No. 10-1543

In the Supreme Court of the United States

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

Petitioner,

v.

DAMIEN ANTONIO SAWYERS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a parent's years of residence after lawful admission to the United States may be imputed to an unemancipated minor child who resided with that parent during the period for which he seeks imputation, for purposes of satisfying 8 U.S.C. § 1229b(a)(2)'s requirement that aliens seeking discretionary cancelation of removal have "resided in the United States continuously for 7 years after having been admitted in any status."

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RESPONDENT'S BRIEF IN OPPOSITION

Under the Immigration and Nationality Act (INA), certain aliens deemed removable from the United States may apply for discretionary cancellation of removal. As relevant here, a legal permanent resident is eligible for cancellation if, among other things, he or she has "resided in the United States continuously for 7 years after having been admitted in any status." 8 U.S.C. § 1229b(a)(2). The Ninth Circuit has concluded that, for determining satisfaction of this requirement, an alien may impute the legal status of a parent with whom the alien resided while an unemancipated minor. The government seeks certiorari, contending (1) that the Ninth Circuit has misinterpreted the INA, (2) that two circuits have reached a contrary result, and (3) that this issue is of extraordinary importance because the Ninth Circuit's approach "impedes the government's high-priority efforts to remove criminal aliens."

All three of these assertions are wrong. The government has not demonstrated that the question presented is important—there is no indication that it arises with much frequency and, in any event, however the issue is resolved the Attorney General will retain unreviewable discretion to deny cancellation of removal to *any* alien. The conflict in the circuits asserted by the government is overstated—there is uncertainty about the rule that applies in some circuits, and many considerations that bear on the issue presented here have not been widely addressed by the courts of appeals. And the decision below is correct—under the government's approach, aliens who are minors (including those who were eligible for automatic adjustment of status) may be categorically barred from seeking cancellation of removal simply

because a parent failed to complete an application for such an adjustment. The INA surely does not compel that perverse result.

STATEMENT

1. A lawful permanent resident adjudicated removable from the United States may petition the Attorney General for discretionary relief from removal. 8 U.S.C. § 1229b. An alien is *eligible* to apply for cancellation of removal if he or she: (1) "has been an alien lawfully admitted for permanent residence for not less than 5 years," (2) "has resided in the United States continuously for 7 years after having been admitted in any status," and (3) "has not been convicted of any aggravated felony." *Id.* § 1229b(a).

This case concerns the second requirement: that, to be eligible for cancellation of removal, an alien must have resided continuously in the United States for at least seven years in any lawful status. The time period of an alien's lawful presence ends either when the alien is served notice to appear for a removal proceeding or when the alien commits an offense that renders him or her inadmissible or removable. 8 U.S.C. § 1229b(d)(1).

Under the INA, certain children of lawful permanent residents and U.S. citizens may adjust their status to that of lawful permanent resident. See 8 U.S.C. §§ 1153(a)(2) & 1255. To do so, an immigrant must file an application with U.S. Citizenship and Immigration Services, using a Form I-485. See Form I-485, Application to Register Permanent Residence or Adjust Status, OMB No. 1615-0023.

2. In October 1995, at the age of fifteen, respondent was admitted to the United States as a lawful permanent resident. Pet. App. 10a.[1] Respondent's mother, however, became a lawful permanent resident in 1989, when respondent was nine years old. J.A. 8.[2] The date of respondent's physical arrival in the United States and the place of his residence as an unemancipated minor are not reflected in the record.

Six years and ten months after respondent was admitted as a lawful permanent resident, on August 9, 2002, he was convicted in Delaware state court of "maintaining a dwelling for keeping a controlled substance." Pet. App. 11a. The government subsequently commenced removal proceedings against him. Respondent conceded that his conviction rendered him subject to removal but sought cancellation of removal. *Ibid*. In particular, he contended that he satisfied the second prong of the Section 1229b(a) test for eligibility for cancellation because the period of his mother's lawful permanent residence in the United States could be imputed to him. The government, in turn, conceded that respondent satisfies the first prong of the cancellation-eligibility test (he had been admitted as a lawful permanent resident for longer than five years at the time of the offense) and third prong of the test (he has not been convicted of an

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[1] An alien may adjust his or her status to "lawful permanent resident" following physical admission to the United States. See, *e.g.*, *Martinez* v. *Mukasey*, 519 F.3d 532, 542 (5th Cir. 2008). It is unclear from the record how long respondent had been in the United States at the time he was admitted as a lawful permanent resident.

[2] "J.A." refers to the Joint Appendix in the Ninth Circuit.

"aggravated felony"). Pet. 5 n.1. But the government contends that respondent cannot satisfy the second prong because he is two months shy of having resided in the United States for seven years under an independent lawful status and his mother's period of lawful residence while he was an unemancipated minor may not be imputed to him. Therefore, the government concluded, he is not eligible for cancellation of removal. Pet. 7.

3. The Immigration Judge ("IJ") found that respondent's conviction rendered him removable and that he is ineligible for cancellation of removal because he failed the second prong of the Section 1229b(a) test. Pet. App. 13a. The IJ did not, however, expressly discuss whether respondent could impute the lawful status of his mother while he was an unemancipated minor. *Ibid.*

4. The Board of Immigration Appeals ("BIA") affirmed, specifically declining respondent's request for imputation. Pet. App. 7a. In so doing, the BIA rejected the Ninth Circuit's decision in *Cuevas-Gaspar* v. *Gonzales*, 430 F.3d 1013 (9th Cir. 2005), which had authorized imputation in similar circumstances. Pet. App. 7a. The BIA explained that it had disagreed with *Cuevas-Gaspar* in a subsequent published decision, *In re Escobar*, 24 I. & N. Dec. 231 (BIA 2007), and it followed that opinion in lieu of *Cuevas-Gaspar*. Pet. App. 7a.

5. The Ninth Circuit reversed. The court applied the rule of *Mercado-Zazueta* v. *Holder*, 580 F.3d 1102 (9th Cir. 2009), in which it had rejected the BIA's decision in *In re Escobar*. Pet. App. 2a. Instead, the court concluded that the BIA "must impute to [respondent] his mother's residency for purposes of can-

cellation of removal." *Ibid.* The court remanded so that the agency could "make findings in the first instance regarding the residency of [respondent's] mother and regarding whether [respondent] was a minor residing with her." *Ibid.* It did so "on an open record for any further determinations that the BIA deems necessary, including a determination of when imputation should start." *Ibid.*

The court of appeals subsequently denied the government's petition for rehearing en banc. No judge on the panel called for or recommended rehearing, and no judge on the full court of appeals requested a vote on the government's petition. Pet. App. 3a.

REASONS FOR DENYING THE PETITION

The government's arguments in favor of review by this Court are substantially overstated. The question presented is of limited importance, if for no other reason than that the holding below will not allow *any* alien otherwise subject to removal to remain in the United States without the Attorney General's discretionary approval. What is more, the question presented has been definitively resolved by only two courts of appeals. And the government's presentation on the merits, which makes up the bulk of its argument, is dubious. In these circumstances, the government simply has not presented a sufficient basis for the Court to grant certiorari at this time.

A. The Issue Presented Here Is Of Limited Importance.

To begin with, even if the decision below were incorrect, and even if there were disagreement in the courts of appeals on the question presented—in fact, the government's argument on these points is wrong,

as we will demonstrate—the government has failed to show that the question presented is a recurring one of substantial importance. In arguing to the contrary, the government maintains that "[t]he Ninth Circuit's imputation rule creates significant adverse consequences that underscore the need for this Court's review." Petition for a Writ of Certiorari at21-22, *Holder* v. *Martinez Gutierrez*, No. 10-1542 ("Gutierrez Pet."). But that conclusion is insupportable. In fact, not a single judge supported or called for a vote on the government's petition for rehearing en banc, even though the judges of the Ninth Circuit are not shy about taking cases en banc or dissenting from the denial of en banc rehearing when the panel went astray on an important question. They failed to do so in this case for good reason.

First, it is not evident that the issue here arises with great frequency. Although the government has presented the Court with unpublished data on the percentage of the Nation's cancellation-of-removal petitions that are considered in the Ninth Circuit (*Gutierrez* Pet. 22), it offers "no statistics * * * on how many cancellation-of-removal applications would not have been granted but for reliance on imputation." *Ibid*. In this context, that the Ninth Circuit's rule theoretically "expand[s] the class of removable aliens eligible for such relief" (*ibid*.) hardly establishes a pressing need for review.

Second, the government is wrong to contend that review is warranted here because "the Ninth Circuit's rules impede the execution of the INA's goal * * * of removing criminal aliens." *Gutierrez* Pet. 22. The sole issue here is *eligibility* for cancellation relief, not cancellation itself. Thus, "any practical effect on policing our Nation's borders * * * is a limited

one"; while respondent is eligible to apply for cancellation under the Ninth Circuit's rule, "[a]ny relief he may obtain depends upon the discretion of the Attorney General." *Carachuri-Rosendo* v. *Holder*, 130 S. Ct. 2577, 2589 (2010). See also *Padilla* v. *Kentucky*, 130 S. Ct. 1473, 1480 (2010) (describing the "equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses"); *Mercado-Zazueta*, 580 F.3d at 1115 (the Ninth Circuit's imputation rule "merely grant[s] access to the possibility of cancellation of removal, leaving the ultimate determination to the sound discretion of the Attorney General"). The Attorney General thus retains authority to deny cancellation when an alien's criminal history suggests that he or she presents a danger to the Nation. And the exercise of this discretion is not subject to judicial review. See 8 U.S.C. § 1252(a)(2)(B)(i). The suggestion that the rule applied below has any substantial effect on "removing criminal aliens" is thus greatly exaggerated; its only real effect is to *permit* the Attorney General to exercise his discretion in favor of an alien who merits relief, and who otherwise would be removed from the country no matter how compelling his or her case to stay.

Third, the government's speculation as to the possible future extension of the imputation rule does not provide a basis for review. In fact, as the government acknowledges, attempts by aliens to extend imputation to other statutory contexts have been uniformly "unsuccessful[]"—and, as the government's citations show, such attempts have been repeatedly turned aside by the Ninth Circuit itself. *Gutierrez* Pet. 23. See, *e.g.*, *Ramos Barrios* v. *Holder*, 581 F.3d 849, 862 (9th Cir. 2009) ("The meaning of 'physical

presence' is quite distinct from the requirements we have previously held to be imputable. Indeed, the difference in meaning is so great as to be dispositive."); *Saucedo-Arevlao* v. *Holder*, 636 F.3d 532, 533 (9th Cir. 2011) (per curiam) ("But we recently clarified that line of authority and limited our imputation rule to encompass only an intent, state of mind, or legal status.").[3] The government's unsubstantiated snowball-effect argument accordingly provides no reason for review of this issue now.

B. It Would Be Premature To Address The Conflict In The Circuits Asserted By The Government.

The government also maintains that the Court should grant review to resolve a split in the courts of appeals on the question presented here, asserting that the Ninth Circuit is in conflict with the Third and Fifth Circuits. But here, too, the government's submission is substantially overstated. There is uncertainty about the rule applied in at least one of the supposedly conflicting courts of appeals. Moreover, key aspects of the question presented have been inadequately discussed by the lower courts. A grant of review to resolve the conflict presented by the government accordingly would be premature.

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[3] The government also argues that "the Ninth Circuit's interpretation imposes an additional burden on the government insofar as it increases litigation before immigration courts and requires DHS to devote resources to litigating facts that would otherwise not be relevant to an alien's cancellation-of-removal case." *Gutierrez* Pet. 23. But without a showing of how often this issue arises, this is a very thin reed upon which to seek review; and that is especially so as aliens are likely to contest their removal in court, whether or not the Ninth Circuit's imputation rule stands.

1. We recognize that the decision below conflicts with the Fifth Circuit's skeletal decision in *Deus* v. *Holder*, 591 F.3d 807 (5th Cir. 2009)—which devoted less than one page of analysis to the issue. But the rule in the Third Circuit is less clear. To be sure, that court disagreed with elements of the Ninth Circuit's analysis of the imputation rule. See *Augustin* v. *Att'y Gen.*, 520 F.3d 264, 270-271 (3d Cir. 2008). But the Third Circuit also noted a significant distinction between the circumstances in *Augustin* and those in the Ninth Circuit's cases. In *Augustin*, the alien sought to impute to himself the continuous presence of a parent for a period when the alien subject to removal was not physically present in this county. This difference was material to the court's analysis: Because the "petitioner did not 'actually dwell' in the United States for seven continuous years before he committed the crime involving moral turptitude that cut off his period of continuous residence," the BIA's "refusal to impute to petitioner his father's years of residence is permissible because it is a straightforward application of the statute's requirements." *Id*. at 269-270 (alterations omitted).

In each of the Ninth Circuit cases to address the issue, in contrast, the minor alien actually was physically present in the United States during the entire period of time for which he had imputed lawful residence, *and* the minor alien actually resided with the parent. See *Mercado-Zazueta*, 580 F.3d at 1103-1104; *Cuevas-Gaspar*, 430 F.3d at 1016; *Lepe-Guitron* v. *INS*, 16 F.3d 1021, 1022-1023 (9th Cir. 1994). Here, the Ninth Circuit strongly suggested that this issue is relevant to its analysis. The record does not reveal whether either of those things is true of petitioner, and the court accordingly remanded the case for fac-

tual findings as to "the residency of Petitioner's mother" and "whether Petitioner was a minor residing with her." Pet. App. 2a.

The Fourth Circuit, in dicta, has drawn precisely this distinction. It found that *Cuevas-Gaspar* "is factually distinguishable" from a case where the minor aliens "did not personally reside with their parents in the United States during the pertinent period." *Cervantes* v. *Holder*, 597 F.3d 229, 237 (4th Cir. 2010).[4] And the Fifth Circuit, too, noted that *Augustin* "may have rested * * * on the facts presented" because in that case Augustin did not actually dwell in the United States for the relevant period and because his "parent had preceded him into the United States. The Third Circuit found that the goal of maintaining relationships between legal permanent resident parents and their minor children could not alone form the basis to find the BIA's unwillingness to read into the statute an exception to the requirements for cancellation of removal for minors whose parents precede them in immigrating to the United States." *Deus*, 591 F.3d at 811 (citing *Augustin*, 520 F.3d at 270). There is accordingly no square conflict between the Third and Ninth Circuits on the question presented here; it is not at all certain that the Third Circuit would reject the Ninth Circuit's rule on the distinct facts presented here.

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[4] The government relies on the Fourth Circuit's decision in support of its assertion of a conflict. *Gutierrez* Pet. 20. Although that court did express disagreement with aspects of the Ninth Circuit's analysis (see *Cervantes*, 597 F.3d at 236-237), it also noted the distinction described in text. And the Fourth Circuit's discussion of the issue is, in any event, dicta, as the government acknowledges.

At most, therefore, the Fifth Circuit in *Deus* has departed from the Ninth Circuit. But rehearing en banc was not sought in *Deus* and, as we have explained, the Fifth Circuit's analysis was undeveloped. Such a thin conflict in the circuits—one that could resolve itself without this Court's intervention—is a skimpy basis for review.

2. Moreover, review is premature because there are substantial practical reasons for the Court to await additional consideration of the question presented by the lower courts. Not only have the courts of appeals inadequately considered whether physical presence in the United States or actual residence with the parent is required for imputation, but the courts have also yet to address fully a separate question—whether post-emancipation conduct of the alien is relevant.

In Section 1182(c) cases, the Ninth Circuit has suggested that imputation would be available only in circumstances where, upon reaching majority, the alien gained proper admission. See *Lepe-Guitron*, 16 F.3d at 1026 n.12 ("if an alien child has joined his or her parents in the United States prior to reaching majority, but has not secured permanent residency by that time, there will necessarily be a 'gap' in that person's lawful domicile, rendering it no longer 'unrelinquished'"). As imputation rests on the view that a minor takes the residence and status of his or her parent, imputation may cease when the alien reaches majority. It therefore is possible that courts could conclude that an alien who has failed to adjust his or her own status in a timely manner upon reaching majority may be precluded from invoking the imputation doctrine. This Court accordingly would benefit from further percolation of the issue to allow the

courts of appeals to first address the full range of considerations that bear on the issue presented here.[5]

C. The Decision Below Is Correct.

Finally, the government devotes the bulk of its attention to arguing that the Ninth Circuit's decision is wrong on the merits. Even if the government were correct on that score, review still would not be warranted for the reasons addressed above. But the government's argument on the merits is, in any event, wrong on its own terms. In fact, the Ninth Circuit was correct to conclude that an unemancipated minor who resides with a parent in the United States may impute the parent's residence for purposes of 8 U.S.C. § 1229b(a)(2).

1. To begin with, the government is wrong to argue that the plain language of Section 1229b(a)(2) bars imputation. *Gutierrez* Pet. 9-11. The statute, on its face, neither directly permits nor bars imputation. Tellingly, the courts that the government contends disagree with the Ninth Circuit have *not* adopted the textual arguments that the government offers here. To the contrary, the Third Circuit declared that "[t]he INA * * * does not expressly address the question whether parents' years of residence may be imputed to their minor children * * *. The cancellation of removal provision neither provides for such impu-

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[5] In the companion case to this one, *Martinez Gutierrez*, it appears there was an approximately one year "gap" between the respondent's reaching the age of majority and his obtaining admitted status. *Gutierrez* Pet. 4. In contrast, respondent here was admitted while still a minor. Pet. 4. The courts below, however, have had no opportunity to examine whether these factual differences are significant.

tation nor disallows it. * * * In short, in *Chevron* terms, 'the statute is silent [* * *] with respect to the specific issue.'" *Augustin*, 520 F.3d at 269 (quoting *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)). Both the Third and the Fifth Circuits therefore based their holdings on *Chevron* deference rather than the statutory language. See *id.* at 267-271; *Deus*, 591 F.3d at 811.

Those courts were correct to reject the government's strained argument from the statutory text. The government asserts that the statute's use of the phrase "*the* alien" precludes imputation. *Gutierrez* Pet. 8-9 (emphasis added). But this argument simply assumes its conclusion—that a parent's residence may not be imputed to an alien child. If imputation of residence *is* permissible for a minor child, "*the* alien" necessarily will be deemed to have satisfied the seven-year residency requirement.

For the same reason, the government's focus on the phrase "after having been admitted" fails. *Gutierrez* Pet. 8. If imputation is a permissible construction of the statute, then the admission of a parent may be imputed to a minor. Nothing in the statute itself forecloses such an interpretation.

Finally, the government invokes the INA's definition of "residence" to contend that Section 1229b(a)(2)'s use of the term "resided" "denotes the alien's own residence, and not the residence of anyone else." *Gutierrez* Pet. 10-11. But that is simply beside the point because aliens who may benefit from the imputation rule, like respondent here, *did* in fact "reside" in the United States, and did so for seven

years after *a parent* was admitted.[6] The requirement that an alien "reside" in the United States says nothing about whether an alien actually *residing* in this country may or may not impute the *lawful status* of a parent.

2. Although the language of the statute is not definitive, "[t]he construction of statutory language often turns on context" (*FCC* v. *AT & T Inc.*, 131 S. Ct. 1177, 1182 (2011))—and the context of the statute here demonstrates that the imputation rule is correct. See *Deal* v. *United States*, 508 U.S. 129, 132 (1993). The context of the statute includes the "contemporary legal context" at the time of enactment. *Cottage Sav. Ass'n* v. *Comm'r*, 499 U.S. 554, 562 (1991) (quotation omitted).

Section 1229b was enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 304(a)(3), 110 Stat. 3009-594 ("IIRIRA"). Prior to IIRIRA, the Attorney General had the discretion under 8 U.S.C. § 1182(c) to cancel removal of an alien who possessed "a lawful unrelinquished domicile of seven consecutive years" in the United States. *INS* v. *St. Cyr*, 533 U.S. 289, 294-295 (quoting 8 U.S.C. § 1182(c)). IIRIRA repealed Section 1182(c) and replaced it with Section 1229b.[7]

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[6] As we have noted, the record does not establish when respondent arrived in the United States or how long he resided with his mother in this country. For present purposes, it therefore must be assumed that he resided with a parent for the requisite period; if the Ninth Circuit's decision is not disturbed, that factual question will be resolved on remand to the BIA.

[7] This change appears to have had two purposes. *First*, unlike Section 1182(c), Section 1229b bars relief for any alien who has

Under the now-repealed Section 1182(c), the courts of appeals that had addressed the question uniformly agreed that an unemancipated minor was permitted to impute the domicile status of a parent for the purpose of satisfying the waiver requirements. See *Rosario* v. *INS*, 962 F.2d 220, 224 (2d Cir. 1992) ("[T]he ameliorative purpose of § 212(c) is better served by permitting a minor to establish domicile through a parent with whom he had a significant

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been convicted of an aggravated felony, whereas Section 1182(c), as amended in 1990, barred relief only for those aliens who had served a term of imprisonment of at least five years. See *St. Cyr*, 533 U.S. at 297.

Second, IIRIRA resolved a disagreement among the circuits as to whether the requirement of "a lawful unrelinquished domicile of seven consecutive years" referred to lawful permanent resident status or to *any* lawful status, including non-permanent residence. The BIA, the Fourth Circuit, and the Tenth Circuit had held that only lawful permanent resident status counted. See *In re S.*, 5 I. & N. Dec. 116, 117-118 (BIA 1953), *Chiravacharadhikul* v. *INS*, 645 F.2d 248, 249 (4th Cir. 1981); *Michelson* v. *INS*, 897 F.2d 465, 469 (10th Cir. 1990). The Ninth Circuit initially agreed (*Castillo-Felix* v. *INS* 601 F.2d 459, 467 (9th Cir. 1979)), but then reversed course, finding that non-permanent residents could also qualify (*Ortega de Robles* v. *INS*, 58 F.3d 1355, 1360-1361 (9th Cir. 1995)). The Second, Fifth, and Seventh Circuits likewise held that non-permanent residents were eligible for a Section 1182(c) waiver. *Lok* v. *INS*, 548 F.2d 37, 40 (2d Cir. 1977); *Castellon-Contreras* v. *INS*, 45 F.3d 149, 152-154 (7th Cir. 1995); *White* v. *INS*, 75 F.3d 213, 216 (5th Cir. 1996). Section 1229b(a) resolved this disagreement by requiring seven years of residency under any legal status and five years of lawful permanent residence. See *Cuevas-Gaspar*, 430 F.3d at 1027. The Department of Justice explained that a substantially similar earlier amendment was intended to "clarify an area of the law regarding the cutoff periods for these benefits that have given rise to significant litigation and different rules being applied in different judicial circuits." 141 Cong. Rec. S6082-04, S6104 (1995).

relationship during the time in question."); *Morel* v. *INS*, 90 F.3d 833, 841 (3d Cir. 1996) ("domicile of a parent may be imputed to his or her child for purposes of determining whether the child has met the seven year domicile requirement of section 212(c)"); *Lepe-Guitron*, 16 F.3d at 1026 ("parents' 'lawful unrelinquished domicile' should be imputed to their minor children" under Section 1182(c)).

Accordingly, at the time that Section 1229b replaced the former provision, imputation of a parent's status to an unemancipated minor for purposes of relief from removal eligibility was settled. Therefore, "because Congress has left undisturbed through subsequent reenactments" of this provision "the principles" that had been "established" in prior cases, it must be "presume[d] that Congress intended to codify these principles." *Cottage Sav. Ass'n*, 499 U.S. at 562. See also *Barnhart* v. *Walton*, 535 U.S. 212, 220 (2002); 2B Norman J. Singer & J.D. Shambie Sinter, *Sutherland Statutory Construction* § 49:9 (7th ed. 2007) ("Where reenactment of a statute includes a contemporaneous and practical interpretation, the practical interpretation is accorded greater weight than it ordinarily receives, as it is regarded as presumptively the correct interpretation of the law."). This presumption should take on special force here as Congress *did* expressly amend other elements of the statute to displace the rule stated by certain judicial decisions. See, *supra*, 14 n.7.

Of course, the new statute does use the term "resided" rather than "domiciled," and the government points to this distinction in contending that Congress could not have meant to validate the imputation rule. *Gutierrez* Pet. 15-17. This is so, the government argues, because domicile contains an intent compo-

nent but residence does not, which makes imputation inappropriate with respect to the latter. *Id.* at 16-17. This argument is a new one for the government. As the Third Circuit noted in *Augustin,* one of the decisions upon which the government here relies, "[t]he government has not contended before us that Congress in IIRIRA eliminated the word 'domicile' in favor of 'residence' in order to eliminate imputation, and IIRIRA's legislative history does not provide support for such an inference. Accordingly, we decline to speculate along those lines." 520 F.3d at 269 n.5.

The government's past squeamishness in making this argument is understandable: It misapprehends the imputation that occurred under Section 1182(c). Under that provision, the "seven years of lawful unrelinquished domicile" necessarily required a lawful *admission* to this country, for until there was such an admission there could be no "*lawful* * * * domicile." See *Cuevas-Gaspar*, 430 F.3d at 1026. Thus, the courts necessarily were imputing the parent's admission and resulting status—not simply the parent's intent—to an alien seeking cancellation of removal. In re-enacting the cancellation-of-removal provision without disallowing such imputation, Congress therefore is best understood to have authorized the imputation rule.

3. There is no basis for deferring to the views of the BIA with respect to imputation because the Board has taken wildly inconsistent positions on this issue, which negates the credibility of its pronouncements about the provision. There can be little doubt that "the consistency of an agency's position is a factor in assessing the weight that position is due." *Good Samaritan Hosp.* v. *Shalala*, 508 U.S. 402, 417

(1993). See also *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 480 (1992) ("[I]nconsistency * * * in itself weakens any argument that the Board's interpretation is entitled to some weight."). While *any* inconsistency "considerably" undercuts the deference owed to an agency's "interpretation" of a statute (*INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987)), "[*u*]*nexplained* inconsistency" is an especially strong indicator of "arbitrary and capricious" reasoning (*Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (emphasis added)) that precludes deference. See *United States* v. *Mead Corp.*, 533 U.S. 218, 227 (2001). And an agency's consistency in application of the law applies not just to singular statutory provisions, but to parallel areas of the statutes it administers. See *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-133 (2000) (Congress is presumed to have intended to create coherent regulatory schemes.).

That principle governs here because, in other contexts, the BIA has recognized that imputation of parents' intent, state of mind, or legal status to their minor children *is* appropriate because children lack the capacity to navigate the immigration process or apply for certain forms of relief. For example, in *Senica* v. *INS*, 16 F.3d 1013 (9th Cir. 1994), the court affirmed the BIA's conclusion that children could not receive discretionary relief from deportation under the exception for "immigrants * * * unaware of their ineligibility for admission * * * who could not have discovered the ineligibility by exercise of reasonable diligence." *Id.* at 1014. Although the plain words of the statute seemed to apply to the children at issue, the BIA determined that their mother's lack of diligence in discovering their ineligibility should be im-

puted to them. In so holding, the Board recognized that children are, practically speaking, incapable of navigating the immigration system without the aid of their parents. See also *In re Winkens*, 15 I. & N. Dec. 451-452 (BIA 1975) (imputing a parent's abandonment of lawful permanent resident status to children); *In re Huang*, 19 I. & N. Dec. 749, 755 (BIA 1988) (same); *Vang* v. *INS*, 146 F.3d 1114, 1117 (9th Cir. 1998) (imputing parents' "firm resettlement" to children).

The government attempts to distinguish these rulings by noting that they all concern imputation of a state of mind, whereas "the criteria at issue here—'residence,' 'admission,' and 'status'—depend solely on an individual's objective conduct or status, coupled with some official action by the government, without regard to mental state—a fact with which the Ninth Circuit has failed to grapple." *Gutierrez* Pet. 19. But the Ninth Circuit declined to address this fact for the simple reason that the BIA's decisions never suggested that imputation was tied solely to a state of mind. Rather, the Board recognized that children lack the *capacity* to navigate the immigration process by themselves.

For example, in *Senica*, the Board could have ruled merely that the mother's actual knowledge of her ineligibility for admission should be imputed to her children (it was uncontested that she had such knowledge). But instead of basing its ruling on imputed knowledge, the Board imputed capacity, a status that, like residence, is objective: "'reasonable diligence' under § 212(k) should be determined by considering what the parent could have ascertained by the exercise of reasonable diligence, rather than considering what the minor children could have discov-

ered." *Senica*, 16 F.3d at 1015. Similarly, in *In re Winkens*, the alien had "testified that he had not wanted to leave but that [* * *] there was no way [he] could stay by [him]self." 15 I. & N. Dec. at 451. Yet, despite the alien's intent, the Board concluded that the "abandonment of [his parents'] lawful permanent resident status is imputed to the respondent, who was subject to their custody and control." *Id.* at 452. Thus, the BIA has repeatedly held that parents' status should be imputed to their minor children where that status depends on capacities that the children do not possess.

Moreover, the distinction drawn by the government is implausible and artificial: "[m]ental states" can be demonstrated only through incidents of "objective conduct." See, *e.g.*, *In re Huang*, 19 I. & N. Dec. at 755 ("While the applicant's professed intent was to return to the United States, her actions have not supported that intent."). So while it is true that respondent did not "objectively" follow the procedure necessary to adjust his status at the same time as did his mother, one could just as easily conclude that, as a child, he lacked the legal or mental capacity to do so.

Nor is "some official action by the government" significant to this case, because the government action at issue—adjustment of residence status—is often automatic for children of permanent residents. 8 U.S.C. § 1153(a)(2). The single variable that is most likely to determine whether the child of a lawful permanent resident is admitted is not the action of an immigration officer, but rather a parent's action in applying (or not applying) for adjustment of the child's status. The Board was thus incorrect in making the blanket statement that "admission does not

depend on either the intent or the capacity of the minor, but rather on inspection and authorization by an immigration officer." *Gutierrez* Pet. App. 14a. As a practical matter it is precisely the minor's lack of intent and capacity that is most likely to prevent the alien from being lawfully admitted. *Cf. Deus*, 591 F.3d at 808 ("Her mother was granted permanent resident status * * * when Deus was one year old.").[8]

4. To the extent that there is ambiguity here, the presumption that the INA is designed to keep families intact, together with the canon that ambiguities in the INA must be construed in favor of the alien, both compel the result reached below.

In several contexts, as the Third Circuit recognized, the INA is designed to favor the unification of families. See *Augustin*, 520 F.2d at 270; see also *Cuevas-Gaspar*, 430 F.3d at 1023. And as the Ninth Circuit has explained, families have special preferences for visas (8 U.S.C. §§ 1152 & 1153), and waivers are available for certain aliens who assist their children in entering the United States unlawfully (*id.* § 1182(a)(6)(E)(ii)). This observation provides substantial reason to believe that the INA permits imputation of the status of a parent to a child. The rule that the government urges, in contrast, would disrupt families simply because a parent failed to timely complete an unemancipated minor's application for adjustment of status.

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[8] There has never been a suggestion, either by respondent or the Ninth Circuit, that imputation would be proper even if the child were not a qualified immigrant. These cases address only the situation in which the child could have (and presumably would have) been admitted but for a failure to satisfy a simple administrative procedure.

Similarly, "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien" further compels the result reached below. See *Cardoza-Fonseca*, 480 U.S. at 449. In the face of an ambiguous statute, it is error for the BIA to choose a rule adverse to an alien seeking to avoid deportation.

Ultimately, "it would be unreasonable to hold an adolescent responsible for failing to arrange permanent resettlement." *Cuevas-Gaspar*, 430 F.3d at 1024 (quotation omitted). Congress did not intend to penalize unemancipated minors for a parent's failure to apply for appropriate immigration relief. Yet that would be the effect of the government's rule.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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