No. 10-1543

In the Supreme Court of the United States

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
Petitioner,

v.

DAMIEN ANTONIO SAWYERS,
Respondent.

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

BRIEF FOR RESPONDENT

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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 for purposes of satisfying the requirement of 8 U.S.C. § 1229b(a)(2) that aliens seeking discretionary cancellation of removal have "resided in the United States continuously for 7 years after having been admitted in any status."

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BRIEF FOR RESPONDENT

STATEMENT

To be eligible for relief from removal under 8 U.S.C. § 1229b(a)(2), respondent Damien Antonio Sawyers must establish that he has "resided in the United States continuously" for seven years. Respondent's mother, now a U.S. citizen, did reside continuously in this country for more than seven years while respondent was a minor child, and he lived with her for at least a portion of that period. The question here is whether the years of continuous U.S. residence accumulated by respondent's mother may be imputed to him for purposes of satisfying the "resided continuously" requirement of Section 1229b(a)(2).

In its answer to this question, the government's brief reveals significant areas of common ground between the parties. The government evidently recognizes that the courts uniformly had permitted parent-to-child imputation under Section 1229b(a)(2)'s predecessor provision, Section 212(c) of the Immigration and Nationality Act of 1952 (INA), Pub. L. 82-414, 66 Stat. 163. See U.S. Br. 27. It acknowledges that Congress changed the language of this relief-from-removal provision when it enacted Section 1229b(a)(2) for reasons that had nothing to do with imputation, and does not suggest any reason why Congress would have *wanted* to preclude imputation when it made this change. It also recognizes that precluding imputation leads to an outcome that is in some tension with Congress's goal of encouraging family unification. See U.S. Br. 25-26, 29-30. But the government nevertheless insists that when Congress replaced the "unrelinquished domicile" requirement

of Section 212(c) with Section 1229b(a)(2), it left "no textual hook whatever for imputation." U.S. Br. 28.

That conclusion, however, is wrong. Courts permitted imputation of "unrelinquished domicile" from parent to child under Section 212(c) in part because domicile has an intent component and it is appropriate to impute a parent's intent to a minor child. But in this respect, the language of Section 1229b(a)(2) is identical to that of Section 212(c); in the immigration context, the term "resided continuously" (or "continuously resided") *also* always has been understood to look to intent. Moreover, courts applying Section 212(c) necessarily imputed residence from parent to child because residence is an essential element of domicile. Congress accordingly would have known that the language of Section 1229b(a)(2) did not depart from that of its predecessor in any material way—and that this language continued to permit imputation.

A. Statutory Background

1. The current cancellation-of-removal provision codified at 8 U.S.C. § 1229b is rooted in a long history of earlier immigration provisions. Section 3 of the Immigration Act of 1917 excluded from admission to the United States several classes of aliens, such as those that had committed crimes of moral turpitude. Immigration Act of 1917, Pub. L. 64-301, 39 Stat. 875-876. The Seventh Proviso in Section 3 of the Act contained an early version of a waiver of excludability. *Id.* at 878. In 1952, when Congress enacted the current INA, it included a waiver of excludability in

the former Section 212(c) of the Act. 8 U.S.C. § 1182(c) (1994).[1] Prior to 1996, this section provided:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(c)).

8 U.S.C. § 1182(c) (1994); *Judulang* v. *Holder*, No. 10-694, slip op. 2-3 (U.S. Dec. 12, 2011) (describing Section 212(c)).[2] In the years prior to 1996, the agency awarded relief under former Section 212(c) in approximately half of all cases in which it was sought. See *INS* v. *St. Cyr*, 533 U.S. 289, 296 n.5 (2001).

Prior to the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, div. C, 110 Stat. 3009-546, all of the courts of appeals that had addressed the issue uniformly agreed that a parent's lawful unrelinquished domicile could be imputed to an unemancipated minor for the purpose of satisfying the eligibil-

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[1] This provision is generally referred to as Section 212(c), its place in the INA. In this brief, we refer to the current version of the cancellation-of-removal provision by its place in Title 8 of the United States Code.

[2] The Board of Immigration Appeals (BIA) and courts interpreted this provision to apply to aliens in deportation as well as exclusion proceedings, so long as the inadmissible or deportable alien was a lawful permanent resident and had accrued seven years of lawful unrelinquished domicile in the United States. See *Judulang*, slip op. 2-4.

ity requirements for a Section 212(c) waiver. *Morel* v. *INS,* 90 F.3d 833, 840-841 (3d Cir. 1996), *vacated on other grounds*, 144 F.3d 248 (3d Cir. 1998); *Lepe-Guitron* v. *INS*, 16 F.3d 1021, 1022 (9th Cir. 1994); *Rosario* v. *INS*, 962 F.2d 220, 224 (2d Cir. 1992). This settled judicial construction of former Section 212(c) allowing imputation was based in part on the courts' view that children lacked the legal capacity to form their own domicile. See, *e.g.*, *Rosario*, 962 F.2d at 224 (noting that under the common law understanding of domicile, "[a] minor's domicile is the same as that of its parents, since most children are presumed not legally capable of forming the requisite intent to establish their own domicile") (citing *Miss. Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 48 (1989)).

The courts recognized "Section 212(c) was enacted to provide relief from deportation for those who have lawfully formed strong ties to the United States," and "[b]ecause children naturally form the strongest of ties to the place where their parents are domiciled and they with them, section 212(c)'s core policy concerns would be directly frustrated by the government's proposal to ignore the parent's domicile in determining that of the child." *Lepe-Guitron*, 16 F.3d at 1025; see also *Morel*, 90 F.3d at 841 (same); *Rosario*, 962 F.2d at 224 (explaining that "[t]his connection with the parent—and, by extension, with this country—evinces the type of bond that the statute was designed to protect from unwarranted severance").

2. In 1996, Congress enacted IIRIRA, replacing former Section 212(c) with a new "cancellation of removal" provision codified at 8 U.S.C. § 1229b(a). See 110 Stat. 3009-597; *Judulang*, slip op. 4. This provi-

sion sets out the eligibility criteria for cancellation of removal for specified aliens as follows:

> (a) Cancellation of removal for certain permanent residents
>
> The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien–
>
> (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.

8 U.S.C. § 1229b(a).

It appears that Congress replaced Section 212(c) with Section 1229b(a) 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).[3] In particular, the courts of appeals at the time were divided on when an alien began accruing the years of domicile

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[3] This explanation for the provision was offered by the Justice Department in connection with a predecessor bill to IIRIRA, the Immigration Enforcement Improvements Act, S. 754, 104th Cong. (1995). See 141 Cong. Rec. S6082-04, S6092 (May 3, 1995). The statement in text is taken from the Department's section-by-section commentary on the unenacted bill, which contained a version of the cancellation of removal provision virtually identical to the provision codified at 8 U.S.C. § 1229b(a).

required to qualify for relief. Three circuits had held that an alien could begin accruing years of domicile *prior* to acquiring LPR status;[4] the Board of Immigration Appeals (BIA) and two other circuits, in contrast, had concluded that an alien began accruing years of domicile only *after* the alien acquired lawful permanent resident (LPR) status.[5]

Congress resolved this disagreement through the enactment of Section 1229b(a), requiring five years as a lawful permanent resident and seven years in any status after lawful admission as a prerequisite for relief; the latter provision allows aliens to begin accruing years of residence after entering the United States on a non-permanent visa, such as a student visa. The legislative history of IIRIRA does not contain any indication that Congress considered the then-settled imputation rule during the passage of the bill.

At the time that Congress enacted IIRIRA, some of the terms used in Section 1229b already were defined in the INA. Thus, the INA defines the phrase "lawfully admitted for permanent residence" as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigrant laws,

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[4] See *White* v. *INS*, 75 F.3d 213, 216 (5th Cir. 1996); *Castellon-Contreras* v. *INS*, 45 F.3d 149, 152-154 (7th Cir. 1995); *Lok* v. *INS*, 548 F.2d 37, 40 (2d Cir. 1977).

[5] See *Michelson* v. *INS*, 897 F.2d 465, 469 (10th Cir. 1990); *Chiravacharadhikul* v. *INS*, 645 F.2d 248, 249 (4th Cir. 1981); *In re S.*, 5 I. & N. Dec. 116, 117-118 (B.I.A. 1953). The Ninth Circuit initially agreed with the BIA and the Fourth and Tenth Circuits (see *Castillo-Felix* v. *INS*, 601 F.2d 459, 467 (9th Cir. 1979)), but later changed its position. See *Ortega de Robles* v. *INS*, 58 F.3d 1355, 1360-1361 (9th Cir. 1995).

such status not having changed." 8 U.S.C. § 1101-(a)(20). "Residence" is defined in the INA as being the alien's "place of general abode; the place of general abode means his principal, actual dwelling place in fact, without regard to intent." 8 U.S.C. § 1101-(a)(33). And the INA defines the word "admitted" as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A). An alien may be admitted into the United States by entering at a port of entry or by applying for adjustment of status under the INA while already in the country. See *In re Alyazji*, 25 I. & N. Dec. 397, 399 (B.I.A. 2011) (noting that "the Board has often held that adjustment of status is an 'admission'").

B. Proceedings Below

In October 1995, at the age of fifteen, respondent became a lawful permanent resident. Pet. App. 10a. His mother, however, had become a lawful permanent resident in 1989, when respondent was nine years old. Resp. Opening Br. 3 & n.2, *In re Damien Antonio Sawyers*, A44-852-478 (B.I.A. 2007), *available at* Admin. Rec. 8. The government states that the record does not indicate whether Sawyers had been present in the United States prior to his admission as an LPR in 1995. U.S. Br. 9.

On August 9, 2002, respondent was convicted in Delaware state court of "maintaining a dwelling for keeping controlled substances." J.A. 30-44; Pet. App. 11a. The government subsequently began removal proceedings against him by filing a Notice to Appear charging (as amended) that he is subject to removal under 8 U.S.C. § 1227(a)(2)(B)(i) as an alien convicted of a controlled-substance offense. Pet. App. 10a-11a. Respondent denied removability and, in the

alternative, sought cancellation of removal. J.A. 16-29, 49-55; Pet. App. 11a-13a. 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.[6]

In September 2007, after a hearing, the Immigration Judge (IJ) found respondent removable and further found that he was ineligible for cancellation of removal because his conviction in August 2002, when he had been a lawful permanent resident for just under seven years, cut off his period of residence for purposes of becoming eligible for relief from removal under Section 1229b(a)(2). Pet. App. 9a-14a. The IJ did not, however, expressly discuss whether respondent could impute his mother's period of lawful residence for the purpose of fulfilling Section 1229b(a)(2)'s seven-year continuous-residence requirement.

The BIA affirmed, specifically declining respondent's request for imputation. Pet. App. 7a. The BIA acknowledged the Ninth Circuit's decision in *Cuevas-Gaspar* v. *Gonzalez*, 430 F.3d 1013 (9th Cir. 2005), which had authorized imputation of a parent's period of continuous residence after lawful admission for the purpose of satisfying Section 1229b(a)(2)'s seven-year continuous-residence requirement. Pet. App. 7a.

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[6] At the time of his hearing, respondent had been an "alien lawfully admitted for permanent residence" for more than five years and therefore satisfied the first prong of the Section 1229b(a) test for eligibility. 8 U.S.C. § 1229b(a)(1). Additionally, the government concedes that respondent satisfies the third prong of the eligibility test. 8 U.S.C. § 1229b(a)(3) (the alien must not have been "convicted of any aggravated felony").

The BIA explained, however, that it had disagreed with the Ninth Circuit in a subsequent published decision (*In re Escobar*, 24 I. & N. Dec. 231 (B.I.A. 2007)), and followed that holding instead of the Ninth Circuit's ruling in *Cuevas-Gaspar*. Pet. App. 7a.

The Ninth Circuit reversed. Pet. App. 1a-2a. 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. The court concluded that, in light of *Mercado-Zazueta*, the BIA "must impute to [respondent] his mother's residency for purposes of cancellation of removal." Pet. App. 2a. The court remanded "on an open record for any further determinations that the BIA deems necessary," including findings "regarding the residency of [respondent's] mother and regarding whether [respondent] was a minor residing with her." Pet. App. 2a. The Ninth Circuit subsequently denied the government's petition for rehearing en banc without dissent. Pet. App. 3a.

INTRODUCTION AND SUMMARY OF ARGUMENT

The government's brief is striking in its almost complete failure to offer an affirmative case for its position. It concedes that the imputation rule was settled prior to the enactment of Section 1229b(a)(2). U.S. Br. 27 (noting "the preexisting interpretation permitting imputation"). It does not suggest that Congress actually sought to abandon the imputation rule when it enacted the provision, or, indeed, thought about imputation at all. U.S. Br. 26, 27. It does not offer any reason of policy why Congress *would* have wanted to abandon the imputation rule, or to change the relief-from-removal provision in a

way that would advantage adults while harming children. And it appears to agree that immigration policy generally favors rules that encourage family unification. U.S. Br. 29 (noting "[t]he general preference for family unity"). Almost the entirety of its brief therefore is devoted to arguing (unsuccessfully, as we will explain) why these considerations do not compel recognition of an imputation requirement. Even the government's appeal to agency deference is defensive, arguing not why the agency is right or reasonable, but why its position is not inconsistent with its past pronouncements or with the federal immigration policy favoring family unification.

Against this background, the government really offers only two defenses of the BIA's approach. The first is that Section 1229b(a)(2)'s reference to "the alien" necessarily precludes imputation; but that reading of the statute is obviously wrong, having been rejected even by those courts that ultimately deferred to the agency on the imputation question. The second is that Congress's substitution of the term "resided continuously" for "domicile" in Section 1229b(a)(2) eliminated consideration of intent from the statutory test and thus (perhaps inadvertently) precluded imputation. But that, too, is incorrect: The term "resided continuously" has always been understood to require an inquiry into intent, and the BIA has itself long imputed residence in a range of contexts.

Congress accordingly would have understood the language it chose to provide for imputation; it would have had no reason to eliminate imputation, even as it liberalized the relief-from-removal rule in other respects; and it would have seen imputation as wholly consistent with broader immigration policy. By focus-

ing only on the statutory definition of "residence," while ignoring the well-established meaning of "resided continuously," the government disregards these compelling considerations.

A. Relying on the statute's use of a "definite article" in referring to "*the* alien," the government contends that the plain language of Section 1229b(a)(2) precludes imputation. But the courts of appeals have uniformly rejected this argument, for good reason: It assumes its conclusion. The question is what years of continuous residence are attributable to "the alien" seeking relief. If more than seven years that the applicant's parent spent residing in the United States are imputable to the applicant, "the alien" seeking relief has, as a legal matter "resided in the United States continuously" for the relevant period. Section 1229b(a)(2) does not differ in this respect from other provisions of the immigration law in which the BIA has recognized imputation as permissible or, for that matter, from Section 212(c) itself.

B. Congress plainly did not intend to displace the imputation rule. That rule had been embraced by every court to consider it prior to the enactment of IIRIRA. The government agrees that Congress did not change the language of Section 212(c) *for the purpose* of displacing the rule, and does not suggest that Congress had expressed dissatisfaction with imputation in any respect. And the government offers no reason why Congress would have wanted to bar imputation. In fact, there is every reason to believe Congress had no such intent: Elimination of imputation would be inconsistent with Congress's use of language that liberalized the rules governing the availability of relief from removal in significant respects; would run counter to Congress's broader im-

migration goal of favoring family unity; and would suggest, perversely, that Congress intended to favor adults while disadvantaging children.

C. The government contends that the change in language from "unrelinquished domicile" to "resided continuously" necessarily precludes imputation because (1) courts impute intent from parent to child and (2) domicile, but not residence, "turns on intent." U.S. Br. 28. The government is wrong, in two respects.

For one, "resided continuously" is a term of art in immigration law that has always required consideration of intent. Long before the enactment of IIRIRA, the BIA had taken the position that determination of "continuous residence" required looking to whether the applicant had an "intent to abandon residence in the United States." *In re A.*, 4 I. & N. Dec. 723, 725 (B.I.A. 1952). And in the context of another provision of the INA, the BIA had said that a child's "*residence* is imputed [from] his parents while a minor" (*In re Ng*, 12 I. & N. Dec. 411, 412 (B.I.A. 1967) (emphasis added))—notwithstanding the presence in the INA of 8 U.S.C. §1101(a)(33), which defines "residence" (but not "*continuous* residence") without regard to intent.

That is unsurprising; the element of intent comes into play when determining whether the residence was *continuous*. In other words, even if "residence" or "residing" does not have a mental-state component, "continuously" does. This Court likewise equated unrelinquished domicile with continuous residence. Congress is presumed to have been aware of this background when it drafted Section 1229b(a)(2), and thus would have thought the lan-

guage of that provision to be wholly consistent with imputation.

In addition, residence, even regarded as a "principal, actual dwelling place in fact," has consistently been imputed from parent to child as an element of the imputation of domicile. Residence must be established for domicile to be present; a person domiciled in a particular place *must* also be resident there. As a consequence, the pre-IIRIRA courts that imputed domicile under Section 212(c) necessarily were imputing not only the parent's intent to remain in the United States permanently, but also the parent's residence in the United States. For this reason as well, Congress would have expected its choice of the term "resided continuously" to continue to permit imputation under Section 1229b(a)(2).

D. The government cannot escape this conclusion by invoking principles of agency deference. Viewed in context, the statute is not ambiguous at all. Congress chose language for Section 1229b(a)(2) that it would have understood to permit imputation; it makes no sense to believe that Congress implicitly eliminated parent-child imputation even while liberalizing the relief-from-removal provision in other respects; and the government's reading runs counter both to the broader policy of immigration law and to the principle that requires construction of ambiguous language in the alien's favor. But even if there were uncertainty here, the BIA's approach would not be entitled to deference. The Board has been wildly inconsistent in its treatment of imputation, allowing it in circumstances similar to those here when it harms, but not when it aids, the alien. This is the paradigm of arbitrary agency action.

ARGUMENT

I. SECTION 1229b(a)(2) DOES NOT ALTER THE SETTLED IMPUTATION RULE APPLIED TO CANCELLATION OF REMOVAL PRIOR TO IIRIRA.

A. The Text Of Section 1229b(a) Furnishes No Support For The Government's Rejection Of The Well-Settled Imputation Rule.

At the outset, the government places considerable emphasis on the plain language of Section 1229b(a)(2). U.S. Br. 15-23. But the text of Section 1229b(a)(2) contains no indication that Congress intended to reject a rule that was uniformly accepted prior to IIRIRA. The language of Section 1229b(a)(2) reads much like that of Section 212(c) or any other provision where imputation applies; it contains no explicit language that either endorses or rejects the rule, but the context plainly implies the possibility of imputation. The government's contrary reading advocates a position that would read imputation out of the INA entirely, a position neither it nor the BIA endorses.

Notably, the courts that the government contends agree with its approach have *not* adopted the textual arguments 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 imputation nor disallows it." *Augustin* v. *Att'y Gen.*, 520 F.3d 264, 269 (3d Cir. 2008) (quoting *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843

(1984)). Thus, neither the Third nor the Fifth Circuit based its holding for the government on the statutory language. See *id.* at 267-271; *Deus* v. *Holder*, 591 F.3d 807, 811 (5th Cir. 2009).

The courts rejected the government's linguistic argument for good reason. The government misstates the imputation rule, which does not imply that a parent is fulfilling the statutory criteria *on behalf* of his or her child; instead, "the alien" is fulfilling the requirements *him- or herself*, after the child's parents' years of domicile have been imputed. The government's argument therefore presupposes its conclusion: Only by rejecting the imputation rule in the first place can one argue that "the alien" is unable to fulfill the requirements of 1229b(a). 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 statutory phrase "after having been admitted" fails. U.S. Br. 17.[7]

In fact, the imputation rule is used elsewhere in the INA in just the way described above. Nowhere is the rule explicitly mentioned in the text of the statute—and there are other contexts where it has been held to apply despite the use of limiting articles such

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[7] The government also misunderstands the imputation rule when it conflates years of continuous residence, which is imputable, with date of admission, which is not. See U.S. Br. at 21-23. There is nothing inherently problematic about utilizing aliens' actual date of admission for the purposes of one provision, while imputing years of their parents' residence for another. Indeed, this is the natural consequence of *any* imputation rule. The government's claims that imputation would lead to "incongruous results" and would "nullify" the operation of other provisions are exaggerated and unexplained assertions.

as "the" or "an." See, *e.g.*, *Senica* v. *INS*, 16 F.3d 1013, 1016 (9th Cir. 1994) (imputing a mother's knowledge of her children's excludability even though the provision at issue (8 U.S.C. § 1182(k) (1988)) provided that the grounds for exclusion must be known to "*the* immigrant" (emphasis added));[8] see also *Vang* v. *INS*, 146 F.3d 1114, 1116 (9th Cir. 1998) (imputing a parent's resettlement status to a child for the purpose of applying an immigration regulation denying asylum to "an alien" who has "resettled" in another country).

Most notably, the government's textual argument applies equally to Section 212(c) itself, which says nothing of imputation but which the government acknowledges was understood to permit it.[9] Hence there is no merit to the government's assertion that Section 1229b(a) "leaves no room" for imputation (U.S. Br. 16); it leaves the same "room" as did Section 212(c).

Imputation is a pervasive and well-settled principle of immigration law, as we explain below in some detail, and Congress need not refer to it directly in contexts where it is understood to apply. *Alber-*

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[8] The statute in *Senica* stated in relevant part that "any alien" may be admitted in the Attorney General's discretion if the grounds for inadmissibility were not known to "*the* immigrant," including "in the case of an immigrant coming from foreign contiguous territory, before the time of the immigrant's application for admission." 16 F.3d at 1014 n.2 (emphasis added).

[9] Section 212(c) referred to "aliens" rather than "the alien," but this distinction is irrelevant. "In determining the meaning of any Act of Congress, unless the context indicates otherwise—words importing the singular include and apply to several persons, parties, or things; words importing the plural include the singular * * *." 1 U.S.C. § 1.

naz v. *United States*, 450 U.S. 333, 341 (1981) ("Congress cannot be expected to specifically address each issue of statutory construction which may arise."). Our point is not, as a general matter, that "the lack of an express bar cannot be read as affirmatively authorizing imputation" (U.S. Br. 20); it is the less ambitious one that the language Congress used in Section 1229b cannot plausibly be read to settle the matter in the government's favor.

B. Congress Did Not Intend To Alter The Imputation Rule When It Replaced The Phrase "Unrelinquished Domicile" With "Resided Continuously."

The plain language of Section 1229b thus does not answer the question in this case. But the statutory context does: Congress plainly did not mean to disturb the settled imputation rule.

1. Congress Did Not Alter The Statutory Text For The Purpose Of Altering The Imputation Rule.

As an initial matter, the government does not deny that the imputation rule *was* settled prior to the enactment of IIRIRA. And it nowhere argues that Congress altered the statutory language *for the purpose of* foreclosing the imputation rule. To the contrary, the government agrees with us that Section 212(c) was amended for an entirely different reason: to resolve the disagreement among the circuits as to "whether * * * seven years must follow the granting of LPR status to the alien or whether the alien could count years of domicile in the United States under some other lawful status preceding his adjustment to LPR status." U.S. Br. 25.

Within this context, the change from "unrelinquished domicile" in Section 212(c) to "resided continuously" in Section 1229b(a)(2) was a logical textual alteration specifically tailored for a particular purpose. Before IIRIRA, the BIA had held that aliens could accrue years of lawful unrelinquished domicile only when they had lawful permanent resident status. This is because "domicile" was understood to involve the lawful intent to make the United States one's home. The BIA reasoned that, unless an alien had LPR status, he or she could not *lawfully* intend to remain; any intent to remain indefinitely would contravene the terms of the alien's non-immigrant visa. See *In re S.*, 5 I. & N. Dec. 116, 117-118 (B.I.A. 1953).

Continuous residence, in contrast, could be accrued in any status.[10] As explored in further detail below, "unrelinquished domicile" and "resided conti-

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[10] This distinction between the terms is brought into sharp relief in court decisions pre-IIRIRA where INA Section 212(c) (unrelinquished domicile) intersected with 8 U.S.C. § 1255a (which requires continuous residence). For example, Section 1255a requires that an alien "continuously resided in the United States" as a temporary resident until he or she applies for LPR status. 8 U.S.C. § 1255a(b)(1)(B)(i); see also 8 U.S.C. § 1255a(b)(3)(A) (during temporary residence, "the Attorney General shall * * * permit the alien to return to the United States after such brief and casual trips abroad *as reflect an intention* on the part of the alien to adjust to lawful permanent resident status" (emphasis added)). The Seventh Circuit allowed the alien to count years spent residing continuously in lawful temporary status, under Section 1255a, toward years of lawful "unrelinquished domicile" under INA Section 212(c). See *Castellon-Contreras* v. *INS*, 45 F.3d 149, 154 (7th Cir. 1995); see also *infra* pp. 30-31 (discussing Section 1255's intent-based "continuous residence" requirement).

nuously" are concepts that have been treated very similarly in immigration law over the past sixty years. See, *e.g., INS* v. *Phinpathya*, 464 U.S. 183, 191 (1984). The principal difference between the two concepts is that, while continuous residence does require the intent to *presently* remain, it does not require the intent to make the United States one's home *permanently*. It therefore is possible to reside in the United States continuously without having LPR status. As a consequence, the term "resided continuously" was an ideal one for Congress to use in Section 1229b(a)(2): The term imports most of the connotations of unrelinquished domicile (including an intent component), but avoids the ambiguity regarding the immigration status a resident must have.

As one commentator noted immediately after the amendment's passage, "IIRIRA *solves the problem of domicile* by requiring the alien's continuous residence for seven years after the alien has been admitted in any status." Elwin Griffith, *The Road Between the Section 212(c) Waiver and Cancellation of Removal Under Section 240a of the Immigration and Nationality Act—The Impact of the 1996 Reform Legislation*, 12 Geo. Immigr. L.J. 65, 116 (1997) (emphasis added). This understanding of IIRIRA's purpose fully explains why Congress changed the phrase "unrelinquished domicile" to "resided continuously." The government accepts this explanation, and points to no evidence that Congress had any other motive when removing the word "domicile" from the statute. Congress did not alter the relevant statutory language in order to foreclose the imputation rule.

2. Congress Cannot Have Intended To Remove The Imputation Rule Because Such A Desire Would Be Inconsistent With The Effect Of Section 1229b And With The INA As A Whole.

Indeed, far from acting *to* eliminate imputation, such an outcome would be inconsistent with the broader congressional purpose. The change from Section 212(c) to Section 1229b(a) generally liberalized the showing of presence in the United States that must be made to qualify for relief from removal. Thus, aliens now are allowed to count two years prior to their accrual of LPR status toward the seven-year residence requirement; under the BIA's prior interpretation of Section 212(c), aliens had to be domiciled in the United States for seven years *after* they became legal permanent residents to be eligible for cancellation of removal. In addition, for reasons we have just explained, it is easier to demonstrate continuous residence than domicile because the latter requires a showing of an intent to reside in the United States *permanently*, while the former does not.

The change from Section 212(c) to 1229b(a) therefore makes it more likely that aliens will successfully petition for cancellation, and likely leads to more aliens being able to remain in the United States. See Griffith, *supra*, at 116. ("It stands to reason, therefore, that this change in statutory language should benefit the alien by removing any doubts about the alien's status preceding his admission as a permanent resident.").[11] In this context, it is im-

[11] This is not to say that Section 1229b as a whole necessarily will lead to more aliens being allowed to remain in the United States, as it contains other new restrictions, including a bar on

plausible to suggest that Congress, in changing the phrase "unrelinquished domicile" to "resided continuously," had the intention of helping adult immigrants by liberalizing the eligibility requirements for relief even while radically reducing the availability of relief for immigrant children by eliminating the imputation rule.[12]

Any such intent is made especially improbable by the favorable treatment of children evidenced elsewhere in the INA. The legislative history of the INA demonstrates this general intent to favor children. See H.R. Rep. No. 85-1199, at 6 (1957) ("The legislative history of the Immigration and Nationality Act clearly indicates that the Congress intended to provide for a liberal treatment of children * * *.").

Similarly, the INA shows a clear preference for family unity, as we also explain below in more detail and as the government acknowledges. U.S. Br. 29. To be sure, the government devotes much space to explaining that this preference does not "trump" the

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relief for aliens who have committed certain crimes and a stop-time provision. U.S. Br. 24. But with respect to the critical change in statutory language that the government relies on here (from "unrelinquished domicile" to "resided continuously"), it is undeniable that the purpose of Congress in amending the statute was to benefit immigrants who had lived in the United States for at least seven years but not for seven years with LPR status.

[12] In fact, Congress took steps to avoid enacting provisions in IIRIRA that had punitive effects on immigrant children. Thus, when signing IIRIRA into law, President Clinton noted that the law "does not include the so-called Gallegly amendment, which * * * would have allowed States to refuse to educate the children of illegal immigrants." Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, 1996 U.S.C.C.A.N. 3388, 3391 (1996) (signing statement of Pres. Clinton).

plain language of the statutory text. U.S. Br. 29-33. This is certainly correct, but it is not responsive to our point—which is that consistent congressional policy surely is a relevant consideration in trying to discern Congress's intent in altering statutory language. Absent a clear indication in the text or history of Section 1229b(a)(2), the Court should not understand Congress to have enacted that provision to achieve an end that is inconsistent with the language and structure of the rest of the INA. *United States* v. *Atl. Research Corp.*, 551 U.S. 128, 135 (2007) ("Statutes must 'be read as a whole.'" (quoting *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991)). And because the INA shows a clear preference for family unity, it is most improbable that Congress altered the text of Section 212(c) in a way that would undermine that goal.

3. The Government Cannot Rely On The Assertion That Congress Was Ignorant Of The Imputation Rule As A Reason To Reject It.

Against this background, the government is attempting to make lemons into lemonade when it declares that there is no indication Congress "considered the possibility, let alone intended, that the period of LPR status or residence after lawful admission of * * * the alien's parent * * * would satisfy the new statutory requirements." U.S. Br. 26. We look at this same history and draw quite a different conclusion: The government can point to *no* evidence that Congress *intended* to change the settled imputation rule, evidence one would have expected to find if Congress truly meant to specially disadvantage children and depart not only from the established rule of imputation, but also from general INA policy.

Nor can the government escape this conclusion by arguing that "there is no indication that the imputation issue was ever called to the attention of Congress." U.S. Br. 27. "We normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent." *Merck & Co.* v. *Reynolds*, 130 S. Ct. 1784, 1795 (2010). "[I]f anything is to be assumed from the congressional silence on this point, it is that Congress was aware of the * * * rule and legislated with it in mind." *Albernaz*, 450 U.S. at 341-342. Congress is "predominantly a lawyers' body" (*Callanan* v. *United States*, 364 U.S. 587, 594 (1961)), and it is appropriate "to assume that our elected representatives * * * know the law." *Cannon* v. *Univ. of Chicago*, 441 U.S. 677, 696-697 (1979). See also *Edelman* v. *Lynchburg Coll.*, 535 U.S. 106, 116-117 & n. 13 (2002); *U.S. R.R. Ret. Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980) (stating that we should not assume "Congress was unaware of what it accomplished.").

The government's assumption of congressional ignorance not only violates accepted norms of statutory interpretation but is also facially implausible. The overwhelming number of immigration cases arise in the Second and Ninth Circuits,[13] which had

[13] While data disaggregating the number of immigration cases from all administrative cases is unavailable prior to 2002, recent data demonstrates the disproportionate number of immigration cases arising in the Second and Ninth Circuits. In 2010, for example, the Ninth Circuit received 3,169 appeals from the BIA, and the Second Circuit heard 1,299. Admin. Office of the U.S. Courts, Judicial Business of the United States Courts, 2010 Annual Report of the Director 97, 100 tbl. B-3. The combined total from these two circuits represents almost two-thirds of the 6,750 total appeals from the BIA. *Id.* at 96.

both adopted the imputation rule pre-IIRIRA, and the imputation rule therefore likely would have applied to the vast majority of aliens in the United States at the time of IIRIRA's enactment. It is highly unlikely that Congress was unaware of a settled rule that affected most of the aliens in the nation. Certainly, the government's unsupported assertion to the contrary offers no basis for accepting its proposed rule.

C. "Resided Continuously" Is A Term Of Art With A Longstanding And Well-Settled Meaning In The Immigration Context, And Includes Imputable Components Of Intent And Residence.

Against this background, the government's argument from the text and policy of Section 1229b(a)(2) reduces to a single proposition: that, even if unintentionally, Congress eliminated the imputation rule by hinging the availability of relief on the applicant's having "resided continuously," rather than on having maintained "unrelinquished domicile," in the United States. This is "meaningfully different operative language," the government maintains, because "domicile turns on intent, whereas residence does not"; the imputation rule rested on imputation of intent; and "there is no longer any intent-based requirement on which imputation (or ratification thereof) could be predicated." U.S. Br. 28-29. But even disregarding the improbability of the assertion that Congress achieved such a significant change inadvertently, this argument is wrong as a textual matter, for two reasons: The language used by Congress in Section 1229b(a)(2) *does* hinge the availability of relief on intent; and residence *was* imputed under Section 212(c).

1. A Test That Requires A Finding That The Applicant "Resided Continuously" In The United States Requires Consideration Of The Applicant's Intent.

In arguing that Section 1229b(a)(2) must have the effect of repudiating the imputation doctrine, the government notes that 8 U.S.C. § 1101(a)(33), defines "residence" without regard to intent. U.S. Br. 28. But Section 1229b(a)(2) uses a different term, "resided * * * continuously," which is not defined in the INA. And that term—which appears at numerous points in the INA—is a term of art that has long been used and has *always been understood to include an intent component*, notwithstanding the presence in the INA of Section 1101(a)(33), which was drafted almost sixty years ago. In this respect, the term "resided continuously" is no different from the term "unrelinquished domicile" that, as used in Section 212(c), was understood to allow for imputation. If intent (and a child's legal inability to formulate it) is the linchpin of imputation, Section 212(c) and Section 1229b(a)(2) are in the relevant sense identical.

a. "Resided continuously" is a term of art in immigration law that has always required consideration of intent. That is clear from the BIA's decisions pre-IIRIRA (the backdrop against which Section 1229b(a)(2) was enacted) that intent was central to determinations of continuous residence.[14]

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[14] Unlike "unrelinquished domicile," which now appears nowhere in the INA and appeared only in Section 212(c) before IIRIRA, "resided continuously" appears throughout the INA. See, *e.g.*, 8 U.S.C. §§ 1254a, 1255a, 1259, 1427, 1430, 1435, 1437, 1439, 1445.

In 1952, the same year that Congress enacted the INA, the BIA interpreted a 1940 statute under which the appellant would be a citizen provided she "ha[d] *resided continuously in the United States* since the date of her marriage." *In re A.*, 4 I. & N. Dec. 723 (B.I.A. 1952) (emphasis added). The Board wrote:

> [T]he term "resided continuously" within the United States has been found in laws relating to naturalization since the basic naturalization act of June 29, 1906. It was well settled at the time of the amendment of July 2, 1940 * * * that temporary absences *unaccompanied by an intent to abandon residence in the United States*, did not operate to interrupt the continuity of residence * * *.

Id. at 725 (emphasis added). The Board found that the "continuity of residence" was not broken because, in the circumstances, "a finding of abandonment of domicile in the United States is required" to show an intent to abandon residence in the United States. *Ibid.* Thus, the Board equated non-abandonment of domicile in the United States—that is, unrelinquished domicile—with "resided continuously."[15] *Ib-*

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[15] The equivalence of continuous residence and unrelinquished domicile also can be seen in Board interpretations of Section 212(c). See, *e.g.*, *In re Loza-Bedoya*, 10 I. & N. Dec. 778, 779 (B.I.A. 1964) ("The first contention couples Section 212(c) of the Act and its predecessor, the 7th proviso to Section 3 of the Act of February 5, 1917. *Section 212(c) of the Act authorizes the admission of an inadmissible alien returning to a lawful residence*; the 7th proviso authorized the same relief (except as to documentary grounds) to an alien with seven years' residence whether the residence was lawful or not." (emphasis added)). Even though Section 212(c) used the term "domicile," the Board wrote interchangeably of "residence."

id. It was the "intent to abandon" (or not) that determined continuity of residence. *Ibid.*[16]

The importance of intent to the abandonment of continuous residence, as well as of unrelinquished domicile, has been an element of immigration law ever since. For example, it is well established that an immigrant may maintain a continuous (or permanent) residence in the United States despite a temporary visit abroad. See, *e.g.*, *Singh* v. *Reno*, 113 F.3d 1512, 1514 (9th Cir. 1997) ("[A] legal permanent resident may plan * * * a relatively short trip. He may extend his trip beyond that relatively short period * * * if he intends to return to the United States as soon as possible thereafter."). In determining whether temporary visits abroad break periods of continuous or permanent residence, it is "the *intention* of the alien, when it can be ascertained, [that] will control." *In re Huang*, 19 I. & N. Dec. 749, 753 (B.I.A. 1988) (emphasis added).[17] That intent is assessed

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[16] This was not a novel conclusion. For the purpose of the precursor to INA Section 212(c), "domicile" was considered "synonymous with actual residence or place of abode." *In re C.*, 1 I. & N. Dec. 631, 633 (B.I.A. 1943). Domicile was further defined by regulation to mean "that place where a person has his true, fixed, and permanent home and principal establishment and to which whenever he is absent he has the intention of returning." *Id.* at 635-636. "Note should be made in this connection that *the courts regard residence and domicile as synonymous terms* under the naturalization statutes." *Id.* at 638 (emphasis added).

[17] That continuity of residence turns on intent rather than physical presence is reflected in the text and structure of Section 1229b. Physical presence ends when an alien "has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days." 8 U.S.C. § 1229b(d)(2). No such concrete or objective limitation determines continuous residence.

based on such factors as "location of his family ties, property holdings, and job." *Ibid.* And because a child is incapable of forming the relevant intent—or, for that matter, ties based on property holdings and vocation—a child's "*residence* is imputed [from] his parents while a minor" in making the continuous residence determination. See *In re Ng*, 12 I. & N. Dec. 411, 412 (B.I.A. 1967) (emphasis added).

It is not at all surprising that Congress and the BIA understood the terms of art "resided continuously," "temporary residence," and "permanent residence" to require consideration of intent even when the location of the alien's physical residence could be determined; the term "residence" has, in the common law, always contained an intent component. See *Martinez* v. *Bynum*, 461 U.S. 321, 330 (1983) ("'residence' generally requires both physical presence and an intention to remain."). As the New Jersey Supreme Court put it, in a decision cited approvingly by this Court in *Holyfield*, 490 U.S. at 48:

> At common law, residence and domicile were not synonymous, the difference between them being one of intention. Thus, *for residence there must have been an intention to live in a place for the time being*, whereas, for domicile * * * it was necessary that there be an intention not only to live in the place but also to make a home there.

Perri v. *Kisselbach*, 167 A.2d 377, 379 (N.J. 1961) (emphasis added). This common law definition of residence remains the law today. See, *e.g.*, *Saenz* v. *Roe*, 526 U.S. 489, 517 (1999) (residence requires "both physical presence and an intention to remain"). Congress thus would not have regarded it as at all ano-

malous for a "resided continuously" test to require consideration of intent.

b. This Court also has noted the similarity between "continuous residence" and domicile in immigration law, and has recognized that *both* residence and domicile are distinct from the concept of "continuous physical presence." Thus, in *INS* v. *Phinpathya*, 464 U.S. 183 (1984), the Court held that continuous physical presence, unlike continuous residence, is terminated by temporary absence. A law enacted in 1948 had allowed suspension of deportation for aliens who "resided continuously in the United States for seven years or more." *Id.* at 190. The law was subsequently changed to replace the "seven year 'continuous residence' requirement with the current seven year 'continuous physical presence' requirement." *Ibid.* In explaining the meaning of the current and former laws, the Court wrote: "Had Congress been concerned only with 'non-intermittent' presence or with the mere *maintenance of a domicile or general abode*, it could have retained the 'continuous residence' requirement. Instead, Congress expressly opted for the seven year 'continuous physical presence' requirement." *Id.* at 191 (emphasis added).

The Court thus expressly equated "maintenance of a domicile" (*i.e.*, unrelinquished domicile) with "continuous residence."[18] *Phinpathya* was the leading

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[18] The distinction between continuous residence and continuous physical presence embraced by the *Phinpathya* Court had been recognized two decades earlier by the BIA. Prefiguring the Court's approach, the Board wrote:

> The Congress of the United States in amending [Section 244(a) of INA in 1962] had an opportunity to change the terminology of the statute to require continuous residence in the United States instead of continuous physical

interpretation from the Court of the meaning of "resided continuously" in immigration law before IIRIRA, and it underscores the settled meaning of the term of art that Congress is presumed to have shared when enacting Section 1229b(a)(2).

c. Additional evidence that Congress has been aware of both the meaning of "resides continuously" and of the distinction between continuous residence and continuous physical presence comes from 8 U.S.C. § 1255a, which was enacted before IIRIRA. Section 1255a allows illegal immigrants to acquire temporary resident status (8 U.S.C. § 1255a(a)) and then permanent resident status. 8 U.S.C. § 1255a(b). To be eligible for temporary resident status, the alien must have resided continuously (and unlawfully) in the United States since 1982, and have been continuously physically present in the United States since November 1986. This statute preserves the distinction between physical presence and residence embraced by the Court in *Phinpathya*. Section 1255a, however, modifies the strict meaning of continuous physical presence (*no* absences from the United States) embraced by the Court in *Phinpathya*, expressly allowing for "brief, casual, and innocent absences from the United States." 8 U.S.C. § 1255a-(a)(3)(B). Continuous residence, under 8 U.S.C. § 1255a(a), is less exacting than continuous physical presence, allowing for absences from the United States with the intent to return.

> presence. Congress failed to make any such change in the continuous physical presence requirements * * *. Clearly, the term "continuous physical presence" can in nowise be equated with the term "continuous residence."

In re Graham, 11 I. & N. Dec. 234, 238 (B.I.A. 1965).

The importance of intent to return to continuous residence is made explicit with regard to the second provision of 1255a (8 U.S.C. § 1255a(b)), which allows conversion of temporary resident status to permanent resident status. Continuous residence as a temporary resident (which is necessary for permanent residence) is not interrupted by

> brief and casual trips abroad as *reflect an intention* on the part of the alien to adjust to lawful permanent resident status * * * and after brief temporary trips abroad occasioned by a family obligation involving an occurrence such as the illness or death of a close relative or other family need.

8 U.S.C. § 1255a(b)(3)(A) (emphasis added).

d. It should be added that the government mentions the INA's definition of "residence" in Section 1101(a)(33) in connection with its discussion of intent almost in passing. See U.S. Br. 28. There is good reason for that; the context and purpose of the provision shows that it has no bearing on the question here.

Section 1101(a)(33) was first enacted as part of the original INA in 1952 to codify this Court's definition of "residence" in *Savorgnan* v. *United States*, 338 U.S. 491 (1950). In that decision, the Court interpreted a nationality act that stipulated that expatriation of nationals could occur, in part, "if and when the national thereafter takes up a residence abroad." 338 U.S. 491, 493 n.2 (1950) (quoting Nationality Act of 1940, Section 403). That same statute stated that, in relevant part, "the place of [the] general abode shall be deemed [the] place of residence." *Id.* The petitioner had resided in Europe with her husband, an Italian citizen, for many years, but the

district court found that she "did not intend to establish a 'permanent residence' in any country other than the United States." *Id.* at 495-496 (citing *Savorgnan* v. *United States*, 73 F. Supp. 109 (W.D. Wis. 1947)). But this Court found that intent was irrelevant for the purposes of establishing a "residence abroad":

> In contrast to such terms as: 'temporary residence,' 'domicile,' 'removal, with his family and effects,' 'absolute removal' or 'permanent residence,' the new Act used the term 'residence' as plainly as possible to denote an objective fact. To identify the required 'place of residence,' it required only that it be the 'place of general abode.'

Id. at 504-505. The Court thus contrasted the unadorned term "residence" with qualified uses of the term, such as "temporary residence" and "permanent residence," as well as with "domicile." Unlike all of those other terms, "residence" used in isolation was understood to "denote an objective fact."

The meaning of "residence" as used in *Savorgnan* was codified in 1952 as 8 U.S.C. § 1101(a)(33). The report that accompanied the bill, from the House Committee on the Judiciary, stated: "This definition is a codification of judicial constructions of the term 'residence' as expressed by the Supreme Court of the United States in Savorgnan v. United States (338 U.S. 491 (1950))." H.R. Rep. No. 82-1365, at 33 (1952).

The definition of "residence" in Section 1101(a)(33) thus has no bearing on the meaning of a term like "resided continuously," in which "resides" is qualified by a temporal or descriptive term that nec-

essarily turns on intent. That proposition is not controversial. In fact, it has been expressly embraced by the BIA itself in its application of the term "lawful permanent residence," a companion term to "resided continuously" that also appears in Section 1229b(a). As to that, the BIA has held: "The definition of 'residence' in section 1101(a)(33) of the Act, which would preclude consideration of the alien's 'intent' in proceeding or remaining abroad, is inapplicable in determining whether an alien has abandoned her lawful permanent resident status." *Huang*, 19 I. & N. Dec. at 754. Exactly the same conclusion applies here. Whether someone has "resided continuously" in the United States for a given period always has been understood to turn on that person's intent, and in that respect the language of Section 1229b(a)(2) is identical to that of Section 212(c).

2. "Residence" As A Legal Construct Consistently Has Been Imputed As An Element Of Domicile.

Congress accordingly used a term in Section 1229b(a)(2)—"resided continuously"—that it would have known would require an inquiry into intent, and thus would have led to imputation of a parent's "continuous residence" to a child. But even if that were not so, Congress would have expected a parent's residence to be imputed to a child for a different reason: Residence, even as a "principal, actual dwelling in fact," has consistently been imputed from parent to child as an element of the imputation of domicile.

Domicile and residence are in large part coextensive because those domiciled in a particular place must also be resident there. More than a century ago, this Court described domicile as "[a] residence at

a particular place accompanied with positive or presumptive proof of an intention to remain there for an unlimited time." *Mitchell* v. *United States*, 88 U.S. 350, 352 (1874) (citation omitted). The definition of domicile as a union of current residence and intent to make that residence one's "home" has been universally accepted by the common law ever since. See, *e.g.*, *Texas* v. *Florida*, 306 U.S. 398, 424 (1939) ("[R]esidence in fact, coupled with the purpose to make the place of residence one's home, are the essential elements of domicile").

As a consequence, in each instance where courts imputed a parent's domicile to a child under Section 212(c), they also, by extension, necessarily imputed the parent's residence to the child because there can be no domicile without residence. Thus, none of those pre-IIRIRA courts required a showing that the child was present in the United States during his or her parents' period of domicile. See, *e.g.*, *Rosario*, 962 F.2d at 225. Although the opinions pointed to the "intent" component of domicile in explaining the imputation rule, the courts notably did not require that the child separately establish residence in the United States during this period. If they had done so, they would have been imputing the parent's intent *only*. Instead, as the *Rosario* court put it, "a minor admitted into the United States might derive lawful domicile from a parent already present for seven years, thereby making that person eligible for § 212(c) relief *on the very day of arrival*." 962 F.2d at 225 (emphasis added).

Courts accordingly were imputing more than the parent's intent to remain—they were imputing the parent's period of residence as well. And the reason they did so is clear: The common thread running

through the immigration cases is the child's lack of capacity independently to satisfy the legal requirement. See, *e.g.*, *Lepe-Guitron*, 16 F.3d at 1026 (imputation required "since most children are *presumed not legally capable* of forming the requisite intent" (emphasis added) (quoting *Rosario*, 962 F.2d at 224)); see also *Mercado-Zazueta*, 580 F.3d at 1105 ("[W]e have allowed imputation precisely because the minor either was legally incapable of satisfying one of these criteria or could not reasonably be expected to satisfy it independent of his parents." (internal quotation marks omitted)).

Congress therefore must have understood the reasoning of these decisions to extend to all areas where a child lacks legal capacity. For example, children lack the capacity to navigate the "complications" of the immigration system on their own. See *Mercado-Zazueta*, 580 F.3d at 1112. Similarly, a child lacks the legal capacity to prove that a particular dwelling is his or her "principal" one. Such a determination is made through examination of the "typical indicia of residence [such] as the maintenance of a bank account in this country and continued membership in a domestic union." *Mrvica* v. *Esperdy*, 376 U.S. 560, 565 (1964). A child lacks the capacity to acquire these "typical indicia": "Children * * * normally lack the material and psychological wherewithal to decide where they will reside." *Mozes* v. *Mozes*, 239 F.3d 1067, 1076 (9th Cir. 2001).

Thus, the language, context, and policy of the statute lead to a conclusion quite different from that drawn by the government. At the time Congress enacted Section 1229b(a)(2), the imputation rule was settled and noncontroversial. No one suggests that Congress acted with the purpose of changing that

rule; such a suggestion could not be squared with actions Congress took to liberalize the rules governing eligibility for relief in other respects. And Congress chose language for Section 1229b(a)(2) that, in relevant part, is analytically identical to the superseded language of Section 212(c)—and that Congress is presumed to have known would have provided for imputation. The government's contrary submission, which rests on the proposition that Congress accidentally eliminated imputation through its choice of a term selected for a different reason, simply does not stand up to scrutiny.

II. THE BIA'S REJECTION OF IMPUTATION IS NOT ENTITLED TO DEFERENCE.

Having little else to say, the government ultimately retreats to an argument for deference to the BIA under step two of the *Chevron* analysis. But viewed in context and in its entirety, Section 1229b(a)(2) must be read to permit imputation; there is no room for deference to the agency. And even if that were not the case, the BIA's approach should be rejected as "arbitrary or capricious in substance" in light of the agency's inconsistent positions regarding imputation, and as "manifestly contrary to the statute" considering the INA's overarching purposes. *Mayo Found. for Med. Educ. & Research* v. *United States*, 131 S. Ct. 704, 711 (2011) (quoting *Household Credit Servs., Inc.* v. *Pfennig*, 541 U.S. 232, 242 (2004)).

A. The Meaning Of Section 1229b(a)(2) Clearly Supports Imputation, Leaving No Reason To Defer To The Agency Under *Chevron*.

Under step one of the *Chevron* analysis, the Court will first consider whether "the statute is silent or ambiguous with respect to the specific issue." *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). As the Court explained in a decision interpreting a different aspect of IIRIRA's alteration of former INA Section 212(c), "We only defer * * * to agency interpretations of statutes that, applying the normal 'tools of statutory construction,' are ambiguous." *St. Cyr*, 533 U.S. at 320 n.45 (quoting *Chevron*, 467 U.S. at 843 n.9). Here, the ordinary tools of statutory construction show that the purpose of Section 1229b(a)(2) is unambiguous and leaves no room for the exercise of agency discretion.

First, as we have explained, Congress did not mean to disturb the settled construction of the former Section 212(c); it chose language that would have been understood to provide for imputation; and rejection of imputation runs counter to the thrust of the liberalized relief provision. Second, Section 1229b(a) should be read in light of the INA's overall and undisputed goal of promoting family unity. *Cf. Gen. Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 600 (2004) (finding that "regular interpretative methods," including the structure and history of the statute and its "relationship to other federal statutes," leave no room for *Chevron* deference on the question at issue). And third, the Court generally applies the "longstanding principle [in immigration law] of construing any lingering ambiguities in deportation sta-

tutes in favor of the alien." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (citing *INS* v. *Errico*, 385 U.S. 214, 225 (1966); *Costello* v. *INS*, 376 U.S. 120, 128 (1964); *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10 (1948)). These usual tools of statutory construction lead to a conclusion that children should be able to impute their parents' period of continuous residence under Section 1229b(a)(2), as they were under former Section 212(c).

B. Even If The Meaning Of The Statute Is Not Entirely Clear, The BIA's Interpretation Is Not Owed Deference.

Even if the Court rejects the conclusion that the statute clearly permits imputation of continuous residence after lawful admission, and finds that Section 1229b(a) is silent or ambiguous with respect to imputation, the BIA's refusal to allow imputation in this context is not "based on a permissible construction of the statute." *Chevron,* 467 U.S. at 843. In fact, the government has remarkably little to say in favor of deference to the BIA's view. Most of its argument is negative; it asserts that its rejection of imputation here is not inconsistent with its use of imputation elsewhere (U.S. Br. 38-39), and that the Ninth Circuit's rationale for employing imputation is not supported by the statute. U.S. Br. 35-38. On the face of it, these arguments hardly serve to affirmatively justify the BIA's rule. Deference is owed to an administrative agency only if "Congress has explicitly left a gap for the agency to fill" *Chevron*, 467 U.S. at 843, and only "when the agency has exercised its *own* judgment, not when it believes that interpretation is compelled by Congress." *Arizona* v. *Thompson*, 281 F.3d 248, 254 (D.C. Cir. 2002) (internal quotation marks omitted). Since, here, the BIA believed its re-

sult was compelled by statutory language, it was not exercising its discretion and therefore is not owed deference. But even if that were not so, the government's arguments fail on their own terms.

1. The Board's Interpretation Has Been Inconsistent.

In arguing that the BIA's treatment of imputation has been consistent, the government maintains that the BIA has permitted imputation of intent but not of "objective conduct." U.S. Br. 39. But that is not so: In practice, the BIA has imputed both states of mind *and* objective conduct from parents to minor children in situations where imputation would harm the alien, but disallowed imputation in situations where imputation would benefit the alien. That is the essence of an interpretation that is "arbitrary or capricious in substance." *Mayo Found.*,131 S. Ct. at 711 (quoting *Pfennig*, 541 U.S. at 242).

On the one hand, as we have shown, continuous residence *does* turn on intent. The government offers no reason for treating it differently from those situations where it acknowledges that imputation is warranted.

And the converse is true as well: The BIA often does impute "objective conduct" from parents to children. Thus, in *Vang* v. *INS*, 146 F.3d 1114, 1117 (9th Cir. 1998), the court noted that the BIA imputes a parent's "firm resettlement" in a third country to children for the purposes of asylum eligibility in the United States; if an applicant for asylum is deemed to have "firmly resettled" in a third country, he or she is ineligible for asylum here. Agency regulations define "firm resettlement" as follows: "An alien is considered to be firmly resettled if, prior to arrival in

the United States, he or she entered into another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement." 8 C.F.R. § 208.15. This definition of "firm resettlement" does *not* involve any sort of "intent" or "state of mind" element (unless, contrary to the government's contention, residence status is understood to have an intent component); rather, it involves objective conduct (entering a third country) and a government's "official action" with regard to the alien (offering some form of legal status).

The Board's analysis in *In re Ng* illustrates the agency's practice of imputing residence in making the "firm resettlement" determination. After noting that the asylum applicant's father owned a business in Hong Kong and was "certainly resettled" there, the Board stated that "[t]he applicant's *residence* is imputed to his parents while a minor." 12 I. & N. Dec. 411, 412 (B.I.A. 1967) (emphasis added). However this BIA rule is regarded, it is inconsistent with the government's position here; either residence turns on intent, or the agency imputes residence regardless of intent.

The BIA also has imputed objective circumstances under Section 212(k) of the INA, which provides an exception from inadmissibility for immigrants whose ineligibility for admission "was not known to, *and could not have been ascertained by the exercise of reasonable diligence* by, the immigrant." 8 U.S.C. § 1182(k) (emphasis added). The failure to "exercise * * * reasonable diligence" prong is not a mental state; it is objective conduct on the part of the parent. In *In re Aurelio*, 19 I. & N. Dec. 458 (B.I.A. 1987), the BIA "conclud[ed] that the female applicant

failed to exercise reasonable diligence in ascertaining her admissibility to the United States * * *. We therefore find that the immigration judge properly denied the applicants' [including the female applicant's minor son] section 212(k) waiver request." See also *Senica* v. *INS*, 16 F.3d 1013, 1016 (9th Cir. 1994) ("The BIA's decision here was not a departure from its previous practice of imputing a parent's state of mind, *or failure to reasonably investigate*, to an unemancipated minor child." (emphasis added)).

The BIA's inconsistency on the treatment of imputation makes agency deference inappropriate. 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 *Judulang*, slip op. 18 (indicating that "we cannot detect the consistency that the BIA claims has marked its approach to this issue," and, "[t]o the contrary, the BIA has repeatedly vacillated in its method for applying § 212(c) to deportable aliens"); *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 (*Cardoza-Fonseca*, 480 U.S. at 446 n.30), "[*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 is just what we have here.

2. The Board's Interpretation Of Section 1229b(a) Is "Manifestly Contrary To The Statute."

In addition, the Board's interpretation of Section 1229b(a) is "manifestly contrary to the statute" (*Mayo Found.*, 131 S. Ct. at 711), given that one of the overarching goals of the INA is promoting family unity. The structure of the visa family preference system, as well as specific provisions of the Act, supports this view. It would be contrary to the overall family-unity purpose of the Act to deny children the ability to impute their parent's continuous residence so as to achieve eligibility for cancellation of removal.

Three of the INA's four family preference categories are designed to reunite parents and children.[19] See 8 U.S.C. § 1153(a)(1) (allowing admissions for unmarried sons and daughters of U.S. citizens); 8

[19] Congress places a particularly high priority on reuniting parents with minor children. For example, in 1990, Congress subdivided the second preference category into subsections A and B, to ensure that a higher percentage of admissions would go to spouses and minor children as opposed to children who had already reached age twenty-one. Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978. The history of the INA confirms this view. See H.R. Rep. No. 85-1199, at 6 (1957) ("The legislative history of the Immigration and Nationality Act clearly indicates that the Congress intended to provide for a liberal treatment of children * * *.").

U.S.C. § 1153(a)(2) (allowing admissions for spouses and minor children of lawful permanent residents); 8 U.S.C. § 1153(a)(3) (allowing admissions for married sons and daughters of U.S. citizens). The family preference system is an integral part of immigration law, and represents a significant proportion of the visas granted every year. In 2010, for example, 214,589 people entered under a family preference visa.[20] Department of Homeland Security, Office of Immigration Statistics, 2010 Yearbook of Immigration Statistics 18 tbl. 6 (Aug. 2011), *available at* http://tinyurl.com/3vcuse5.

Other provisions of the INA likewise demonstrate a clear preference for family unity. For example, Section 203(d) of the INA provides that spouses and children of aliens who qualify for a family-preference, employment-based, or diversity visa may be admitted in the same preference category, and in the "same order or consideration" as the principal alien. 8 U.S.C. § 1153(d). In addition, 8 U.S.C. § 1182(a)(6)(E)(ii) codifies the "[s]pecial rule in the case of family reunification." This provision provides a waiver of excludability for certain immigrants who "encouraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in viola-

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[20] In addition, 476,414 people entered as immediate relatives of United States citizens in 2010. Department of Homeland Security, Office of Immigration Statistics, 2010 Yearbook of Immigration Statistics 18 (Aug. 2011), *available at* http://tinyurl.com/3vcuse5. The total number of people admitted lawfully to the United States was 1,042,625, so family-sponsored or immediate-relative entries (a combined total of 691,003 people) represent two-thirds of the total number of entries. *Ibid.*

tion of law." *Ibid.* And the legislative history of the INA more generally demonstrates that family unity was an extremely important consideration for the drafters of the INA. See H.R. Rep. No. 82-1365, *reprinted in* 1952 U.S.C.C.A.N. 1653, 1680 (commenting on "the underlying intention of our immigration laws regarding the preservation of the family unity").

Finally, imputation cannot be thought inconsistent with congressional intent on the theory, hinted at by the government, that it threatens vastly to expand the category of aliens allowed to remain in the United States. U.S. Br. 27. After all, 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 will be eligible to apply for cancellation if he prevails before this Court, "[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 (noting that 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 unreviewable authority to deny cancellation. See 8 U.S.C. § 1252(a)(2)(B)(i). As a consequence, the only real effect of the rule we advocate 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.

In all, the government's reading of the statute disregards the analytical consistency between the language of Section 1229b(a)(2) and Section 212(c); departs from the particular congressional goal in amending the relief provision and the broader purpose of the INA; and is inconsistent with the BIA's position in clearly analogous circumstances. The Court should reject such an approach.

CONCLUSION

The judgment of the court of appeals should be affirmed, and the case remanded for further proceedings.

Respectfully submitted.

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December 2011