No. _____

IN THE
Supreme Court of the United States

ANDRE MARTELLO BARTON,
Petitioner,

v.

U.S. ATTORNEY GENERAL,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a lawfully admitted permanent resident who is not seeking admission to the United States can be "render[ed] . . . inadmissible" for the purposes of the stop-time rule, 8 U.S.C. § 1229b(d)(1).

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PETITION FOR A WRIT OF CERTIORARI

Andre Martello Barton petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The decision of the Eleventh Circuit (Pet. App. 1a) is reported at 904 F.3d 1294. The decision of the Board of Immigration Appeals (Pet. App. 20a) is unreported. The decision of the immigration judge (Pet. App. 25a) is also unreported.

JURISDICTION

The Eleventh Circuit entered its judgment on September 25, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

8 U.S.C. § 1229b(a) provides:

> 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(d)(1) provides, in relevant part:

> For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end . . . when the

alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.

INTRODUCTION

If a lawfully admitted permanent resident is removable from the United States, he may seek cancellation of removal if, among other things, he has "resided in the United States continuously for 7 years after having been admitted in any status." 8 U.S.C. § 1229b(a)(2). But the permanent resident's period of continuous residence is "deemed to end" when, as relevant here, he has "committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title." *Id.* § 1229b(d)(1)(B). This provision is commonly referred to as the "stop-time rule" because it specifies the circumstances under which the time period for continuous residence is stopped.

This case presents the question whether a lawfully admitted permanent resident who is not seeking admission to the United States can commit an offense that "renders the alien inadmissible to the United States," *id.*, for purposes of the stop-time rule. The courts of appeals have divided over that question. The Ninth Circuit has held that lawfully admitted permanent residents who are not seeking admission cannot be "rendered inadmissible." *Nguyen v. Sessions*, 901 F.3d

1093, 1100 (9th Cir. 2018) (quotation marks omitted). In its decision below, the Eleventh Circuit reached the opposite conclusion, joining the Second and Fifth Circuits. *See* Pet. App. 2a-3a; *Heredia v. Sessions*, 865 F.3d 60, 68 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 677 (2018); *Calix v. Lynch*, 784 F.3d 1000, 1012 (5th Cir. 2015). The Third Circuit has also reached that conclusion in an unreported opinion. *Ardon v. Att'y Gen. of the United States*, 449 F. App'x 116, 118 (3d Cir. 2011). The Eleventh Circuit explicitly recognized that it was taking sides in a circuit split. Pet. App. 3a ("[W]e agree with the Second, Third, and Fifth Circuits, and disagree with the Ninth.").

This case is an ideal vehicle to resolve the circuit split. The immigration judge stated on the record that she "would have granted [Petitioner's] application for cancellation of removal" if he were eligible to seek that relief. Pet. App. 36a. The decisions of the immigration judge, Board of Immigration Appeals, and Eleventh Circuit rejecting Petitioner's application for relief turned entirely on the interpretation of the stop-time rule.

Finally, the Eleventh Circuit's decision warrants review because it is wrong. "As a lawful permanent resident," Petitioner "was not charged with being inadmissible—and indeed, he could not have been." *Nguyen*, 901 F.3d at 1097. As such, Petitioner was not "rendered inadmissible" by his crime. *Id.* The Court should grant certiorari to resolve the circuit split and reverse the Eleventh Circuit's errant ruling.

STATEMENT OF THE CASE

A. Statutory Framework

Congress has "long made a distinction between those aliens who have come to our shores seeking admission . . . and those who are within the United States after an entry." *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958). In particular, federal law recognizes two distinct grounds for denying someone "the hospitality of the United States." *Landon v. Plasencia*, 459 U.S. 21, 25 (1982). Under the current terminology, an alien is "deportable" when he is "in and admitted to the United States" and falls under one of the categories of "deportable aliens" listed in 8 U.S.C. § 1227(a). The term "admitted" refers to "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 is "inadmissible" if he is not already "admitted" to the country and falls under one of the categories of "inadmissible aliens" listed in 8 U.S.C. § 1182(a). An inadmissible alien is "ineligible to receive visas and ineligible to be admitted." *Id.* § 1182(a).

The United States is home to millions of lawfully admitted permanent residents, non-citizens who have been "accorded the privilege of residing permanently in the United States." *Id.* § 1101(a)(20); *see* James Lee & Bryan Baker, Dep't of Homeland Security, *Estimates of the Lawful Permanent Resident Population in the United States: January 2014* 1 (2017), https://www.dhs.gov/sites/default/files/publications/LPR%20Population%20Estimates%20January%202014.pdf. An alien cannot become a permanent resident unless he is lawfully admitted into the United States. 8 U.S.C.

§ 1101(a)(20) (definition of "lawfully admitted for permanent residence"). If a lawfully admitted permanent resident temporarily leaves the United States and returns, the permanent resident does not need to seek readmission into the United States unless certain statutory criteria are met, such as if the alien has abandoned permanent resident status or leaves the country for more than 180 days. *Id.* § 1101(a)(13)(C) ("An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless" enumerated statutory criteria are met).

Before Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104- 208, Div. C, 110 Stat. 3009-546, the government used different proceedings to decide whether an alien was deportable or excludable (*i.e.*, inadmissible). A "deportation hearing" was "the usual means of proceeding against an alien already physically located in the United States." *Landon*, 459 U.S. at 25. An "exclusion hearing" was "the usual means of proceeding against an alien outside the United States seeking admission." *Id.* Only aliens seeking admission could be subject to exclusion proceedings. *See id.* at 28.

As part of its overhaul of the immigration statutes in 1996, Congress merged deportation and exclusion proceedings into one unified "[r]emoval proceeding." *See* 8 U.S.C. § 1229a; *Judulang v. Holder*, 565 U.S. 42, 45-46 (2011); *Vartelas v. Holder*, 566 U.S. 257, 261-62 (2012). Today, the removal proceeding is used to determine "whether an alien may be admitted to the

United States or, if the alien has been so admitted, removed from the United States." 8 U.S.C. § 1229a(a)(3).

Although the procedural mechanisms and terminology have changed, the distinction between inadmissibility and deportability remains. When the government initiates removal proceedings against someone, it must charge either that the person is inadmissible under section 1182 or deportable under section 1227. *See id.* § 1229a(a)(2). If the person has not been admitted, the government charges the person with inadmissibility; if the person has been admitted, the government charges the person with deportability. *See id.* § 1229a(a)(3); *Matter of Pena*, 26 I. & N. Dec. 613, 615-18 (B.I.A. 2015).

Determining deportability is both substantively different and procedurally different from determining inadmissibility. Procedurally, an alien charged with inadmissibility has the burden of proving that he "is clearly and beyond doubt entitled to be admitted," whereas the government has the burden of proving "by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable." 8 U.S.C. § 1229a(c)(2)-(3).

Substantively, "the statutory bases for excluding and deporting aliens have always varied." *Judulang*, 565 U.S. at 46. Section 1182 enumerates the categories of inadmissibility, while section 1227 enumerates the categories of deportability. Section 1182 and section 1227's lists are "sometimes overlapping and sometimes divergent." *Id.* Of relevance here, both sections list certain categories of crimes as grounds for

inadmissibility or deportability, but the categories on each list differ. For example, section 1182(a)(2) provides that an alien who is "convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of . . . a crime involving moral turpitude" is inadmissible. 8 U.S.C. § 1182(a)(2)(A). By contrast, section 1227 provides that an alien is deportable if he is "convicted of a crime involving moral turpitude committed within five years . . . after the date of admission." *Id.* § 1227(a)(2)(A)(i)(I).

If a lawfully admitted permanent resident is found to be removable—either because he has already been admitted and is deportable, or because he needs to seek admission and is found to be inadmissible—the Attorney General has discretion to cancel the removal if (1) the applicant has been a lawfully admitted permanent resident not less than five years, (2) the applicant "has resided in the United States continuously for 7 years after having been admitted in any status," and (3) the person has not been convicted of an aggravated felony. 8 U.S.C. § 1229b(a). However, section 1229b(d)(1)—the so-called "stop-time" rule—provides that:

> For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end (A) . . . when the alien is served with a notice to appear under section 1229(a) of this title, or (B) when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of

> this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.

Id. § 1229b(d)(1). In other words, a lawfully admitted permanent resident's period of continuous presence ends when he receives a notice to appear or commits one of the offenses described, whichever comes first. In the latter case, the stop-time rule is generally held to be triggered as of the date when the offense was committed. *See Matter of Perez*, 22 I. & N. Dec. 689, 693 (B.I.A. 1999). If the resident has not established at least 7 years of continuous residence by that point, he is ineligible to apply for cancellation or removal.

B. Factual Background

Petitioner Andre Martello Barton is a 40-year-old lawfully admitted permanent resident and a native and citizen of Jamaica. Pet. App. 26a. He and his mother were lawfully admitted to the United States on B-2 visitor visas on May 27, 1989, when Petitioner was a minor. *Id.* 3a, 22a, 31a, 34a. Petitioner became a lawfully admitted permanent resident in June 1992. *Id.* 22a. Thus, unless the stop-time rule applies, Petitioner would have become eligible for cancellation of removal on May 27, 1996, *i.e.*, "7 years after having been admitted in any status." 8 U.S.C. § 1229b(a).

In January 1996—when Petitioner was 18 and just a "few months shy" of his seventh year in the country—Petitioner was arrested and charged with aggravated assault, criminal damage to property, and first-degree possession of a firearm during the commission of a felony. Pet. App. 34a. More than ten years later,

Petitioner was arrested for drug possession in 2007 and again in 2008. *Id.* 3a-4a. Petitioner sought in-patient and out-patient treatment after his 2008 arrest, and he has had no legal trouble since then. *Id.* 32a.

Petitioner graduated from technical college in 2009 and now runs a local Meineke car shop that is owned by his mother. Pet. App. 31a-32a. Petitioner has four young children (all of whom are U.S. citizens) and a fiancée here in the United States. *Id.* Petitioner's mother also still resides in the United States, as do most of his relatives. *Id.* 31a. In fact, Petitioner has no family in Jamaica aside from an uncle and two distant cousins. *Id.* Petitioner is also the primary provider for his family; his fiancée has been unable to work since 2015 due to an injury she sustained on the job, *id.* 32a, and she now suffers from a diagnosed autoimmune disorder. *Id.* 32a-33a.

C. Procedural History

After Petitioner's 2008 arrest, the government served Petitioner with a notice to appear and initiated removal proceedings against him. Pet. App. 4a. Because Petitioner had been lawfully admitted to the United States, the government charged Petitioner with being deportable under 8 U.S.C. § 1227(a)(2), rather than inadmissible. Pet. App. 4a. Petitioner conceded removability, and the immigration judge ("IJ") found him removable. *Id.*

Petitioner then applied for cancellation of removal under 8 U.S.C. § 1229b(a). Pet. App. 4a-5a. The government objected, arguing that Petitioner was ineligible to seek cancellation of removal. Pet. App. 5a. In particular, the government argued that Petitioner's arrest in January 1996 triggered the stop-time rule and

that Petitioner had not accrued the necessary seven years of continuous presence by that time. Pet. App. 6a.

The government argued that because Petitioner's 1996 offense constituted a crime of moral turpitude, it rendered him ineligible for cancellation of removal under the stop-time rule. Pet. App. 6a. However, the government did not argue that Petitioner had "committed an offense referred to in section 1182(a)(2) of this title that renders the alien . . . removable from the United States under section 1227(a)(2) or 1227(a)(4)"—*i.e.*, the deportability provisions—for the purposes of the stop-time rule. 8 U.S.C. § 1229b(d)(1); *see* Pet. App. 5a-6a (stating that the government "didn't press—and has since abandoned" this argument).[1] Instead, the government argued that Petitioner's 1996 offense was an offense "referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title," 8 U.S.C. §

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[1] The government was unable to advance this argument because although section 1182(a)(2) "refer[s] to" crimes of moral turpitude, 8 U.S.C. § 1182(a)(2)(A)(i)(I), classification of Petitioner's 1996 crime as a crime of moral turpitude would not have "render[ed] [him] . . . removable from the United States under section 1227(a)(2) or 1227(a)(4)," 8 U.S.C. § 1229b(d)(1), because Petitioner committed his crime more than five years after his 1989 admission. 8 U.S.C. § 1227(a)(2)(A)(i) (alien is deportable for crime of moral turpitude only if crime is committed within five years of admission); *see* Pet. App. 5a-6a. While Petitioner's 1996 offense was a firearms offense and 8 U.S.C. § 1227(a)(2)(C) specifies that firearms offenses may be a basis for deportability, that provision has no analog in 8 U.S.C. § 1182; therefore, deportability under § 1227(a)(2)(C) cannot trigger the stop-time rule because such offenses are not "referred to in section 1182(a)(2)." 8 U.S.C. § 1229b(d)(1); *see also* Pet. App. 23a (citing *Matter of Campos-Torres*, 22 I. & N. Dec. 1289, 1293 (B.I.A. 2000)).

1229b(d)(1)—even though Petitioner was in a deportability proceeding, not an admissibility proceeding. Pet. App. 6a.

The IJ agreed with the government that Petitioner had committed an offense that "renders him inadmissible," and therefore held that Petitioner was ineligible to seek cancellation of removal. Pet. App. 35a-36a. However, the IJ explained that she "would have granted the respondent's application for cancellation of removal" if he were eligible to seek that relief. *Id.* 36a. According to the IJ, Petitioner's "positive factors far outweigh the negative. And considering the fact that his last arrest was over 10 years ago is telling to this court, that the respondent is clearly rehabilitated." *Id.* The IJ also noted that Petitioner's family "relies on him and would suffer hardship if he were to be deported to Jamaica." *Id.*

Petitioner appealed to the Board of Immigration Appeals ("BIA"). The BIA dismissed the appeal, agreeing with the IJ that the stop-time rule precluded Petitioner from seeking cancellation of removal. Pet. App. 20a-24a.

The Eleventh Circuit denied Petitioner's petition for review of the BIA's decision. The sole question before the Eleventh Circuit was whether Petitioner's 1996 offense "render[ed]" him "inadmissible" for the purposes of the stop-time rule. Pet. App. 2a, 6a. The Eleventh Circuit held that it did and affirmed the BIA. *Id.* 2a-3a. The Eleventh Circuit reasoned that "an alien can be rendered *inadmissible* regardless of whether he is actually seeking admission." *Id.* 12a (emphasis in original). According to the Eleventh Circuit,

inadmissibility "is a *status* that an alien assumes by virtue of his having been convicted of a qualifying offense under § 1182(a)(2)." *Id.*

The Eleventh Circuit acknowledged Petitioner's argument that the stop-time rule requires *both* that an offense be "referred to" in § 1182(a)(2) *and* that the offense "renders the alien inadmissible" under § 1182(a)(2), and that its interpretation would render the latter phrase surplusage. Pet. App. 15a. But it rejected this argument for two reasons. First, it reasoned that the canon is not absolute and should not be applied when it would "make an otherwise unambiguous statute ambiguous." *Id.* (citing *Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004)). Second, it reasoned that its reading of the statute did not result in surplusage because it is possible to commit "an offense referred to in section 1182(a)(2)" without being "render[ed] . . . inadmissible . . . under section 1182(a)(2)." *Id.* 15a-16a (quotation marks omitted). In particular, the Eleventh Circuit concluded that one must be *convicted* of an offense referred to under section 1182(a) before one is rendered inadmissible under the stop-time rule. *Id.* 16a.

The Eleventh Circuit noted that "[o]ther circuits have divided over the answer" to the question Petitioner raised. Pet. App. 2a. The court acknowledged in its decision that it was agreeing with decisions by the Second and Fifth Circuits (and an unpublished decision by the Third Circuit) while disagreeing with the Ninth Circuit. *Id.* 2a-3a.

Finally, in a lengthy footnote, the Eleventh Circuit declined to decide whether the BIA's decision—a non-precedential, single-member order—was entitled to

Chevron deference, given that it had affirmed the BIA even without deference. Pet. App. 17a-18a n.5. The Eleventh Circuit expressed considerable skepticism that *Chevron* deference would apply, however, noting: "One of the principal justifications for granting deference to administrative agencies is that they operate pursuant to regular procedures that ensure thorough consideration and vetting of interpretive issues . . . . When, as here, those procedures are short-circuited, that justification evaporates." *Id.* 18a n.5. The Eleventh Circuit rejected the government's argument that a prior, published BIA decision was entitled to *Chevron* deference, observing that the prior BIA decision had not resolved the precise issue before the Court. *Id.* (addressing *Matter of Jurado-Delgado*, 24 I. & N. Dec. 29, 31 (B.I.A. 2006)).

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari to resolve the circuit split over whether a lawfully admitted permanent resident who is not seeking admission to the United States can be rendered inadmissible for the purposes of the stop-time rule, 8 U.S.C. § 1229b(d)(1).

I. THERE IS AN ACKNOWLEDGED CIRCUIT SPLIT ON THE QUESTION PRESENTED.

The Court should grant certiorari because there is a circuit split on the question presented. In its opinion below, the Eleventh Circuit recognized that "[o]ther circuits have divided over the answer" to the question presented here. Pet. App. 2a. Specifically, the Ninth Circuit holds that a lawfully admitted permanent resident cannot be rendered inadmissible when he has already been admitted to the United States and is not

seeking admission. *See Nguyen*, 901 F.3d at 1100 (quotation marks omitted). By contrast, the Second, Fifth, and Eleventh Circuits hold that a lawfully admitted permanent resident is "inadmissible" for the purposes of the stop-time rule so long as he has committed one of the offenses listed in section 1182(a), regardless of whether he is seeking admission. *See* Pet. App. 12a; *Heredia*, 865 F.3d at 68; *Calix*, 784 F.3d at 1012. The Third Circuit has reached the same conclusion in an unreported opinion. *Ardon*, 449 F. App'x at 118.

A. The Ninth Circuit holds that lawfully admitted permanent residents cannot be not rendered inadmissible when they are not seeking admission to the United States.

The Eleventh Circuit acknowledged its disagreement with the Ninth Circuit's decision in *Nguyen*. Pet. App. 2a. In that case, the petitioner was a lawfully admitted permanent resident from Vietnam who had resided in the United States for fifteen years. *Nguyen*, 901 F.3d at 1095. The government initiated removal proceedings, charging that Nguyen was deportable under section 1227(a)(2) in light of three misdemeanor convictions. *Id.* As with Petitioner here, the government never charged that Nguyen was inadmissible under section 1182. *See id.* at 1097.

Nguyen applied for cancellation of removal, but the government argued that he was ineligible to seek it. *Id.* at 1095. During his removal proceedings, Nguyen had admitted to using cocaine in 2005—five years after he was first admitted to the United States. *See id.* at 1095. Because this was a recognized ground for inadmissibility under section 1182(a), the government argued that

Nguyen's cocaine use "render[ed]" him "inadmissible" under the stop-time rule and that his period of continuous presence had therefore ended before the required seven years had passed, despite the fact that Nguyen was not seeking admission to the United States. *Id.* at 1095, 1097-99.

The Ninth Circuit rejected the government's argument, holding that "Nguyen was not 'rendered inadmissible' by his drug offense because he is a lawful permanent resident not seeking admission." *Id.* at 1095. The court explained that federal immigration law distinguishes between inadmissibility and deportability in multiple respects. *Id.* at 1096-97. It held that because Nguyen was in a deportability proceeding rather than an admissibility proceeding, he had not been "render[ed] inadmissible" for purposes of the stop-time rule. *Id.* at 1097 ("Under the plain text of the stop-time rule, Nguyen was not rendered inadmissible . . . because he is not subject to the grounds of inadmissibility."). The Ninth Circuit rejected the government's argument—accepted by the court below—that Nguyen was "rendered inadmissible because he *would* be inadmissible if he ever sought admission to the United States." *Id.* It characterized the government's argument as an "obvious overreach, especially because Nguyen's reading perfectly comports with the statute's plain language in light of the distinction between inadmissibility and removability." *Id.*

The Ninth Circuit also rejected the government's contention that *Matter of Jurado-Delgado*, 24 I. & N. Dec. 29 (B.I.A. 2006), was entitled to *Chevron* deference, holding that that "[b]ecause the BIA's interpretation

impermissibly renders a portion of the rule superfluous, there is no ambiguity that would require us to exercise deference." *Id.* at 1098. The court also held, in any event, that *Jurado-Delgado* had not addressed the issue before the court. *Id.* at 1098-99; *see also* Pet. App. 17a-18a n.5 (reaching the same conclusion as the Ninth Circuit on this issue).

The Ninth Circuit "acknowledged that our conclusion parts ways with the Fifth Circuit." 901 F.3d at 1099 (discussing *Calix*). But it was "not persuaded by *Calix*'s analysis." *Id.*

B. The Second, Fifth, and Eleventh Circuits hold that lawfully admitted permanent residents can be rendered "inadmissible," even when they are in and admitted to the United States.

As the Eleventh Circuit noted, its decision is consistent with the Fifth Circuit's decision in *Calix* and the Second Circuit's decision in *Heredia*. The Eleventh Circuit's decision is also consistent with the Third Circuit's unreported decision in *Ardon*.

Calix involved a lawfully admitted permanent resident from Honduras, Rony Alexander Paz Calix, who was admitted to the United States in 1997. 784 F.3d at 1002. Calix was convicted of drug possession offenses in 2001 and 2007. *Id.* The government initiated removal proceedings, contending that Calix was deportable under section 1227. *See id.* Calix applied for cancellation of removal, but the immigration judge granted the government's motion to pretermit the application, holding that he was barred from seeking cancellation because his convictions rendered him inadmissible under

the stop-time rule. *Id.* at 1002-03. The BIA upheld the IJ's decision. *Id.* at 1003.

On appeal, the government acknowledged that Calix "is not seeking admission," but nonetheless "assert[ed] that if an alien seeking cancellation of removal has committed an offense that would make him or her inadmissible if actually seeking admission, that offense suffices to make the alien ineligible for cancellation of removal." *Id.* at 1004. The Fifth Circuit held that the "renders . . . inadmissible" language in the stop-time rule is ambiguous. *Id.* at 1005-07. Finding that the BIA had never squarely addressed the question presented in a published opinion, the Fifth Circuit "impose[d] [its] own construction on the stop-time rule." *Id.* at 1009. The Fifth Circuit concluded that "[a]ny offense that triggers the stop-time rule will halt the period of continuous residence for those who are seeking admission and those who have already been admitted." *Id.* at 1011. The Fifth Circuit observed that "[l]awful permanent-resident aliens do at times need to be admitted, such as when they have abandoned that status or have been absent for more than 180 days." *Id.*

The Second Circuit reached the same result in *Heredia*. That case involved a lawfully admitted permanent resident, Hoxquelin Gomez Heredia, who hailed from the Dominican Republic and had been admitted to the United States in 1997. 865 F.3d at 62. While in the United States, Heredia was convicted of a drug possession offense in 1999 and possession with intent to sell in 2010. *Id.* As relevant here, the Second Circuit was faced with the question whether the drug

possession offense in 1999 rendered Heredia inadmissible for purposes of the stop-time rule. *Id.* at 66.

The Second Circuit agreed with the Fifth Circuit's decision in *Calix*, holding that "a lawful permanent resident need not apply for admission to be rendered inadmissible under the stop-time rule." *Id.* at 67. The court explained that "'inadmissible' means not admissible, and 'admissible' means '*[c]apable of being or having the right to be admitted* to a place.'" *Id.* at 68 (quoting *Oxford English Dictionary* (3d ed. 2011) (emphasis in original)). Thus, "[t]he plain language of the statute . . . suggests that one who has been convicted of a controlled substance offense is no longer capable of being admitted to the United States, should he ever apply; it is not necessary to apply and be refused admission for one to be, in fact and in law, not capable of being admitted." *Id.* at 68.[2]

Finally, in an unpublished opinion, the Third Circuit adopted the same interpretation of the stop-time rule. *Ardon*, 449 F. App'x at 118. In that case, the petitioner was a lawfully admitted permanent resident from Honduras who was found to be removable because he

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[2] The Second Circuit went on to hold that it "need not definitively decide" the question because many years later, Heredia left the United States and needed to be readmitted. Thus, Heredia actually had been rendered inadmissible even under Heredia's interpretation of the statute. *Id.* at 68. The Second Circuit rejected Heredia's argument that the continuous-residence clock should have kept running until Heredia actually needed to be readmitted, *i.e.*, when he departed the United States. The court found that the stop-time rule is triggered on the date the alien commits the predicate offense regardless of whether the alien is not "rendered inadmissible" until much later. *Id.* at 69.

committed passport fraud. *Id.* at 116-17. The BIA also found that Ardon was ineligible for cancellation because he had only accrued five years of presence before he committed his offense. *Id.* at 117. The Third Circuit affirmed, holding that "an alien 'need not actually be charged and found inadmissible or removable on the applicable ground in order for the criminal conduct in question to terminate continuous residence in this country.'" *Id.* at 118 (quoting *Jurado-Delgado*, 24 I. & N. Dec. at 31).

* * *

Thus, there is a circuit split over whether a lawfully admitted permanent resident not seeking admission to the United States can be "rendered inadmissible" under the stop-time rule. Had Petitioner's case arisen in the Ninth Circuit, he would have been eligible to seek cancellation of removal—and the IJ made clear that he would have received it. Pet. App. 36a. But because his case arose in the Eleventh Circuit, he was found to be ineligible for cancellation of removal, based on the Eleventh Circuit's disagreement with the Ninth Circuit's interpretation of the stop-time rule.

II. THIS CASE MERITS REVIEW BY THIS COURT.

The Court should grant certiorari in this case to resolve the circuit conflict.

The question presented is important. An alien may receive cancellation of removal when removing the alien would lead to "exceptional and extremely unusual hardship" for his or her family. 8 U.S.C. § 1229b(b)(1)(A)-(D). Thus, eligibility for cancellation of removal may have a profound impact on aliens and their

families. Notably, this Court recently granted certiorari to resolve a different circuit split over the interpretation of the stop-time rule. *Pereira v. Sessions*, 138 S. Ct. 2105, 2113 (2018). This case is equally certworthy.

This case is an ideal vehicle. The facts are undisputed: Petitioner is a lawfully admitted permanent resident who was not seeking admission to the United States. Further, Petitioner has preserved his argument that he was not rendered inadmissible at every stage of the proceedings below. Pet. App. 7a. The Eleventh Circuit squarely addressed Petitioner's argument and did not identify any other barriers to relief.

The issue recurs frequently—since 2017, three different circuits have published opinions on this issue. And additional percolation would be unhelpful. In *Nguyen*, the Ninth Circuit expressly acknowledged, and rejected, the Fifth Circuit's contrary decision in *Calix*. In the decision below, the Eleventh Circuit expressly acknowledged, and rejected, the Ninth Circuit's contrary decision in *Nguyen*. The arguments on both sides of the split have been fully aired, and the case is ripe for review.

III. THE ELEVENTH CIRCUIT'S DECISION IS WRONG.

The Eleventh Circuit erred in holding that Petitioner's 1996 offense "render[ed]" him "inadmissible" for purposes of the stop-time rule. The Eleventh Circuit should have followed the Ninth Circuit: because Petitioner was a lawfully admitted permanent resident who was not seeking admission, he had not been rendered inadmissible.

Petitioner was not "rendered inadmissible" by his 1996 offense. He had already been admitted to the United States and did not need to be readmitted. A person who has already been admitted can be rendered *deportable—i.e.*, eligible to *lose* the status of a lawfully admitted permanent resident. But once the alien has been "lawfully admitted," he cannot be "rendered inadmissible."

The Eleventh Circuit took the position that inadmissibility is a "status" that "exists independent of any particular facts on the ground." Pet. App. 11a. It offered the example that water can be undrinkable even if no one subjectively wants to drink it. *Id.* Here, however, Petitioner is *incapable* of being adjudicated inadmissible, because he has already been admitted. For an already-admitted alien, the sole question an immigration judge can possibly consider is whether the alien is deportable, not whether the alien is inadmissible. Petitioner therefore was not "rendered inadmissible."

The Eleventh Circuit pointed out that Petitioner *could do* certain things that would require a fresh admissibility adjudication, such as abandon permanent-resident status. Pet. App. 12a. Perhaps so—and at that point, Petitioner might be "rendered inadmissible." But the pertinent question under the stop-time rule is not whether the alien *could* be rendered inadmissible if certain contingent future events occur; it is whether the alien *has* been rendered inadmissible. Petitioner was not.

The Eleventh Circuit's interpretation also ignores "one of the most basic interpretive canons" that "'[a] statute should be construed so that effect is given to all

its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . .'" *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)). As relevant here, the stop-time rule is triggered when two conditions are met: (1) the alien commits an offense referred to in section 1182(a)(2), and (2) committing that offense renders the alien inadmissible under section 1182(a)(2) or deportable under sections 1227(a)(2) or 1227(a)(4). *See* 8 U.S.C. § 1229b(d)(1)(B). The Eleventh Circuit's decision renders the second condition superfluous, because under its interpretation, committing an offense referred to in section 1182(a)(2) *necessarily* "renders the alien inadmissible." Pet. App. 2a. The Eleventh Circuit attempted to avoid that superfluity by stating that the first condition requires that the alien have *committed* the offense, while the second condition requires that the alien have been *convicted* of the offense: "while only commission is required at step one, conviction (or admission) is required at step two." Pet. App. 16a. But in that case, Congress would not have identified two separate conditions. Rather, it would have simply said that an alien is ineligible for cancellation of removal if he has been convicted of a crime referred to in section 1182(a)(2).

By contrast, Petitioner's reading respects Congress's drafting choice. Congress identified two statutory criteria for triggering the stop-time rule. The first criterion refers to the categories of *crimes*, *i.e.*, crimes referred to in section 1182(a)(2). The second criterion refers to the immigration *consequence* of those crimes, *i.e.*, being rendered inadmissible under section 1182(a)(2) or deportable under sections 1227(a)(2) or

1227(a)(4). An alien in inadmissibility proceedings can face the consequence of being rendered inadmissible; an alien in deportation proceedings can face the consequence of being rendered deportable. But because Petitioner was in deportation proceedings, he could not have been rendered inadmissible.

The Eleventh Circuit decision is also inconsistent with the structure of federal immigration law. It is well established that a lawfully admitted permanent resident who is not seeking admission to the country cannot be charged with being inadmissible. *See Landon*, 459 U.S. at 28; *Matter of Pena*, 26 I. & N. Dec. at 615-18. There is no other section of the Immigration and Nationality Act where the status of being "inadmissible" is divorced from the context of an alien seeking admission to the United States. *See Nguyen*, 901 F.3d at 1097. Under Petitioner's interpretation, this anomaly does not arise: for an alien in deportation proceedings, the relevant question is whether the alien has been rendered deportable, while for an alien in inadmissibility proceedings, the relevant question is whether the alien has been rendered inadmissible.

The Eleventh Circuit's decision conflicts with the text and structure of federal immigration law. Its decision should be reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A

IN THE UNITED STATERS COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-13055

Agency No. A029-021-783

ANDRE MARTELLO BARTON,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the
Board of Immigration Appeals

(September 25, 2018)

Before WILSON and NEWSOM, Circuit Judges, and VINSON,[*] District Judge.

NEWSOM, Circuit Judge:

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[*] Honorable C. Roger Vinson, United States District Judge for the Northern District of Florida, sitting by designation.

The federal immigration laws give the Attorney General the discretion to cancel the removal of an otherwise removable lawful permanent resident who (among other conditions) "has resided in the United States continuously for 7 years after having been admitted in any status." 8 U.S.C. § 1229b(a)(2). Importantly for present purposes, though, the continuous-residence requirement is subject to the so-called "stop-time rule." The provision that embodies that rule—at issue here—states that any period of continuous residence terminates when the alien "commit[s] an offense referred to in section 1182(a)(2) of this title that *renders the alien inadmissible* to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest." *Id.* § 1229b(d)(1) (emphasis added).

The question before us is whether a lawful-permanent-resident alien who has already been admitted to the United States—and who isn't currently seeking admission or readmission—can, for stop-time purposes, be "render[ed] ... inadmissible" by virtue of a qualifying criminal conviction. Other circuits have divided over the answer. For slightly different reasons, the Second and Fifth Circuits have both held that a lawful permanent resident needn't apply for admission to be "render[ed] ... inadmissible" under the stop-time rule (as has the Third Circuit, albeit in an unpublished opinion). *See Heredia v. Sessions*, 865 F.3d 60, 67 (2d Cir. 2017); *Calix v. Lynch*, 784 F.3d 1000, 1008-09 (5th Cir. 2015); *Ardon v. Att'y Gen. of U.S.*, 449 Fed. App'x 116, 118 (3d Cir. 2011). More recently, the Ninth

Circuit disagreed, concluding that "a lawful permanent resident cannot be 'rendered inadmissible' unless he is seeking admission." *Nguyen v. Sessions*, —— F.3d ——, ——, 2018 WL 4016761, at *5 (9th Cir. Aug. 23, 2018).

For the reasons that follow, we agree with the Second, Third, and Fifth Circuits, and disagree with the Ninth.

I

A

Andre Martello Barton is a native and citizen of Jamaica. Barton was initially admitted to the United States on May 27, 1989 as a B-2 visitor for pleasure; approximately three years later, he successfully adjusted his status to lawful permanent resident. Since his admission, Barton has run afoul of the law on several occasions. Initially, on January 23, 1996—for reasons that will become clear, the dates matter—Barton was arrested and charged with three counts of aggravated assault and one count each of first-degree criminal damage to property and possession of a firearm during the commission of a felony. He was convicted of all three offenses in July 1996. Then, a little more than a decade later—first in 2007 and then again in 2008—Barton was charged with and convicted of violating the Georgia Controlled Substances Act. (For present purposes, only Barton's 1996 crimes are relevant to determining whether he is eligible for cancellation of removal. Barton's 2007 and 2008 offenses occurred more than seven years after his admission to the United States—which, as we will

explain, is the pertinent timeframe for establishing continuous residence under the cancellation statute.)

The Department of Homeland Security subsequently served Barton with a notice to appear, charging him as removable on several grounds: (1) under 8 U.S.C. § 1227(a)(2)(A)(iii), for being convicted of an aggravated felony related to drug trafficking; (2) under 8 U.S.C. § 1227(a)(2)(B)(i), for violating controlled-substance laws; (3) under 8 U.S.C. § 1227(a)(2)(C), for being convicted of illegally possessing a firearm; and (4) under 8 U.S.C. § 1227(a)(2)(A)(ii), for being convicted of two crimes involving moral turpitude not arising out of a single scheme. Barton admitted the factual allegations in the notice and conceded removability based on the controlled-substance and gun-possession offenses, but denied that he had been convicted of a trafficking-related aggravated felony or of two crimes involving moral turpitude not arising out of a single scheme. Barton also indicated that he intended to seek cancellation of removal as a lawful permanent resident. The immigration judge sustained the two conceded charges of removability, and the government later withdrew the other two charges.

B

As promised, Barton subsequently filed an application for cancellation of removal under 8 U.S.C. § 1229b(a), which, as already explained, allows the Attorney General to cancel the removal of an otherwise removable lawful-permanent-resident alien if—in addition to other requirements not relevant here—the alien "has resided in the United States continuously for

7 years after having been admitted in any status." 8 U.S.C. § 1229b(a)(2). Importantly, though—as also explained—the continuous-residence requirement is subject to the "stop-time rule," which terminates the accrual of continuous residence when the alien commits a crime that (1) is listed in 8 U.S.C. § 1182(a)(2) and (2) that renders the alien either "inadmissible" under § 1182(a)(2) or "removable" under 8 U.S.C. § 1227(a)(2) or (a)(4). *Id.* § 1229b(d)(1)(B).

In his cancellation application, Barton acknowledged his prior criminal convictions and included as exhibits records that, as relevant here, showed that he had committed the crimes that resulted in his convictions for aggravated assault, criminal damage to property, and unlawful gun possession on January 23, 1996. The government moved to pretermit Barton's application, arguing that Barton hadn't accrued the required seven years of continuous residence after his May 27, 1989 admission because, under the stop-time rule, his continuous-residence period ended on January 23, 1996.

In response, Barton contended that his 1996 crimes didn't trigger the stop-time rule. As to § 1229b(d)(1)'s "removable" prong, Barton said that his 1996 offenses didn't qualify because they arose from a single scheme of misconduct constituting one crime involving moral turpitude committed outside his first five years in the United States, whereas the cross-referenced § 1227(a)(2) establishes removability, as relevant here, only for (i) a single crime involving moral turpitude committed within five years of an alien's admission or (ii) multiple crimes involving moral turpitude not

arising out of a single scheme. The government didn't press—and has since abandoned—the argument that Barton's 1996 crimes rendered him "removable" for stop-time purposes. Instead, it insisted that Barton's 1996 offenses—even if considered as a single crime involving moral turpitude occurring outside the five-year timeframe—rendered Barton "inadmissible" under § 1182(a)(2), which unlike removability under § 1227(a)(2) isn't limited by a single-scheme requirement. Barton replied—thus teeing up the issue before us—that as an already-admitted lawful permanent resident not seeking admission (or readmission) to the United States, he could not as a matter of law be "render[ed] ... inadmissible" within the meaning of § 1229b(d).

The immigration judge ruled in the government's favor, concluding that Barton's 1996 offenses "render[ed]" him "inadmissible" under § 1182(a)(2), thereby triggering § 1229b(d)(1)'s stop-time rule, thereby prematurely ending his period of continuous residence in the United States, thereby disqualifying him for cancellation of removal.

C

Barton sought review of the IJ's order in the Board of Immigration Appeals, reiterating his argument that a lawful-permanent-resident alien not seeking admission to the United States can't be "render[ed] inadmissible" under § 1182(a)(2) for stop-time purposes. In a non-precedential single-member decision, the Board agreed with the IJ, concluding that Barton's 1996 offenses triggered the stop-time rule and thus forestalled his accrual of the requisite seven years of

continuous residence. Citing its earlier decision in *Matter of Jurado-Delgado*, 24 I. & N. Dec. 29 (B.I.A. 2006), the Board (per the lone member) held that Barton's convictions barred him from seeking cancellation of removal because—so far as we can tell from a very summary order—the phrase "renders the alien inadmissible" in § 1229b(d)(1)'s stop-time rule requires only that the applicant be "potentially" inadmissible, not that he be actively seeking admission.

Barton now petitions for review of the Board's decision. He asserts, as he has all along, that as a lawful permanent resident he "plainly cannot be inadmissible as a result of any offense, as he is not seeking admission to the United States." Br. of Petitioner at 8.

II

Under the principle announced in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, (1984), "[a]s a general rule, an agency's interpretation of a statute which it administers is entitled to deference if the statute is silent or ambiguous and the interpretation is based on a reasonable construction of the statute." *Fajardo v. U.S. Att'y Gen.*, 659 F.3d 1303, 1307 (11th Cir. 2011). And to be clear, the Supreme Court has held that *Chevron* deference applies with full force when the Board of Immigration Appeals interprets ambiguous statutory terms in the course of ordinary case-by-case adjudication. *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 424–25, (1999). But so do *Chevron*'s limitations. Accordingly, here as elsewhere, if we determine—employing "traditional tools of statutory

construction"—that "Congress has spoken clearly, we do not defer to [the] agency's interpretation of the statute," because "we must give effect to the unambiguously expressed intent of Congress." *Fajardo*, 659 F.3d at 1307 (quoting *Chevron*, 467 U.S. at 842–44).

The threshold question before us, therefore—at *Chevron* step one, so to speak—is whether the usual rules of statutory interpretation provide a clear answer to the following question: Can a lawful-permanent-resident alien who is not presently seeking admission to the United States nonetheless be "render[ed] ... inadmissible" within the meaning of 8 U.S.C. § 1229b(d)(1)? Although it is undoubtedly true that "the concept of inadmissibility is generally married to situations in which an alien is actually seeking admission to the United States," *Calix v. Lynch*, 784 F.3d 1000, 1004 (5th Cir. 2015), for the reasons that follow, we hold that an already-admitted lawful permanent resident—who doesn't need and isn't seeking admission—*can* be "render[ed] ... inadmissible" for stop-time purposes.

A

Any application of the "traditional tools of statutory construction," of course, must begin "with the statutory text, and proceed from the understanding that unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013) (internal quotation marks omitted). At issue here (again) is the stop-time rule, which (again) terminates the seven years of continuous residence that a lawful

permanent resident must accrue in order to qualify for cancellation of removal. In relevant part, the stop-time rule provides as follows:

> [A]ny period of continuous residence ... in the United States shall be deemed to end ... when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.

8 U.S.C. § 1229b(d)(1).

Because the parties here agree that Barton is not ineligible for cancellation of removal on account of having committed an offense that rendered him "removable" under § 1227(a)(2) or § 1227(a)(4), the sole question before us is whether his 1996 convictions rendered him "inadmissible" under § 1182(a)(2). Barton's position is simply stated: He says that he "plainly cannot be *inadmissible* as a result of any offense, as he is not seeking *admission* to the United States." Br. of Petitioner at 8 (emphasis added). Although Barton's argument has a certain intuitive appeal, we conclude that § 1229b(d)(1)'s plain language forecloses it.

We begin our textual analysis where Barton does—with the word "inadmissible." Standard English-language dictionaries all seem to define "inadmissible" in pretty much the same way: "Not admissible; not proper to be allowed or received." *Webster's Second New International Dictionary* 1254 (1944); *see also*,

e.g., *Webster's Third New International Dictionary* 1139 (2002) (same); *Oxford English Dictionary* (3d ed. 2011) ("[n]ot admissible; not to be admitted, entertained, or allowed"). Unsurprisingly, those same dictionaries similarly define the root word "admissible": "Capable of being or having the right to be admitted to a place." *Oxford English*; *see also*, *e.g.*, *Webster's Second* at 34 ("[e]ntitled or worthy to be admitted"); *Webster's Third* at 28 (same). So, in short, an alien like Barton is "inadmissible" if he isn't "proper[ly]"—or doesn't "hav[e] the right to be"—present in the United States.

On, then, to the word "renders," which precedes "inadmissible." Barton asserts that Congress's use of that term—such that the alien must commit an offense that "renders" him "inadmissible"—"requires certain factual circumstances to be in existence to be operative," and thus that it "makes most sense for Congress to have used 'renders' inadmissible to apply to those seeking admission ...." Br. of Petitioner at 12–13. We disagree that the term "renders" necessitates (or even properly suggests) so narrow a reading. Turning again to the dictionaries, we find that they almost uniformly define "render" to mean "to cause to be or to become." *E.g.*, *Webster's Second New International Dictionary* 2109 (1944); *Webster's Third New International Dictionary* 1922 (2002) (same); *Oxford English Dictionary* (3d ed. 2011) (same). Some, interestingly—and we think tellingly—go on to explain that the word "render" can indicate the conferral of a particular condition, or "state." *Webster's Second* at 2109; *Webster's Third* at 1922.

A "state"-based understanding makes particularly good sense here, where the word that follows "renders" is "inadmissible." *Cf. Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (emphasizing that a statutory term's meaning should be determined by reference to "the specific context in which [it] is used"). By their very nature, "able" and "ible" words[1] connote a person's or thing's character, quality, or status—which, importantly for present purposes, exists independent of any particular facts on the ground, so to speak. Consider, for instance, the following example, taken from one dictionary's definition of the word "render": "Sewage effluent leaked into a well, grossly contaminating the water and rendering it *undrinkable* for 24 hours." *Oxford English* (emphasis added). The described water isn't properly drunk for a full day—whether or not anyone is actually trying to drink it. It is, by its very nature, not drinkable. Here's another, again from a dictionary definition of "render": "[T]he rains rendered his escape *impossible*." *Oxford Dictionary of English* 1503 (3d ed. 2010) (emphasis added). Because of the rains, the unidentified captive's escape couldn't be made—whether or not he was actually trying to make it. Similar illustrations abound: A terminal illness renders its victim *untreatable* regardless of whether she is actively seeking treatment; rot renders a piece of fish *inedible*

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[1] For an explanation of the differences—why sometimes "able" and sometimes "ible"?—*see* Catherine Soanes, *Do you know your -ibles from your -ables?*, Oxford Dictionaries: Oxford Words (Oct. 23, 2013), https://blog.oxforddictionaries.com/2012/10/23/ibles-and-ables/ (last visited Sept. 15, 2018).

regardless of whether someone is trying to eat it; sheer weight renders a car *immovable* regardless of whether someone is trying to move it. You get the point. So too here—an alien can be rendered *inadmissible* regardless of whether he is actually seeking admission.

We simply cannot discern in § 1229b(d)(1)'s text any indication that in order to be "render[ed] ... inadmissible" within the meaning of the stop-time rule, an alien *must* presently be seeking admission. Rather, an alien is "render[ed] ... inadmissible" when he is "cause[d] to be or to become" not "proper[ly]" or "right[ly]" admitted. In other words, "inadmissib[ility]" is a *status* that an alien assumes by virtue of his having been convicted of a qualifying offense under § 1182(a)(2). True, for an alien like Barton, who has already been admitted—and isn't currently seeking admission—that status might not immediately produce real-world admission-related consequences. But it isn't categorically irrelevant to admission either; rather, it may just be that the otherwise-latent status manifests somewhere down the road. Barton is of course correct that, as a general rule, an already-admitted lawful permanent resident needn't seek readmission to the United States. There are exceptions, however. For instance, a once-admitted alien may need readmission if he "has abandoned or relinquished [lawful-permanent-resident] status," "has been absent from the United States for a continuous period in excess of 180 days," or "has engaged in illegal activity after having departed the United States." 8 U.S.C. § 1101(a)(13)(C). (Importantly, the term of "inadmissib[ility]" imposed by § 1182(a)(2) has no

sunset; once an alien is "render[ed] ... inadmissible" under the statute, he retains that status indefinitely.)[2]

So as a matter of both linguistics and logic, at least for stop-time purposes, a lawful permanent resident can—contrary to Barton's contention—be "render[ed] ... inadmissible" even if he isn't currently seeking (and for that matter may never again seek) admission to the United States.

In resisting this plain-language interpretation, Barton relies principally on the rule against surplusage—which cautions against needlessly reading a statute in a way that renders (pun fully intended) certain language superfluous. *See, e.g.*, *Duncan v. Walker*, 533 U.S. 167, 174 (2001). In particular, Barton asserts—

> If an offense referred to in 8 U.S.C. § 1182(a)(2), to wit, a [crime involving moral turpitude], categorically render[s] an alien inadmissible and trigger[s] the stop-time rule, without respect to whether that individual is actually seeking admission, then there would be no need to consider whether, in the alternative, the offense

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[2] In *Nguyen*, the Ninth Circuit acknowledged that § 1101(a)(13)(C) specifies circumstances in which a lawful permanent resident might have to seek readmission, but answered that none of them applied in the case before it. —— F.3d at ——, 2018 WL 4016761, at *3. With respect, we think that misses the point—which isn't whether the particular alien before the court himself needs readmission right now, but rather whether a once-admitted alien might someday need readmission, such that his "inadmissible" status would matter. Clearly he might, such that it would.

> render[s] the alien removable under 8 U.S.C. § 1227(a)(2) or (a)(4).

Br. of Petitioner at 11.

Although we find Barton's surplusage-based argument a little hard to follow, he seems to be saying something like the following. At the outset, he correctly recognizes that in order to trigger § 1229b(d)(1)'s stop-time rule, two conditions must be met: first, the alien must have "committed an offense referred to in section 1182(a)(2)"; second, and separately, that offense must "render[ ] the alien" either "inadmissible ... under section 1182(a)(2)" or "removable ... under section 1227(a)(2) or 1227(a)(4) ...." *See Heredia v. Sessions*, 865 F.3d 60, 66–67 (2d Cir. 2017) (explaining the "stop-time rule as having two requirements"); *Calix*, 784 F.3d at 1006 (same). From that starting point, and presumably fastening on the fact that both § 1229b(d)(1)'s prefatory "referred to" clause and the "inadmissible" prong of the statute's operative clause cross-reference § 1182(a)(2), Barton appears to contend that an alien's commission of any § 1182(a)(2)-based crime that meets the threshold "referred to" condition will also *ipso facto* "render[ ] the alien inadmissible under section 1182(a)(2)." Thus, he says, there will never be a need to proceed to determine whether a crime qualifies under the operative clause's separate § 1227(a)-based "removable" prong—hence, the argument goes, the surplusage. Barton's solution: Courts should read the stop-time rule "so that the inadmissibility part applies to permanent residents seeking admission, and the [removability] part applies to those permanent

residents in the United States already, not seeking admission ...." Br. of Petitioner at 11.

We reject Barton's argument for two reasons. As an initial matter, the Supreme Court has repeatedly explained that the usual "preference" for "avoiding surplusage constructions is not absolute" and that "applying the rule against surplusage is, absent other indications, inappropriate" when it would make an otherwise unambiguous statute ambiguous. *Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004) (citing *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001)). Rather, faced with a choice between a plain-text reading that renders a word or clause superfluous and an interpretation that gives every word independent meaning but, in the doing, muddies up the statute—courts "should prefer the plain meaning since that approach respects the words of Congress." *Id.* Because, as we have explained, the statutory language here is clear, it is unnecessary—and in the Supreme Court's words, would be "inappropriate"—to apply the anti-surplusage canon here.

Moreover, and in any event, Barton's surplusage-based argument misunderstands the stop-time rule's operation. Contrary to Barton's assumption, answering "yes" to the first question—whether the alien has "committed an offense referred to in section 1182(a)(2)"—does *not* necessarily require a "yes" to the second question—whether that offense "renders the alien inadmissible ... under section 1182(a)(2)." The reason is that while the mere "commi[ssion]" of a qualifying offense satisfies the prefatory clause, actually "render[ing] the alien inadmissible" demands

more. Under § 1182(a)(2), an alien "is inadmissible"—here, as a result of a "crime involving moral turpitude"—only if he is "convicted of, or ... admits having committed, or ... admits committing acts which constitute the essential elements of" the listed offense. 8 U.S.C. § 1182(a)(2)(A)(i)(I). In short, while only commission is required at step one, conviction (or admission) is required at step two. *See Calix*, 784 F.3d at 1006 ("If an alien has committed an offense listed [in § 1182(a)(2)], does inadmissibility automatically result? It does not."); *see also Heredia*, 865 F.3d at 66–67 (recognizing commission-conviction distinction).[3]

So contrary to Barton's contention, there is no surplusage. The statutory language that he assails as superfluous is in fact the second of two independent

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[3] There is one clarification worth making here. Although it is an alien's conviction of a qualifying offense that "renders [him] inadmissible" for stop-time purposes, his period of continuous residence is deemed to terminate on the date he initially committed that offense. So, in effect, his conviction-based inadmissibility "relates back" (our term) to the date of the crime's commission. *See, e.g.*, *Heredia*, 865 F.3d at 70–71 ("[W]hen a non-citizen is rendered inadmissible—by a conviction, admission of the criminal conduct, or through some other means—the stop-time rule may make him ineligible for cancellation of removal, if, as of the date of his *commission* of the underlying offense, he had not yet resided in the United States continuously for seven years. To state it another way: as long as a qualifying offense later does render the non-citizen inadmissible under 8 U.S.C. § 1182(a)(2), the date of the *commission* of the offense governs the computation of a lawful permanent resident's continuous residency in the United States.").

requirements, both of which are necessary to trigger the stop-time rule.[4]

III

For the foregoing reasons, we hold, per the stop-time provision's plain language, that a lawful-permanent-resident alien need not be seeking admission to the United States in order to be "render[ed] ... inadmissible." Accordingly, the Board correctly concluded that Barton is ineligible for cancellation of removal because the stop-time rule—triggered when he committed a crime involving moral turpitude in January 1996—ended his continuous residence a few months shy of the required seven-year period.[5]

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[4] Although the Ninth Circuit embraced a version of this surplusage-based argument in *Nguyen*, *see* —— F.3d at ——, 2018 WL 4016761, at *3, it failed to account for the fact that while commission of a crime alone satisfies § 1229b(d)(1)'s prefatory clause, the operative "render[ing]" clause requires more—either a conviction of or a formal admission to the underlying offense.

[5] Because we conclude that the stop-time provision's statutory language is unambiguous, we needn't definitively determine whether, as the government contends, the Board's decision here—which the parties agree is a non-precedential single-member order—is entitled to *Chevron* deference. *See Chevron*, 467 U.S. at 842 ("If the intent of Congress is clear, that is the end of the matter."). We note, though, that in *Quinchia v. U.S. Attorney General*, this Court held that "*Chevron* deference is not appropriate[ly]" afforded to "a non-precedential decision issued by a single member of the [Board] that does not rely on existing [Board] or federal court precedent." 552 F.3d 1255, 1258 (11th Cir. 2008) (emphasis added). *Quinchia* further indicates that a single-member Board decision should be deemed to have "rel[ied] on"

existing precedent for *Chevron* purposes only where it is actually dictated—or "compelled"—by an earlier decision. *See id.* at 1258 (citing *Garcia–Quintero v. Gonzales*, 455 F.3d 1006, 1011–14 (9th Cir. 2006), for the proposition that "*Chevron* deference may apply where the non-precedential [Board] decision relied on, and was 'compelled by' an earlier precedential decision"); *cf. Silva v. United States Att'y Gen.*, 448 F.3d 1229, 1243 (11th Cir. 2006) (holding that it is permissible under 8 C.F.R. § 1003.1(e)(4)(i)(A) for the Board to summarily affirm the decision of the immigration judge without opinion when, among other conditions, the issues "are governed by existing precedent").

It is true, as the government says, that the single-member opinion here cited (parenthetically) the Board's earlier decision in *Matter of Jurado-Delgado* for the proposition that "the phrase 'renders the alien admissible ... or removable' in section [1229b(d)(1)] requires only that an alien 'be or become' inadmissible or removable, i.e., be potentially removable if so charged," 24 I. & N. Dec. 29, 31 (B.I.A. 2006). But as the Fifth Circuit has correctly explained, "[t]he [Board] in *Jurado-Delgado* clearly answered one narrow question," which is similar, but not identical, to the one presented here: "It held that an alien could be charged with removal on one ground and be ineligible for cancellation of removal because of another ground. The opinion does not explicitly answer whether a lawful permanent resident who does not need to be admitted nonetheless has his period of continuous residence stopped by an offense rendering him inadmissible." *Calix*, 784 F.3d at 1009. Because the single-member decision here required an extension (or at least a refinement) of *Jurado-Delgado*, we doubt that it qualifies under *Quinchia* as one that "rel[ies] on" existing Board precedent.

One of the principal justifications for granting deference to administrative agencies is that they operate pursuant to regular procedures that ensure thorough consideration and vetting of interpretive issues. *See Chevron*, 467 U.S. at 865 (basing policy of deference, in part, on the conclusion that "the agency considered the matter in a detailed and reasoned fashion"). When, as here, those procedures are short-circuited, that justification evaporates.

PETITION DENIED.

Cf. Rotimi v. Gonzales, 473 F.3d 55, 57–58 (2d Cir. 2007) (refusing to give *Chevron* deference to a single-member Board decision because (1) the Board itself affords such decisions no precedential weight and (2) the Board's governing regulations provide that it has a duty to provide "clear and uniform guidance [...] on the proper interpretation and administration" of the immigration laws, which it shall do through precedential decisions) (cited in *Quinchia*, 552 F.3d at 1258).

Appendix B

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A029 021 783 – Lumpkin, GA Date: JUN 12, 2017

In re: ANDRE MARTELLO BARTON a.k.a. Andre Bourton

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Carolina Antonini, Esquire

ON BEHALF OF DHS: Kelly Johnson
Deputy Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] – Convicted of controlled substance violation (sustained)

Sec. 237(a)(2)(C), I&N Act [8 U.S.C. § 1227(a)(2)(C)] – Convicted of firearms or destructive device violation (sustained)

APPLICATION: Cancellation of removal under section 240A(a) of the Act

The respondent, a native and citizen of Jamaica, appeals from the Immigration Judge's February 17,

2017, decision denying his application for cancellation of removal for certain permanent residents under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a). The Department of Homeland Security (OHS) has filed a brief opposing the appeal. The appeal will be dismissed.

The respondent was convicted, inter alia, of three counts of aggravated assault and possession of a firearm in the commission of a felony in September 1996 (I.J. at 8-9; Exh. 2).[1] The Immigration Judge concluded that pursuant to the stop time rule, the respondent is ineligible for cancellation of removal since his conviction for a crime involving moral turpitude in 1996 terminated his continuous presence (I.J.at 8-10). *See* sections 240A(a)(2), (d)(1) of the Act. Thus, the Immigration Judge denied the respondent's application for cancellation of removal under section 240A(a) of the Act (I.J. at 8-10).

On appeal, the respondent argues that the stop time rule does not apply to his 1996 conviction because he was charged with removability under section 237(a)(2) of the Act, and since there is no matching charge under section 212(a)(2), the stop time rule is not triggered (Respondent's Brief at 16-19). The respondent further argues, among other things, that this Board's interpretation of the word "renders" contained in the stop time rule as set forth under section 240A(d)(l) of

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[1] The respondent was also convicted of possession of a controlled substance on two separate occasions in 2007 and 2008 (I.J. at 8; Exhs. 3-4).

the Act renders the term superfluous (Respondent's Brief at 12-16).

Pursuant to section 240A(a)(2) of the Act, the respondent cannot qualify for cancellation of removal unless he can show that he "has resided in the United States continuously for 7 years after having been admitted in any status." Upon our de novo review, we affirm the Immigration Judge's determination that the respondent has not established his statutory eligibility for cancellation of removal under section 240A(a) of the Act (I.J. at 8-10). Specifically, we agree that the respondent has not demonstrated 7 years of continuous residence in the United States "after having been admitted in any status." *See* section 240(a)(2) of the Act. The respondent was admitted into the United States on May 27, 1989, as a B2 visitor (I.J. at 8; Exh. 1). He became a lawful permanent resident on June 23, 1992 (I.J. at 6, 8; Exh. 1). According to the stop time rule at section 240A(d)(1) of the Act, the respondent' s commission of the crimes of aggravated assault, criminal damage to property in the first degree, and possession of a firearm in the commission of a felony on January 23, 1996, cut off his period of continuous residence (I.J.at 8-10; Exh. 2). *See Tefel v. Reno*, 180 F.3d 1286, 1289 (11th Cir. 1999). He therefore accrued less than 7 years of continuous residence after having been admitted in any status on May 27, 1989.

On appeal, the respondent contends that the stop time rule is not triggered by his 1996 criminal conviction since he is in section 237(a)(2) proceedings, and there is no matching charge under section 212(a)(2) of the Act (Respondent's Brief at 16-19). We find this

argument unpersuasive. In order for the stop time provision in section 240A(d)(1) of the Act to apply, the offense committed by the alien must be referred to in section 212(a)(2) of the Act, 8 U.S.C. § 1182(a)(2). *See Matter of Garcia*, 25 I&N Dec. 332, 334 (BIA 2010) (explaining that the "offense-related" portion of the stop time rule under section 240A(a)(2) requires that "the offense must be one that is 'referred to in section 212(a)(2),' and it also must be one that 'renders the alien inadmissible ... or removable' on specified grounds"). The Immigration Judge found that the respondent's conviction for aggravated assault, inter alia, is a ground of inadmissibility under section 212(a)(2) of the Act, in that the offense is categorically a crime involving moral turpitude (I.J. at 9-10). The respondent does not contest this finding on appeal.

Thus, section 240A(d)(1) of the Act is applicable and the respondent is barred, by reason of his aggravated assault offense, from seeking cancellation of removal under section 240A(a) of the Act. *See Matter of Jurado-Delgado*, 24 I&N Dec. 29, 31 (BIA 2006) (stating that "the phrase 'renders the alien inadmissible ...or removable' in section 240A(d)(1)(B) of the Act requires only that an alien 'be or become' inadmissible or removable, i.e., be potentially removable if so charged"); *cf. Matter of Campos-Torres*, 22 I&N Dec. 1289, 1293 (BIA 2000) (finding that the stop time rule was not applicable since the respondent's firearms offense is not referred to in section 212(a)(2) of the Act, although included in section 237(a)(2)(C) of the Act).

Moreover, we also find that the respondent's contention that the Board's interpretation of the term

"renders" under section 240A(d)(1) of the Act renders it superfluous, to be unavailing (Respondent's Brief at 12-16). *See Matter of Jurado-Delgado*, *supra*, at 31 (explaining that with regard to the word "renders" in section 240A(d)(1)(B) of the Act, "there is no reason to believe that Congress intended that an alien *must* have been charged with such an offense as a ground of inadmissibility or removability in order for the provision to stop the alien's accrual of continuous residence") (emphasis added); *see also Matter of Perez*. 22 I&N Dec. 689, 699 (BIA 1999) (stating that in construing the language of section 240A(d)(1) of the Act, we must also consider the language in section 240A as a whole, not in isolation).

As the respondent was first admitted in any status on May 27, 1989, less than 7 years before his commission of the crimes occurring on January 23, 1996, which rendered him removable under section 237(a)(2) of the Act, the Immigration Judge properly denied his application for cancellation of removal pursuant to sections 240A(a)(2) and 240A(d)(1) of the Act (I.J. at 8-10). Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

FOR THE BOARD

Appendix C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
LUMPKIN, GEORGIA

File: A029-021-783 February 17, 2017

In the Matter of

ANDRE MARTELLO BARTON	)	
	)	IN REMOVAL
RESPONDENT	)	PROCEEDINGS

CHARGES: Section 237(a)(2)(B)(i) of the Immigration and Nationality Act, and Section 237(a)(2)(C) of the Immigration and Nationality Act. The court notes that there were two additional charges that were contained in a Notice to Appeal that were either withdrawn—and if not had been withdrawn, the court would not have sustained them

APPLICATION: Cancellation of removal for permanent residents

ON BEHALF OF RESPONDENT: Ms. Carolina Antonini

ON BEHALF OF DHS: Mr. Thomas Thompson

ORAL DECISION OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY OF THE CASE

The respondent is a 39-year-old single, male, native and citizen of Jamaica. The United States Department of Homeland Security (DHS) has brought these removal proceedings against the respondent under the authority of the Immigration and Nationality Act (INA). Proceedings were commenced with the filing of the Notice to Appear (NTA) with the Immigration Court. See Exhibit 1.

Initially, the respondent admitted Allegations 1 through 7, denied Allegation 8, admitted Allegation 9, and denied Allegation 10. After review and satisfaction of review of certain documents regarding the criminal acts that were listed in Allegation 8, the respondent then admitted Allegation 8. Allegation 10 has remained denied. The respondent did not admit any of the charges contained in Notice to Appear, but charges under Section 237(a)(2)(B)(i) of the Act and Section 237(a)(2)(C) of the Act were both sustained by the court. Based on respondent's admissions, the conviction records contained at Exhibits 2, 3, and 4, I find that respondent's removability has been established. Jamaica was designated as the country of removal. The respondent applied for relief from removal in the form of cancellation of removal for permanent residents.

The respondent's form EOIR-42A application for cancellation is contained in the record as Exhibit 5. Prior to admission of the application, the respondent was given an opportunity to make necessary correction

and then swore or affirmed that the contents of the application, as corrected, were all true and correct to the best of his knowledge.

The evidentiary record consists of documentary evidence, Exhibits 1 through 7, including Exhibit 1, the Notice to Appear; Exhibit 2, the judgment and conviction documents, dated September 26, 1996; Exhibit 3, judgment and conviction documents, dated January 11th, 2008; Exhibit 4, judgment and conviction documents, dated May 16th, 2007; Exhibit 5, the 42A application; Exhibit Number 6, respondent's documents in support, Tabs A through V; and Exhibit 7, respondent's documents in support, Tabs W through OO. On today's date, counsel for the respondent also provided a document from a psychologist, Dr. Julie Pope, and requested that that document also be admitted into evidence. The court declined to admit this document into evidence, as it was previously available to the respondent and should have been submitted with the other documents by the deadline provided by the court. So, this document was marked for ID only (the respondent testified to seeking psychological treatment).

II. STATEMENT OF THE LAW

The provisions of the REAL ID Act of 2005 apply to the respondent's application, as it was filed on or after May 11th, 2005.

SUSTAINING BURDEN:

The applicant must comply with the applicable requirements to submit information or documentation in support of the applicant's application for relief for

protection as provided by law or by regulation, or in the instructions for the application form.

CREDIBILITY DETERMINATION:

Considering the totality of the circumstances and all relevant factors, the immigration judge may base a credibility determination on the demeanor, candor, and responsiveness of the applicant or witness; the inherent plausibility of the applicant or witness's account; the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made); the internal consistency of each such statement; the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions); and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim; or any other relevant factor. There is no presumption of credibility; however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal. The court finds that the respondent and both his witnesses were credible. They were all candid with the court, and there is no reason for this court to believe that they were not being candid in their testimony. Also, any and all information provided through testimony by the respondent or either of his two witnesses was corroborated by documentary evidence contained in the file.

The respondent shall have the burden of establishing that he is eligible for any requested benefit or privilege that it should be granted in the exercise of discretion. If the evidence indicate that one or more grounds for mandatory denial of the application for relief may apply, the alien should have the burden of proving by a preponderance of evidence that such grounds do not apply.

INA Section 240A(a) provides that a lawful permanent resident is eligible for cancellation of removal if he: (1) has been lawfully admitted for permanent residence for not less than five years; (2) has resided in the United States continuously for seven years after having been admitted in any status; and (3) has not been convicted of an aggravated felony. Pursuant to INA Section 240A(d)(1), the stop-time rule, any period of continuous residence in the United States shall be deemed to end when the applicant is served with a Notice to Appear or when the applicant commits an offense referred to in INA Section 212(a)(2) that renders the applicant inadmissible to the United States under INA Section 212(a)(2) or removable under INA Sections 237(a)(2) or INA Section 237(a)(4). *See also Matter of Campos-Torres*, 22 I&N Dec. 289, 294 (BIA 2000), holding that a firearms offense that rendered an alien removable under Section 237(a)(2)(C) is not one referred to in Section 212(a)(2), and thus does not stop the accrual of continuous residence for purposes of establishing eligibility for cancellation of removal.

In addition to demonstrating statutory eligibility, an applicant for cancellation of removal bears the burden of showing that relief is warranted in the exercise of

discretion. INA Section 240A(a); s*ee also Matter of C-V- T-*, 22 I&N Dec.7, 8-9 (BIA 1998). The Board has held that the general standards developed for the exercise of discretion under INA Section 212(c) are also applicable in the exercise of discretion under INA Section 240A(a). *Matter of C-V-T-*,22 I&N Dec. at 10. *See also Matter of Sotelo-Sotelo*, 23 I&N Dec. 201, 202 (BIA 2001),affirming *Matter of C-V-T-*. In keeping with the standards developed under former Section 212(c) of the Act, the court shall consider the record as a whole and balance the adverse factors evidencing the alien's undesirability as a permanent resident with the social and human considerations presented in his favor to determine whether a grant of relief would be in the best interests of this country. *Matter of C-V-T-*, 22 I&N Dec. 11, *Matter of Edwards*, 20 I&N Dec. 191, 195 (BIA 1990). There is no threshold requirement that the applicant show unusual or outstanding equities. Rather, the court must weigh the favorable and adverse factors to balance the totality of the evidence before reaching a conclusion as to whether the applicant warrants a grant of cancellation of removal in the exercise of discretion. More serious misconduct necessarily weighs more heavily against the exercise of discretion than does less serious misconduct. Therefore, the applicant must present additional favorable evidence to counterbalance an adverse factor, such as a serious criminal history.

When exercising discretion in the cancellation of removal case, positive factors to be considered include but are not limited to: family ties in the United States, residence of long duration in this country, evidence of

hardship to the applicant and his family if removal occurs, a history of employment, existence of property or business ties, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to the applicant's good moral character. The adverse factors to be considered include the nature and underlying circumstances of the removal ground at issue and any other evidence that could be indicative of an applicant's bad character or undesirability as a permanent resident of the United States.

III. FINDINGS OF FACT

The respondent entered the United States as a minor when he was approximately 10 years old with his mother. He entered legally and both he and his mother adjusted their status to lawful permanent residence through the respondent's then-stepfather. The respondent dropped out of high school in the 11th grade, but he then received his GED after he was arrested for his first conviction in 1996. Thereafter, the respondent attended and graduated from Gwinnett Technical College in the automotive field in 2009. The only family that the respondent has in Jamaica is an uncle and distant cousins. All of the respondent's immediate family resides in the United States, including his mother, his children, and his fiancée. The respondent's distant relatives or non-immediate family—including aunts and cousins—also live in the United States. The only time that the respondent has returned to Jamaica was in approximately 1992, when he went to visit his grandparents. The respondent has four United States citizen children: 11-year-old Kennedy, 7-year-old Andre, 4-year-old Alicia, and 2-

year-old Aiden. The respondent is currently engaged to Alicia and Aiden's mother. He has known her for approximately four years, and although they don't live together, they live approximately 10 minutes apart, and the respondent saw Aiden and Alicia on a daily basis when the respondent was not in detention. The respondent has not seen Kennedy or Andre in approximately two to three years. The respondent maintains an open communication with both Kennedy and her mother Sharon (Sharon provided a letter in support of the respondent's application). However, the respondent has not spoken to or seen Andre in about three years. The respondent pays approximately $800 per month for both Andre and Kennedy in child support. And while he has been in detention, his mother has maintained his child support obligations. The respondent's mother owns a Meineke car shop that the respondent was running when he was not detained. Because the respondent is the expert in automotive care, the respondent's mother only ran the Meineke car shop financially, and the respondent maintained the day-to-day activities of the business. The respondent's last arrest was in 2007 for drug possession. He has not since been arrested for any crime. Rather, he has been attending school and working in the automotive field. Through testimony from the respondent, his mother Pamela Langshaw, as well as his fiancée Stacy Murray [phonetic]—it has been determined that the respondent's employment was the primary avenue of financing both of those household (respondent's and his fiancée's). The respondent's fiancée suffered an injury on the job, to her shoulder, in 2015, and has not worked since June of that year. She has also recently been

diagnosed with Sjogren's Syndrome and is undergoing treatment for that disorder. However, she testified that this is a fairly new disorder that has been discovered by doctors, so much so that clinical trials for treatment are under way, as there is only one known to her that has been approved to treat this disorder. Ms. Murray testified that her prognosis for her shoulder injury as about as good as it's going to get at this time.

The respondent has been arrested on three different occasions. His first arrest was in 1996, when he was 17 or 18 years old. He was driving with a friend when he says that his friend stood up out of the sunroof and shot a gun towards the house where respondent's ex-girlfriend lived. The respondent testified that he was not aware that his friend has a gun or that he was intending on shooting at the house. Both he and his friend, to respondent's knowledge, were convicted of the crimes of aggravated assault, criminal damage to property, first degree possession of a firearm during the commission of a felony. The respondent was sentenced to attend boot camp and also to obtain his GED. The respondent did both and satisfied those requirements. The respondent appeared to remain out of trouble for several years, until his next arrest approximately 10 years later, in 2006. This arrest was for possession of amphetamine, marijuana—and according to the respondent—also for possession of ecstasy. The respondent admitted that he had a drug problem at that time, which appears to have continued through his next arrest in 2008. After his 2008 arrest for possession of cocaine and possession of marijuana, the respondent attended an in-treatment rehabilitation

program, and thereafter attended an outpatient rehabilitation program approximately one year thereafter. The respondent has not had any arrests whatsoever since that time.

IV. ANALYSIS AND CONCLUSIONS

After hearing verbal arguments from both counsel for respondent and counsel for the Department of Homeland Security, the court requested that both parties brief as to why they believe the respondent was eligible for the relief that he was seeking under the stop-time rule. Initially, the government submitted a motion to pretermit based on one of respondent's crimes being an aggravated felony. The government has since withdrawn that charge and has also withdrawn that argument. Rather, the government relies on an argument that the respondent's 1996 arrest is a CIMT, and that that arrest stops time. Specifically, the respondent was admitted for lawful permanent residence on May 27th, 1989. Therefore, the respondent was admitted in any lawful status at that time, and the seven-year period would begin at that time. On January 23rd, 1996, the respondent was arrested for possession of a firearm in commission of a felony and three counts of aggravated assault. These convictions are listed in Allegation 5 of the Notice to Appear and the respondent admitted that he was convicted of said crime, and that crime is also evidenced in Exhibit Number 2 in the record. At the time of the commission of that particular crime, the respondent had been present in the United States for just a few months shy of seven years. The government argues that the crime identified in Allegation Number 5 stops

the time of respondent's continuous residence in the United States.

Termination of continuous residence, in Section 240A(d)(1)(A) of the Act, which reads, in pertinent part: "Any period of continuous residence in the United States shall be deemed to end when an alien has committed an offense referred to in Section 212{a)(2) that renders the alien inadmissible to the United States under Section 212(a)(2) or removable from the United States under Section 237(a)(2) or 237(a)(4)." INA Section 240A(d)(1). The issue of whether the respondent is subject to the stop-time rule under Section 240A(d)(1)(A) of the Act is resolved by Board precedent in *Matter of Jurado-Delgado*, 24 I&N Dec. 29, 31 (BIA 2006), where the Board determined that an alien need not actually be charged and found admissible or removable on the applicable ground for the criminal conduct in question to terminate continuous residence in this country. This court finds that the crime committed in 1996, which is found, again, at Exhibit 1, Allegation Number 5, does stop the time of the respondent's continuous residence in the United States. This court finds that therefore, the respondent is not eligible for cancellation of removal for permanent residents, because he has been convicted of a CIMT, and it renders him inadmissible under Section 212(a)(2)(A)(i)(I). Not only was the respondent convicted of possession of a firearm, which this court understands has previously been determined to not be considered a CIMT under this section—or a relatable charge under this section—however, having been convicted of aggravated assault and criminal damage to

property in the first degree are CIMTs that would trigger the stop-time rule. Therefore, the court has determined that the respondent is not eligible and that his application would be denied on that basis.

However, if this court were to have agreed with the respondent's argument that is contained in the record but has not been marked as an exhibit, then the court would have granted the respondent's application for cancellation of removal under 240A(a). It is clear to this court that the respondent's positive factors far outweigh the negative. And considering the fact that his last arrest was over 10 years ago is telling to this court, that the respondent is clearly rehabilitated. And the testimony from both the respondent, his mother, and his fiancée is also telling, that his family relies on him and would suffer hardship if he were to be deported to Jamaica. This court determined that it would hold a hearing on the merits of the respondent's application for cancellation of removal in the event this court's determination that the respondent was ineligible for the relief that he seeks was incorrect.

ORDERS

It is hereby ordered that the respondent's application for cancellation of removal be denied.

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NJERI B. MALDONADO
Immigration Judge