No. 10-1542

IN THE

Supreme Court of the United States

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

v.

CARLOS MARTINEZ GUTIERREZ,
Respondent.

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

BRIEF IN OPPOSITION

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

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

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE.................................. 1

A. Introduction 1

B. Factual Background 2

C. Procedural Background......................... 3

REASONS FOR DENYING THE PETITION 7

A. This Case Is an Inferior Vehicle on One of the Questions Presented, and No Split Exists on the Other Question. 7

1. This Case Is the Wrong Vehicle on the Question of Imputation of the Seven-Year Residence Requirement of Section 1229b(a)(2). 7

2. No Circuit Split Exists on the Question of Imputation of the Five-Year Lawful Permanent Residence Requirement of Section 1229b(a)(1). 8

3. This Court Should Await a Superior Vehicle to Consider the Ninth Circuit's Imputation Rule in a Broader Context. 10

TABLE OF CONTENTS
(continued)

Page

4. There Is No Urgency to the Issue Presented, and this Court Should Therefore Allow Further Percolation........ 11

B. The Ninth Circuit's Decision is Correct on the Merits. 13

1. The Ninth Circuit Followed Settled Circuit Interpretation of a Predecessor Statute, and Congress Did Not Intend to Alter that Consensus. 13

2. The Ninth Circuit's Decision Is Consistent with Settled Judicial and Agency Practice. 17

3. The Ninth Circuit's Imputation Rule Furthers Congress' Important Goal of Promoting Family Unity in the Immigration Context. 20

CONCLUSION... 23

TABLE OF AUTHORITIES

Page(s)

CASES

Augustin v. Att'y Gen.,
520 F.3d 264 (3d Cir. 2008) 9, 15, 20

Barrios v. Holder,
581 F.3d 849 (9th Cir. 2009) 17

Carachuri-Rosendo v. Holder,
130 S. Ct. 2577 (2010) 11

Cervantes v. Holder,
597 F.3d 229 (4th Cir. 2010) 9, 10, 11

City of Springfield v. Kibbe,
480 U.S. 257 (1987) (per curiam) 8

Cuevas-Gaspar v. Gonzales,
430 F.3d 1013 (9th Cir. 2005) 4, 5, 20

De Leon-Ochoa v. Att'y Gen.,
622 F.3d 342 (3d Cir. 2010) 10, 11

Deus v. Holder,
591 F.3d 807 (5th Cir. 2009) 9

Forest Grove Sch. Dist. v. T.A.,
129 S. Ct. 2484 (2009) 15

Gitter v. Gitter,
396 F.3d 124 (2d Cir. 2005) 17

Good Samaritan Hosp. v. Shalala,
508 U.S. 402 (1993) 19

In re C-V-T-,
22 I. & N. Dec. 7 (B.I.A. 1998) 12, 21

In re Escobar,
24 I. & N. Dec. 231 (B.I.A. 2007) 5

TABLE OF AUTHORITIES
(continued)

Page(s)

In re Huang,
19 I. & N. Dec. 749 (B.I.A. 1988) 20

In re Winkens,
15 I. & N. Dec. 451 (B.I.A. 1975) 18

In re Zamora,
17 I. & N. Dec. 395 (B.I.A. 1988) 18

INS v. Cardoza-Fonseca,
480 U.S. 421 (1987) 20

INS v. Yeuh-Shaio Yang,
519 U.S. 26 (1996) 21

Lepe-Guitron v. INS,
16 F.3d 1021 (9th Cir. 1994) 13, 14, 16

Lorillard v. Pons,
434 U.S. 575 (1978) 15

Martinez v. Bynum,
461 U.S. 321 (1983) 16

Mercado-Zazueta v. Holder,
580 F.3d 1102 (9th Cir. 2009) ....*passim*

Miss. Band of Choctaw Indians v. Holyfield,
490 U.S. 30 (1989) 14

Morel v. INS,
90 F.3d 833 (3d Cir. 1996), *vacated on reconsideration on other grounds*,
144 F.3d 248 (3d Cir. 1998)..................13, 14, 16

Mozes v. Mozes,
239 F.3d 1067 (9th Cir. 2001) 17

TABLE OF AUTHORITIES
(continued)

Page(s)

Mushtaq v. Holder,
583 F.3d 875 (5th Cir. 2009) 19

Nikoi v. Att'y Gen.,
939 F.2d 1065 (D.C. Cir. 1991) 19

Pa. Dep't of Corrections v. Yeskey,
524 U.S. 206 (1998) 8

Padilla v. Kentucky,
130 S. Ct. 1473 (2010) 19

Rosario v. INS,
962 F.2d 220 (2d Cir. 1992).........................13, 16

Senica v. INS,
16 F.3d 1013 (9th Cir. 1994) 19

Shyiak v. Bureau of Citizenship & Immigration Servs.,
579 F. Supp. 2d 900 (W.D. Mich. 2008)...........18

Touche Ross & Co. v. Redington,
442 U.S. 560 (1979) 15

United States v. Mendenhall,
446 U.S. 544 (1980) 8

Usmani v. Att'y Gen.,
341 Fed. App'x 473 (11th Cir. 2009).................18

Vang v. INS,
146 F.3d 1114 (9th Cir. 1998) 18

Woodby v. INS,
385 U.S. 276 (1966) 20

TABLE OF AUTHORITIES
(continued)

Page(s)

Youakim v. Miller,
425 U.S. 231 (1976) 8

STATUTES

Immigration and Nationality Act,
8 U.S.C. § 1101 *et seq.* 1

8 U.S.C. § 1101(a)(33)...16

8 U.S.C. § 1152...21

8 U.S.C. § 1153...21

8 U.S.C. § 1158(b)(3)(A)...21

8 U.S.C. § 1182(a) (2006 & Supp. III 2009) 20

8 U.S.C. § 1182(a)(6)(E)(i) 3

8 U.S.C. § 1182(a)(6)(E)(ii) 21

8 U.S.C. § 1182(c) (repealed 1996).........2, 13, 14, 15

8 U.S.C. § 1182(k) 19

8 U.S.C. § 1227(a)(1)(E)(iii) 21

8 U.S.C. § 1229b (2006 & Supp. III 2009)..........1, 13

8 U.S.C. § 1229b(a) ....*passim*

8 U.S.C. § 1229b(a)(1)..................................*passim*

8 U.S.C. § 1229b(a)(2)..................................*passim*

8 U.S.C. § 1229b(a)(3)...4

8 U.S.C. § 1251(a)(1)(H) (transferred 1997) 21

8 U.S.C. § 1252(a)(2)(B)(i) 12

TABLE OF AUTHORITIES
(continued)

Page(s)

8 U.S.C. § 1254a(b)(1)(A) 11

8 U.S.C. § 1254a(b)(1)(B)(i) 11

8 U.S.C. § 1254a(c)(1)(A) 10

8 U.S.C. § 1254a(c)(2) 20

8 U.S.C. § 1433 (2006 & Supp. III 2009)................ 21

Illegal Immigration Reform and Immigrant
Responsibility Act of 1996,
Pub. L. No. 104-208, § 304(a)(3),
110 Stat. 3009-594 (1996) 14, 15

REGULATIONS

8 C.F.R. § 207.1(c) 18

OTHER AUTHORITIES

141 Cong. Rec. S6082 (May 3, 1995)................ 14, 15

Br. for Resp't, *Gutierrez v. Holder*,
No. 08-70436 (9th Cir. July 29, 2010)......... 5, 6, 8

Designation of Honduras Under
Temporary Protected Status,
64 Fed. Reg. 524 (Jan. 5, 1999)..................... 9, 10

Hague International Child Abduction
Convention; Text and Legal Analysis,
51 Fed. Reg. 10,494 (Mar. 26, 1986) 16, 17

Hague Convention on the Civil Aspects of
International Child Abduction,
Oct. 25, 1980, T.I.A.S. No. 11,670,
1343 U.N.T.S. 89 .... 16, 17

STATEMENT OF THE CASE

A. Introduction

The Immigration and Nationality Act (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 (2006 & Supp. III 2009). The statute, however, sets forth several eligibility requirements, two of which are at issue in the Government's petition: 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); and, 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). In prior decisions, the United States Court of Appeals for the Ninth Circuit has concluded that both a parent's period of lawful permanent residence 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 Government seeks certiorari with respect to both issues.

The petition does not warrant this Court's review. *First*, this case is the wrong vehicle for this Court to consider the seven-year continuous residence requirement of section 1229b(a)(2). The Government represented below that Respondent's compliance with this requirement was not at issue, and neither the Board of Immigration Appeals (BIA) nor the Ninth Circuit has addressed it. *Second*, there is no circuit split on the question of whether imputation is proper

under the five-year lawful permanent residence requirement of section 1229b(a)(1), as the Ninth Circuit is the only court of appeals to have addressed that issue. This Court's intervention is therefore premature.

Third, the Ninth Circuit is correct on the merits. In permitting imputation of a parent's residence and lawful status under section 1229b(a), the Ninth Circuit merely followed a uniform approach of circuit courts that have permitted such imputation to a minor under the predecessor statute, the former 8 U.S.C. § 1182(c). When Congress amended that provision in 1996, it did so in order to resolve a disagreement among the circuits on an entirely different issue, not to disavow the settled imputation rule.

Nor do the textual differences between the former section 1182(c) and the current section 1229b(a) justify a departure from this prior judicial consensus. On the contrary, the Ninth Circuit's imputation rule is consistent with the existing court and agency practice of imputing a parent's state of mind, intent, and status to a minor child under the INA. Finally, the Ninth Circuit's rule furthers an important congressional goal of promoting family unity through legal immigration, and specifically of maintaining the family relationship between lawful permanent-resident parents and their unemancipated minor children. The petition should be denied.

B. 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.

App. 12a, 18a. Since arriving in the United States, Gutierrez has lived with his family in Northern California. Gutierrez's father became a lawful permanent resident in 1991, when Gutierrez was seven years old, App. 12a, 18a, and Gutierrez himself received lawful permanent resident status on October 28, 2003. App. 12a, 19a.

Gutierrez attended elementary and high school in Santa Clara County, California, graduating in 2002. He has been employed since graduation, first at K-Mart and, later, at Costco Wholesale. Gutierrez's sister, a U.S. lawful permanent resident, and his younger brother, a U.S. citizen, also resided with Gutierrez and their parents. At the time he was detained, Gutierrez and his sister were the only working members of the family. App. 25a.

On December 2, 2005, Gutierrez was stopped while trying to re-enter the United States from Mexico with three undocumented minors in his car. App. 18a. Gutierrez first represented that the children were his nephews and niece, but later admitted that they were not his relatives and that they did not have permission to enter the United States. Gutierrez told immigration officers that he had tried to bring the children into the United States at the request of their mother, a friend who was living in the U.S. On December 3, 2005, Gutierrez was issued a Notice to Appear, charging that he was removable under 8 U.S.C. § 1182(a)(6)(E)(i) for attempted alien smuggling. App. 18a.

C. Procedural Background

At a hearing before the Immigration Judge (IJ), Gutierrez conceded removability and sought

cancellation of removal pursuant to 8 U.S.C. § 1229b(a). App. 19a. The IJ found Gutierrez statutorily eligible for cancellation of removal and, in the exercise of her discretion, granted cancellation. 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 Ninth Circuit's holding, the IJ found that Gutierrez had satisfied the seven-year residence requirement of section 1229b(a)(2). 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 Gutierrez for the purpose of satisfying section 1229b(a)(1), because Gutierrez had resided with his father as an unemancipated minor. App. 22a.[1]

The BIA reversed. The BIA refused to extend the Ninth Circuit's holding in *Cuevas-Gaspar* to permit the imputation of his father's period of lawful permanent status to Gutierrez in order to satisfy section 1229b(a)(1). App. 16a. Consequently, the BIA concluded that Gutierrez was not eligible for cancellation of removal because he was two years short of section 1229b(a)(1)'s five-year requirement. *Id.*

---

[1] There is no dispute that 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. App. 20a; Pet. 5 n.1.

On remand, the IJ entered an order of removal, as mandated by the BIA. App. 7a. The BIA dismissed Gutierrez's second appeal. 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)." App. 5a-6a. The BIA further observed that it has 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). App. 6a. The BIA therefore reiterated its prior conclusion that Gutierrez was not eligible for cancellation of removal because his period of lawful permanent residence fell short of the five-year period required by section 1229b(a)(1). App. 6a.

Gutierrez sought review of the BIA's decision by the U.S. Court of Appeals for the Ninth Circuit. In the proceedings before the court of appeals, the Government stated that "Gutierrez has not been convicted of an aggravated felony, and he has resided in the United States continuously since he arrived in 1989." Br. for Resp't, *Gutierrez v. Holder*, No. 08-70436 (9th Cir. July 29, 2010), at 8-9. Consequently, the Government represented that "the only eligibility requirement at issue is whether Gutierrez has been lawfully admitted for permanent residence for not less than five years." *Id.* at 9.

The Government acknowledged that the Ninth Circuit's recent 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 Ninth Circuit granted Gutierrez's petition, and remanded the case to the BIA with direction to reconsider Gutierrez's application for cancellation of removal in light of *Mercado-Zazueta*. App. 2a.

The Solicitor General petitioned this Court for a writ of certiorari presenting two questions: (1) whether imputation of a parent's period of lawful permanent residence status to an unemancipated minor residing with that parent is proper for the purpose of satisfying the five-year requirement of section 1229b(a)(1); and (2) whether imputation of a parent's period of continuous residence to such minor is proper for the purpose of satisfying the seven-year requirement of section 1229b(a)(2). Pet. (I).

REASONS FOR DENYING THE PETITION

A. This Case Is an Inferior Vehicle on One of the Questions Presented, and No Split Exists on the Other Question.

1. This Case Is the Wrong Vehicle on the Question of Imputation of the Seven-Year Residence Requirement of Section 1229b(a)(2).

This case is the wrong vehicle to address the second question presented by the Government — whether a parent's period of continuous residence after lawful admission to the United States can be imputed to an unemancipated minor for the purpose of satisfying section 1229b(a)(2)'s seven-year residence requirement. As the Government concedes, the BIA did not address this question when denying Gutierrez's eligibility for cancellation of removal, basing its decision solely on the five-year bar of section 1229b(a)(1). Pet. 21 n.4; *see also* App. 5a-6a.[2]

While the Government now contends that Gutierrez cannot satisfy the second prong of section 1229b(a) either, Pet. 21 n.4, the Government failed to preserve this issue below. In its brief before the Ninth Circuit, the Government represented that Gutierrez "has resided in the United States continuously since he arrived in 1989," and therefore

[2] Nor did the BIA address section 1229b(a)(2) in its initial decision denying Gutierrez's eligibility for cancellation of removal, which likewise was based solely on the BIA's conclusion that he cannot satisfy the five-year lawful permanent status requirement of section 1229b(a)(1). App. 16a.

"the only eligibility requirement at issue is whether 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 9; *see also supra* at 5. Accordingly, the Ninth Circuit's decision addressed only the question whether remand to the BIA was proper given the BIA's refusal to impute to Gutierrez his father's period of lawful permanent residence status. App. 2a.

This Court has repeatedly stated that it "does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *see also Pa. Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998); *City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) (per curiam) (dismissing writ as improvidently granted because this Court "ordinarily will not decide questions not raised or litigated in the lower courts"); *United States v. Mendenhall*, 446 U.S. 544, 551-52 n.5 (1980). Because the issue whether Gutierrez satisfies the seven-year requirement of section 1229b(a)(2) was neither pressed by the Government below nor passed upon by the court of appeals, this Court should adhere to its traditional practice and deny review on the second question presented.

2. No Circuit Split Exists on the Question of Imputation of the Five-Year Lawful Permanent Residence Requirement of Section 1229b(a)(1).

The first question presented — whether a parent's period of lawful permanent residence in the United States can be imputed to an unemancipated minor for the purpose of satisfying section

1229b(a)(1)'s five-year requirement — does not merit review on its own. There is no split on this issue. To date, the Ninth Circuit is the only court of appeals to have addressed the propriety of imputation of a parent's status as a lawful permanent resident to an unemancipated minor child who otherwise would not meet section 1229b(a)(1)'s durational requirement. *See Mercado-Zazueta*, 580 F.3d at 1103, 1112-13.

The other courts of appeals that have addressed the question of whether imputation is permissible under section 1229b(a) have done so only in the context of examining the statute's second prong — the seven-year continuous residence requirement. *See Deus v. Holder*, 591 F.3d 807, 809 (5th Cir. 2009) ("there is no question that Deus has been lawfully admitted as a permanent resident for not less than 5 years;" therefore, "[t]he only issue in this case is whether Deus can demonstrate that she resided in the United States for a continuous seven-year period after being admitted in any status"); *Augustin v. Att'y Gen.*, 520 F.3d 264, 267 (3d Cir. 2008); *see also* Pet. 20 (observing that the Third and the Fifth Circuits have addressed only section 1229b(a)(2)'s seven-year continuous residence requirement).[3]

---

[3] The Government also relies on the criticism of the imputation rule expressed by the Fourth Circuit in *Cervantes v. Holder*, 597 F.3d 229 (4th Cir. 2010), which the Government concedes to be dicta. Pet. 9, 20. The issue before the Fourth Circuit — minor siblings' eligibility for the Temporary Protected Status (TPS) — similarly involved only the permissibility of imputation in order to satisfy TPS's dual statutory requirement of "continuous physical presence" and "continuous residence" since a pre-determined date. *Cervantes*, 597 F.3d at 231 (quoting 64 Fed.

(continued...)

The Government acknowledges that the pertinent language of section 1229b(a)(1) differs in important respects from that of section 1229b(a)(2). Pet. 11-12. Given the recent vintage of the Ninth Circuit's decision in *Mercado-Zazueta*, this Court should permit other courts of appeals to consider the imputation issue in the context of section 1229b(a)(1)'s five-year requirement.

3. This Court Should Await a Superior Vehicle to Consider the Ninth Circuit's Imputation Rule in a Broader Context.

This Court should await a better vehicle, one that would enable the Court to examine the wisdom of the imputation rule in a context involving actual minors, as opposed to individuals, like Gutierrez, who have already reached adulthood. Such a case would better illustrate the respective merits of different approaches to imputation.

The question of whether a parent's period of residence should be imputed to a minor arises in a variety of contexts. *See infra* at 17-19. One such context involves minors who seek an affirmative immigration benefit called Temporary Protective Status (TPS). *See, e.g.*, *Cervantes*, 597 F.3d at 231; *De Leon-Ochoa v. Att'y Gen.*, 622 F.3d 342, 347-48 (3d Cir. 2010). This status is granted to aliens from countries where "an ongoing armed conflict … pose[s] a serious threat to their personal safety" or that have

(...continued)

Reg. 524, 525 (Jan. 5, 1999) (internal quotation marks omitted); *see also* 8 U.S.C. § 1254a(c)(1)(A).

suffered considerable devastation as a result of a natural disaster. 8 U.S.C. § 1254a(b)(1)(A), (B)(i). Courts that have considered requests to impute parents' residence periods to minors in order to satisfy the TPS statute's "continuous residence" requirement have expressly acknowledged that their analysis was guided by similar principles as the analysis under section 1229b(a). *See Cervantes*, 597 F.3d at 236-37; *De Leon-Ochoa*, 622 F.3d at 352-53.

A case presenting the propriety of imputation in this situation would enable the Court to examine the question in a context that allows fuller consideration of the rule's impact on actual minors.

4. There Is No Urgency to the Issue Presented, and this Court Should Therefore Allow Further Percolation.

The Government intones that the imputation rule "impedes the government's high-priority efforts to remove criminal aliens." Pet. 9; *see also* Pet. 22. This claim exaggerates the importance of the issue presented.

The relief of cancellation of removal is entirely discretionary. 8 U.S.C. § 1229b(a); *see also Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2589 (2010). An alien's eligibility for cancellation under section 1229b(a) "merely grant[s] access to the possibility of cancellation of removal," with the ultimate determination of whether to grant cancellation remaining in "the sound discretion of the Attorney General." *Mercado-Zazueta*, 580 F.3d at 1115. The decision whether to grant or deny

cancellation of removal is, moreover, insulated from judicial review. 8 U.S.C. § 1252(a)(2)(B)(i).

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). Here, the IJ considered these factors and determined that Gutierrez merits a grant of cancellation. App. 22a-26a. The immigration courts, however, remain free to deny relief to aliens where the gravity of the criminal offense is not outweighed by the factors counseling in favor of granting discretionary relief. Thus, nothing in the Ninth Circuit's imputation rule imperils the Department of Homeland Security's "prioritized [goal] of removing criminal aliens." Pet. 22.

B. The Ninth Circuit's Decision is Correct on the Merits.

1. The Ninth Circuit Followed Settled Circuit Interpretation of a Predecessor Statute, and Congress Did Not Intend to Alter that Consensus.

Section 1229b was enacted in 1996 to replace former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). Under section 1182(c), a lawful permanent resident "returning to a lawful unrelinquished domicile of seven consecutive years" was eligible for discretionary cancellation of removal, provided he satisfied other immigration law requirements, such as absence of an aggravated felony conviction.

The circuit courts that have considered the propriety of imputation under section 1182(c) uniformly concluded that a parent's period of legal residency could be imputed to a child for the purpose of satisfying the seven-year unrelinquished domicile requirement. *See 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). As these courts explained, a child's domicile follows that of his parents. These circuits reasoned that, prior to the age of majority, a child was unable to form the intent necessary to establish a domicile. *See Lepe-Guitron*, 16 F.3d at 1025; *Morel*, 90 F.3d at 840; *Rosario*, 962 F.2d at 224. Accordingly, "because 'most minors are legally incapable of forming the requisite intent to

establish a domicile, their domicile is determined by that of their parents.'" *Morel*, 90 F.3d at 841 (quoting *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989)).

Importantly, the courts of appeals explained that permitting imputation under the former section 1182(c) furthered Congress' intent, by fostering the INA's goal of family unity. *See 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"). This overarching goal of the INA applies with special force in the context of lawful permanent residents and their children, given these individuals' determination to make the United States their permanent home. *See Lepe-Guitron*, 16 F.3d at 1025 (the INA gives "high priority to the relation between permanent resident parents and their children").

When Congress amended section 1182(c) in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 304(a)(3), 110 Stat. 3009-594 (1996), and replaced it with the current section 1229b(a), it did not intend to alter this settled judicial rule of imputation. Instead, the amendment was meant to resolve a deep circuit split as to whether section 1182(c)'s requirement of "lawful unrelinquished domicile of seven consecutive years" demanded that an alien be admitted for permanent residence before the seven-year period can commence, or whether it required only that the alien be admitted eventually to lawful permanent status. *See* 141 Cong. Rec. S6082, S6104 (May 3, 1995); *see also Mercado-Zazueta*, 580 F.3d at 1107 (describing the circuit split). As the U.S.

Department of Justice explained, the amendment 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.

In enacting section 1229b(a), Congress resolved this disagreement among the circuits by imposing a dual durational requirement: five years of lawful permanent status and seven years of continuous residence after admission to any lawful status. 8 U.S.C. § 1229b(a)(1), (2). In enacting this dual requirement, section 1229b(a) explicitly specified the length both of an alien's lawful permanent status and of his continuous residence in order to qualify for cancellation of removal. But there is no indication that the amendment enacted as a part of IIRIRA was meant to affect the ongoing circuit consensus that a parent's status or residence may be imputed to a child. *See Augustin*, 520 F.3d at 269 n.5 ("IIRIRA'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"). "'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. v. T.A.*, 129 S. Ct. 2484, 2492 (2009) (quoting *Lorillard v. Pons,* 434 U.S. 575, 580 (1978)). 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).

The Government focuses on the fact that the former section 1182(c) used the term "domicile,"

whereas the current section 1292b(a) employs the term "residence." Pet. 16-17. But the Government is mistaken that intent is altogether absent from a determination of a minor's residence. As this Court explained, "[a]lthough 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). "This classic two-part definition of residence has been recognized as a minimum standard in a wide range of contexts time and time again." *Id.* at 331. Like domicile, then, residence traditionally includes an element of intent, and Congress that enacted section 1229b(a) is presumed to have been well aware of this settled understanding.

It is true that the INA provides that "residence" is to be evaluated "without regard to intent." 8 U.S.C. § 1101(a)(33); *see also* Pet. 16-17. But it does not follow that, in enacting section 1229b(a) Congress disregarded, without explanation, settled understanding that a minor's residence is determined by that of his parents, precisely because a minor is incapable of choosing residence (and so, by necessity, his parents' intent to make a certain place his residence is imputed to the minor). *See Lepe-Guitron*, 580 F.3d at 1025; *Morel*, 90 F.3d at 840; *Rosario*, 962 F.2d at 224; *supra* at 13-15.[4] "Children … normally

---

[4] The courts of appeals' decisions seeking to determine the "habitual residence" of children under the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention), Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89, *reprinted in* 51 Fed. Reg. 10,494 (Mar. 26, 1986), are instructive in this regard. The Hague Convention seeks to

(continued...)

lack the material and psychological wherewithal to decide where they will reside." *Mozes v. Mozes*, 239 F.3d 1067, 1076 (9th Cir. 2001). For this reason, a minor's residence, like domicile, should be construed based on the residency of a parent.

2. The Ninth Circuit's Decision Is Consistent with Settled Judicial and Agency Practice.

This petition should also be denied because the Ninth Circuit's imputation rule is consistent with the existing practice of courts and the BIA to impute a parent's state of mind, intent, and status to a minor alien child.

Imputation of the duration requirements of section 1229b(a) is only one of numerous immigration contexts where 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).

(...continued)

protect children from wrongful removal by one parent without the consent of another, and "to ensure their prompt return to the State of their habitual residence." 51 Fed. Reg. at 10,498. The Hague Convention does not define the term "habitual residence." *Gitter v. Gitter*, 396 F.3d 124, 131 (2d Cir. 2005). In conducting this inquiry, therefore, the courts of appeals have "inquire[d] into the shared intent of those entitled to fix the child's residence (usually the parents)." *Gitter*, 396 F.3d at 134.

Thus, 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 (internal quotation marks and citation omitted).

In many cases, imputation actually works to the alien's detriment. For example, the BIA imputes a parent's abandonment of lawful permanent residence to his minor children, maintaining 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 decision by the Citizenship and Immigration Services — a Department of Homeland Security component agency — 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. 1988) (imputing parents' abandonment of lawful permanent residence to minor child); *In re Winkens*, 15 I. & N. Dec. 451, 452 (B.I.A. 1975) (same).

Courts have affirmed these decisions of the BIA. *See Usmani v. Att'y Gen.*, 341 Fed. App'x 473, 476 (11th Cir. 2009) (upholding the BIA's order of removal based on an imputation to the minor alien of his parents' intent to abandon lawful permanent

resident status); *Nikoi v. Att'y Gen.*, 939 F.2d 1065, 1070-75 (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 imputes parental state of mind to minors in other contexts as well. 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).

The BIA's widespread reliance on imputation lessens considerably the degree of deference its rejection of imputation under section 1229b(a) should receive. *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993). The Ninth Circuit was therefore correct 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 omitted). Removal is a particularly significant consequence for a lawful permanent resident like Gutierrez, whose familial ties are in the United States, not in Mexico. As the BIA 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) (citing *Woodby v. INS*, 385 U.S. 276, 285 (1966)). Given these weighty equities, the Ninth Circuit has correctly applied the settled principle of "construing any lingering ambiguities in deportation statutes in favor of the alien." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987).

3. The Ninth Circuit's Imputation Rule Furthers Congress' Important Goal of Promoting Family Unity in the Immigration Context.

Finally, the petition should be denied because the Ninth Circuit's imputation rule furthers Congress' goal under the INA of placing "a high priority on relations between permanent legal residents and their children." *Cuevas-Gaspar*, 430 F.3d at 1025-26. As the Third Circuit acknowledged, even while rejecting the Ninth Circuit's approach, the INA is driven by the goal of maintaining family relationships among lawful-permanent-resident parents and their children. *Augustin*, 520 F.3d at 270.

Several provisions of the INA highlight the statute's emphasis on prioritizing familial relations and providing favorable provisions for immediate family members. Section 1254a(c)(2) allows an IJ, in considering a grant of Temporary Protected Status, to waive certain excludability provisions of 8 U.S.C. § 1182(a), in order to "assure family unity." 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). Likewise, section 1227(a)(1)(E)(iii) (former 8 U.S.C. § 1251(a)(1)(H)) 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).

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. Similarly, the asylum provisions give priority to immediate family members: 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. § 1433 (2006 & Supp. III 2009).

The BIA has long acknowledged this policy. In *In re C-V-T-*, 22 I. & N. Dec. at 11, 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."

The immigration agencies' practice further illustrates the priority that the INA places on family unity, and demonstrates that imputation of parental state of mind, intent, or status to minors can advance this goal. This agency practice assumes that parents make legal and status decisions on behalf of their children. The application for asylum and withholding of removal (Form I-589), for example, allows an applicant to include his spouse and unmarried children under the age of twenty-one on the primary application, not requiring a separate application for the spouse or children. Similarly, an applicant for the 2012 Diversity Immigrant Visa Program (DV-2012) must include a spouse and minor children on the primary application.

As this practice illustrates, the Ninth Circuit's rule simply allows for the implementation of the INA in the manner envisioned by Congress, which intended the law to encourage family unity and reunification. In contrast, the rule urged by the Government is flatly contrary to this important Congressional goal.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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

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

Counsel for Respondent

August 2011