American Bar Association
www.supremecourtpreview.org

No. 10-1542

IN THE
Supreme Court of the United States

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
Petitioner,
v.
CARLOS MARTINEZ GUTIERREZ,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT

STEPHANOS BIBAS
UNIVERSITY OF PENNSYLVANIA LAW SCHOOL SUPREME COURT CLINIC
3400 Chestnut Street
Philadelphia, PA 19104
(215) 746-2297

MICHAEL FRANQUINHA
AGUIRRE LAW GROUP LLP
200 E. Mitchell Drive, Suite 306
Phoenix, AZ 85012
(602) 294-0203

STEPHEN B. KINNAIRD
COUNSEL OF RECORD
IGOR V. TIMOFEYEV
TAMARA L. GRAHAM
MARIA T. DAVIS
D. SCOTT CARLTON
MICHELLE E. YETTER
DEVON E. WINKLES
PAUL HASTINGS LLP
875 15th Street, N.W.
Washington, D.C. 20005
(202) 551-1700
stephenkinnaird@paulhastings.com

Counsel for Respondent
(Additional Counsel Listed on Inside Cover)

DARIO AGUIRRE
AGUIRRE LAW GROUP LLP
1350 17th Street,
Suite 100
Denver, CO 80202
(303) 298-9990

QUESTIONS PRESENTED

1. Whether a parent's years of lawful permanent resident status can be imputed to an alien who resided with that parent as an unemancipated minor, for the purpose of satisfying 8 U.S.C. § 1229b(a)(1)'s requirement that the alien seeking cancellation of removal have "been an alien lawfully admitted for permanent residence for not less than 5 years."

2. Whether a parent's years of residence after lawful admission to the United States can be imputed to an alien who resided with that parent as an unemancipated minor, for purposes of satisfying 8 U.S.C. § 1229b(a)(2)'s requirement that the alien seeking cancellation of removal have "resided in the United States continuously for 7 years after having been admitted in any status."

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

REGULATIONS

LEGISLATIVE MATERIALS

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

INTRODUCTION

In enacting immigration laws, Congress has consistently treated children as part of integral family units in which parents are responsible for making crucial immigration decisions on their children's behalf. Both courts and immigration agencies have adhered to this precept and have imputed a parent's years of residence, decisions, state of mind, and status to a minor child in various immigration contexts.

Cancellation of removal is one immigration context in which imputation serves the dual purpose of promoting family unity and protecting individuals who have strong ties to the United States. The Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq*. (2006 & Supp. IV 2011), vests the Attorney General of the United States with unreviewable discretion to cancel the removal from the United States of an alien who has committed a removable offense. 8 U.S.C. § 1229b. The statute sets forth several eligibility requirements, two of which are at issue here. First, the statute requires that the alien seeking cancellation has been "lawfully admitted for permanent residence for not less than 5 years." 8 U.S.C. § 1229b(a)(1). Second, it requires that 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). The court of appeals has held that both a parent's period of lawful permanent resident status and a parent's period of continuous residence may be imputed to an unemancipated minor for the purposes of satisfying these durational requirements.

The court of appeals' interpretation of section 1229b(a) is correct. Circuit courts uniformly permitted such imputation to a minor under section 1229b(a)'s predecessor statute, former INA section 212(c), and there is no indication that Congress intended to alter that long-standing judicial interpretation. Imputation also furthers the congressional goal of promoting family unity through legal immigration, and specifically of maintaining the family relationship between lawful permanent-resident parents and their minor children. Finally, imputation is necessary to achieve section 1229b(a)'s purpose of enabling the Attorney General to consider the equities of persons with longstanding ties to the United States. Typically, a divergence in status of parent and child is a product of systemic delays in processing routine applications to adjust the child's status; there is no rational basis why Congress would foreclose even eligibility for consideration to children with strong equities of longstanding residence in the United States because of such happenstance, and the Government gives none. The BIA's contrary and harsh interpretation that imputation is unavailable under section 1229b(a), when it applies imputation to the detriment of the children under other provisions, is unreasonable.

STATEMENT OF THE CASE

I. Statutory Background

A. Process of Obtaining Derivative Lawful Permanent Residence for Minors

A parent who is "an alien lawfully admitted for permanent residence may file a petition on behalf of a child or an unmarried son or daughter for preference classification under section 203(a)(2)" of the INA. 8 C.F.R. § 204.2(d)(1). Obtaining lawful permanent resident status for a minor child is a relatively routine process that involves little, if any, discretion on the part of the immigration authorities. A lawful permanent resident parent must first obtain approval of his immigrant visa petition filed on behalf of the child (Form I-130). 8 U.S.C. § 1153(a)(2); 8 C.F.R. § 204.1(a)(1).

Approval of a petition filed on behalf of a child is ministerial as long as the parent provides the appropriate evidence of the parent's lawful permanent residence and relationship to the child. 8 C.F.R. § 204.1(f). With the I-130 petition, the parent must file originals or true copies of a permanent resident card or other documents proving lawful permanent residence. 8 C.F.R. § 204.1(g). To demonstrate the requisite relationship with a child, a mother simply needs to provide a copy of the child's birth certificate showing the mother's and child's names. A father needs to provide a copy of the birth certificate and a copy of his marriage or divorce certificate. For a child born out of wedlock, the father "must show that he is the natural father and that a

bona fide parent-child relationship was established." 8 C.F.R. § 204.2(d)(2)(iii).

Once the petition is approved, the child must wait to receive an immigrant visa number from the United States Department of State. When the visa number becomes available, a child living outside of the United States completes immigration processing at the local United States consulate, and a child residing within the United States applies to adjust his status with the U.S. Citizenship and Immigration Services (CIS) (a Department of Homeland Security component agency) by filing an application for adjustment of status (Form I-485). 8 U.S.C. § 1154.

A child of a lawful permanent resident receives a second-level preference for an immigrant visa.[1] 8 U.S.C. § 1153(a)(2). Once the I-130 is approved, the child will receive a "priority date" and will be issued a visa once one becomes available. Section 202 of the INA, 8 U.S.C. § 1152, governs the number of visas available per country for family-sponsored immigrants and provides special rules for minor children of lawful permanent residents. Because of the numerical quotas, there can be a long waiting period before an immigrant visa becomes available.

---

[1] The family preference system allocates a numerical visa quota to specific groups of family-based immigrants, setting priority among these immigrants on the basis of the relationship with their sponsors (who must be either U.S. citizens or lawful permanent residents). The first-level preference is reserved for adult children of U.S. citizens. In addition, spouses, parents, and unmarried minor children of U.S. citizens are admitted into the United States as immediate relatives, without quota limitations.

Nevertheless, children of lawful permanent residents receive a preference over other types of immigrants and are consistently approved for such visas once they are available.[2]

Normally, only aliens who are in the United States in a legal status are permitted to apply for adjustment of status. 8 U.S.C. § 1255(a). In 1994, however, Congress enacted Section 245(i) of the INA, 8 U.S.C. § 1255(i), allowing aliens who were in the United States illegally to apply for adjustment of their status to that of a permanent resident. Dep't of Commerce, etc., Appropriations Act, Pub. L. No. 103-317, § 506(b), 108 Stat. 1724, 1765 (1994). Although section 245(i) expired in 1997, Congress extended or reinstated this provision for additional limited periods, most recently in 2000. *See* Legal Immigration Family Equity (LIFE) Act, Pub. L. No. 106-553, Title XI, 114 Stat. 2762, 2762A-142 (Dec. 21, 2000), as amended by LIFE Act Amendment of 2000, Pub. L. No. 106-554, Title XV, § 1502(a)(1)(B), 114 Stat. 2763, 2763A-324 (Dec. 21, 2000) (substituting "April 30, 2001" for "January 28, 1998" in INA § 245(i)). Under the LIFE Act, an alien for whom a qualified I-130 immigrant petition has been filed prior to April 30, 2001, and who was physically present in the United States on December 21, 2000, could apply for adjustment of status, provided an

---

[2] Subsection (a)(4)(A), moreover, exempts 75 percent of second-level preference set-aside visas for spouses and children from the usual per-country limitation. 8 U.S.C. § 1152(a)(4)(A). The final prerequisite to lawful permanent residence is a medical examination by a civil surgeon or an overseas panel physician. 8 C.F.R. § 245.5.

immigrant visa number was immediately available to him. *Id.*

The LIFE Act also created a temporary nonimmigrant "V" status for spouses and minor children of lawful permanent residents who were waiting for longer than three years for an immigrant visa based on a previously filed I-130 petition. 8 U.S.C. §§ 1101(a)(15)(V), 1255(i). In addition, the alien who properly filed his application for adjustment of status under sections 245(a) and (i) was considered to be an alien "present in the United States under a period of stay authorized by the Attorney General," provided that the alien was not already in removal proceedings. 8 C.F.R. § 245a.34(d); LIFE Act at § 1504.

B. Statutory Scheme for Cancellation of Removal

The INA, 8 U.S.C. § 1101 *et seq.*, vests the Attorney General with unreviewable discretion to cancel the removal from the United States of an alien who committed a removable offense. 8 U.S.C. § 1229b. The statute, however, sets forth several eligibility requirements, authorizing cancellation of removal only if the alien

> (1) has been an alien lawfully admitted for permanent residence for not less than 5 years,
>
> (2) has resided in the United States continuously for 7 years after having been admitted in any status, and
>
> (3) has not been convicted of any aggravated felony.

8 U.S.C. § 1229b(a).

The INA specifies that "[t]he term 'lawfully admitted for permanent residence' means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." 8 U.S.C. § 1101(a)(20). The term "residence" is defined as "the place of general abode," and "the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent." 8 U.S.C. § 1101(a)(33). The INA defines the term "permanent" to mean "a relationship of continuing or lasting nature, as distinguished from temporary," and "a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual, in accordance with law." 8 U.S.C. § 1101(a)(31).

"The terms 'admission' and 'admitted' mean, with respect to an alien, 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). The Board of Immigration Appeals (BIA) has interpreted these terms to encompass not only an alien's entry into the United States at a port of entry with the permission of an immigration officer, but also an adjustment to a lawful permanent status by an alien who had entered the United States without permission or who was paroled. *In re Alyazji*, 25 I. & N. Dec. 397, 399-404 (B.I.A. 2011).

The relief of cancellation of removal is discretionary. 8 U.S.C. § 1229b(a); *see also Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2589 (2010). While an alien must satisfy section 1229b(a)'s

statutory eligibility requirements for cancellation of removal, the ultimate determination of whether to grant cancellation remains in the discretion of the Attorney General. *See Mercado-Zazueta v. Holder*, 580 F.3d 1102, 1115 (9th Cir. 2009). In the exercise of this discretion, the immigration courts weigh the seriousness of the alien's offense against countervailing equitable factors, such as "family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred at a young age), evidence of hardship to the [alien] and his family if deportation occurs, … a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character." *In re C-V-T-*, 22 I. & N. Dec. 7, 11 (B.I.A. 1998). The decision whether to grant or deny cancellation of removal is insulated from judicial review. 8 U.S.C. § 1252(a)(2)(B)(i).

Section 1229b(a) was enacted as a part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, Title III § 304(a)(3), 110 Stat. 3009-594 (1996). Prior to IIRIRA, the cancellation-of-removal provision was contained in the INA's section 212(c), which vested the Attorney General with discretion to waive the deportation of

> [a]liens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are

> returning to a lawful unrelinquished domicile of seven consecutive years.

8 U.S.C. § 1182(c) (1988); *see also* Petr. Br. 7 n.2.[3]

Circuit courts construing former section 212(c) waivers in cases involving minors uniformly concluded that a parent's period of lawful residency could be imputed to a child for the purpose of satisfying the seven-year unrelinquished domicile requirement. *Morel v. INS*, 90 F.3d 833, 841 (3d Cir. 1996), *vacated on reconsideration on other grounds*, 144 F.3d 248 (3d Cir. 1998); *Lepe-Guitron v. INS*, 16 F.3d 1021, 1026 (9th Cir. 1994); *Rosario v. INS*, 962 F.2d 220, 224-25 (2d Cir. 1992). The courts were divided, however, on whether, in order to qualify for relief under former section 212(c), the alien's seven-year period of lawful domicile had to follow his admission as a lawful permanent resident. *Compare Morel*, 90 F.3d at 838, *White v. INS*, 75 F.3d 213 (5th Cir. 1996), *Castellon-Contreras v. INS*, 45 F.3d 149 (7th Cir. 1995), and *Lok v. INS*, 548 F.2d 37 (2d Cir. 1977), *with Chiravacharadhikul v. INS*, 645 F.2d 248 (4th Cir. 1981), *Castillo-Felix v. INS*, 601 F.2d 459 (9th Cir. 1979), and *In re S*, 5 I. & N. Dec. 116, (B.I.A. 1953). As the U.S. Department of Justice explained at the time, the dual durational requirement enacted by section 1229b(a) was designed to "clarify an area of the law regarding the cutoff periods for these

---

[3] Although former section 212(c), by its plain terms, applied only to aliens attempting to enter the United States, courts have interpreted it to also allow for discretionary waiver of deportation. *See INS v. St. Cyr*, 533 U.S. 289, 295 (2001); *see also Lepe-Guitron v. INS*, 16 F.3d 1021, 1023 (9th Cir. 1994).

benefits that have given rise to significant litigation and different rules being applied in different judicial circuits." 141 Cong. Rec. S6082, S6104 (May 3, 1995) (explaining S. 754, Immigration Enforcement Improvements Act of 1995, a precursor to IIRIRA).

II. Factual Background

In 1989, when he was five years old, Respondent Carlos Martinez Gutierrez, a citizen of Mexico, was brought to the United States by his parents. Pet. App. 12a, 18a; JA32-33. Martinez Gutierrez's father became a lawful permanent resident on February 7, 1991, when Martinez Gutierrez was seven years old. JA 26, 31.

Since arriving in the United States, Martinez Gutierrez has lived with his family in northern California. JA 32-33. Martinez Gutierrez has had little to no contact with Mexico or his few remaining Mexican relatives. JA 44-45. Martinez Gutierrez attended elementary, middle, and high school in California, graduating in 2002. JA 34. Martinez Gutierrez has been employed since graduation and has pursued further education. JA 34-35. While working, Martinez Gutierrez continued to live at home with his parents; his sister, a United States lawful permanent resident; and his younger brother, a United States citizen. JA 36. Martinez Gutierrez used the money that he earned to help to support his family. JA 37-38.

Martinez Gutierrez became a lawful permanent resident on October 28, 2003, when he was nineteen years old. JA 19. Martinez Gutierrez had traveled a long road to achieve lawful permanent status. Martinez Gutierrez's father had filed an I-130

petition on his behalf in 1993, seeking lawful permanent status for Martinez Gutierrez (then nine years old) as his minor child.[4] The INS received this petition on September 10, 1993, which became Martinez Gutierrez's "priority date" for the purpose of determining how soon he would be allowed to file his own I-485 application for lawful permanent resident status. *See* Application to Register Permanent Residence or Adjust Status (Form I-485) of Carlos Martinez Gutierrez (Martinez Gutierrez Form I-485) at 2, FOIA Request at 286; *see also* INS, Memorandum of Creation of Record of Lawful Permanent Residence, FOIA Request at 278 (listing September 10, 1993 as the priority date).

Martinez Gutierrez's priority date did not become "current" until May 1999, when a visa number became available to him, thereby permitting Martinez Gutierrez to seek adjustment of his status

---

[4] Pursuant to Supreme Court Rule 32.3, Martinez Gutierrez is submitting a request to lodge a copy of his adjustment of status application, together with the INS's Memorandum of Creation of Record of Lawful Permanent Residence and the INS's letter informing Martinez Gutierrez that he has been granted permanent resident alien status. Martinez Gutierrez's application is not part of the administrative record below, but has been obtained pursuant to a request under the Freedom of Information Act (FOIA). This Court's consideration of the obtained material is proper because it is not submitted to contest or supplement any adjudicatory fact necessary to a decision in this case (and indeed Martinez Gutierrez's eligibility depends strictly upon this Court's resolution of the statutory interpretation question presented). Rather, the material is of utility to the Court as background material illustrating the operation of the system for adjusting the status of minor children of lawful permanent residents.

to that of a permanent resident. *See* U.S. Dep't of State, *Visa Bulletin, Vol. VIII, No. 5: Immigrant Numbers for May 1999*, http://dosfan.lib.uic.edu/ERC/visa_bulletin/9905bulletin.html. Martinez Gutierrez filed his application for adjustment of status in February 2001. Martinez Gutierrez Form I-485 at 1, FOIA Request at 285. On May 15, 2001, the INS informed Martinez Gutierrez that he "ha[s] been granted permanent resident alien status as of [that] date," FOIA Request at 284, and his application was formally approved on October 28, 2003. JA 19; *see also* INS, Memorandum of Creation of Record of Lawful Permanent Residence, FOIA Request at 278.

On December 2, 2005, Martinez Gutierrez was stopped while trying to re-enter the United States from Mexico with three undocumented minors in his car. JA 39-40. Martinez Gutierrez first represented that the children were his nephews and niece, but he later admitted that they were not his relatives and that they did not have permission to enter the United States. JA 44. Martinez Gutierrez had tried to bring the children into the United States at the request of their mother, a friend who was living in the United States. JA 40-41. Martinez Gutierrez did not expect to profit from bringing the children into the United States; he gave the money he received from the children's mother to their grandfather in Mexico. Martinez Gutierrez was issued a Notice to Appear on December 3, 2005, charging that he was removable under 8 U.S.C. § 1182(a)(6)(E)(i) for attempted alien smuggling. Pet. App. 18a; JA 59.

III. Procedural Background

At a hearing before the Immigration Judge (IJ), Martinez Gutierrez conceded removability and sought cancellation of removal pursuant to 8 U.S.C. § 1229b(a). Pet. App. 19a; JA 24. The IJ found Martinez Gutierrez statutorily eligible for cancellation of removal and, in the exercise of her discretion, granted cancellation. Pet. App. 27a. In rendering her decision, the IJ relied on *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1021-29 (9th Cir. 2005), which held that a parent's period of continuous residence after admission to lawful status may be imputed to a minor child residing with the parent for the purpose of satisfying section 1229b(a)(2). Guided by the *Cuevas-Gaspar's* holding, the IJ found that Martinez Gutierrez had satisfied the seven-year residence requirement of section 1229b(a)(2). Pet. App. 20a. The IJ further concluded that "a careful reading of *Cuevas-Gaspar*" also mandated that the period of his father's lawful permanent resident status be imputed to Martinez Gutierrez for the purpose of satisfying section 1229b(a)(1), because Martinez Gutierrez had resided with his father as an unemancipated minor. Pet. App. 22a.[5]

The BIA reversed. The BIA refused to extend the court of appeals' holding in *Cuevas-Gaspar* to permit the imputation of his father's period of lawful permanent resident status to Martinez Gutierrez in

---

[5] There is no dispute that Martinez Gutierrez had not been convicted of any aggravated felony and therefore satisfied section 1229b(a)(3), the third statutory eligibility requirement for cancellation of removal. Pet. App. 20a; Petr. Br. 6 n.1.

order to satisfy section 1229b(a)(1). Pet. App. 16a. Thus, the BIA concluded that Martinez Gutierrez was not eligible for cancellation of removal because he was two years short of section 1229b(a)(1)'s five-year requirement. *Id.*

On remand, the IJ entered an order of removal, as mandated by the BIA. Pet. App. 7a. The BIA dismissed Martinez Gutierrez's second appeal. Pet. App. 6a. The BIA adhered to its prior holding that "a parent's lawful permanent resident status cannot be imputed to a child for purposes of calculating the 5 years of lawful permanent residence required to establish eligibility for cancellation of removal under [section] 1229b(a)(1)." Pet. App. 5a-6a. The BIA observed that it had reaffirmed this position in an intervening precedential decision, *In re Escobar*, 24 I. & N. Dec. 231 (B.I.A. 2007), which limited the application of *Cuevas-Gaspar* to the instances involving the seven-year residence requirement of section 1229b(a)(2). Pet. App. 6a. The BIA therefore reiterated its prior conclusion that Martinez Gutierrez was not eligible for cancellation of removal because his own period of lawful permanent residence fell short of the five-year period required by section 1229b(a)(1). *Id.*

Martinez Gutierrez sought review of the BIA's decision in the court of appeals. In the proceedings before the court of appeals, the Government acknowledged that Martinez Gutierrez "has resided in the United States continuously since he arrived in 1989" and represented that "the only eligibility requirement at issue is whether Martinez Gutierrez has been lawfully admitted for permanent residence for not less than five years." Br. for Resp't, *Gutierrez*

v. Holder, No. 08-70436 (9th Cir. July 29, 2010), at 8-9.

The Government also acknowledged that the court of appeals' decision in *Mercado-Zazueta v. Holder*, 580 F.3d 1102, 1113 (9th Cir. 2009), held that a parent's period of residence in a lawful permanent status should be imputed to a minor child for the purpose of satisfying the five-year requirement of section 1229b(a)(1). Br. for Resp't, *Gutierrez v. Holder*, No. 08-70436 (9th Cir. July 29, 2010), at 9. Nevertheless, the Government sought to preserve its position that section 1229b(a)(1) does not permit a parent's period of lawful permanent residence to be imputed to the parent's minor child for the purpose of calculating the child's period of admission as a lawful permanent resident. *Id.*

The court of appeals granted Martinez Gutierrez's petition and remanded the case to the BIA with direction to reconsider Martinez Gutierrez's application for cancellation of removal in light of *Mercado-Zazueta*. Pet. App. 2a. This Court granted certiorari.

SUMMARY OF THE ARGUMENT

The imputation rule serves three key purposes: First, it reflects the widely accepted principle that parents make immigration decisions on behalf of their minor children. Second, it vindicates the immigration law's overarching goal of keeping immediate families together. Third, it interprets section 1229b(a) as consonant with its fundamental purpose of ensuring that lawful permanent residents with strong ties to the United States remain eligible for discretionary cancellation of removal. The BIA's

rigid rule forbidding imputation irrespective of the equities involved is an unreasonable interpretation of the statutory scheme.

The text of section 1229b(a) is silent as to whether imputation of a parent's period of residence or lawful permanent residence to his minor child is permitted for the purpose of satisfying the provision's dual durational requirement. While the Government argues that the plain language of section 1229b(a) is dispositive, it can point to no specific language in the statute that addresses imputation. The Government contends that, because the text of section 1229b(a) refers to the alien whose removal is at issue, that text forecloses imputation from any other individual, even the alien's parent. This argument simply assumes its conclusion. Interpreting section 1229b(a) as permitting imputation would be fully consonant with its plain language. The alien seeking cancellation of removal would still have to satisfy the provision's durational requirements, except that his parent's period of residence or of lawful permanent residence would be factored into the calculation. Notably, a variety of other immigration law provisions (including section 1229b(a)'s predecessor statute, former section 212(c)) use analogous language, and both courts and the BIA have permitted imputation in these contexts. Indeed, this Court has expressly approved of imputation outside the immigration context where the statutory scheme is silent, in order to further the statutory purpose.

The Government's plain language argument is further undermined by the fact that, at the time of section 1229b(a)'s enactment, courts uniformly endorsed imputation of the parents' residency period

to unemancipated minors. There is no indication — as the Government concedes — that in amending the cancellation of removal provision's durational requirement, Congress intended to alter that judicial consensus.

The BIA's rejection of imputation under section 1229b(a) should receive no deference because the BIA did not purport to interpret any statutory ambiguity or to fill a gap left by Congress. Rather, the BIA adopted its no-imputation rule because it believed (erroneously) that such construction was mandated by the plain language of section 1229b(a). Because the BIA did not identify any ambiguity or silence in section 1229b(a) that it attempted to resolve through the application of its specialized expertise, no deference to the agency is warranted.

To the extent deference is permissible, the prior uniform judicial approval of imputation, combined with the absence of any indication that Congress intended to change that interpretation, demonstrates that the Government's construction of section 1229b(a) is unreasonable. In replacing former section 212(c) with section 1229b(a), Congress intended to resolve a deep circuit conflict on an entirely different issue: namely, whether the alien's seven-year period of lawful domicile, required under former section 212(c), must follow the alien's admission to lawful permanent resident status. The dual durational requirement adopted by Congress in section 1229b(a) resolved that split.

While Congress replaced the term "domicile" used in former section 212(c) with the term "residence," that change was not intended to disavow the imputation rule. Although the INA specified that

intent should not be considered in determining residence, it was always settled that a minor's residence is determined by that of his parent. Furthermore, the immigration law recognizes that the concept of "permanent residence" — which section 1229b(a)(2) requires the alien to have for at least five years — contains an element of intent.

The Government's rejection of imputation in the context of minor children of lawful permanent residents contradicts the statute's fundamental policy objectives. The immigration law prioritizes family unity, especially the relationship between parents and their minor children. Moreover, the INA seeks to ensure that individuals with strong ties to the United States — of whom children of lawful permanent residents who are themselves lawful permanent residents are one of the leading examples — can remain in this country. Accordingly, section 1229b(a) is designed to provide relief to aliens who have formed strong ties to the United States. That relief remains entirely discretionary with the Attorney General; section 1229b(a) simply ensures that aliens with strong equities are eligible to apply for this relief.

In a variety of other contexts, the BIA imputes the status or mental knowledge of one person or entity to another as a matter of equity. The BIA's widespread reliance on imputation lessens considerably the degree of deference that its rejection of imputation under section 1229b(a) should receive. Imputation in this context cures inequity and permits vindication of statutory purpose in the unusual circumstance where the alien is the child of a lawful permanent resident and where the relevant time

periods correspond with a period of his minority. There is no sound reason why a statute that authorizes the Attorney General to cancel removal of longtime residents of the United States for equitable reasons should be construed to exclude lawful permanent residents even from consideration for relief, where the delay in their obtaining that status is commonly a product solely of the systemic operation of quotas and the delays inherent in bureaucratic processing of applications. This case illustrates the strong equities that are served by imputation: Martinez Gutierrez had resided in the United States for sixteen years before being served with a Notice of Removal; he was unquestionably eligible for lawful permanent residence from the time his father sought it on his behalf twelve years prior to the Notice of Removal; and his delay in receiving lawful permanent resident status was attributable not to his own actions, but to the visa backlog. This Court should affirm the judgment below.

ARGUMENT

I. Section 1229b(a) Is Silent About Whether Imputation Is Permissible.

Because the BIA interpreted section 1229b(a) in published decisions, this Court assesses that interpretation under the two-step test articulated in *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984). The first step of the test determines "whether Congress has directly spoken to the precise question at issue" or whether "the statute is silent or ambiguous with respect to the specific issue." 467 U.S. at 842-43. If the statute is "silent or ambiguous," the second step asks whether the

agency's interpretation is based upon a reasonable, "permissible construction of the statute." *Id.* at 843.

As this Court recently explained, in examining the BIA's interpretation of former section 212(c), an agency decision does not merit Chevron deference when the agency fails to "provide a reasoned explanation for its action," *Judulang v. Holder*, 565 U.S. ___, Slip. Op. at 1, 9 n.7 (Dec. 12, 2011). A failure to supply such explanation renders the agency interpretation arbitrary and capricious. This Court reversed the BIA's interpretation of former section 212(c) in the deportation context because the BIA's rule was "unmoored from the purposes and concerns of the immigration laws [in] a matter of utmost importance — whether lawful resident aliens with longstanding ties to this country may stay here." *Id.* at 21. The Court emphasized, moreover, that it would have reached the same result under step two of *Chevron*, where it considers "whether an agency interpretation is 'arbitrary or capricious in substance.'" *Id.* at 9 n.7 (quoting *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. ___, 131 S. Ct. 704, 711 (2011)) (internal quotation marks omitted).

The Government is correct that statutory interpretation "'must begin with the plain language of the statute.'" Petr. Br. 15 (quoting *Negusie v. Holder*, 555 U.S. 511, 542 (2009)). But the text of section 1229b(a) is entirely silent about whether a parent's years of status or residence may be imputed to his child to satisfy the statute's dual durational requirements. The language of section 1229b(a) neither expressly permits nor bars imputation; it simply does not address this question. For this

reason, no circuit court has adopted the Government's interpretation of section 1229b(a) as foreclosing imputation by its plain terms. On the contrary, courts have concluded that section 1229b(a) is silent on the question and based their holdings on *Chevron* deference rather than the statutory language. *See Augustin v. Att'y Gen.*, 520 F.3d 264, 269 (3d Cir. 2008) ("The cancellation of removal provision neither provides for such imputation nor disallows it."); *Cuevas-Gaspar*, 430 F.3d at 1022 ("Section 1229b is silent as to whether a parent's status may be imputed to the parent's unemancipated minor child for purposes of satisfying the requirements of subsections (a)(1) and (a)(2)."); *Deus v. Holder*, 591 F.3d 807, 810-11 (5th Cir. 2009).

The Government argues that section 1229b(a)'s reference to "*the* alien" whose removal is at issue unambiguously precludes imputation. Petr. Br. 16-17 (addressing section 1229b(a)(2)); *id.* at 18 (addressing section 1229b(a)(1)). But this definite article cannot bear the interpretive weight that the Government places on it. This definite article simply indicates that section 1229b(a) is concerned with the specific alien for whom cancellation of removal is being considered. Petr. Br. 16. That concern will remain the case irrespective of whether a period of residence of the alien's parent may be imputed to him. The Government's argument simply assumes its conclusion.

As the Government concedes, courts have permitted imputation under section 1229b(a)'s predecessor statute, former section 212(c) of the INA, 8 U.S.C. § 1182(c) (1988). Petr. Br. 35 (citing *Lepe-Guitron*, 16 F.3d at 1025-26); *see also Morel*, 90 F.3d

at 841; *Rosario*, 962 F.2d at 224-25; *supra* at 9. By its terms, former section 212(c), which provided for a discretionary waiver from inadmissibility of deportation for "[a]liens lawfully admitted for permanent residence … who are returning to a lawful unrelinquished domicile of seven consecutive years," 8 U.S.C. § 1182(c) (1988), also referred only to the aliens whose inadmissibility or deportation was at issue, not to their parents. The circuit courts so understood former section 212(c). *See Morel*, 90 F.3d at 837 ("Section 212(a) identifies those classes of aliens who are ineligible to receive visas and are excluded from admission to the United States."); *Lepe-Guitron*, 16 F.3d at 1023; *Rosario*, 962 F.2d at 223. Nevertheless, these courts concluded that former section 212(c) permitted imputation of a parent's period of legal domicile to these aliens in the instances where the aliens were minor children.

In addition, the BIA has interpreted other provisions of immigration law that use the definite article "the" when referring to an alien as permitting imputation to minors. Thus, the BIA imputes parental knowledge of inadmissibility to a minor child for the purposes of determining whether the child would qualify for a waiver of removal under 8 U.S.C. § 1182(k), a provision that permits a waiver if the alien did not know or could not have known of facts establishing his inadmissibility. *See Senica v. INS*, 16 F.3d 1013, 1014 (9th Cir. 1994); Petr. Br. 39. Section 1182(k) permits the Attorney General to waive inadmissibility if he concludes that "inadmissibility was not known to, and could not have been ascertained by the exercise of reasonable diligence by, *the immigrant* before the time of departure." 8 U.S.C. § 1182(k) (emphasis added).

Under the Government's logic, this statutory text would unambiguously foreclose imputation.

The Government's reliance on section 1229b(a)(1)'s phrase "lawfully admitted for permanent residence," Petr. Br. 18, is similarly unavailing. This precise phrase was also used by former section 212(c), and was defined at the time in the INA in exactly the same way as it is defined presently, as "the status of having been lawfully accorded the privilege of residing permanently in the United States, … such status not having changed." 8 U.S.C. § 1101(a)(2); *see also* Petr. Br. 18-19; *Rosario*, 962 F.2d at 222. Nonetheless no court has viewed that phrase as foreclosing the imputation under former section 212(c).[6]

---

[6] For the same reason, the Government's reliance on section 1229b(a)(2)'s analogous phrase "after having been admitted," Petr. Br. 17, is similarly unavailing. If section 1229b(a) is construed to permit imputation, then the parent's period of residence after "having been admitted" may be imputed to a minor. The Government asserts that this requirement makes imputation of his father's residence period to Martinez Gutierrez particularly inappropriate because, the Government speculates, Martinez Gutierrez did not attain any lawful status (or "admission") until he was granted lawful permanent resident status in 2003. *Id.* But because Martinez Gutierrez's eligibility under section 1229b(a)(2) was not at issue before the BIA or the Ninth Circuit, neither considered the question of his status prior to becoming a lawful permanent resident. Indeed, the LIFE Act, which permitted Martinez Gutierrez to legalize his status, created a temporary nonimmigrant "V" status for minor children of lawful permanent residents waiting for longer than three years for an immigrant visa based on their parent's previously filed petition. 8 U.S.C. §§ 1101(a)(15)(V); 1255(i); *supra* at 6. Because his father filed a petition for Martinez Gutierrez in

(continued...)

Finally, the Government relies on the use of the possessive pronoun "his" in the INA's definition of "residence" as "the place of general abode," with the further explanation that "'the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.'" Petr. Br. 17 (quoting 8 U.S.C. § 1101(a)(33)). The use of the pronoun "his" is not determinative of whether imputation is permissible. Again, other provisions of the immigration law use this and similar pronouns, including when referring to the alien's "residence" in a particular country. *See, e.g.*, 8 C.F.R. § 208.15 ("[a]n alien is considered to be firmly resettled if, prior to arrival in the United States, *he or she* entered into another country with [some] type of permanent resettlement, unless *he or she* establishes" certain facts regarding "*his or her* entry into that country" or "the conditions of *his or her* residence in that country") (emphasis added). As the Government concedes (Petr. Br. 39), the BIA has nevertheless allowed imputation in these contexts.

In a variety of other contexts, courts impute the conduct of one person or entity to another to vindicate statutory purposes, even though the relevant statutory language does not explicitly provide for such imputation. This Court has expressly approved of this practice, for example in the context of the "responsible corporate officer" doctrine. In *United States v. Dotterweich*, 320 U.S. 277 (1943), the relevant statute made it a misdemeanor for "a

---

(...continued)

September 1993, *see supra* at 10-11, Martinez Gutierrez could have been eligible for that status.

person" to introduce or deliver into interstate commerce any adulterated or misbranded drug. *Id.* at 278. This Court held that the acts of the corporation could be imputed to a responsible corporate officer even though he did not personally commit the offense. Noting that "[l]iteralism and evisceration are equally to be avoided," *id.* at 284, the Court explained that Congress intended to impose liability "upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless," *id.* at 285. *See also, e.g.*, *Staples v. United States*, 511 U.S. 600, 607 (1994) (noting that the Court has looked to "*the nature of the statute* … to determine whether congressional silence concerning the mental element of the offense should be interpreted as dispensing with conventional *mens rea* requirements") (first emphasis added); *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 567 (1982) (a principal is liable for the acts of an agent in order to provide protection to persons dealing with the agent); *United States v. Park*, 421 U.S. 658, 673-74 (1975) (the knowledge of a corporation may be imputed to a corporate officer in order to protect the public interest). Courts apply imputation as a matter of equity, consistent with the underlying statutory purpose.

Tacitly admitting the weakness of its plain-language argument, the Government acknowledges that "Section 1229b(a) does not expressly prohibit imputation." Petr. Br. 20. Instead, the Government contends that "the lack of an express bar cannot be read as affirmatively authorizing imputation." *Id.*

This argument, however, is beside the point. The question is not whether section 1229b(a)'s silence on the issue "affirmatively authorizes" imputation; by definition, congressional silence on a particular issue cannot provide such express authorization. Rather, the question is whether, by not expressly addressing the question of imputation in section 1229b(a), the plain text of the statute affirmatively *forecloses* that possibility.

Notably, the Government can point to no language in section 1229b(a) that forecloses imputation. Instead, the Government invokes entirely dissimilar situations, such as the Third Circuit's invalidation of the BIA regulation that extended 8 U.S.C. § 1101(a)(42) — the provision granting refugee status to victims of forced sterilization — to the victims' spouses, absent any congressional authorization to do so. Petr. Br. 20 (citing *Lin-Zheng v. Att'y Gen.*, 557 F.3d 147, 156 (3d Cir. 2009)). The Third Circuit rejected the BIA's interpretation as irreconcilable with the statutory language because "'the statutory scheme *unambiguously dictates* that applicants can become candidates for asylum relief only based on persecution status that *they themselves* have suffered,'" and because the BIA openly acknowledged that it has "'put aside' the very statutory text that should have controlled its inquiry into congressional intent." *Lin-Zheng*, 557 F.3d at 156-57 (citation omitted) (emphasis added). By contrast, nothing in

section 1229b(a) "unambiguously dictates" that imputation is impermissible.[7]

Moreover, the context of section 1229b(a)'s enactment (*supra* at 8-10, 21-22) precludes the Government's argument that the text of section 1229b(a) forbids imputation. "The construction of statutory language often turns on context," *FCC v. AT&T Inc.*, 131 S. Ct. 1177, 1182 (2011), and that context includes "the 'contemporary legal context' in

---

[7] The Government also invokes the Ninth Circuit's refusal to permit imputation in *Barrios v. Holder*, 581 F.3d 849, 865 (9th Cir. 2009), which, the Government asserts, involved an INA provision "providing similar cancellation-of-removal relief." Petr. Br. 21. *Barrios*, however, involved a very different requirement of continuous "physical presence," which "does not require a specific 'status, intent, or state of mind,'" and the Ninth Circuit carefully distinguished this requirement from its precedents permitting imputation under section 1229b(a). 581 F.3d at 862-63. Moreover, while the Ninth Circuit observed that the continuous-physical-presence provision was not ambiguous, it did so in the course of determining whether to apply the interpretive canon that any statutory ambiguity must be read in the light most favorable to the alien, *id.* at 865; the question of deference to the BIA did not even arise because the BIA had not addressed the imputation issue, *id.* at 859-60. Similarly unavailing is the Government's reliance, Petr. Br. 21 n.4, on the Third Circuit's decision in *DeLeon-Ochoa v. Attorney General*, 622 F.3d 341 (3d Cir. 2010). *DeLeon-Ochoa* also concerned a very different statute: one containing both continuous-residence and continuous-physical-presence requirements for aliens seeking Temporary Protected Status (TPS). *Id.* at 353-56. By contrast, the Third Circuit previously held that section 1229b(a) "is silent" on the imputation question, *Augustin*, 520 F.3d at 269, a conclusion that *DeLeon-Ochoa* did not question. Other courts, moreover, interpreted the TPS statute's continuous-residence requirement under the *Skidmore* deference standard. *Cervantes v. Holder*, 597 F.3d 229, 236-37 (4th Cir. 2010).

which Congress enacted" the statute, *Cottage Savings Ass'n v. Comm'r*, 499 U.S. 554, 562 (1991) (citation omitted). Specifically, where Congress "adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575, 581 (1978).

Courts construing section 1229b(a)'s predecessor section, former section 212(c), have uniformly held that a parent's period of legal residency could be imputed to a child for the purpose of satisfying former section 212(c)'s seven-year unrelinquished domicile requirement. *See Morel*, 90 F.3d at 841; *Lepe-Guitron*, 16 F.3d at 1026; *Rosario*, 962 F.2d at 224-25; *supra* at 9, 21-22. "Congress is presumed to be aware of a[] judicial interpretation of a statute." *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 2492 (2009) (internal quotation marks and citation omitted). The Government points to no evidence, whether in the statutory text of section 1229b(a) or in its legislative history, that Congress intended to alter this judicial consensus and forbid imputation in this context. *See also Augustin*, 520 F.3d at 269 n.5 (section 1229b(a)'s "legislative history does not provide support for [an] inference" "that Congress in IIRIRA eliminated the word 'domicile' in favor of 'residence' in order to eliminate imputation."). Indeed, the Government concedes that section 1229b(a) "was crafted 'to resolve a circuit split that did not concern imputation.'" Petr. Br. 25 (quoting *Mercado-Zazueta*, 580 F.3d at 1110). Had Congress intended to overturn a uniform conclusion of the circuit courts, "it knew how to do so." *Touche Ross &*

Co. v. Redington, 442 U.S. 560, 572 (1979). Thus, even if section 1229b(a) is not viewed as having codified the existing imputation rule, *Cottage Savings Ass'n*, 499 U.S. at 562, it is at least silent as to its continuing validity.[8]

II. No Deference to the BIA Is Warranted Because the BIA Did Not Interpret a Statutory Ambiguity.

As a fall-back position, the Government urges this Court to defer to the BIA's anti-imputation rule under the second step of *Chevron* as a reasonable construction of section 1229b(a). Petr. Br. 33. But deference is inappropriate here, because the BIA did not purport to interpret a "silent or ambiguous statute" by applying its specialized expertise. *Chevron*, 467 U.S. at 843. Rather, the BIA rejected imputation under section 1229b(a) because it believed (erroneously) that this result was mandated by the plain language of the statute. In such a situation, where the agency wrongly believed itself to be compelled by the statutory text, no *Chevron* deference is warranted.

---

[8] Nor is there merit to the Government's argument that the structure of section 1229b's statutory scheme unambiguously forecloses imputation because otherwise "the same alien could be considered to have two different dates for which he was lawfully admitted for permanent residence." Petr. Br. 22-23. As the Government concedes (Petr. Br. 23 n.6), the INA permits the same alien to have different admission dates, with only one of these dates being the relevant one for the purpose of determining the alien's removability. *In re Alyazji*, 25 I. & N. Dec. 397, 405-08 (B.I.A. 2011).

The BIA first examined the imputation rule in a published decision in *In re Escobar*, 24 I. & N. Dec. 231 (B.I.A. 2007). There, the BIA considered whether it should apply the rationale of *Cuevas-Gaspar*, which permitted imputation with respect to the seven-year durational requirement of section 1229b(a)(2), to the five-year requirement of section 1229b(a)(1) as well. *Id.* at 232-33. The BIA rejected this approach on the grounds that it "runs *contrary to the clear language of the statute*, which requires an alien to be lawfully admitted for permanent residence, in his or her own right, for no less than 5 years and to have 7 years of residence after any admission." *Id.* at 235 (emphasis added); *see also id.* at 234 ("[a]llowing the status of a parent to simply attach to a child, without regard to the mandated statutory and regulatory application process and the substantive eligibility requirements for admission, *would run contrary to the clear intent of Congress*") (emphasis added).[9]

Although *In re Escobar* involved only the permissibility of imputation for the purposes of satisfying the five-year requirement of section 1229b(a)(1), *id.* at 232, the BIA viewed this decision as rejecting the imputation rule for the purposes of satisfying section 1229b(a)(2) as well. *Id.* at 235; *In re Ramirez-Vargas*, 24 I. & N. Dec. 599, 600 (B.I.A. 2008) (refusing to apply the imputation rule in order to satisfy section 1229b(a)(2)'s seven-year

[9] The BIA also sought to buttress its rejection of the imputation rule by arguing that it "would also run counter to the legislative history," *In re Escobar*, 24 I. & N. Dec. at 235 — one of the "traditional tools of statutory construction" that courts use at the first step of the *Chevron* inquiry. 467 U.S. at 843 n.9.

requirement on the grounds that *In re Escobar* rejected the interpretation adopted in *Cuevas-Gaspar*). In neither decision did the BIA purport to exercise any discretion to fill a statutory gap or resolve any statutory ambiguity.

"[D]eference to an agency's interpretation of a statute is not appropriate when the agency wrongly believes that interpretation is compelled by Congress." *Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 (D.C. Cir. 2006) (quoting *PDK Labs., Inc. v. DEA*, 362 F.3d 786, 798 (D.C. Cir. 2004); *Ariz. v. Thompson*, 281 F.3d 248, 254 (D.C. Cir. 2002) (internal quotation marks omitted); and citing *ITT Indus., Inc. v. NLRB*, 251 F.3d 995, 1004 (D.C. Cir. 2001); *Transitional Hosps. Corp. v. Shalala*, 222 F.3d 1019, 1028-29 (D.C. Cir. 2000); *Alarm Indus. Commc'ns Comm. v. FCC*, 131 F.3d 1066, 1072 (D.C. Cir. 1997); *Teva Pharms. USA, Inc. v. FDA*, 441 F.3d 1, 4-5 (D.C. Cir. 2006); *Prill v. NLRB*, 755 F.2d 941, 956-57 (D.C. Cir. 1985)). This is so because "*Chevron* step 2 deference is reserved for those instances when an agency recognizes that the Congress's intent is not plain from the statute's face." *Peter Pan Bus Lines*, 471 F.3d at 1354. Moreover, as this Court explained, "one of the principal justifications behind *Chevron* deference" is deference to "practical agency expertise." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651-52 (1990) (citing *Chevron*, 467 U.S. at 865). To receive deference, the agency "must bring its experience and expertise to bear" to resolve a statutory ambiguity or fill a gap left by Congress. *PDK Labs.*, 362 F.3d at 797-98 (citing *Chevron*, 467 U.S. at 865-66). When the agency does so, it receives deference, provided its reading of the statute is reasonable.

Here, by contrast, the BIA did not identify any ambiguity or silence in section 1229b(a) that it sought to clarify. Nor did the BIA seek to justify its reading of section 1229b(a) by invoking its specialized expertise in the administration of the INA. Rather, the BIA believed its construction of section 1229b(a) to be compelled by "the clear language of the statute." *In re Escobar*, 24 I. & N. Dec. at 235. Therefore, this is not a circumstance where deference to the BIA is warranted.

In the absence of an agency construction to which it should defer, this Court may interpret section 1229b(a) on its own. If it does so, it should hold that the construction most consonant with the statutory text and congressional intent is one that permits imputation of a parent's status and residence to his minor child. Because, however, this question may involves "policy choices that agencies are better equipped to make than courts," *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005), and because "the BIA has not yet exercised its *Chevron* discretion to interpret the statute in question," the Court may appropriately remand this case to the agency. *Negusie v. Holder*, 555 U.S. 511, 523 (2009).

III. The BIA's Interpretation of Section 1229b(a) as Foreclosing Imputation to Minors Is Unreasonable.

To the extent the BIA may claim deference to its construction of section 1229b(a), this Court assesses whether the BIA's interpretation "is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 842-43. In doing so, the Court applies the traditional tools of statutory construction and

considers the provision's language, statutory context, legislative history, and policy considerations. *See id.* at 843-66. Such review compels the conclusion that the BIA's interpretation of section 1229b(a) as prohibiting imputation is unreasonable. *Cf. Judulang v. Holder*, 565 U.S. ___, Slip. Op. at 9, 21.

A. Section 1229b(a) Was Not Intended To Alter the Uniform Judicial Interpretation that Permitted Imputation Under the Predecessor Statute.

Former section 212(c), the predecessor statute to section 1229b(a), required the alien applying for a cancellation of deportation to demonstrate that he had seven years of unrelinquished domicile in the United States. The circuit courts that have interpreted former section 212(c) in the context of minors' seeking cancellation of removal uniformly held that a parent's legal status could be imputed to a child. *See Morel*, 90 F.3d at 841; *Lepe-Guitron*, 16 F.3d at 1026; *Rosario*, 962 F.2d at 224-25; *supra* at 9, 21-22, 28. These courts reasoned that a child is incapable of forming the intent necessary to establish domicile and, therefore, a child's domicile necessarily follows that of his parent. *Morel*, 90 F.3d at 840-41; *Lepe-Guitron*, 16 F.3d at 1025; *Rosario*, 962 F.2d at 224.

Moreover, these courts acknowledged that permitting imputation of a parent's legal status to a child served important congressional objectives. Critically, imputation furthered the INA's goal of family unity by allowing a child to remain in the United States with his parent. *Morel*, 90 F.3d at 841 ("[v]arious provisions of the INA reflect Congress'

intent to prevent the unwarranted separation of parents from their children"); *see also* 8 U.S.C. § 1182(a)(6)(E)(ii) (waiving excludability for aliens that assisted children in entering the United States illegally); 8 C.F.R. § 245.1(e)(2)(vi)(B)(1) (granting children applying for permanent residency from outside the United States the same priority date and preference category as their parents).

The family-unity objective applies with special force in the context of lawful permanent residents and their children, because these families have chosen to make the United States their permanent home. *Lepe-Guitron*, 16 F.3d at 1025 (the INA gives "high priority to the relation between permanent resident parents and their children").

Accordingly, when imputing the parent's duration of domicile to a minor child, courts emphasized the strong tie that the children of lawful permanent residents have formed to the United States, their adoptive home. A child residing with his parent in the United States has a significant relationship "with the parent — and, by extension, with this country — [which] evinces the type of bond that the statute was designed to protect from unwarranted severance." *Rosario*, 962 F.2d at 224; *see also Lepe-Guitron*, 16 F.3d at 1025 ("Because children naturally form the strongest of ties to the place where their parents are domiciled and they with them, section 212(c)'s core policy concerns would be directly frustrated by the government's proposal to ignore the parent's domicile in determining that of the child.").

Although circuit courts uniformly agreed that former section 212(c) permitted imputation of a parent's permanent resident status to his child, they

were sharply divided over whether the required seven-year period of "lawful unrelinquished domicile" had to follow the alien's admission as a lawful permanent resident or whether the period prior to that admission also could count to satisfy that requirement. *See Mercado-Zazueta*, 580 F.3d at 1107 (describing the circuit split); *supra* at 9-10.

To resolve this protracted conflict, Congress replaced former section 212(c) with current section 1229b(a). *See* 141 Cong. Rec. at S6092, *et seq*. (May 3, 1995).[10] As the Department of Justice explained, the amendment of former section 212(c) was designed to "clarify an area of the law regarding the cutoff periods for these benefits that have given rise to significant litigation and different rules being applied in different judicial circuits." 141 Cong. Rec. at S6104. There is no indication that Congress viewed the imputation rule as a cause for concern. Nor is there any suggestion that, in replacing former section 212(c) with section 1229b(a), Congress meant to overturn the established judicial consensus that permitted imputation of a parent's period of domicile to a child.

Rather, Congress was concerned solely with the circuit split concerning former section 212(c)'s requirement permitting discretionary cancellation of

---

[10] Because no legislative history is available for the Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, which enacted Section 1229b(a), the history of the precursor bill, the Immigration Enforcement Improvements Act, S. 754, 104th Cong. (1995), is informative as to the legislative intent behind the provision. *See Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 370-71 (1980); Petr. Br. 26.

removal where an alien has been "lawfully admitted for permanent residence" and had "a lawful unrelinquished domicile of seven consecutive years. 8 U.S.C. § 1182(c). To resolve the widespread disagreement among circuits on the application of this rule, Congress amended former section 212(c) by creating a dual durational requirement. Under section 1229b(a), an alien is eligible for discretionary cancellation of removal only if he meets both the five-year lawful permanent residence requirement and the seven-year continuous residency requirement. 8 U.S.C. § 1229b(a)(1), (2).

Although in instituting this dual durational requirement, Congress replaced the seven-year *domicile* requirement with the seven-year continuous *residence* requirement, there is no indication that Congress intended this change to alter the circuit courts' uniform position that a parent's legal status could be imputed to a minor child. *See Augustin*, 520 F.3d at 269 n.5. Indeed, the Government concedes as much, admitting that "there is no indication that the imputation issue was ever called to the attention of Congress." Petr. Br. 27 (citation omitted).[11]

---

[11] The Government argues that Congress' generalized concern of ensuring that the more limited form of relief provided in IIRIRA be respected counsels in favor of rejecting imputation under section 1229b(a). Petr. Br. 27 (citing statement of Rep. Lamar Smith). But if Congress was concerned that the new durational requirements imposed by section 1229b(a) would be subverted through imputation from parents to minors, it would have surely addressed that issue by expressly foreclosing imputation. Congress was aware that courts uniformly permitted imputation, yet, as the Government concedes (Petr. Br. 27), there is no indication that Congress viewed that as a potential problem.

If Congress had intended to effect such a significant change in the implementation of the cancellation-of-removal provision towards minors, and to abrogate the established judicial rule permitting imputation, Congress would have expressed its intent clearly. "'Congress is presumed to be aware of a[] judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.'" *Forest Grove Sch. Dist.*, 129 S. Ct. at 2492 (quoting *Lorillard,* 434 U.S. at 580). Although Congress amended the cancellation-of-removal provision, it did not adopt any language disavowing the imputation rule. This Court should not read congressional silence as evidence of congressional intent to overturn the established judicial construction of the cancellation-of-removal provision as permitting imputation of their parents' durational periods of residence to minor children. *See Newton v. Comm'rs*, 100 U.S. 548, 562 (1879) (the Court will not "interpolate into the statute a thing so important, which it does not contain"). If Congress did not intend to overturn the imputation rule when it amended the cancellation-of-removal provision, it is unreasonable for the BIA to change the imputation rule post-enactment.

The Government contends that residence "differs fundamentally" from domicile because, unlike domicile, residence under the INA is not defined by reference to intent. Petr. Br. 28; *see* 8 U.S.C. § 1101(a)(33) (defining the term "residence" as the alien's "principal, actual dwelling place in fact, without regard to intent"). The Government ignores that section 1229b(a) does not use the unqualified term "residence" but refers instead to "permanent residence" and "resided … continuously," 8 U.S.C.

§ 1229b(a)(1), (2), and this Court has recognized a distinction between residence and permanent residence (with the latter connoting intent). *See Savorgnan v. United States*, 338 U.S. 491, 504-05 (1950). Indeed, the INA defines the term "permanent" as "a relationship of continuing or lasting nature, as distinguished from temporary." 8 U.S.C. § 1101(a)(31). A determination of whether the relationship between an alien and a specific residence will be "of continuing and lasting nature" necessarily entails an inquiry into that individual's intent. Because "[c]hildren … normally lack the material and psychological wherewithal to decide where they will reside," *Mozes v. Mozes*, 239 F.3d 1067, 1076 (9th Cir. 2001), it is reasonable to impute the residence of the parent to the child.[12]

Regardless, the pre-existing imputation rule never turned solely on the question of whether children can form intent. Indeed, courts imputed not only the parent's intent, but the parent's status and

---

[12] "Although the meaning may vary according to context, 'residence' generally requires both physical presence *and an intention to remain*." *Martinez v. Bynum*, 461 U.S. 321, 330 (1983) (emphasis added); *see also Carrington v. Rash*, 380 U.S. 89, 93-94 (1965) (a state resident is someone who intends to make the state his home indefinitely); *Pope v. Williams*, 193 U.S. 621, 621, 632 (1904) (an individual is only eligible to vote if he intends to establish residency and citizenship within the state), *overruled on other grounds by Dunn v. Blumstein*, 405 U.S. 330 (1972). This Court has also recognized intent as an element to establishing residence in the context of welfare benefits. *Shapiro v. Thompson*, 394 U.S. 618, 636 n.16 (1969), *overruled in part by Edelman v. Jordan*, 415 U.S. 651 (1974); *see also Saenz v. Roe*, 526 U.S. 489, 517 (1999) (residency requires both physical presence and an intent to remain).

duration of residency. In imputing the parents' years of "*lawful* unrelinquished domicile" to their minor children under former section 212(c), the courts necessarily imputed the parents' lawful status as well as their years of residence in order to satisfy the statutory seven-year requirement. *See Morel*, 90 F.3d at 837, 842 (allowing the imputation of four years of the mother's lawful domicile, accumulated prior to the child's entering the United States, in order to satisfy the seven-year domicile requirement); *Lepe-Guitron*, 16 F.3d at 1024, 1026 (allowing imputation of the parents' years of legal permanent residence to establish the minor's seven years of lawful unrelinquished domicile); *Rosario*, 962 F.2d at 222, (allowing imputation of the mother's period of lawful residence in the eleven months prior to the minor's lawful admission to permanent resident status pending evidence of his significant relationship with the mother). As explained more fully in the following sections, the driving force of the imputation rule is equity: the prevailing national immigration policy of family unity, and the curing of anomalies that arise from systemic delays in adjusting a child's status to that of the parent. The inequity of the BIA's interpretation is that, for no discernible policy reason, it sweeps in individuals like Martinez Gutierrez who do not require imputation of their parents' residency (having long resided in the U.S. themselves), but only the imputation of the parent's lawful permanent resident status to which most children will eventually accede.

B. The BIA's Interpretation of Section 1229b(a) Contradicts the Statutory Objective of Providing Relief to Aliens with Strong Ties to the United States.

The imputation rule focuses on a narrowly defined category of immigrants: children of lawful permanent residents who themselves have been admitted as lawful permanent residents. These individuals are among the aliens with the strongest connection to the United States, because both they and their families have chosen to make the United States their adoptive home. The BIA's rule that disallows imputation in this context is unreasonable because it contradicts section 1229b(a)'s objective of providing relief to aliens with strong ties to the United States. Imputation is an equitable doctrine, yet the BIA's rule disregards the strong equities of these immigrants without any legitimate justification.

The purpose of the time requirements in both section 1229b(a) and in its predecessor, former section 212(c), is to provide relief to aliens who have formed strong ties to the United States. *Mercado-Zazueta*, 580 F.3d at 1113 (noting "the longstanding 'congressional policy of recognizing that presence in the United States of an extended length gives rise to such strong ties to the United States that removal would result in undue hardship'") (quoting *Cuevas-Gaspar*, 430 at 1029). Imputing a lawful permanent resident parent's duration of residence or status to his lawful permanent resident child directly furthers this statutory aim. *Cf. Lepe-Guitron*, 16 F.3d at 1025 (Section "212(c) was enacted to provide relief from

deportation for those who have lawfully formed strong ties to the United States.") (citing S. Rep. No. 1515, 81st Cong., 2d Sess. 383 (1950)); *Rosario*, 962 F.2d at 224 ("the ameliorative purpose of § 212(c) is better served by permitting a minor to establish domicile through a parent with whom he had a significant relationship during the time in question" because "[t]his connection with the parent — and, by extension, with this country — evinces the type of bond that the statute was designed to protect from unwarranted severance").

By contrast, refusing to impute a parent's status "'frustrates the legislative scheme because it works to prevent those who *have* developed close ties to the United States ... from being able to seek a waiver.'" *White v. INS*, 75 F.3d 213, 216 (5th Cir. 1996) (quoting *Rosario*, 962 F.2d at 225). Martinez Gutierrez was a lawful permanent resident at the time he was served with a Notice of Removal in 2005, and he had resided continuously in the United States for sixteen years prior to that point. *Supra* at 10. He has significant ties to the United States, in contrast to his highly attenuated (if any) connection to his native country, Mexico. *See supra* at 10. As the BIA has previously acknowledged, "drastic deprivation may follow if a resident of the United States is compelled to forsake all bonds formed in this country and go to a foreign land where the resident often has no current ties." *In re Huang*, 19 I. & N. Dec. 749, 754 (B.I.A. 1988). Imputing the duration of lawful permanent residence and continuous residence from Martinez Gutierrez's father (himself a lawful

permanent resident) to Martinez Gutierrez directly serves section 1229b(a)'s purposes.[13]

A prohibition on imputation is particularly unreasonable in the case of a lawful permanent resident such as Martinez Gutierrez, who failed to satisfy section 1229b(a)'s durational requirements because of the delay in the availability of his immigrant visa number. The Government contends that Martinez Gutierrez should not benefit from the imputation rule because he was not granted lawful permanent status until the age of nineteen. Petr. Br. 30. But this argument ignores entirely the fact that Martinez Gutierrez and similarly situated children did not delay applying for a lawful permanent status earlier through any fault of their own; rather, the delay was solely a result of the visa backlog. Martinez Gutierrez's father, who became a lawful permanent resident in 1991, promptly sought lawful permanent status for his son in September 1993, when Martinez Gutierrez was nine years old. *Supra* at 10-11. Upon approval of his father's I-130 petition, Martinez Gutierrez became eligible to apply for adjustment of status as soon as an immigrant visa number became available to him. *Supra* at 4, 11.

---

[13] Instances where courts refused to impute a parent's period of residence often involve wholly different facts. Thus, in *Cervantes v. Holder*, 597 F.3d 229, 237 (4th Cir. 2010), the children at issue did not enter the country with their parents and had only recently arrived in the United States. *See also Barrios*, 581 F.3d at 858 (refusing to impute a parent's physical presence to a minor child who was not actually living in the United States during the statutory seven-year period). In contrast, Martinez Gutierrez has resided in the United States continuously since 1989. *Supra* at 10.

This visa number did not become available until more than five years later, in May 1999. *Supra* at 11. Had that number been available in 1993, when Martinez Gutierrez's father filed the I-130 petition for him, Martinez Gutierrez in all likelihood would have easily satisfied both durational requirements of section 1229b(a).[14]

The availability of an immigrant visa number, however, is not a matter of executive discretion. A visa will invariably become available as a matter of course, with the delay being simply a function of the visa backlog created by the overall size of family-based immigration into the United States. *See* Petr. Br. 31-32 & n.10; *supra* at 3-5. Moreover, the approval of an application for adjustment of status filed by a second-level preference alien (such as a minor child of a lawful permanent resident) is largely a ministerial function. It is therefore unreasonable for the BIA to disregard entirely section 1229b(a)'s objective of providing relief to aliens with strong ties to the United States merely because, due to the visa backlog, such aliens were delayed in submitting their applications for adjustment of status.[15]

---

[14] Martinez Gutierrez filed his I-485 application for adjustment of status in February 2001, and was informed in May 2001 that this status "ha[s] been granted." *Supra* at 12.

[15] The Government's argument that Martinez Gutierrez "did not seek to benefit from imputation of his father's LPR status and residence until after he was apprehended and placed in removal proceedings," Petr. Br. 30, is therefore difficult to comprehend. The question of imputation under the cancellation-of-removal statute does not arise until the alien has a reason to seek cancellation of his removal. Nor would Martinez Gutierrez have any need to "benefit" from the imputation rule if he had been

(continued...)

The refusal to impute is particularly unreasonable with respect to Martinez Gutierrez's eligibility under the seven-year residence requirement of section 1229b(a)(2). The LIFE Act expressly created a temporary nonimmigrant "V" status for minor children of lawful permanent residents who, like Martinez Gutierrez, were waiting for longer than three years for an immigrant visa based on their parent's previously filed petition. 8 U.S.C. §§ 1101(a)(15)(V); 1255(i); *supra* at 6. Moreover, aliens who apply for adjustment of status are considered to be "present in the United States under a period of stay authorized by the Attorney General." LIFE Act at § 1502(a)(1)(C); 8 C.F.R. § 245a.34(d); *supra* at 6. These provisions of the immigration law further support the court of appeals' rule of imputing the residence period from lawful permanent residents to their minor children (who are themselves lawful permanent residents). For this reason, the imputation rule is not an "end-run," Petr. Br. 32, around the statutory limitations on obtaining lawful status.

C. The Imputation Rule Furthers Congress' Important Goal of Promoting Family Unity in the Immigration Context.

The imputation rule furthers the congressional intent embodied to place "a high priority on relations

(...continued)

able to seek adjustment of status immediately upon the approval of his father's I-130 petition, filed in September 1993, instead of waiting for over five years for an available immigrant visa number.

between permanent legal residents and their children." *Cuevas-Gaspar*, 430 F.3d at 1025-26. The integrity of the family unit is of cardinal importance in American law. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). Raising one's children is deemed essential to liberty — a right "far more precious … than property rights." *May v. Anderson*, 345 U.S. 528, 533 (1953).

The immigration law has long recognized the importance of family unity. *Fiallo v. Bell*, 430 U.S. 787, 795 n.6 (1977) (noting congressional objective "'of keeping families of United States citizens and immigrants united'") (quoting H.R. Rep. No. 85-1199, at 7 (1957), *reprinted in* 1957 U.S.C.C.A.N. 2016, 2020)); *see also* Stephen H. Legomsky & Cristina M. Rodriguez, *Immigration and Refugee Law and Policy* 262 (5th ed. 2009) ("[O]ne central value that United States immigration laws have long promoted … is family unity."); Jennifer M. Chacón, *Loving Across Borders: Immigration Law and the Limits of Loving*, 2007 Wis. L. Rev. 345, 358 (2007) ("family reunification is a central part of United States immigration law"). Congress was expressly cognizant of this objective when it enacted section 1229b(a) as part of IIRIRA. *See Reform of Legal Immigration: Hearing Before the Subcomm. on Immigration of the S. Comm. on the Judiciary*, 104th Cong. 13 (Sept. 13, 1995) (statement of Doris Meissner, Comm'r, INS) ("[f]amily reunification has been the centerpiece of our legal immigration system for decades, and it should remain so").

Through the INA, Congress intended not only "to preserve the family unit" but also "to provide for a liberal treatment of children" in particular. H.R. Rep.

No. 85-1199, 1957 U.S.C.C.A.N. at 2020-21 (1957). Indeed, as Congress stressed at the time of the INA's enactment, "the underlying intention of our immigration laws [is] the preservation of the family unit." H.R. Rep. No. 82-1365, at 24 (1952). Moreover, Congress emphasized that "any new immigration law should provide a better method of keeping families of immigrants together by affording a more liberal treatment of children." S. Rep. No. 8-1515, at 468 (1952); *see also* H.R. Rep. No. 89-745, at 12 (1965) ("Reunification of families is emphasized as the foremost consideration [of the legislation]."); *cf. Prince v. Mass.*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.").

The INA is replete with special preferences promoting the goal of family unity. *See Morel*, 90 F.3d at 841 ("Various provisions of the INA reflect Congress's intent to prevent the unwarranted separation of parents from their children."); *Lepe-Guitron*, 16 F.3d at 1025 (the INA gives "high priority to the relation between permanent resident parents and their children"); *see also* Thomas Alexander Aleinikoff, *et al.*, Immigration and Citizenship 326 (6th ed. 2008).

Several provisions of the INA highlight the statute's emphasis on prioritizing familial relations and providing favorable provisions for immediate family members. For instance, section 1254a(c)(2) allows immigration courts, in considering a grant of Temporary Protected Status (TPS), to waive certain excludability provisions for immigrants who have

helped their alien children enter the United States illegally. *See* 8 U.S.C. § 1182(a)(6).[16] To promote "family reunification," a waiver of excludability is provided for persons caught smuggling undocumented aliens if those undocumented persons are immediate relatives. 8 U.S.C. § 1182(a)(6)(E)(ii).[17]

Other provisions allow close family members to enter the country as a unit or provide opportunity for the family unit to re-constitute itself as quickly as possible. Thus, spouses and unmarried minor children of lawful permanent residents receive priority in visas for permanent resettlement in the United States. 8 U.S.C. §§ 1152, 1153. Children "applying for permanent residency status from outside the United States receive the same priority date and preference category as that of their parents." *Morel*, 90 F.3d at 841 (citing 8 C.F.R. 245.1(e)(2)(vi)(B)(1) (2009)). The asylum provisions similarly give priority to immediate family members:

---

[16] *See* 136 Cong. Rec. H12358 (Oct. 27, 1990) ("[T]he conference report enhances the unification of families who have been separated by their own unfortunate circumstances and by our immigration laws. We have been faithful in returning family unification as the cornerstone of American immigration law and policy … . American immigration law should be based upon a desire for pursuing the time-honored American tradition of encouraging family unity.").

[17] Additionally, section 1227(a)(1)(E)(iii) (former 8 U.S.C. § 1251(a)(1)(E)(iii)) allows the Attorney General to waive deportation of an alien who gained entry by fraud or misrepresentation if the alien is the "spouse, parent, son, or daughter" of a United States citizen or a lawful permanent resident. *See INS v. Yeuh-Shaio Yang*, 519 U.S. 26, 29 (1996).

the "spouse or child … of an alien who is granted asylum … may, if not otherwise eligible for asylum …, be granted the same status as the alien if accompanying, or following to join, such alien." 8 U.S.C. § 1158(b)(3)(A). Importantly, the naturalization provisions, arguably the most stringent of the INA, illustrate Congress' intent to maintain family unity by allowing minor children in the legal and physical custody of their naturalized parents to become United States citizens automatically. 8 U.S.C. §§ 1431, 1433. These provisions exemplify strong and abiding congressional concern for the unification of parents with their children. *Lepe-Guitron*, 16 F.3d at 1025.

Congress has further provided protection for the family unity by enacting the Child Protection Status Act (CPSA), Pub. L. No. 107-208, 116 Stat. 927 (2002), codified at 8 U.S.C. § 1151(f). The CPSA allows a minor child's age to be "frozen" for the purpose of navigating the immigration process. 8 U.S.C. § 1151(f). Recognizing that the journey from admission to lawful permanent residence can take years because of the backlog of cases in the immigration courts, Congress mandated that a minor child will retain "child" status as of the date the child's parents file Form I-130 on the child's behalf. By creating this mechanism to protect the status of a minor child moving through the immigration process, Congress has provided further evidence of its intention to keep families together. The BIA's inflexible rule disallowing imputation of a parent's periods of residence and lawful permanent residence is inconsistent with this congressional purpose.

The Government acknowledges the immigration law's overall policy of maintaining family unity, but retorts that this preference cannot "trump Section 1229b(a)'s explicit requirement[s]." Petr. Br. 29. As already demonstrated, however, section 1229b(a) is silent as to whether imputation from a parent to his minor child is permitted. *Supra* at 20-28. Given the statutory silence, it is unreasonable for the agency to interpret section 1229b(a) in a way that runs counter to the cardinal policy of the INA. And although the policy of promoting family unity is not "absolute," Petr. Br. 30, the Government offers no reason to construe section 1229b(a) as contrary to that policy. The Government's examples demonstrate only that some immigration programs do not provide for an automatic derivative legal status for immediate family members. Petr. Br. 30-31. But the imputation rule does not vest minors with any automatic status, irrespective of whether they had already obtained such status on their own. Rather, as a matter of equity, it refuses to penalize them for a delay in obtaining that status when that delay is not attributable to the minors.

Consonant with the statutory objective of promoting family unity, courts have accorded a liberal treatment for children within the context of the immigration system. *See, e.g., Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1094 (9th Cir. 2005) (the INA "was intended to keep families together" and therefore "[i]t should be construed in favor of family units and the acceptance of responsibility by family members"); *Amezquita-Soto v. INS*, 708 F.2d 898, 903 (3d. Cir. 1983) ("the separation of family members from one another [is] a serious matter requiring close and careful scrutiny") (citation omitted); *Perales v.*

Casillas, 903 F.2d 1043, 1046 (5th Cir. 1990) ("one of the central purposes of the immigration laws [is] family reunification"); *Lau v. Kiley*, 563 F.2d 543, 545 (2d Cir. 1977) (the INA's preference system was "primarily designed to further the basic objective of reuniting families"); *Dallo v. INS*, 765 F.2d 581, 587 n.7 (6th Cir. 1985) (Congress has promoted the goal of family unification through many provisions in the INA); *Fornalik v. Perryman*, 223 F.3d 523, 525-26 (7th Cir. 2000) (lamenting that the "basic principle" of family unification is sometime overwhelmed by complexities of immigration laws).

Moreover, the BIA itself has long acknowledged this policy of promoting family unity. Thus, in *In re C-V-T-*, 22 I. & N. Dec. 7, 11 (B.I.A. 1998), the BIA explained that an IJ considering cancellation of removal should give considerable weight to "such factors as family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred at a young age), [and] evidence of hardship to the respondent and his family if deportation occurs."

CIS — the DHS component agency that administers immigration benefits — similarly acknowledges the prioritization of family unity when providing guidance regarding the process of applying for lawful permanent residence: "To promote family unity, immigration laws allow permanent residents of the Unites States (green card holders) to petition for certain eligible relatives to come live permanently in the United States." U.S. Citizenship and Immigration Services, "Green Card for a Family Member of a Permanent Resident" (2011), http://www.uscis.gov/portal/site/uscis (follow "Green

Card Through Family" hyperlink; then follow "a family member of a green card holder" hyperlink). These eligible relatives include the resident's spouse and unmarried children under the age of 21. *Id.* The CIS's guidance further points out that "[i]mmediate relatives [of United States citizens] have special immigration priority and do not have to wait in line for a visa number to become available to them to immigrate because there are an unlimited number of visas for their particular categories." U.S. Citizenship and Immigration Services, "Green Card for an Immediate Relative of a U.S. Citizen" (2011), http://www.uscis.gov/portal/site/uscis (follow "Green Card Through Family" hyperlink; then follow "an immediate relative of a U.S. citizen" hyperlink). Children of lawful permanent residents also receive higher priority for immigrant visa, being placed into a "family preference category," which allows them to receive available visas before other types of applicants. U.S. Citizenship and Immigration Services, "Green Card for a Family Member of a Permanent Resident."

Imputation of the parents' actions and status to their minor children supports the basic understanding embraced by the immigration agencies that parents must make decisions regarding immigration on behalf of their minor children. The immigration agencies' practice further illustrates the priority that the INA places on the family and demonstrates that imputation of parental status and residency promotes this goal.

D. The Court of Appeals' Rule Is Consistent with the Use of Imputation as an Equitable Doctrine.

Imputation of the durational requirements of section 1229b(a) is only one of numerous immigration contexts where both courts and the BIA impute parental state of mind, intent, and status to the parents' unemancipated minor children. Courts have "allowed imputation precisely because the minor either was legally incapable of satisfying one of these criteria or could not reasonably be expected to satisfy it independent of his parents." *Barrios v. Holder*, 581 F.3d 849, 862 (9th Cir. 2009). By using imputation in these ways, courts and the BIA further the congressional goal of promoting family unity in the immigration context and interpret the INA consistently with that goal.

In the asylum context, courts hold that a minor child's status must be assumed to be the same as that of the parents. *See Vang v. INS*, 146 F.3d 1114, 1116 (9th Cir. 1998) (applying 8 C.F.R. § 207.1(c) to make a determination of whether a minor "has firmly resettled in another country"). As the court in *Vang* noted, "it would be unreasonable to hold an adolescent responsible for arranging or failing to arrange permanent resettlement," precisely because it is a parent's duty to do so. *Id.* at 1116 (quotation marks and citation omitted).

The BIA imputes parental state of mind to minors in other contexts where a child is deemed incapable of establishing his own status or state of mind. The BIA imputes parental knowledge of inadmissibility to a minor child for the purposes of determining whether

the child would qualify for a waiver of removal under 8 U.S.C. § 1182(k) — a provision that permits a waiver if the alien did not know or could not have known of facts establishing his inadmissibility. *See Mushtaq v. Holder*, 583 F.3d 875, 878 (5th Cir. 2009) (upholding a BIA decision to impute the parent's knowledge of inadmissibility to the child); *Senica v. INS*, 16 F.3d 1013, 1014 (9th Cir. 1994) (same).

In addition, the BIA imputes a parent's abandonment of lawful permanent residence to his minor children. The BIA has maintained that a minor child has "abandoned [his] status as a permanent resident when [his] parents abandoned their status while [he was] still a minor in their care and custody." *Shyiak v. Bureau of Citizenship & Immigration Servs.*, 579 F. Supp. 2d 900, 903 (W.D. Mich. 2008) (quoting a CIS decision holding an alien ineligible for naturalization after imputing to the alien his parents' abandonment of their lawful permanent status); *see also In re Zamora*, 17 I. & N. Dec. 395, 396 (B.I.A. 1980) (imputing parents' abandonment of lawful permanent residence to minor child); *In re Winkens*, 15 I. & N. Dec. 451, 452 (B.I.A. 1975) (same).[18] Recognizing the purpose behind such

---

[18] The Government seeks to distinguish these cases on the basis that they implicate "state of mind, not objective conditions such as 'status' or 'residence.'" Petr. Br. 38. But, as already demonstrated, the determination of a continuous or permanent residence under the immigration law cannot be divorced entirely from the question of whether the alien made an intentional decision to establish a residence in a particular place, or to choose a particular country as his permanent residence. *Supra* at 37-39 & n.12. Unlike adults, the minors are incapable of taking such actions or making such a choice on their own. Therefore, looking towards the actions and choices made by

(continued...)

imputation, circuit courts have affirmed these decisions of the BIA. *See Usmani v. Att'y Gen.*, 341 Fed. App'x 473, 476 (11th Cir. 2009) (unpublished) (upholding the BIA's order of removal based on imputation to the minor alien of his parents' intent to abandon lawful permanent resident status); *Nikoi v. Att'y Gen.*, 939 F.2d 1065, 1070-71 (D.C. Cir. 1991) (upholding the BIA's practice of imputing parents' abandonment of lawful permanent residence to the U.S.-born children of foreign diplomats in denying naturalization).

The BIA's widespread reliance on imputation in the immigration context lessens considerably the degree of deference its rejection of imputation under section 1229b(a) should receive. *See Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) (conflicting agency interpretations are entitled to significantly less deference than consistently applied interpretations). It is inconsistent to permit imputation of a parent's status in certain cases, including some cases where imputation harms the child and makes immigration more difficult, but refuse to impute lawful permanent resident status or admission status for 8 U.S.C. § 1229b(a).

The court of appeals was thus correct to endorse imputation and to refuse to defer to the BIA's position, especially given that deportation or removal is a "drastic measure" and "a particularly severe penalty." *Padilla v. Kentucky*, 130 S. Ct. 1473, 1478, 1481 (2010) (internal quotation marks and citation

(...continued)

their parents is entirely reasonable and consonant with the statutory purposes.

omitted). The BIA's interpretation is therefore unreasonable and not entitled to *Chevron* deference.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

STEPHANOS BIBAS
UNIVERSITY OF PENNSYLVANIA LAW SCHOOL SUPREME COURT CLINIC
3400 Chestnut Street
Philadelphia, PA 19104
(215) 746-2297

MICHAEL FRANQUINHA
AGUIRRE LAW GROUP LLP
200 E. Mitchell Drive, Suite 306
Phoenix, AZ 85012
(602) 294-0203

DARIO AGUIRRE
AGUIRRE LAW GROUP LLP
1350 17th Street, Suite 100
Denver, CO 80202
(303) 298-9990

STEPHEN B. KINNAIRD
COUNSEL OF RECORD
IGOR V. TIMOFEYEV
TAMARA L. GRAHAM
MARIA T. DAVIS
D. SCOTT CARLTON
MICHELLE E. YETTER
DEVON E. WINKLES
PAUL HASTINGS LLP
875 15th Street, N.W.
Washington, D.C. 20005
(202) 551-1700
stephenkinnaird@paulhastings.com

Counsel for Respondent

December 2011