Nos. 10-1542 and 10-1543

In the Supreme Court of the United States

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

v.

CARLOS MARTINEZ GUTIERREZ

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

v.

DAMIEN ANTONIO SAWYERS

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes:

Statutes—Continued: Page

Miscellaneous:

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Despite a clear conflict with other courts of appeals, the Ninth Circuit has refused to reconsider its rule permitting an alien to "impute" his parent's period of residence after having acquired lawful permanent resident (LPR) status, or after having been admitted in any status, to gain his own eligibility for cancellation-of-removal relief. That imputation rule finds no support in the statutory language and is contrary to the interpretation of the Board of Immigration Appeals (Board). Con-

trary to respondents' contentions, these two cases together provide the Court an appropriate vehicle to correct the Ninth Circuit's course and restore uniformity in the availability of this form of immigration relief.

A. The Ninth Circuit's Decisions Are Incorrect

The cancellation-of-removal statute, 8 U.S.C. 1229b(a), requires (in relevant part) that "the alien" "(1) ha[ve] been an alien lawfully admitted for permanent residence for not less than 5 years," and "(2) ha[ve] resided in the United States continuously for 7 years after having been admitted in any status." The Ninth Circuit permits circumvention of those requirements by allowing an alien to impute to himself the years of lawful residence and LPR status accrued by someone else—the alien's parent. As explained in the *Gutierrez* petition (at 9-19), the Ninth Circuit's imputation rule is contrary to the plain language of the statute and the Board's authoritative interpretation, both of which require that "the alien" *personally* satisfy Section 1229b(a)'s requirements. Respondents' contrary arguments fail.

1. Contrary to Sawyers's contention (Br. in Opp. 12-13), Section 1229b(a)'s lack of an express bar on imputation is not tantamount to permitting imputation or even to leaving the issue open for agency resolution. "A statute can be unambiguous without addressing every interpretive theory offered by a party." *Salinas* v. *United States*, 522 U.S. 52, 60 (1997); see *Pruidze* v. *Holder*, 632 F.3d 234, 240 (6th Cir. 2011) (explaining that statutory silence does not always indicate a "gap to fill"). Nothing in Section 1229b(a) nor in the broader statutory context suggests that Congress intended to permit cancellation-of-removal relief for aliens who do

not themselves satisfy the statute's express eligibility requirements. See *Gutierrez* Pet. 9-14.

2. Because Section 1229b(a)'s language leaves no room for the Ninth Circuit's imputation rule, respondents' reliance (*Sawyers* Br. in Opp. 14-16; *Gutierrez* Br. in. Opp. 13-17) on the legislative history and legal context underlying the enactment of Section 1229b(a) as a replacement for former 8 U.S.C. 1182(c) (1994) is misplaced. See, *e.g.*, *Schindler Elevator Corp.* v. *United States*, 131 S. Ct. 1885, 1893 (2011) ("In interpreting a statute, [the Court's] inquiry must cease if the statutory language is unambiguous.") (citations and internal quotation marks omitted).

In any event, respondents' argument that it was "settled" (*Sawyers* Br. in Opp. 16) that the previous domicile-based statute permitted imputation is irrelevant. The residency requirement in Section 1229b(a) fundamentally differs from the intent-based domicile requirement under former Section 1182(c) that originally led to the Ninth Circuit's imputation rule.[1] *Gutierrez* Pet. 15-17; see 8 U.S.C. 1101(a)(33) (defining "residence" to be "without regard to intent").[2] As respondents ac-

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[1] Sawyers (Br. in Opp. 17) is mistaken in contending that the Ninth Circuit had held that imputation under former Section 1182(c) applied not only to domicile but also to a parent's admission and lawful status. See *Gutierrez* Pet. 17 (analyzing *Lepe-Guitron* v. *INS*, 16 F.3d 1021 (1994)). In any event, such a holding would have been incorrect for the same reasons the decisions below are incorrect.

[2] Gutierrez (Br. in Opp. 16) relies on *Martinez* v. *Bynum*, 461 U.S. 321, 330-331 (1983), for the proposition that "residence traditionally includes an element of intent." But see *id.* at 330 (noting that "the meaning [of 'residence'] may vary according to context"). Even if that were "traditionally" the case, the definition of "residence" under the immigration laws, as quoted in the text, expressly makes intent irrelevant.

knowledge, the Section 1182(c) cases reasoned that "because most minors are legally incapable of forming the requisite intent to establish a domicile, their domicile is determined by that of their parents." *Gutierrez* Br. in Opp. 13-14 (citations and internal quotation marks omitted). There is no similar intent-based requirement in Section 1229b(a) to support the use of imputation for cancellation of removal. Whether "Congress in IIRIRA eliminated the word 'domicile' in favor of 'residence' in order to eliminate imputation" (*Sawyers* Br. in Opp. 17) or for some other purpose (*Gutierrez* Br. in Opp. 14-15) is beside the point; the pertinent fact is that there is no longer any intent-based requirement on which imputation can be predicated. Respondents' contention (*Sawyers* Br. in Opp. 17; see *Gutierrez* Br. in Opp. 15) that Congress "authorized the imputation rule" therefore lacks any support in the text or legislative history; indeed, respondents cite no evidence that Congress approved of imputation under the old (let alone the new) statute.

3. Even assuming ambiguity as to the permissibility of imputation, respondents' attempt (*Gutierrez* Br. in Opp. 19-20; *Sawyers* Br. in Opp. 17-20) to deny *Chevron* deference to the Board's interpretation of Section 1229b(a), as set out in published decisions, lacks merit. Respondents nowhere contend (nor could they contend) that the Board's interpretation rejecting imputation is foreclosed by the terms of the statute. Although respondents assert that the Board's interpretation is not entitled to *Chevron* deference because the Board has been "inconsistent" (*Sawyers* Br. in Opp. 17), they cite only instances in which the Board has permitted imputation "in other contexts" under different statutory provisions. *Id.* at 17-20; *Gutierrez* Br. in Opp. 18-20 (citing cases

involving imputation as to "firm[] resettle[ment]"; "abandonment"; and "knowledge of inadmissibility"). As the government's certiorari petition in *Gutierrez* explains (at 19), those other contexts (unlike this one) involved intent or "state of mind" requirements which the Board reasonably determined should not be ascertained based on the minor alien alone. The Board has been consistent in its rejection of imputation of objective legal status under Section 1229b(a) and has explained its reasoned (and reasonable) rejection of the Ninth Circuit's contrary rule in detail. *Gutierrez* Pet. 14-15; see, *e.g.*, *In re Escobar*, 24 I. & N. Dec. 231, 232-235 (B.I.A. 2007).

4. Contrary to respondents' suggestion (*Sawyers* Br. in Opp. 21-22; *Gutierrez* Br. in Opp. 20-22), a general Congressional preference for preserving family unity—in particular, keeping parents together with unemancipated minor children—does not trump the terms of Section 1229b(a), as authoritatively interpreted by the Board. To begin with, respondents are not unemancipated minors seeking to reunite or remain with their parents in the United States; they are adults seeking to avoid removal, after committing removable offenses, by retroactively availing themselves of their parents' residence and status. *Gutierrez* Pet. 4, 12-13; *Sawyers* Pet. 3-4. In any event, as explained in the *Gutierrez* petition (at 18-19), that preference is not absolute. For example, when Gutierrez was admitted as a lawful permanent resident in October 2003, children of lawful permanent residents immigrating from Mexico had to wait over seven years (ten years if over the age of 21) for a visa. See U.S. Dep't of State, *Visa Bulletin for October 2003*,

http://www.travel.state.gov/visa/bulletin/bulletin2985.html.[3]

B. The Questions Presented Warrant Immediate Review

1. The conflict among the courts of appeals warrants this Court's review. As Sawyers concedes (Br. in Opp. 9), the Ninth Circuit's rule permitting imputation to satisfy Section 1229b(a)(2)'s seven-year continuous residence requirement squarely conflicts with the Fifth Circuit's decision in *Deus* v. *Holder*, 591 F.3d 807, 811-812 (2009). That conflict alone is sufficient to warrant this Court's review, especially in light of the Ninth Circuit's considered refusal to revisit its erroneous imputation rule notwithstanding the conflict. See *Gutierrez* Pet. 20-21.

Sawyers attempts (Br. in Opp. 9-10) to distinguish the Third Circuit's conflicting decision in *Augustin* v. *Attorney General of the United States*, 520 F.3d 264 (2008), on the ground that the alien in that case was not physically present in the United States for the requisite period. The Third Circuit's decision, however, rejects the Ninth Circuit's reasoning separate and apart from that ground. See *id.* at 270-271 (rejecting various aspects of the Ninth Circuit's reasoning); see also *Deus*, 591 F.3d at 811 (noting that although *Augustin* might have rested in part on the fact that the alien did not re-

[3] For that reason, the delay in alien children obtaining LPR status may be attributable in certain cases to the waiting time for immigrant visas and not to any decision on the part of the alien's parents. Contrary to Sawyers's suggestion (Br. in Opp. 20-21), however, the Ninth Circuit's imputation rule does not require a court to examine the reasons why an alien did not obtain LPR status when his parent obtained that status. Nor does the statute provide any basis for such an inquiry. Cf. *Mercado-Zazueta* v. *Holder*, 580 F.3d 1102, 1115-1116 (9th Cir. 2009) (Graber, J., concurring).

side in the United States during the relevant period, "the Third Circuit also rejected other arguments that form the basis of the *Cuevas-Gaspar* decision"). In light of the Fourth Circuit's similar disagreement with the imputation rule, see *Cervantes* v. *Holder*, 597 F.3d 229, 236 (2010) (in dicta), three courts of appeals have now expressly rejected the Ninth Circuit's approach.

2. Although Gutierrez is technically correct in arguing (Br. in Opp. 8-9) that the circuit conflict described above involves the seven-year continuous residence requirement of Section 1229b(a)(2), the Third, Fourth, and Fifth Circuits' rejection of imputation in that context logically entails rejection of imputation in the context of the five-year LPR status requirement of Section 1229b(a)(1). The Ninth Circuit's basis for extending imputation to Section 1229b(a)(1) was its "controlling precedent" in *Cuevas-Gaspar* v. *Gonzales*, 430 F.3d 1013 (2005), permitting imputation under Section 1229b(a)(2). See *Mercado-Zazueta* v. *Holder*, 580 F.3d 1102, 1109 (2009). Tellingly, neither the Ninth Circuit nor respondents provide any potential basis for permitting imputation under Section 1229b(a)(2) but not 1229b(a)(1) (or vice versa). Because the same (erroneous) Ninth Circuit precedents underlie both requirements, it makes sense for the Court to consider them together rather than await a separate (but inevitable) rejection by other courts of imputation under Section 1229b(a)(1) as well. To the extent the Court agrees with Gutierrez that his case presents only the Section 1229b(a)(1) issue,[4] the

[4] Gutierrez takes too narrow a view of the proceedings below when asserting (Br. in Opp. 7-8) that a challenge to the use of imputation to meet Section 1229b(a)(2)'s seven-year continuous residence requirement is not presented in his case. Neither party disputed below that, without imputation, Gutierrez cannot meet *either* statutory require-

Court can safely reach both issues by granting both petitions. Indeed, that is a significant reason why the government has sought certiorari in these two cases together. See *Gutierrez* Pet. 21 n.4; *Sawyers* Pet. 7 n.2.[5]

3. Nor is further "percolation" (*Sawyers* Br. in Opp. 11; *Gutierrez* Br. in Opp. 11) warranted to allow the lower courts to address the full range of possible circumstances. The government's position is that imputation under Section 1229b(a) is impermissible *regardless* of the alien's circumstances. For example, the government's position is that imputation is not available even where the alien has continuously resided with his parents for the requisite period and has become an LPR himself before or upon reaching the age of majority (see *Sawyers* Br. in Opp. 11-12 & n.5).

4. Sawyers argues (Br. in Opp. 6) that "it is not evident that the issue here arises with great frequency." Although the government does not have comprehensive

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ment at issue. *E.g., Gutierrez* Pet. App. 20a-21a. Because the Ninth Circuit already had held imputation must be allowed for purposes of Section 1229b(a)(2) at the time of the immigration proceedings, the immigration judge and the Board focused on the Section 1229b(a)(1) requirement. But in that process the Board criticized the Ninth Circuit's decision in *Cuevas-Gaspar* permitting imputation under Section 1229b(a)(2). *Id.* at 14a-15a. On petition for review to the Ninth Circuit, the government argued that "the cancellation statute does not permit imputation under any circumstances." Gov't C.A. Br. 13. Given the interrelated nature of the issues and the procedural posture, that is sufficient to allow this Court to reach the Section 1229b(a)(1) issue even in Gutierrez's case.

[5] Although Gutierrez suggests (at 10-11) that the Court should take up the imputation issue in the Temporary Protected Status context instead, he alleges no conflict under that statute, and the courts of appeals have (correctly) rejected imputation in that context. See *De Leon-Ochoa* v. *Attorney Gen. of the U.S.*, 622 F.3d 341 (3d Cir. 2010); *Cervantes*, *supra*.

data, the Ninth Circuit, relying on its published decisions in *Mercado-Zazueta* and *Cuevas-Gaspar*, has decided in 2011 alone at least 11 cases (in addition to these two) raising the same issues. See *Rodriguez* v. *Holder*, No. 07-73224, 2011 WL 2412555 (June 16, 2011); *Mendiola-Sanchez* v. *Holder*, No. 08-71522, 2011 WL 2259812 (June 9, 2011); *Pimentel-Ornelas* v. *Holder*, No. 09-70437, 2011 WL 1762572 (May 10, 2011); *Portillo* v. *Holder*, No. 09-70334, 2011 WL 1762573 (May 10, 2011); *Fernandez* v. *Holder*, No. 08-71372, 2011 WL 1770855 (May 10, 2011); *De Hernandez* v. *Holder*, No. 08-71124, 2011 WL 1747993 (May 9, 2011); *Camacho* v. *Holder*, 412 Fed. Appx. 32 (2011); *Gallardo-Sanchez* v. *Holder*, 411 Fed. Appx. 102 (2011); *Becerra* v. *Holder*, 411 Fed. Appx. 67 (2011); *Guardiano* v. *Holder*, 411 Fed. Appx. 74 (2011); *Hernandez Barron* v. *Holder*, 411 Fed. Appx. 85 (2011). Indeed, since filing the two present petitions in June 2011, the government has filed three more petitions for certiorari raising the same issues and suggesting that those petitions be held pending disposition of the two petitions here. *Holder* v. *Mojica*, No. 11-99 (filed July 25, 2011); *Holder* v. *Camacho*, No. 11-103 (filed July 25, 2011); *Holder* v. *Becerra*, No. 11-104 (filed July 25, 2011).[6] And, of course, the issue has arisen frequently enough to generate published decisions in at least two other courts of appeals, thereby giving rise to the circuit conflict discussed above (pp. 6-7, *supra*).

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[6] We understand that the aliens in those subsequently filed petitions do not plan to file responses until the Court adjudicates these two petitions. There is thus no need to delay resolution of the present petitions; to the contrary, the resolution of these petitions will inform the proper disposition of the other three.

5. Respondents also take issue with the government's concern that the imputation rule impedes the execution of its priority goal of removing criminal aliens. Respondents contend that the concern is overstated because, notwithstanding a finding of eligibility based on imputation, immigration judges "remain free to deny relief" to aliens convicted of sufficiently "grave" offenses at the discretionary stage of the inquiry. *Gutierrez* Br. in Opp. 11-12; see *Sawyers* Br. in Opp. 6-7.

Under current procedures, however, immigration judges are not as "free" as respondents suggest to deny relief to statutorily eligible aliens. An immigration judge cannot, for example, simply deny an application based on the nature of the alien's criminal conviction. Rather, the immigration judge must consider all the applicable required factors set out in *In re C-V-T-*, 22 I. & N. Dec. 7, 11-12 (B.I.A. 1998). See, *e.g.*, *Zheng* v. *Holder*, 644 F.3d 829, 833 (9th Cir. 2011) ("[T]he BIA abuses its discretion when it fails to consider all favorable and unfavorable factors bearing on a petitioner's application for [discretionary] relief."); *In re Sotelo-Sotelo*, 23 I. & N. Dec. 201, 204 (B.I.A. 2001) ("[A] complete review of the favorable factors in the case is required.") (citation and internal quotation marks omitted). That process may require an evidentiary hearing and additional detention pending further proceedings. The process thus imposes a burden on both immigration judges and the Board, as well as on the Department of Homeland Security in presenting the cases, and delays the removal of certain criminal aliens (those who would be statutorily ineligible for cancellation without imputation) to whom discretionary relief is ultimately denied. And in Gutierrez's case, the imputation issue is dispositive of his removability, as the immigration judge

granted him cancellation of removal (*Gutierrez* Pet. App. 22a-27a).

In any event, this Court recently has granted review on questions of eligibility for discretionary relief under the immigration laws. See, *e.g.*, *Judulang* v. *Holder*, No. 10-694 (to be argued Oct. 12, 2011) (presenting question whether alien meets threshold eligibility criteria for discretionary relief under former 8 U.S.C. 1182(c), one of Section 1229b(a)'s predecessors); *Carachuri-Rosendo* v. *Holder*, 130 S. Ct. 2577 (2010) (examining whether alien's criminal acts constituted an aggravated felony rendering him ineligible for discretionary cancellation of removal under Section 1229b(a)). Although *Judulang* and *Carachuri-Rosendo* arose from petitions by aliens from decisions restricting eligibility for discretionary relief, the identity of the petitioner should not matter, especially where (as here) a circuit conflict exists. Indeed, these cases are no less worthy of further review from the perspective of aliens outside the Ninth Circuit for whom imputation is not available to satisfy Section 1229b(a)'s eligibility requirements.

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For the foregoing reasons and those stated in the petitions for a writ of certiorari, the petitions should be granted.

Respectfully submitted.

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