removable" is an umbrella term that encompasses both "inadmissible" and "deportable." 8 U.S.C. § 1229a(e)(2). But the stop-time rule uses the phrase "removable from the United States *under section 1227(a)(2) or 1227(a)(4) of this title*." *Id.* § 1229b(d)(1) (emphasis added). Thus, for purposes of the stop-time rule, "removable" means deportable, because section 1227(a) defines grounds for deportability, not inadmissibility.

by the Solicitor General less than a year ago. Gov't Br. 35.

There are many problems with this newfound view. First, it reflects an improbable interpretation of the phrase "referred to in section 1182(a)(2)" in the stop-time rule. The natural interpretation of this phrase is that it encompasses the offenses that section 1182(a)(2) actually covers—*i.e.*, if an offense is sufficiently serious to be a ground for inadmissibility under section 1182(a)(2), then it is sufficiently serious to trigger the stop-time rule. The government's position would create the bizarre outcome that crimes expressly *excluded* from section 1182(a)(2)'s coverage can stop the continuous-residence clock, but that crimes merely *not listed* cannot.

Second, the government's view requires believing that *Garcia* is not just wrong but *unambiguously* wrong and hence not entitled to *Chevron* deference. That cannot be.

Third, the government's explanation for the "removable" clause is far less intuitive than Petitioner's. There is an obvious reason why Congress would have specified that the stop-time rule applies to aliens who are *either* inadmissible *or* deportable. An alien can be charged with *either* inadmissibility *or* deportability—not both—so Congress put both clauses in the stop-time rule to cover both possibilities. This is the same reason that Congress authorized cancellation of removal for any alien who is "inadmissible or deportable," 8 U.S.C. § 1229b(a)—because an alien can be found either inadmissible or deportable, and Congress wanted to specify that both categories are eligible for cancellation

of removal. That is also the same reason Congress provided that the immigration judge determines the "inadmissibility or deportability" of an alien, *id.* § 1229a(a)(1): because those are the two types of mutually exclusive adjudications that may occur. So, intuitively, Congress included both types of adjudications in the stop-time rule for *the same reason that Congress included both types of adjudications everywhere else.*

This explanation for the "removable" clause fits Petitioner's interpretation perfectly. Under Petitioner's interpretation, there is no surplusage because the "inadmissible" clause applies to aliens charged with inadmissibility, and the "removable" clause applies to aliens charged with deportability; Congress included both clauses to ensure that both categories were covered. This explanation for the "removable" clause is surely more plausible than the government's explanation, which even the Justice Department did not agree with until its brief in this case.

The government also attributes the stop-time rule's surplusage to Congress's not caring about surplusage. Gov't Br. 36. The Court should instead presume Congress meant what it said and adopt Petitioner's intuitive interpretation.

Good moral character. The government's position is also irreconcilable with the "good moral character" requirement.

One requirement for a non-LPR to obtain cancellation of removal is that the non-LPR show "good moral character" during the continuous-residency period. 8 U.S.C. § 1229b(b)(1)(B). A person lacks "good

moral character" if he is "a member of one or more of the classes of persons, *whether inadmissible or not*, described in paragraphs (2)(D), (6)(E), and (10)(A) of section 1182(a) of this title; or subparagraphs (A) and (B) of section 1182(a)(2) of this title and subparagraph (C) thereof of such section … if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period." *Id.* § 1101(f)(3) (emphasis added).

If Petitioner had been a non-LPR, this statute would have precluded cancellation of removal based on the *exact* facts that, the government claims, triggered the stop-time rule. According to the government, the stop-time rule applies because: (a) Petitioner committed an offense under section 1182(a)(2)(A) during the continuous-residence period, and (b) he was later convicted of that offense. Yet the good-moral-character provision is written in remarkably precise terms to cover those exact facts, even when the non-LPR is *not* charged with inadmissibility: it applies to non-LPRs "whether inadmissible or not."

Yet, for LPRs, Congress conspicuously excluded "good moral character" from the requirements to obtain cancellation of removal. 8 U.S.C. § 1229b(a). Instead, it subjected LPRs to the stop-time rule, which does *not* apply to aliens "whether inadmissible or not"; rather, it requires that the offense "renders the alien inadmissible." The Court should not nullify that drafting choice.

The government's effort to explain away the "whether inadmissible or not" language is similar to—and as implausible as—its effort to address surplusage.

According to the government, the "whether inadmissible or not" language is intended to convey that an alien may lack "good moral character" if he commits acts that are *expressly excluded* from section 1182. For instance, Congress provided that alien-smuggling is generally a ground for inadmissibility, but also provided an exception for certain aliens subject to a "[s]pecial rule in the case of family reunification." *Id.* § 1182(a)(6)(E)(ii). The government's theory is that because section 1182(a)(6)(E)(ii) excepts this class of aliens, the aliens are, literally, "described in" section 1182(a)(6)(E). And so, the government contends, Congress inserted the "whether inadmissible or not" language to ensure that this group of aliens is deemed to lack good moral character, even though they are not inadmissible. Gov't Br. 33.

Thus, the government's theory is premised on the view that Congress intended for the "good moral character" exclusion to apply to aliens *expressly excluded* from section 1182, but not to aliens merely *not mentioned* in section 1182. This is similar to the counterintuitive argument properly rejected in *Garcia*. The Court should reject it as well, and instead adopt Petitioner's more intuitive explanation: "Whether inadmissible or not" means "whether the alien is *found* inadmissible or not." By contrast, an alien is "render[ed] inadmissible" if the alien is *found* inadmissible.

Verb tense. The stop-time has an unusual mid-sentence change in verb tense: it applies to any alien who "*has committed*" an offense referred to in section 1182(a)(2) that "*renders*" an alien inadmissible. Petitioner's interpretation explains that change: the

offense is *committed* in the past, but *renders* the alien inadmissible in the present, *i.e.*, at the removal hearing. As the opening brief explained, the government cannot explain that change, because it contends that Petitioner was rendered inadmissible at the time of his conviction—in the past. Pet. Br. 30.

The government responds that the present-tense "renders" in the stop-time rule matches the present-tense "is" in section 1182(a)(2). Gov't Br. 34. This assertion does not move the ball. It presumes the conclusion that section 1182(a)(2) creates a "status"—the very issue the parties are litigating. And it does not explain the mid-sentence verb tense change.

Indeed, there is no intelligible sense in which Petitioner is *presently* inadmissible. At best, the government's arguments showed that he was *previously* "inadmissible"—because *in the past*, if he left and re-entered, he would have been found inadmissible. But that scenario never materialized. *In the present*—in the middle of a removal hearing where he was found deportable—his "status" is "deportable," not "inadmissible."

C. The purpose and history of the stop-time rule reinforce that Petitioner's position is correct.

Statutory purpose and history support Petitioner's interpretation.

Purpose. Petitioner's interpretation makes sense. Under Petitioner's interpretation, offenses that trigger *mandatory* removal are a subset of offenses that trigger *discretionary* removal. Thus, a broad category of offenses trigger removability. And if the alien

committed certain offenses from that broader category within a short time after admission, then the alien is not only removable, but ineligible for discretionary relief. Pet. Br. 25.[5] By contrast, under the government's position, crimes that Congress expressly *excluded* from the grounds for deportability, such as minor marijuana offenses, *see* 8 U.S.C. § 1227(a)(2)(B)(i), become serious enough to foreclose discretionary relief for deportable aliens.

The government responds that cancellation of removal depends on a "broad[]" range of "relevant considerations." Gov't Br. 37. But the government does not grapple with what makes its position so strange: the range of offenses triggering the stop-time rule is *sometimes* broader and *sometimes* narrower than the range of offenses triggering the removability determination. Take this case: According to the government, Congress made the judgment that Petitioner's firearm offense *does* make him removable, but *does not* stop the clock, yet that Petitioner's aggravated assault offense *does not* make him removable, but *does* stop the clock. Why would that be? The government points to other theoretical scenarios where similar anomalies may arise (Gov't Br. 37-38), but offers no policy rationale for why the stop-time rule should work that way.

Petitioner's interpretation also makes sense because it is simple to apply: to determine whether the stop-time

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[5] Contrary to the government's protestation (Gov't Br. 37), the stop-time rule is, indeed, a mandatory removal provision. If the clock stops during the continuous-residence period, removal is mandatory.

rule applies, the immigration judge merely examines the offense that triggers inadmissibility or deportability. Pet. Br. 25-26. This is much simpler than construing the statute to require restarting removal hearings from scratch. *Id.*

The government's arguments based on statutory purpose are unpersuasive. The government insists that Congress would not have intended eligibility for cancellation of removal to turn on whether an offense was the basis for an inadmissibility determination. Gov't Br. 21-22. It also complains that Petitioner's approach might introduce inefficiency by requiring the government to "bring new charges" against an alien to foreclose eligibility for cancellation of removal. Gov't Br. 28-29. Of course, here, the government was not even *capable* of charging Petitioner with inadmissibility. Moreover, it is hardly unexpected that the government would have to charge an alien with inadmissibility before the alien faces the consequences of inadmissibility. This is how the INA ordinarily works. Under section 1229a, an alien must be charged with inadmissibility in order to face the standard consequence of an inadmissibility adjudication: denial of entry. It makes perfect sense to hold that an alien must be charged with inadmissibility in order to face an additional consequence: application of the stop-time rule.

History. Petitioner's interpretation is consistent with *Matter of Ching*, 12 I. & N. Dec. 710 (B.I.A. 1968), which held that the phrase "is deportable" meant that the alien was *found* to be deportable. Pet. Br. 38-39. The government contends that *Ching* did not survive IIRIRA's changes to the cancellation of removal statute.

Gov't Br. 38-39. But this contradicts the BIA's view in *Jurado* that *Ching*'s longstanding view remains good law. *Supra*, at 4. Moreover, nothing in IIRIRA suggests any disagreement with *Ching*'s logic that an alien "is deportable" if he is adjudicated to be deportable.

The government asserts that because one of IIRIRA's general purposes was to create a unified "cancellation of removal" remedy, it follows that the stop-time rule must apply identically to aliens charged with inadmissibility and aliens erroneously admitted who are later charged with deportability. Gov't Br. 19-20. This does not follow. *Removal* hearings for those two classes of aliens will differ—for instance, non-admitted aliens bear the burden of showing admissibility, while the government bears the burden of showing deportability. 8 U.S.C. § 1229a(c)(2)-(3). It is hardly surprising that the stop-time rule will apply differently. This discrepancy is not remotely "similar" to the discrepancies that "plagued the earlier law," (Gov't Br. 20), where "by its terms, § 212(c) did not apply when an alien was being deported." *Judulang v. Holder*, 565 U.S. 42, 46 (2011).

II. Alternatively, If An Alien Is Capable Of Being Charged With Inadmissibility, Then The Offense "Renders The Alien Inadmissible."

If the Court agrees with the Eleventh Circuit that "inadmissible" refers to a status, it should hold that an alien occupies that status if he *could* be charged with inadmissibility. Under that view, Petitioner acquired the "status" of *deportable* (or "removable") in 1996, upon his firearm conviction, because he *could* have been charged with deportability starting in 1996. But he

never could have been charged with inadmissibility, so he was not "rendered" inadmissible.[6]

The textual arguments that established that Petitioner's primary interpretation is superior to the government's position, also establish that Petitioner's alternative interpretation is superior to the government's position. For instance, Petitioner's alternative interpretation makes more sense in context because the stop-time rule's "inadmissible" clause will only be triggered in a removal hearing where the alien is *charged* with inadmissibility, which is consistent with surrounding provisions. *Supra*, at 8-9. Petitioner's alternative interpretation avoids surplusage because it, too, treats inadmissibility and deportability as mutually exclusive categories, and thus ensures that the "removable" clause has effect whenever an alien is charged with deportability. *Supra*, at 14-17. Petitioner's alternative interpretation avoids the incongruous outcome of offenses triggering *mandatory* removal even when incapable of triggering *non-mandatory* removal. *Supra*, at 20-21. Thus, Petitioner's alternative interpretation—like his primary interpretation—eliminates the textual weaknesses of the government's position.

Further, Petitioner's alternative interpretation is more consistent with the concept of a "status." As Petitioner's opening brief explained (Pet. Br. 47-49), to

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[6] An amicus brief endorses this view and further argues that "continuous residence continues to accrue until a permanent resident is rendered inadmissible or removable." Amicus Br. of Momodoulamin Jobe, at 12 (capitalization omitted). Petitioner, however, does not press that argument in this Court. Pet. Br. 9 n.4.

the extent Petitioner occupied a "status" for purposes of federal immigration law, it was a privileged status conferred by his prior admissibility adjudication. The fact that the government bears the burden of proving deportability, for instance, stems from the fact that Petitioner was previously deemed admissible, and hence admitted. As such, it is more accurate to say that he is "admissible" (or "admitted"), given that he retains the benefit of the prior admissibility determination.

The government ignores Petitioner's arguments in favor of this alternative interpretation. Instead, it merely repeats its argument that "inadmissible" is a status. Gov't Br. 39-40. For the reasons given in Petitioner's brief that the government declines to address, an alien not seeking admission does not occupy the "status" of "inadmissible."

CONCLUSION

The judgment of the Eleventh Circuit should be reversed.

Respectfully submitted,

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