No. 18-725

In the Supreme Court of the United States

ANDRE MARTELLO BARTON, PETITIONER

v.

WILLIAM P. BARR, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the stop-time rule, which governs the calculation of an alien's period of continuous residence in the United States for purposes of eligibility for cancellation of removal, may be triggered by an offense that "renders the alien inadmissible," 8 U.S.C. 1229b(d)(1)(B), when the alien is a lawful permanent resident who is not seeking admission.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 904 F.3d 1294. The decisions of the Board of Immigration Appeals (Pet. App. 20a-24a) and the immigration judge (Pet. App. 25a-36a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 25, 2018. The petition for a writ of certiorari was filed on December 4, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, an alien is "removable" if he is "inadmissible" under 8 U.S.C. 1182 or "deportable" under 8 U.S.C. 1227. 8 U.S.C. 1229a(e)(2); see 8 U.S.C. 1229a(a)(2) ("An alien placed in proceedings under this section may be charged with any applicable ground of

inadmissibility under section 1182(a) of [Title 8] or any applicable ground of deportability under section 1227(a) of [Title 8].").

The Attorney General, in his discretion, may cancel the removal of an alien who is found to be removable. 8 U.S.C. 1229b. To obtain cancellation of removal, the alien must demonstrate both that he is statutorily eligible for such relief and that he warrants a favorable exercise of discretion. 8 U.S.C. 1229a(c)(4)(A).

To demonstrate statutory eligibility for cancellation of removal, an alien who has the status of a lawful permanent resident must show (1) that he has been "lawfully admitted for permanent residence for not less than 5 years"; (2) that he "has resided in the United States continuously for 7 years after having been admitted in any status"; and (3) that he "has not been convicted of any aggravated felony." 8 U.S.C. 1229b(a).

The continuous-residence requirement is subject to the "stop-time rule." *Pereira* v. *Sessions*, 138 S. Ct. 2105, 2110 (2018). That rule provides:

> any period of continuous residence * * * in the United States shall be deemed to end * * * when the alien has committed an offense referred to in section 1182(a)(2) of [Title 8] that renders the alien inadmissible to the United States under section 1182(a)(2) of [Title 8] or removable from the United States under section 1227(a)(2) or 1227(a)(4) of [Title 8].

8 U.S.C. 1229b(d)(1).

2. Petitioner is a native and citizen of Jamaica. Pet. App. 26a. In May 1989, petitioner was admitted to the United States on a nonimmigrant tourist visa. *Id.* at 22a. Three years later, his status was adjusted to that of a lawful permanent resident. *Ibid.*

On January 23, 1996, petitioner committed the crimes of aggravated assault, first-degree criminal damage to property, and possession of a firearm in the commission of a felony. Pet. App. 3a, 22a. He was later prosecuted and convicted on three counts of aggravated assault, as well as one count of each of the other offenses, in state court. *Id.* at 3a; Administrative Record (A.R.) 680. In 2007 and 2008, petitioner was convicted of various controlled-substance offenses under state law. Pet. App. 3a.

3. In 2016, the Department of Homeland Security (DHS) served petitioner with a notice to appear for removal proceedings. Pet. App. 4a; A.R. 757. DHS charged that petitioner was removable on four grounds but later withdrew two of them. Pet. App. 4a. The immigration judge (IJ) sustained the other two grounds of removability—that petitioner had been convicted of a violation of a law relating to a controlled substance, 8 U.S.C. 1227(a)(2)(B)(i), and that he had been convicted of unlawful possession of a firearm, 8 U.S.C. 1227(a)(2)(C). Pet. App. 4a, 26a.

Petitioner applied for cancellation of removal under 8 U.S.C. 1229b(a). Pet. App. 4a, 26a. DHS argued that petitioner was statutorily ineligible for cancellation of removal because he could not establish the necessary seven years of continuous residence in the United States following his admission in May 1989. *Id.* at 5a. According to DHS, the three counts of aggravated assault that petitioner had committed in 1996 constituted crimes involving moral turpitude that rendered him "inadmissible" under 8 U.S.C. 1182(a)(2). Pet. App. 6a; A.R. 694. DHS therefore argued that, under the stop-time rule, petitioner's period of continuous residence

terminated on the date he committed those offenses—January 23, 1996. Pet. App. 5a.[1]

The IJ denied petitioner's application for cancellation of removal. Pet. App. 26a-36a. The IJ agreed with the government that petitioner had committed crimes involving moral turpitude in 1996 that rendered him "inadmissible" under Section 1182(a)(2)(A)(i)(I) and triggered the stop-time rule. *Id.* at 34a-36a. The IJ therefore concluded that petitioner was statutorily ineligible for cancellation of removal. *Id.* at 36a.

The Board of Immigration Appeals (Board) dismissed petitioner's appeal. Pet. App. 20a-24a. The Board noted that petitioner did not dispute that the aggravated assault he had committed in 1996 was a "crime involving moral turpitude" and a "ground of inadmissibility" under Section 1182(a)(2). *Id.* at 23a. The Board therefore agreed with the IJ that the stop-time rule rendered petitioner ineligible for cancellation of removal. *Ibid.*

4. The court of appeals denied petitioner's petition for review. Pet. App. 1a-19a.

The court of appeals rejected petitioner's contention that, because he was not currently seeking admission to the United States, he could not be "render[ed] * * * inadmissible" for purposes of the stop-time rule, 8 U.S.C. 1229b(d)(1)(B). Pet. App. 7a-8a. The court reasoned that, as a matter of ordinary meaning, "the word 'render' can indicate the conferral of a particular condition,

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[1] DHS did not press the argument that his 1996 crimes rendered petitioner "removable" under 8 U.S.C. 1227(a)(2) or (a)(4). See Pet. App. 5a-6a (explaining that Section 1227(a)(2) "establishes removability, as relevant here, only for (i) a *single* crime involving moral turpitude committed *within five years* of an alien's admission or (ii) *multiple* crimes involving moral turpitude *not arising out of a single scheme*") (emphases added).

or 'state.'" *Id.* at 10a (citations omitted). The court found a "'state'-based understanding" to make "particularly good sense here, where the word that follows 'renders' is 'inadmissible.'" *Id.* at 11a. "By their very nature," the court explained, "'able' and 'ible' words connote a person's or thing's character, quality, or status—which * * * exists independent of any particular facts on the ground." *Ibid.* (footnote omitted). The court gave a number of examples: "A terminal illness renders its victim *untreatable* regardless of whether she is actively seeking treatment; rot renders a piece of fish *inedible* regardless of whether someone is trying to eat it; sheer weight renders a car *immovable* regardless of whether someone is trying to move it." *Id.* at 11a-12a. "So too here," the court concluded, "an alien can be rendered *inadmissible* regardless of whether he is actually seeking admission" at a particular time. *Id.* at 12a.

The court of appeals therefore found no "indication" in the text of the stop-time rule that, "in order to be 'render[ed] . . . inadmissible,'" "an alien *must* presently be seeking admission." Pet. App. 12a (brackets in original). The court acknowledged that, "for an alien like [petitioner], who has already been admitted" and "isn't currently seeking admission," the status of having been rendered "inadmissible" "might not immediately produce real-world admission-related consequences." *Ibid.* The court reasoned, however, that such status may become relevant "down the road"; even "an already-admitted lawful permanent resident," the court emphasized, might someday need to seek readmission to the United States. *Ibid.* Having concluded that the stop-time rule's "plain language forecloses" petitioner's interpretation, *id.* at 9a, the court found it unnecessary to determine whether the Board's "non-precedential single-

member order" in this case "is entitled to *Chevron* deference." *Id.* at 17a n.5; see *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

ARGUMENT

Petitioner contends (Pet. 20-23) that a lawful permanent resident who is not seeking admission cannot be "render[ed] * * * inadmissible" for purposes of the stop-time rule, 8 U.S.C. 1229b(d)(1)(B). The court of appeals correctly rejected that contention. Although the Ninth Circuit has reached a contrary conclusion, this Court's intervention would be premature. The Board has yet to issue a precedential opinion addressing the issue, and further percolation in the courts of appeals would be beneficial, particularly given that the court of appeals' decision in this case was the first to conclude that the plain language of the statute forecloses petitioner's interpretation. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly determined that the stop-time rule may be triggered by an offense that "renders the alien inadmissible," 8 U.S.C. 1229b(d)(1)(B), regardless of whether the alien is a lawful permanent resident who is seeking admission. Pet. App. 8a-13a.

a. The text of the stop-time rule provides:

> any period of continuous residence * * * in the United States shall be deemed to end * * * when the alien has committed an offense referred to in section 1182(a)(2) of [Title 8] that *renders the alien inadmissible* to the United States under section 1182(a)(2) of [Title 8] or removable from the United States under section 1227(a)(2) or 1227(a)(4) of [Title 8].

8 U.S.C. 1229b(d)(1) (emphasis added).

The key phrase here is "renders the alien inadmissible." 8 U.S.C. 1229b(d)(1)(B). The ordinary meaning of "render" is "'to cause to be or to become.'" Pet. App. 10a (citing, *inter alia*, *Webster's Second New International Dictionary* 2109 (1944)). The word "can indicate the conferral of a particular condition, or 'state.'" *Ibid.* (quoting *Webster's Second New International Dictionary* 2109).

That is what the word indicates here: the conferral of a state of inadmissibility. "[I]nadmissible" follows "renders" in the text of the stop-time rule. 8 U.S.C. 1229b(d)(1)(B). And like other words that end in "'able'" or "'ible,'" "inadmissible" "connote[s] a person's or thing's character, quality, or status," "independent of any particular facts on the ground." Pet. App. 11a. For example, sewage that leaks into a well may render the water "'*undrinkable*,'" regardless of whether "anyone is actually trying to drink it." *Ibid.* (citation omitted). Or bad weather may render a captive's escape "'*impossible*,'" regardless of whether "he was actually trying to make it." *Ibid.* (citation omitted).

Similarly here, "an alien can be rendered *inadmissible* regardless of whether he is actually seeking admission." Pet. App. 12a. "[I]nadmissib[ility]" is a status that petitioner assumed when he was "convicted of" a "crime involving moral turpitude." 8 U.S.C. 1182(a)(2)(A)(i). The fact that he was not seeking admission then—and is not seeking admission now—is immaterial, because under the stop-time rule, it is the status of being "inadmissible" that matters. 8 U.S.C. 1229b(d)(1)(B). The court of appeals therefore correctly concluded that the crime involving moral turpitude that petitioner had committed in January 1996 triggered the stop-time rule and

made him ineligible for cancellation of removal. Pet. App. 17a.

b. Petitioner's counterarguments (Pet. 20-23) lack merit.

i. Petitioner argues (Pet. 21) that he "was not 'rendered inadmissible' by his 1996 offense" but that he "*could* be rendered inadmissible if certain contingent future events occur." That argument, however, conflates the *status* of inadmissibility with the *consequences* of that status. Contrary to petitioner's contention (Pet. 21), his *status* of inadmissibility is not contingent on some future event. Petitioner was rendered inadmissible in 1996, when he committed and was then convicted of a crime involving moral turpitude. Pet. App. 3a; A.R. 680-684. From that point on, petitioner assumed the status of inadmissibility. To be sure, petitioner might not have experienced the *consequences* of that status in 1996. But that is only because such consequences (as distinct from the status of inadmissibility itself) were contingent on future events. Thus, as the court of appeals explained, if petitioner had subsequently "abandoned or relinquished" his lawful-permanent-resident status, or left the United States "for a continuous period in excess of 180 days," or "engaged in illegal activity after having departed the United States," his status of inadmissibility would have had the consequence of standing in the way of his readmission. 8 U.S.C. 1101(a)(13)(C); see Pet. App. 12a. The stop-time rule simply spells out an additional consequence of petitioner's status—that if he were subsequently placed in removal proceedings, as he was here, his period of continuous residence for purposes of cancellation of removal would be deemed to have terminated on the date that he committed the crime involving moral turpitude.

ii. Petitioner also argues (Pet. 21-23) that the court of appeals' decision renders part of the stop-time rule superfluous. As petitioner observes, the part of the rule at issue here "is triggered when two conditions are met," Pet. 22: (1) "the alien has committed an offense referred to in section 1182(a)(2)," and (2) that offense "renders the alien inadmissible" under Section 1182(a)(2) or deportable under Section 1227(a)(2) or (a)(4). 8 U.S.C. 1229b(d)(1)(B). Petitioner contends that the court of appeals' decision "renders the second condition superfluous, because under its interpretation, committing an offense referred to in section 1182(a)(2) *necessarily* 'renders the alien inadmissible.'" Pet. 22 (citation omitted).

The court of appeals correctly rejected that contention. Pet. App. 15a-16a. As the court explained, satisfying the first condition "does *not* necessarily" mean satisfying the second. *Id.* at 15a. "The reason is that while the mere 'commi[ssion]' of a qualifying offense satisfies the [first condition], actually 'render[ing] the alien inadmissible' demands more." *Id.* at 15a-16a (first and third set of brackets in original). Under 8 U.S.C. 1182(a)(2)(A)(i), for example, a crime involving moral turpitude renders an alien inadmissible only if the alien is "convicted of" the crime, "admits" to "having committed" it, or "admits" to having committed the "acts which constitute [its] essential elements." "In short, while only commission is required at step one, conviction (or admission) is required at step two." Pet. App. 16a.

Petitioner responds (Pet. 22) that, if Congress had meant merely to require that "the alien have been *convicted* of the offense," "it would have simply said that an alien is ineligible for cancellation of removal if he has been convicted of a crime referred to in section 1182(a)(2)." That rewriting of the provision, however,

would fundamentally change its operation in two fundamental respects. First, it would tie the termination of the continuous-residence period to the date of conviction, rather than the date of commission of the offense. See Pet. App. 16a n.3. Second, it would require a conviction in every case, even though a conviction is not necessary to render an alien inadmissible under Section 1182(a)(2)(A)(i) and other provisions. See 8 U.S.C. 1182(a)(2)(A)(i) (requiring a conviction *or* an admission); see also, *e.g.*, 8 U.S.C. 1182(a)(2)(C) (requiring only knowledge or reason to believe that an alien is an illicit trafficker in a controlled substance). That petitioner is unable to achieve the same meaning through different language only highlights the lack of superfluity in the text that Congress enacted.

iii. Finally, petitioner contends (Pet. 23) that "[t]here is no other section of the Immigration and Nationality Act where the status of being 'inadmissible' is divorced from the context of an alien seeking admission to the United States." That contention is incorrect. Section 1227(a)(1)(A), for example, requires a determination of admissibility when an alien is charged as being deportable under that provision, even though the alien is not seeking admission. See 8 U.S.C. 1227(a)(1)(A) ("Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable."). Petitioner thus errs in asserting (Pet. 21) that, "[f]or an already-admitted alien, the sole question an immigration judge can possibly consider is whether the alien is deportable, not whether the alien is inadmissible." Provisions relating to deportability may make an alien's inadmissibility relevant, just as the stop-time rule makes the alien's inadmissibility relevant.

Other provisions of the INA likewise make an alien's admissibility relevant outside the context of his seeking admission. Section 1227(a)(1)(H), for instance, makes admissibility relevant to whether an alien may obtain a waiver of removal for fraud or misrepresentation. See 8 U.S.C. 1227(a)(1)(H) (requiring a determination as to whether the alien was "otherwise admissible to the United States at the time of [his] admission"). And Section 1255(a) makes admissibility relevant to whether an alien may obtain an adjustment of status. See 8 U.S.C. 1255(a) (requiring aliens who were "admitted or paroled" into the United States to establish that they are "admissible to the United States"); see also 8 U.S.C. 1255(*l*)(1) and (2)(B) (providing an avenue for adjustment of status for certain aliens already admitted to the United States as nonimmigrants, and providing for a waiver of inadmissibility for those aliens "if the activities rendering the alien[s] inadmissible under the provision were caused by, or were incident to," being a victim of trafficking in persons). The court of appeals' interpretation of the stop-time rule therefore is consistent with the structure of the INA.

2. Although there is a shallow circuit conflict on the question presented, this Court's intervention at this time would be premature.

a. Like the Eleventh Circuit in this case, the Fifth Circuit has concluded that an alien need not be seeking admission for the "renders * * * inadmissible" language of the stop-time rule to apply. *Calix* v. *Lynch*, 784 F.3d 1000, 1008-1012 (2015). The Fifth Circuit reached that conclusion by "impos[ing] [its] own construction on the stop-time rule," after having found the statute "ambiguous." *Id.* at 1009. By contrast, the Ninth Circuit has concluded that, "[u]nder the plain language of the stop-time

rule and the INA, a lawful permanent resident cannot be 'rendered inadmissible' unless he is seeking admission." *Nguyen* v. *Sessions*, 901 F.3d 1093, 1100 (2018).

Contrary to petitioner's contention (Pet. 17-18), the conflict does not extend beyond those circuits. The Second Circuit in *Heredia* v. *Sessions*, 865 F.3d 60 (2017), cert. denied, 138 S. Ct. 677 (2018), found "dubious" the proposition that an alien is not "rendered inadmissible" until he seeks admission. *Id.* at 71; see *id.* at 67-68. But as petitioner acknowledges (Pet. 18 n.2), the Second Circuit did not "definitively decide *when* [an alien] [i]s rendered inadmissible" under the stop-time rule, *Heredia*, 865 F.3d at 68, because the alien in that case was not entitled to cancellation of removal even assuming that he was not rendered inadmissible until he applied for admission, *id.* at 70-71.[2]

b. The circuit conflict does not warrant this Court's review at this time. Only three courts of appeals have weighed in on the question presented, and the Board itself has yet to address the issue in a precedential opinion. See Pet. App. 18a n.5 (noting that, although the Board in *In re Jurado-Delgado*, 24 I. & N. Dec. 29 (2006), addressed a "similar" question "to the one presented here," it did not "'explicitly answer whether a lawful permanent resident who does not need to be admitted nonetheless has his period of continuous residence stopped by an offense rendering him inadmissible'") (quoting *Calix*, 784 F.3d at 1009).

The Ninth Circuit in *Nguyen* denied the government's petition for rehearing en banc. See No. 17-70251

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[2] As petitioner acknowledges (Pet. 18-19), the Third Circuit has squarely addressed the question presented only in an unpublished opinion. See *Ardon* v. *Attorney Gen. of U.S.*, 449 Fed. Appx. 116, 118 (2011) (per curiam).

11/30/18 C.A. Order. But if the Board issues a precedential opinion on the question presented, the Ninth Circuit may be willing to revisit the issue en banc in a future case. The en banc court in such a case would not be bound by the panel's conclusion in *Nguyen* that the statute unambiguously favors petitioner's interpretation. 901 F.3d at 1098.

Even if the current circuit conflict were to persist in the face of a precedential opinion by the Board, this Court would benefit from the interpretation of the expert agency charged with implementing this complex statute. Premature adjudication of the issue could result in a waste of judicial resources, or could unnecessarily cabin the discretion of the agency. This Court's review would also benefit from further percolation in the courts of appeals, particularly in light of the Eleventh Circuit's decision in this case—the first court of appeals' decision to rely on the "stop-time provision's plain language" in concluding that "a lawful-permanent-resident alien need not be seeking admission to the United States in order to be 'render[ed] . . . inadmissible.'" Pet. App. 17a (brackets in original). Further review is not now warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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