



1       Petitioner.

2       STEPHEN B. KINNAIRD, ESQ., Washington, D.C.; for

3       Respondent in No. 10-1542.

4       CHARLES A. ROTHFELD, ESQ., Washington, D.C.; for

5       Respondent in No. 10-1543.

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1 P R O C E E D I N G S

2 (10:19 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 first this morning in Case 10-1542, Holder v. Gutierrez,  
5 and the consolidated case.

6 Ms. Kruger.

7 ORAL ARGUMENT OF LEONDRA R. KRUGER

8 ON BEHALF OF THE PETITIONER

9 MS. KRUGER: Mr. Chief Justice, and may it  
10 please the Court:

11 Under section 1229b of Title 8, an alien who  
12 has not been a lawful permanent resident for at least 5  
13 years, or who has not continuously resided in the United  
14 States for at least 7 years following admission in any  
15 status, is not eligible for cancellation of removal  
16 under the first prong of the statute. That is true  
17 regardless of whether the alien can show that his  
18 parents, or any other third party, for that matter, did  
19 satisfy those requirements.

20 The Ninth Circuit, alone among the courts of  
21 appeals, has recognized a rule of imputed eligibility  
22 under section 1229b(a). That rule is wrong for at least  
23 two reasons. First of all, it is inconsistent with the  
24 plain text of the statute.

25 The touchstones of eligibility under section

1 1229b(a), LPR status, admission, and residence, are all  
2 terms that are defined in the INA to refer to attributes  
3 that are individual to the alien seeking relief,  
4 attributes that cannot be satisfied by a third party.

5 But even if the statute were thought to be  
6 ambiguous with respect to this question, the Board of  
7 Immigration Appeals has interpreted the statute to mean  
8 that the alien seeking relief must personally and  
9 actually satisfy both durational requirements. That  
10 interpretation is at the very least a reasonable reading  
11 of the statute, if not the only reasonable reading of  
12 the statute.

13 JUSTICE SOTOMAYOR: But did it make that  
14 determination as a legal matter or as an exercise of its  
15 discretion? As I read its opinion, it felt that it had  
16 to come to that conclusion as a matter of law.

17 MS. KRUGER: I think --

18 JUSTICE SOTOMAYOR: If we were to find the  
19 statute ambiguous, where has it explained its policy  
20 decisions independent of its legal conclusions?

21 MS. KRUGER: First of all, Justice  
22 Sotomayor, we don't think the statute is ambiguous; and  
23 so, we don't think there's any reason to go to Chevron  
24 step two in this case.

25 But if you look at the Board's decision in

1 Escobar in particular, I think the Board makes clear  
2 that, although it thought the statutory language was  
3 clear, it also rested its decision on other  
4 considerations that are uniquely within the Board's  
5 expertise. It discussed how the imputation rule  
6 comports with the general policies of the statute, how  
7 it comports with the rule that the Board itself has  
8 recognized over time, that LPR status is something  
9 that's individual to a particular alien, and that the  
10 alien seeking relief has to individually, both  
11 procedurally and substantively, satisfy the eligibility  
12 requirements.

13 And it also noted that the imputation rule  
14 would create significant holes in the statutory scheme.  
15 It would mean that an individual who may not even have  
16 been eligible for admission to the United States or  
17 lawful admission for permanent residence would  
18 nevertheless receive a significant benefit that goes  
19 along with that status.

20 CHIEF JUSTICE ROBERTS: You say that you  
21 think the statute is unambiguous, but it -- it doesn't  
22 address issues of imputation at all, does it?

23 MS. KRUGER: It does not address issues of  
24 imputation.

25 CHIEF JUSTICE ROBERTS: Well, if it doesn't

1 even address it, it seems to me the best you can say is  
2 that it's ambiguous.

3 MS. KRUGER: Well, I don't think that a  
4 statute, as this Court has recognized, has to address  
5 every conceivable possibility in order to be  
6 unambiguous. And this statute, I think, is unambiguous  
7 in that it refers to eligibility requirements that are  
8 by their nature, as defined in immigration law,  
9 individual to a specific alien. There's --

10 JUSTICE GINSBURG: What about -- there  
11 was -- wasn't there in the prior law a child domicile --  
12 a child was able to satisfy the 7-year requirement based  
13 on the parent's domicile, which was deemed to be the  
14 child's?

15 MS. KRUGER: Right. There -- the  
16 Respondents relied very heavily on three court of  
17 appeals cases that had interpreted the predecessor to  
18 this statute, former section 212(c), to allow imputation  
19 of a parent's domicile to a child. Those courts relied  
20 on the common law rule that a child's domicile follows  
21 that of his parents. And applying that rule, they  
22 allowed children to rely on their parents' domicile in  
23 the United States to satisfy the 7-year lawful  
24 unrelinquished domicile requirement in that statute.

25 JUSTICE SCALIA: I guess a child doesn't

1 have any domicile except the parents'; right? Children  
2 who run away from home do not acquire new domiciles, do  
3 they?

4 MS. KRUGER: Under this Court's decision in  
5 Holyfield, the common law rule is that the child's  
6 domicile is determined by that of his parents,  
7 regardless of where the child resides in fact. When  
8 Congress repealed former section 212(c) and enacted the  
9 current cancellation of removal statute, it removed any  
10 reference to the word "domicile," instead replacing the  
11 requirement of 7 years unrelinquished domicile with two  
12 durational requirements that are at issue in this case.

13 JUSTICE KENNEDY: Is that change alone  
14 sufficient for us to say that this is -- was a clear  
15 indication by the Congress of an intent or purpose to  
16 alter the imputation rule?

17 MS. KRUGER: I think if this Court is  
18 willing to presume along with Respondents that Congress  
19 would have been aware of these three court of appeals  
20 decisions that were issued, it should be noted, very  
21 late in the life of a provision that had existed in more  
22 or less the same form since the Immigration Act of 1917,  
23 then the Court also must presume that Congress was aware  
24 that the basis for those decisions was the common law  
25 definition of the term "domicile" and that Congress



1    meant what it did when it replaced "domicile" with three  
2    eligibility criteria that are defined terms in the  
3    immigration law and all of which refer to attributes  
4    that are individual to a specific alien.

5                   JUSTICE GINSBURG:  Does a child who is not  
6    emancipated have the capacity to independently establish  
7    a residence?

8                   MS. KRUGER:  Under the -- how the INA  
9    defines the term "residence" is an actual principal  
10   dwelling in fact.  So, yes, a child will dwell somewhere  
11   in fact and can do so independent of a parent.  That is  
12   in marked contrast to the common law rule of domicile  
13   that this Court explained at length in its Holyfield  
14   decision and that the courts of appeals applied in  
15   interpreting former section 212(c).

16                  JUSTICE KENNEDY:  Can a parent ask for a  
17   permanent resident status for a 5-year-old child?

18                  MS. KRUGER:  Yes, a parent could.

19                  JUSTICE KENNEDY:  So, if you have two cases,  
20   one -- two 5-year-olds.  One, as in this case, lives  
21   with the parent, but the application has not been  
22   granted or not been filed; and the other, the  
23   application has been granted.  And they're treated --  
24   they're treated differently?

25                  MS. KRUGER:  I think that's right,

1 Justice Kennedy. And I think that that is a necessary  
2 corollary of the way the immigration system is  
3 constructed. As a general rule, LPR status and  
4 admission are criteria that are individual to a  
5 particular alien. To be sure, minor children of lawful  
6 permanent residents receive a high preference in the  
7 immigration visa system.

8 But there's no rule that says that children  
9 automatically receive the same legal status as their  
10 lawful permanent resident parents.

11 JUSTICE SOTOMAYOR: Assuming we don't accept  
12 Respondents' -- what appears to be their argument, that  
13 being an LPR is not a requirement of the statute, if we  
14 assume that being an LPR is what triggers the  
15 availability for the Attorney General's exercise of  
16 discretion, how does that -- how does the imputation  
17 rule harm the statute? The child has lived with the  
18 parents for 5 years, whether before or after -- well,  
19 after, it wouldn't be an issue, but before the grant of  
20 LPR status. How does that harm the purposes of the  
21 statute?

22 I thought the idea of the statute was to  
23 give individuals who had ties to the United States an  
24 opportunity to stay. If a child's been with their  
25 parents for 5, 10, 15 years, what sense does it make to

1     deprive them of the Attorney General's exercise of  
2     discretion merely because the administrative process has  
3     taken too long to give them something which they're  
4     going to get and which they've gotten?

5                   MS. KRUGER: I think it's worth separating  
6     out two different components of the cancellation of  
7     removal decision. It is certainly true that it's an  
8     important criteria, in determining whether or not an  
9     individual is entitled as a matter of discretion to  
10    cancellation of removal relief, how strong their ties  
11    are to the United States, what their family ties are and  
12    so on. But it has never been thought that particularly  
13    compelling reasons for the exercise of discretion can  
14    overcome the plain threshold requirements for  
15    eligibility for the exercise of discretion under 1229b.

16                   The difficulty with the imputation rule that  
17    the Ninth Circuit has recognized is that it undermines  
18    the plain requirements for those threshold  
19    determinations of eligibility, conferring an important  
20    benefit that goes along with long-time permanent  
21    resident status and long-time continuous residence after  
22    admission on individuals who not only did not receive  
23    the necessary formal authorization from immigration  
24    officials at the requisite time; they may not even have  
25    been eligible to receive those authorizations.

1           I think it's also worth noting that this  
2 statute is not the beginning and the end of discretion  
3 in the immigration system. It is always true, and it is  
4 -- certainly was the case when Congress enacted the  
5 statute in 1996, that immigration officials have the  
6 discretion not to bring removal proceedings in the first  
7 place, to terminate removal proceedings once they have  
8 begun, to defer action on the execution of a removal  
9 order. And current immigration and customs enforcement  
10 guidance makes clear that a minor receives particular  
11 consideration within the totality of the circumstances  
12 in determining whether or not prosecutorial discretion  
13 is something that should be exercised.

14           JUSTICE BREYER: So, how does it work? I'm  
15 -- how does it work? Two legal permanent residents, a  
16 man and his wife, happen to show up in New York, and  
17 they have a 6-month-old child. All right. What's the  
18 legal -- why doesn't the INS just take the child, ship  
19 him off? I mean there -- is it just discretion? Or is  
20 there some rule of law or regulation that prevents that  
21 from happening?

22           MS. KRUGER: It will depend on the  
23 individual circumstances.

24           JUSTICE BREYER: Well, no. I've given you  
25 the hypothetical. I mean, there we are.

1 MS. KRUGER: Right.

2 JUSTICE BREYER: That's all you know.

3 MS. KRUGER: So, Congress has taken some  
4 steps with respect to some subset of aliens.  
5 Respondent, for example, brings up the LIFE Act, and  
6 that is an example of where Congress has taken a step  
7 to --

8 JUSTICE BREYER: I'm not asking for that.  
9 I'm saying, what in the law -- that's all you know. All  
10 right? There are -- you know the hypothetical.

11 I want -- one possible thing to say would be  
12 that child is -- is actually -- we are imputing that  
13 he's here for lawful permanent residence, too. Every  
14 circuit had had some kind of imputation rule, and  
15 moreover there are other areas of law where I have found  
16 imputation rules in the immigration law. Roughly, I  
17 have three or four cases on that. But they're --  
18 they're not exactly comparable.

19 Okay. So, I just want to know what is it  
20 that prevents you from taking the child and shipping him  
21 off to China if we don't impute?

22 MS. KRUGER: Well, I think the answer is  
23 certainly not that we impute the admission of the -- as  
24 to child.

25 JUSTICE BREYER: I'm not asking that. You

1 know the question. I just want your best effort --

2 MS. KRUGER: So, if there --

3 JUSTICE BREYER: -- to give an answer. Or  
4 I'm thinking that your answer is there is nothing; it's  
5 either imputation or nothing.

6 MS. KRUGER: Well, I think that that's --

7 JUSTICE BREYER: And you don't want me to  
8 reach that conclusion.

9 MS. KRUGER: No, I think that that's  
10 incorrect. There are certain provisions of law that  
11 would allow for the child to be admitted but on an  
12 independent basis from the parents. If a child is not  
13 admissible --

14 JUSTICE GINSBURG: If the supposition -- if  
15 the supposition is that the parents -- I think  
16 Justice Breyer's supposition was that both parents were  
17 LPRs. The likelihood of the 6-month-old child being  
18 born in the United States and therefore being a citizen  
19 would be rather large.

20 MS. KRUGER: Well, that's certainly right.  
21 It is also true that --

22 JUSTICE BREYER: No, no. That isn't my  
23 hypothetical.

24 (Laughter.)

25 MS. KRUGER: Right. The child in your

1     hypothetical -- the child is not born in the United  
2     States, right?

3                 If the child does not independently satisfy  
4     the criteria for admissibility, then the child has  
5     entered the United States illegally and remains here at  
6     the discretion of immigration officials.

7                 JUSTICE SCALIA: I suppose if they come with  
8     somebody else's 6-month-old child, they'd have to send  
9     that child back to China, too, wouldn't they?

10                MS. KRUGER: Well --

11                JUSTICE SCALIA: Which would be very sad,  
12     but that would be the law, right?

13                MS. KRUGER: Well --

14                JUSTICE BREYER: Actually they came from  
15     Italy, in my hypothetical.

16                (Laughter.)

17                MS. KRUGER: I mean, I think that  
18     Martinez --

19                JUSTICE SCALIA: They should not have sent  
20     him back to China, then. Why did they do that?

21                (Laughter.)

22                MS. KRUGER: I think that Martinez  
23     Gutierrez's situation, I think, is a good example of  
24     this. He entered the United States illegally with the  
25     -- with his parents and remained here illegally until he

1 was admitted as an LPR at the age of 19 as an adult.  
2 Until that time, there were no efforts to remove him  
3 from the United States, and I think that that's fairly  
4 typical, but that's not because his parents' admission  
5 or their lawful status in the United States was imputed  
6 to Martinez Gutierrez, and there is no background  
7 principle in the law that would allow for such  
8 imputation of an individual formal authorization to  
9 remain in the country by immigration officials to be  
10 imputed from one to another.

11 Rather, the immigration system sets up a  
12 system in which a lawful permanent resident parent can  
13 seek to -- to petition for an immigration visa on behalf  
14 of a child and facilitate that child's eventual  
15 adjustment to lawful permanent resident status, but it's  
16 not something happens automatically. It's something  
17 that happens through a regular, orderly process.

18 JUSTICE KENNEDY: Can you give me an example  
19 of an instance in which a child who is the child of two  
20 lawful permanent residents cannot get lawful permanent  
21 resident status for himself at the age of 8, but that he  
22 can at the age of 15? I mean, what commonly happens  
23 between that period that would make him ineligible --  
24 eligible only when he is 15, other than just as a matter  
25 of providing all the documents?



1 MS. KRUGER: That would make him ineligible  
2 at the age of 15?

3 JUSTICE KENNEDY: Well, you -- the whole  
4 point here is that some children are given lawful  
5 permanent resident status and -- and some are not. But  
6 I'm asking, does the passage of time, assuming two  
7 lawful resident parents, ever make it so that a child  
8 who was formerly ineligible is now eligible? He was  
9 ineligible at 5, but he's eligible at 14? I mean, how  
10 does that work?

11 MS. KRUGER: I think the most common  
12 scenario is one in which a visa number doesn't become  
13 available until the child is -- is --

14 JUSTICE KENNEDY: Oh, I don't mean a visa  
15 number. But nothing -- nothing with -- with respect to  
16 the child's real status other than his -- where he is on  
17 the queue in the immigration department?

18 MS. KRUGER: That would be the most common  
19 scenario, is -- is where the child is in the queue. And  
20 I think Respondents place a great deal of emphasis on  
21 the amount of time it takes for visa numbers to become  
22 available for both children and spouses of lawful  
23 permanent residents, but that has been a regular and  
24 acknowledged feature of the immigration system for  
25 decades.

1           The Congress that enacted IIRIRA in 1996 was  
2 well aware of the waiting times for these visa numbers.  
3 It had before it proposals for reducing the backlog, and  
4 it rejected those proposals. It enacted in the  
5 cancellation of removal statute two eligibility criteria  
6 that do not turn on potential eligibility for receiving  
7 LPR status or admission to the United States but,  
8 instead, turn on actually having received that formal  
9 authorization from immigration officials.

10           And I think that the best inference that we  
11 can draw from the statutory language is that Congress  
12 meant what it said; it attached special significance to  
13 that formal authorization, the formal exercise of  
14 authority by immigration officials, and not simply the  
15 potential for that exercise in the future.

16           JUSTICE KAGAN: Ms. Kruger, you take a  
17 statute that doesn't say anything about imputation one  
18 way or the other, and you say that statute can still be  
19 unambiguous. And that would I think be true as a  
20 general matter. But now you add to that statute a  
21 history and a tradition and a practice in immigration  
22 law of imputation of various kinds. One is imputation  
23 of domicile in the way we talked about, but there are  
24 other imputations that occur throughout the field of  
25 immigration law. Some cut for the alien; some cut

1     against the alien.

2                     In the world of that practice and tradition,  
3     are you at least in a sphere in which there's ambiguity,  
4     in which the agency essentially has discretion to decide  
5     whether it wants to impute in this way?

6                     MS. KRUGER:  I think the answer is "no,"  
7     Justice Kagan, because the other circumstances in which  
8     imputation had been allowed under the immigration laws  
9     differ in very important respects from the imputation --

10                    JUSTICE KAGAN:  But none of them are  
11    textually commanded; is that right?  I mean, the --  
12    they're all situations in which the agency has decided  
13    that there are good reasons to impute various factors.

14                    MS. KRUGER:  Well, I don't think that the  
15    only reason that the agency has allowed for imputation  
16    is that there is good reason as a general policy matter.

17                    JUSTICE SCALIA:  Counsel, I can't hear you  
18    very well.  Would you --

19                    MS. KRUGER:  Certainly.

20                    JUSTICE SCALIA:  Can you crank up the thing  
21    or something?

22                    MS. KRUGER:  I will.

23                    JUSTICE SCALIA:  Thank you.

24                    MS. KRUGER:  I'll try to speak more directly  
25    into the microphone.

1           The reason the -- the agency has allowed for  
2   imputation in other circumstances is with respect to  
3   certain inquiries that involve an inquiry into the  
4   alien's intent. So, for example, the Board has allowed  
5   for imputation under section 1182(k), which provides for  
6   -- for discretionary relief from the Attorney General  
7   when an immigrant did not know or could not have known  
8   that they were inadmissible. And the Board has said  
9   that, for those purposes, the parents' knowledge of  
10  inadmissibility is imputed to the minor child. So, too,  
11  in the context of abandonment of LPR status. The Board  
12  has said --

13           JUSTICE SCALIA: Excuse me. That first one  
14  usually cuts against the immigrant, I would assume. So,  
15  if the parents knew, the child knows, and the child  
16  normally would not know, right?

17           MS. KRUGER: Well, that's correct.

18           JUSTICE SCALIA: Yes.

19           MS. KRUGER: That's correct. But I think  
20  the critical point is that the agency has interpreted  
21  imputation of intent, of state of mind, to be  
22  permissible, in part for the same reason that the common  
23  law rule about domicile formed, which is that --

24           JUSTICE KAGAN: So, you think that all the  
25  imputations that exist in immigration law are all a

1 matter of imputing intent?

2 MS. KRUGER: I think that that's -- all of  
3 the imputations that Respondents have pointed to concern  
4 state of mind type requirements. They don't concern  
5 formal authorizations by immigration officials. The  
6 Board, I think, has been very consistent, certainly in  
7 the context of cancellation of removal, in not imputing  
8 the legal status of being an LPR or admission from  
9 parent to child. And it's difficult to see any other  
10 examples in which such imputation would be permissible,  
11 in part because the background presumption of the  
12 immigration law is that those are both attributes that  
13 have to be individually achieved and the eligibility  
14 criteria have to be independently satisfied by each  
15 individual alien.

16 JUSTICE SOTOMAYOR: So, why is a parent's  
17 fraudulent conduct imputed to a child? There's no  
18 intent there. The child obviously doesn't have an  
19 intent or couldn't have an intent to commit a crime.  
20 So, why is that imputed by the BIA?

21 MS. KRUGER: Well, I don't --

22 JUSTICE SOTOMAYOR: Other than that it's a  
23 holding against the immigrant, which your adversary  
24 points out is not a very favorable outlook for the  
25 agency, that it only imputes when it harms the

1 immigrant. But, putting that aside, there's no intent  
2 involved in the fraud. It's just the commission of an  
3 act.

4 MS. KRUGER: Well, I think that where the  
5 imputation has come in, in the Board's analysis, is with  
6 respect to the state of mind and not with respect to the  
7 objective conduct.

8 JUSTICE SOTOMAYOR: What's the state of mind  
9 of committing an act, like a fraudulent act?

10 MS. KRUGER: It's -- I think where this has  
11 come up is in the context of knowing that the -- that  
12 the alien is not in fact admissible to the United  
13 States, is generally where it's come up. I'm not --

14 JUSTICE SOTOMAYOR: The child doesn't commit  
15 a fraudulent act.

16 MS. KRUGER: But, again, I think that the  
17 principle that the Board has applied is that, because  
18 the child is presumed not capable of forming a requisite  
19 intent, the parent's intent is imputed to the child.

20 But I think for present purposes the  
21 critical point is, even in that context, what is being  
22 imputed is not a formal status conferred on an  
23 individual alien by immigration officials, or admission,  
24 a formal authorization to enter the country. That is,  
25 again, conferred on an individual basis by immigration

1 officials. I think Respondents can identify no  
2 circumstance, no precedent, for that type of imputation,  
3 and it's one that would be inconsistent with the basic  
4 structure of the immigration system.

5 JUSTICE GINSBURG: They do say --

6 JUSTICE KENNEDY: It's a little odd that the  
7 domicile is the more exacting of the two requirements,  
8 and yet the Congress allowed imputation in the domicile  
9 case but not -- not in the residence case. It seems  
10 almost backward.

11 MS. KRUGER: Well, to be --

12 JUSTICE KENNEDY: Congress enacts a more  
13 forgiving and less exacting standard, but then takes  
14 away the imputation.

15 MS. KRUGER: Well, to be clear,  
16 Justice Kennedy, Congress did not supply a definition of  
17 the term "domicile." And so, the court of appeals  
18 opinions that Respondents are relying on followed the  
19 common law rule that says that a child's domicile  
20 follows that of his parents, but those courts applied  
21 that rule in very different ways.

22 Two courts of appeals permitted children to  
23 benefit from the domicile of their parents in the United  
24 States even when they were not even physically present  
25 in the United States for the full 7-year period; whereas

1 the Ninth Circuit, for its part, applied that rule only  
2 where the alien child had been -- had entered the United  
3 States lawfully with his parents, according to the Ninth  
4 Circuit, remains lawfully in the United States  
5 thereafter, and simply had become an LPR outside of the  
6 full 7-year period.

7 In crafting the current cancellation of  
8 removal statute, there's no reason to believe that  
9 Congress was aware of these three court of appeals  
10 opinions that were, again, decided very late in the life  
11 of former section 212(c). But even if it had been aware  
12 of those decisions, it also would have been aware that  
13 by using defined terms in the INA that are defined in a  
14 way that's individual to the particular alien, it was  
15 eliminating any reference to the common law rule.

16 Unlike domicile, there is no rule that says  
17 that a child's LPR status follows that of his parents or  
18 that a child's admission follows that of its parents.

19 JUSTICE BREYER: I don't see how -- were you  
20 finished?

21 MS. KRUGER: Yes.

22 JUSTICE BREYER: I don't see how the -- you  
23 can read the Lepe-Guitron -- that was one of the cases  
24 -- it seems to me clearly imputes residence as well.  
25 They quote the earlier case from the circuit which said



1 the 7 years of domicile have to come after their  
2 admission for permanent residence. And then the dissent  
3 says, hey, what about permanent residents? And what  
4 they say is this case is different because, in that  
5 earlier case, the parents had never been admitted. He  
6 came after he was married in this case. He's here after  
7 his parents were admitted. Now, I grant you they didn't  
8 explicitly say this, but I don't see how they reached  
9 their conclusion without it.

10 And then there's a different split in the  
11 circuits about the pro and con of tacking on periods,  
12 you know, before the domicile, after, et cetera. And  
13 that seems to be what Congress resolved.

14 So, I think if you're talking about what was  
15 the law, the law was you did impute with -- you did  
16 impute for residence. And then Congress sort of just  
17 doesn't deal with that and deals with a slightly  
18 different thing. Is that a fair reading, or what do you  
19 think?

20 MS. KRUGER: I don't think it is, but first  
21 I'd like to clarify that the Ninth Circuit had no reason  
22 to impute residence in Lepe-Guitron, in part because the  
23 alien in that case had resided in fact in the United  
24 States throughout the 7-year period. I think  
25 Respondents make the argument that Lepe-Guitron was in

1 fact imputing LPR status, as opposed to residence in  
2 fact.

3 But I think that that is an incorrect  
4 reading of the Ninth Circuit's decision as well, and  
5 that's for the following reason: All three courts of  
6 appeals that Respondents rely on dealt separately with  
7 the threshold requirement under former section 212(c)  
8 that the alien be a lawful permanent resident. None of  
9 those three courts permitted LPR status to be imputed  
10 from parent to child. So, where there was an explicit  
11 requirement in the statute that LPR status be obtained  
12 by the alien seeking relief, the courts were very clear  
13 in requiring that the alien before them independently  
14 satisfied that requirement.

15 In Lepe-Guitron, the Ninth Circuit  
16 acknowledged that, under circuit precedent, it had held  
17 that domicile requires an intent to remain permanently  
18 in the United States lawfully and said that that meant  
19 that the alien had to be in LPR status. Lepe-Guitron  
20 said that with respect to children, that intent to  
21 remain in the United States lawfully need not be an LPR  
22 status so long as their parents were lawfully domiciled  
23 in the United States.

24 If the Court has no further questions, I'd  
25 like to reserve the balance of my time.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
2 Mr. Kinnaird.

3 ORAL ARGUMENT OF STEPHEN B. KINNAIRD  
4 ON BEHALF OF THE RESPONDENT IN  
5 NO. 10-1542

6 MR. KINNAIRD: Mr. Chief Justice, and may it  
7 please the Court:

8 Children present special problems under the  
9 immigration laws, and, as discussed, both the courts and  
10 the agency in various contexts have resorted to  
11 imputation to cure those problems. And here the -- the  
12 statute is silent as to imputation, and ambiguity arises  
13 as applied to the special circumstance of children who  
14 were minors during the years in question.

15 CHIEF JUSTICE ROBERTS: I don't know  
16 whether -- I'm having trouble applying the concepts of  
17 unambiguous and ambiguous in this situation. As far as  
18 I can tell, this is something that the statute just  
19 doesn't deal with, and I don't know that you  
20 characterize that correctly as ambiguous. It's just  
21 kind of off the table.

22 MR. KINNAIRD: I think it's ambiguous as  
23 applied to this specific circumstance. And the  
24 ambiguity arises because the requirements for which  
25 there is imputation, status and residency, are matters

1 that are not within the capacity or the control of a  
2 minor. A minor does not decide whether or when a parent  
3 will apply for LPR status for him or her. He does not  
4 control the -- the maintenance of that status over a  
5 period of years, and he also does not control where he  
6 resides.

7 JUSTICE SCALIA: Well, can you give any  
8 example -- the Government says you can't -- of an  
9 instance where status is imputed, not intent, but just  
10 status; where the status that the parents have is  
11 automatically given to the child or, for that matter,  
12 automatically taken away from the child?

13 MR. KINNAIRD: Section 212(c) imputed  
14 status, as the Ninth Circuit found. The reason was that  
15 the requirement there was not just for unrelinquished  
16 domicile but lawful unrelinquished domicile, and,  
17 therefore, they had to reach back to the period in which  
18 the parent was an LPR --

19 JUSTICE SCALIA: But there -- there, you --  
20 what they're imputing is the intent to remain in the  
21 place, right? And that's -- that's an -- that's intent.  
22 That's imputing intent.

23 MR. KINNAIRD: No, they also had to impute  
24 lawfulness, which meant that the parent had to be an LPR  
25 for that period or at least in some lawful status. And

1 in each of the three instances, the parents were LPRs in  
2 the times in question. So, there definitely was a  
3 foregoing rule of imputation of status. And I would  
4 submit that --

5 JUSTICE SCALIA: And the child would not  
6 have been lawfully there but for the imputation of  
7 lawfulness from the parents.

8 MR. KINNAIRD: That's right. He -- well, he  
9 would not have qualified for -- for a waiver of removal.

10 JUSTICE KAGAN: Mr. Kinnaird, I take it that  
11 the point you're making is the statute is ambiguous in  
12 the sense that its silence does not prevent the BIA from  
13 making this imputation if it wants to. But the BIA  
14 clearly doesn't want to. So, where does that leave you?

15 MR. KINNAIRD: Well, I think if it is  
16 ambiguous, then the BIA actually has to exercise its  
17 discretion and grapple with that ambiguity. And that is  
18 one of the fundamental problems, as Justice --

19 JUSTICE KAGAN: Well, are you saying that  
20 the BIA needs to write an opinion that says now we are  
21 doing Chevron step two analysis? Is that what you're  
22 saying, that this is a matter of labeling?

23 MR. KINNAIRD: I don't think it's a matter  
24 of -- of magic words, but what it has to do is actually  
25 grapple with and recognize the ambiguity, at least in

1 the alternative, and then exercise its discretion to say  
2 if this is a permissible construction of the Act and  
3 there's another permissible construction, which of the  
4 two better serves the statutory purpose.

5 CHIEF JUSTICE ROBERTS: But it doesn't have  
6 to grapple with everything that's not there. I mean,  
7 there are a lot of things that the statutes don't  
8 address.

9 MR. KINNAIRD: Agreed.

10 CHIEF JUSTICE ROBERTS: It seems to me that  
11 they don't have to grapple with everything that's there.  
12 You just have to say this doesn't address it. So,  
13 whoever is asking for the affirmative, which is you,  
14 loses.

15 MR. KINNAIRD: I don't think --

16 CHIEF JUSTICE ROBERTS: You're saying: We  
17 think this law should allow -- should provide for this,  
18 should be extended for this. And it's one thing to say,  
19 well, the statute's ambiguous; it talks about children  
20 in one category but not in another category; so, the  
21 issue's there; we don't know what they meant. It's  
22 another thing if it's something that's totally not on  
23 the table. I mean, if -- if you claimed that the law  
24 required every minor to get \$500 a year, you wouldn't  
25 say the statute was ambiguous about that. You'd say it

1 doesn't have anything to do with it.

2 MR. KINNAIRD: Well, that's right, Your  
3 Honor, but I think the ambiguity arises here because the  
4 matters in question are ones not within the capacity or  
5 control of the minor, and that's been the traditional  
6 basis on which the BIA has looked for imputation. And  
7 when you take into account --

8 JUSTICE GINSBURG: In your -- your  
9 argument -- under your argument an alien, a child, who  
10 never acquired LPR status in its own right could get a  
11 cancellation of removal based on the parents' status.

12 MR. KINNAIRD: I don't think that's right.  
13 The Ninth Circuit did not address that, but I think the  
14 better reading of the statute, even if (a)(1) is  
15 somewhat ambiguous on that point, is that you have to be  
16 an LPR in order to seek cancellation. And then for  
17 these durational requirements and the look-back to  
18 status, there you do imputation.

19 And the reason is twofold. One, section  
20 212(c), which it replaced, was limited to LPRs. The  
21 second is that there is a separate subsection,  
22 subsection (b), of that same statute. I don't believe  
23 it's in the addenda provided to the courts, but it is  
24 cancellation of removal for certain nonpermanent  
25 resident aliens. And the critical distinction between

1 the two, besides differences in criteria, is that that  
2 one authorizes adjustment of status as well as  
3 cancellation.

4 JUSTICE KENNEDY: What would --

5 MR. KINNAIRD: So, if you're not an actual  
6 LPR, you need to have adjustment of status to -- to not  
7 be in a legal limbo.

8 JUSTICE KENNEDY: Mr. Kinnaird, what would  
9 happen if the child remains with the grandparents in  
10 Mexico and his parents are living in Los Angeles for 6  
11 years until they can afford to take him. Is the  
12 parents' residence then imputed to the child so that  
13 when he moved to Los Angeles in year 7 he is deemed to  
14 have been there for 6 years?

15 MR. KINNAIRD: I think if there's a  
16 significant separation of that duration, I think there  
17 would be a question about whether you have the  
18 significant relationship between parent and child to  
19 warrant imputation. But it is true that under former  
20 section 212(c), at least in two of the cases, they  
21 imputed residency where the child was not actually  
22 resident.

23 JUSTICE BREYER: You had an example in your  
24 brief, I thought -- you might -- I thought that it was  
25 an example of status rather than intent. The example



1    that you gave -- I took that way; tell me if I'm -- is  
2    where an alien comes in and wants asylum, and then you  
3    can't get it if you were resettled in another country.  
4    And there are criteria -- country with a resettlement  
5    program. And then that seemed like a status, a  
6    residence. Were you resettled in the other country or  
7    were you not? That's his status, and then that's  
8    imputed to the child.

9                   MR. KINNAIRD: That's right. And the  
10   resettlement doesn't have any element of intent to it.  
11   So, it's not true that everything turns upon intent.

12                   And I would also point out that, under  
13   section (a)(1), it's not simply a requirement that there  
14   have been some grant of LPR status at some point and  
15   passage of 5 -- of 5 years. The statutory definition of  
16   "lawfully admitted for permanent residence" includes a  
17   requirement that the status has not changed. And that  
18   requires domiciliary intent because the BIA has  
19   interpreted that phrase to mean that you can change your  
20   status by intent, and in fact the Department of Homeland  
21   Security has defended against cancellation claims on the  
22   grounds that there was abandonment during a -- during  
23   the 5-year period. So, if you had a child coming forth,  
24   you would have to look, in certain circumstances at  
25   least, to the parent for intent of abandonment.

1           So, I think this is an element where there  
2   is direct continuity from section 212(c). It makes  
3   eminent sense. And even if the BIA is deemed to have  
4   exercised its discretion here, I think its rule is  
5   patently unreasonable, and for a number of reasons.

6           First, they're not able to advance a single  
7   policy reason that would be favorable to non-imputation.  
8   It destroys family unity, and it forecloses eligibility  
9   for relief for even people like Mr. Martinez Gutierrez,  
10  who has lived here since the age of 5.

11           JUSTICE GINSBURG: There -- this Court has  
12  dealt in the constitutional context with parent-child  
13  relationships under the immigration law. And let's take  
14  Fiallo v. Bell. There the Court said, well, it tells us  
15  that for married parents it's this way, and for a child  
16  born out of wedlock, that relationship is something  
17  else. That could be considered quite arbitrary when the  
18  question is, is the child left orphaned? But the Court  
19  said, well, that's what the statute said. It made that  
20  distinction, and the Court upheld it.

21           But there are a number of cases where there  
22  is -- the statute does say, parent-child relationship,  
23  this is imputed, that is not, and dealt -- the Court  
24  dealt with that in Miller and Nguyen.

25           MR. KINNAIRD: Yes, Your Honor. I think

1 Congress has the latitude to be -- to draw arbitrary  
2 lines. I don't think the agency does if imputation is a  
3 permissible alternative. I think they have to give a  
4 reasoned basis for denying imputation when it was the  
5 prior rule.

6 CHIEF JUSTICE ROBERTS: Isn't it -- why  
7 can't the BIA adopt or why doesn't the background  
8 principle apply that you're not entitled to admission  
9 unless you make an affirmative case for it?

10 You say, well, the -- the government hasn't  
11 advanced any policy reason on the other side. Why isn't  
12 that the basic policy of the government?

13 MR. KINNAIRD: Well, I think they have to  
14 look to the actual statute, and they have to give their  
15 own reasons, which I don't think they've done adequately  
16 as a matter of discretion. But here, this is a --

17 JUSTICE SCALIA: Why isn't it -- why isn't  
18 it an adequate reason that they've come up with here and  
19 in their decisions that the prior word was "domicile"  
20 and a child's domicile is that of the parents, and that  
21 the word under the new statute is "residence" and the  
22 child's residence is not necessarily the residence of  
23 the parent? That seems to me a perfectly valid reason.

24 MR. KINNAIRD: Well, I wouldn't say that's  
25 Chevron step two discretion. But I think you also have

1 to look to the fact that there was not only imputation  
2 of domicile; it required lawfulness. And -- and in  
3 imputing domicile, they were also imputing residence.  
4 So, it's true the word "domicile" has --

5 JUSTICE SCALIA: That may well be, but it's  
6 a different word.

7 MR. KINNAIRD: It's a different word, yes.

8 JUSTICE SCALIA: And the one word demands  
9 imputation; the other doesn't. So, I mean, I don't  
10 think you can say there's no -- no rational basis given  
11 by the agency.

12 MR. KINNAIRD: Well, the rational basis  
13 comes in if -- if there's ambiguity and they're  
14 determining why -- if it's a permissible construction,  
15 why it should be rejected or not.

16 JUSTICE SOTOMAYOR: One of the problems that  
17 I have is that I see the imputation as an equitable  
18 doctrine.

19 MR. KINNAIRD: Yes.

20 JUSTICE SOTOMAYOR: And to me, that often  
21 means discretionary.

22 MR. KINNAIRD: Yes.

23 JUSTICE SOTOMAYOR: If it is that,  
24 discretionary, I -- I don't know what more the BIA has  
25 to say than "I don't want to," because it renders lots

1 of issues open, like what do we do with 1229b(a)(2)?  
2 Isn't that an end run on stopping this continuous 7-year  
3 statute, or 10, whatever it is, if we're imputing a  
4 parent's residence or any of the things that you're --  
5 that the government said, the BIA said, in rendering its  
6 decision?

7 I mean, you can't force a court to -- the  
8 BIA to impute. So, what more do they have to say than  
9 we don't think it's consistent with the statute, even if  
10 it is ambiguous to do this?

11 MR. KINNAIRD: Well, I would say the statute  
12 has an equitable purpose which allows imputation. I do  
13 not think there's discretion, if imputation is  
14 permissible unless there's a rational basis in serving  
15 the policies of the Act, to deny imputation. And  
16 discretion does come in at the second phase, which is  
17 when the Attorney General determines whether or not the  
18 -- the cancellation should be granted.

19 So, we should bear in mind that this is a  
20 statute strictly for eligibility, simply to get to the  
21 phase where there's unreviewable discretion in the  
22 Attorney General to deny relief. And this is a  
23 once-in-a-lifetime remedy. You can only apply for  
24 cancellation once in your life.

25 So, I think in the special circumstance of

1 children who were minors during the period, who could  
2 not have controlled their status, could not have  
3 controlled their residence, this is an eminently  
4 reasonable rule that's backed by Congress.

5 JUSTICE SOTOMAYOR: What's so reasonable  
6 about a child who lives with their grandparents outside  
7 the country? Why should their parents' being in the  
8 U.S. be imputed to the benefit of that child? I  
9 certainly understand it in your client's situation.  
10 Your client is the one who has been here since 5 years  
11 old.

12 MR. KINNAIRD: Right.

13 JUSTICE SOTOMAYOR: So --

14 MR. KINNAIRD: And if -- BIA, I think, would  
15 be reasonable to draw a narrower rule, and we could  
16 prevail under that rule, but I think the rationale is  
17 family unity; that even though there are periods of  
18 residence where there's a dysjunction, the real reason  
19 is simply the operation of quotas. And -- and there was  
20 a historical practice of allowing imputation of  
21 residence. Since you still have the family ties, I  
22 think imputation is permissible there, as long as you  
23 have the significant relationship.

24 JUSTICE KENNEDY: Mr. Kinnaird, I'm having  
25 trouble figuring out, is your view that non-imputation

1 is just unreasonable per se, or is your view that they  
2 didn't explain non-imputation properly?

3 MR. KINNAIRD: They are alternative  
4 arguments. They certainly didn't explain it. I would  
5 also say it's unreasonable per se: One, because they  
6 have to deal with the fact of lack of custody and  
7 control. That's been the basis for their abandonment  
8 decisions. They have invoked imputation only to the  
9 detriment of the alien where the child has no intent  
10 whatsoever.

11 So, there's no common law principle for  
12 imputing mens rea, for example, knowledge of  
13 inadmissibility to a child; no basis for really imputing  
14 an intent to abandon when the child has none whatsoever.  
15 So, at the very least, they have to explain that.

16 And because -- and the BIA has also not  
17 really taken into account the nature of these as simply  
18 eligibility rules.

19 Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,  
21 Mr. Kinnaird.

22 Mr. Rothfeld.

23 ORAL ARGUMENT OF CHARLES A. ROTHFELD

24 ON BEHALF OF THE RESPONDENT IN

25 NO. 10-1543

1                   MR. ROTHFELD: Thank you, Mr. Chief Justice,  
2   and may it please the Court:

3                   So far as subsection (2) of the provision  
4   that we're talking about this morning, which is the  
5   provision that concerns me in the Sawyers case, we think  
6   that the Government's reading is simply not a sensible  
7   approach to the statute. And in that sense, our  
8   position is not that the statute is ambiguous. We think  
9   that the statutory context and the particular meaning of  
10  the words that Congress used require imputation in the  
11  circumstances of this case.

12                  I'll start with the statutory background,  
13  where I think the Government understates the nature of  
14  the prevailing settled rule that it applied.

15                  CHIEF JUSTICE ROBERTS: We usually like to  
16  start with the statutory language. Where is this issue  
17  addressed in this statute at all?

18                  MR. ROTHFELD: Imputation as such, as has  
19  been said, is not directly addressed. But the words  
20  that the -- that Congress used, the word "residence" and  
21  the word -- particularly "continuous residence" are  
22  words that Congress would have thought carried along  
23  with it the concept of imputation. And the reason why  
24  that is so, I think it's necessary to start with a  
25  little bit of the background both of the statute and how



1 those words have been interpreted in prior usages.  
2 Congress would have been aware of when it used them in  
3 the statute.

4 Under the prior relief provision here,  
5 section 212(c), the old provision, the courts that --  
6 courts of appeals that had addressed it had uniformly  
7 applied an imputation rule. The Government says it's  
8 three courts. Two of those courts are the Second and  
9 Ninth Circuits, the largest immigration circuits that  
10 decide two-thirds of the immigration cases in the  
11 country. So, I think one can presume that Congress  
12 would have been aware of this rule.

13 And the Government concedes that Congress  
14 didn't change the language of 212(c) because it was  
15 dissatisfied with imputation. It had other purposes in  
16 mind altogether. And so --

17 CHIEF JUSTICE ROBERTS: What does the  
18 statute say about imputation of individuals' residence  
19 to grandparents?

20 MR. ROTHFELD: The rule -- it says nothing  
21 directly about it.

22 CHIEF JUSTICE ROBERTS: It says nothing  
23 about it. So, would you say the statute is ambiguous on  
24 whether or not residents' legal permanent residence  
25 status should be imputed to grandparents?

1           MR. ROTHFELD: Well, I think there could be  
2     circumstances in which imputation is appropriate when --  
3     when the child is in the custody of the grandparent.  
4     But I'm focusing on parents because that's how the cases  
5     have been decided up to that point.

6           The BIA itself had said, prior to the  
7     enactment of this statute, in the *In re Ng* case that --  
8     which I think is the case the Justice Breyer had  
9     referred to -- it had said in so many words the  
10    residence of the parent is imputed to child when the  
11    child is a minor. Congress would have been aware of  
12    that when it used the word "residence" in  
13    subsection (2).

14          JUSTICE GINSBURG: What do you do -- what  
15    you do if the parents -- the father is an LPR, the  
16    mother is not? Do we then impute to the child the  
17    father's status? The couple is not married.

18          MR. ROTHFELD: There are rules, common law  
19    rules, that the courts had applied in determining whose  
20    residence and whose domicile would be attributed to the  
21    child when the parents were not -- didn't have joint  
22    custody. When the -- if we're talking only about  
23    residence here --

24          JUSTICE GINSBURG: They have joint custody.  
25    They live together. They're just not married.

1           MR. ROTHFELD: I think that -- again, the  
2 courts have applied -- if we're distinguishing -- for  
3 purposes of residence -- and I'm not talking about the  
4 technical LPR status here when I'm using the term  
5 "residence"; I am referring simply to kind of the  
6 general common law concept.

7           JUSTICE GINSBURG: Well, I think it was  
8 agreed that -- that LPR status would be necessary. At  
9 least, Mr. Kinnaird said that.

10          MR. ROTHFELD: We --

11          JUSTICE GINSBURG: So, we're talking about  
12 the 5-year period and the 7-year period. The child  
13 would have to have LPR status.

14          MR. ROTHFELD: We agree ultimately, to get  
15 relief, the child has to have LPR status and certainly  
16 under subsection (1) of the provision, which is not at  
17 issue in the Sawyers case. That concerns 5 years of LPR  
18 status. Subsection(2), which is all that I'm concerned  
19 with in Sawyers because that's the only -- only element  
20 of the relief provision that he was deemed not to  
21 satisfy, concerns only the term "residence," not LPR as  
22 such; simply continuous residence in the United States.

23                 And so, the question of would Congress have  
24 thought that residence, continuous residence, is  
25 imputable from parent to child -- I think it would have

1 for two reasons: First of all, it would have believed  
2 that residence as a general matter is imputable. The  
3 BIA had said so itself in the Ng case. And as it --  
4 domicile, which the Government concedes was imputable,  
5 necessarily includes --

6 JUSTICE SCALIA: Excuse me. Was residence  
7 at issue in that case?

8 MR. ROTHFELD: It was indeed. It was a firm  
9 resettlement case, and the question was whether or not  
10 the alien had been a resident of Hong Kong. And the  
11 parents were residents, and the BIA said, well, the  
12 parents' residence is imputed to the child.

13 JUSTICE SOTOMAYOR: Just for factual  
14 correction, the record doesn't tell us whether he was  
15 living with his mother -- Mr. Sawyer was living with his  
16 mother.

17 MR. ROTHFELD: That's correct.

18 JUSTICE SOTOMAYOR: And the answer to that  
19 is? Is this a child living with a grandparent out of  
20 the country or not?

21 MR. ROTHFELD: The record does not  
22 reflect -- we don't know if he was living in U.S. in an  
23 unlawful status up until the point he became an LPR at  
24 age 15. The record simply doesn't answer that question.

25 JUSTICE BREYER: You're saying -- I just

1 want to hear your whole argument here. You're saying  
2 they would have had, Congress, as a background, the Ng  
3 case where they imputed the Hong Kong residence; the  
4 fact that you were about to say, that domicile  
5 necessarily includes residence. And is there something  
6 else?

7 MR. ROTHFELD: That's the principle, but  
8 that --

9 JUSTICE BREYER: All right.

10 MR. ROTHFELD: That's correct. That -- but  
11 I can add to that a little bit, that in the section  
12 212 cases, in which domicile was imputed, as the  
13 Government recognizes, in at least two of those cases,  
14 the child was not in the United States for a portion of  
15 that time; and, therefore, necessarily those courts must  
16 have been imputing not only domicile but residence. And  
17 that is necessarily the case because -- residence is an  
18 element, a subset, of domicile --

19 JUSTICE ALITO: So, if he came to the United  
20 States at 15 from Jamaica, he was a resident of the  
21 United States before he came --

22 MR. ROTHFELD: As a -- as a legal matter,  
23 just as he was -- would have been domiciled in the  
24 United States.

25 JUSTICE ALITO: Would he be a resident of

1 Jamaica, too, at that time?

2 MR. ROTHFELD: I think not. I think -- I  
3 think our common law would have regarded him as a  
4 resident of the United States --

5 JUSTICE ALITO: If his father was living in  
6 the U.K., would he be a resident of the U.K.?

7 MR. ROTHFELD: There might be legal rules  
8 that -- that specify the physical presence is equivalent  
9 to residence for particular purposes. But as this Court  
10 held in Holyfield, as the Government recognizes in a  
11 domicile context, a child can be a domicile of a  
12 jurisdiction in which they have never set foot. The  
13 legal presumption is that a child is -- takes the  
14 domicile of the parent, and -- and residence is a  
15 necessary subset, as this Court has said long ago,  
16 before any of these statutes were passed. The  
17 definition --

18 JUSTICE GINSBURG: But you can be a resident  
19 without being a domiciliary?

20 MR. ROTHFELD: One can be -- yes, because  
21 the definition, as this Court said, of -- of "domicile"  
22 is residence in a particular place accompanied by an  
23 intent to remain there indefinitely. And so, you have  
24 to have both. You can't be a domicile without being a  
25 resident of the jurisdiction.

1 Congress would have been aware of that. And  
2 when it used the term "residence," it would have been  
3 aware of that as a general proposition, and it would  
4 have been aware that in the particular context of  
5 section 212(c), imputation rule for relief in the  
6 immigration laws, that use of the term "resident"  
7 carries with it imputation.

8 I think that makes this -- so far as we're  
9 concerned, that makes the use of the term "continuous  
10 residence" in subsection (b) unambiguous and requires  
11 imputation. Congress would have been aware of this.  
12 There's no reason to think, the Government concedes,  
13 Congress was not trying to change the imputation rule  
14 when it changed the terminology from -- from "domicile"  
15 to "resident."

16 In fact, it's sort of perverse to say that  
17 Congress had -- achieved that purpose, because it was  
18 a -- this was a liberalizing change. The reason that  
19 Congress -- it's quite clear from the statutory  
20 background why Congress changed the language from 7  
21 years' unrelinquished lawful domicile in the old 212(c)  
22 to continuous residence after admission in any status in  
23 -- in subsection (b) of the new statute -- was to  
24 broaden the availability of relief.

25 Congress was confronted with a split in the

1 circuits on the interpretation of the old rule, as to  
2 whether or not one could achieve unrelinquished  
3 domicile -- lawful unrelinquished domicile while not in  
4 an LPR status, because the BIA had taken the position  
5 that for -- to have lawful domicile, you have to  
6 lawfully intend to stay here permanently; you can't do  
7 that if you're not an LPR.

8 And, therefore, Congress, confronting the  
9 split on circuits -- because some courts had rejected  
10 the BIA's view, Congress said, okay, we're going to put  
11 in subsection (a) of the new statute a requirement of 5  
12 years' LPR status.

13 JUSTICE ALITO: If Congress had wanted to  
14 use the term "resided" in the ordinary sense of the  
15 word, they wanted to require that the alien actually  
16 have lived in the United States continuously for 7  
17 years, what language would they have used? What  
18 language should they have used?

19 MR. ROTHFELD: For -- for the child? Well,  
20 I think --

21 JUSTICE ALITO: If they wanted (2) to mean  
22 that the alien must have actually -- that person must --  
23 the one who committed the crime later must actually have  
24 resided in the United States continuously for 7 years --

25 MR. ROTHFELD: I would --



1 JUSTICE ALITO: -- then what should they --  
2 actually lived in the United States for 7 years, what  
3 language should they have used?

4 MR. ROTHFELD: For -- for an adult, the  
5 language that they did use, because I think "continuous  
6 residence" carries with it the requirement that the  
7 person be physically present in the United States --

8 JUSTICE ALITO: For a minor.

9 MR. ROTHFELD: If they're a minor?

10 JUSTICE ALITO: For that to apply to  
11 everybody.

12 MR. ROTHFELD: I -- I would think, given the  
13 context, of which imputation was the settled rule, that  
14 Congress would have had to indicate affirmatively that  
15 imputation was impermissible. Just as if -- if Congress  
16 uses the term "domicile" as they did in the old section  
17 212(c), knowing the context in which, as a universal  
18 matter, the domicile of the parents is attributed to the  
19 child, one would expect --

20 JUSTICE ALITO: "Domicile" is a legal term.  
21 You don't go around and you meet somebody and say, Where  
22 are you domiciled?

23 (Laughter.)

24 JUSTICE ALITO: You might not even say,  
25 Where do you reside? But it's closer to being ordinary

1 language.

2 MR. ROTHFELD: Well -- and "reside" can have  
3 different meanings in different contexts. There is a  
4 definition in the statute which the BIA itself has said  
5 does not apply to conditional uses of the term. So, you  
6 know, "residence" in its plainest sense -- I mean, as  
7 this Court said in the Savorgnan case, which is where  
8 Congress derived the -- the definition which is now in  
9 the INA, that was under the plainest use of the term  
10 "residence." You know, unadorned. And that was the  
11 statutory definition, which says without regard to  
12 intent.

13 But when there's a conditional use, when  
14 it's continuous residence, as in subsection (b) of the  
15 statute, or permanent residence, necessarily one has to  
16 look at intent. And, therefore, that statutory  
17 definition cannot apply. The BIA itself has said that  
18 expressly in the Huang case, which we discuss in our  
19 brief, that so far as permanent residence is concerned,  
20 the statutory definition has no application because  
21 necessarily one has to look to intent.

22 And so, this is sort of a second --  
23 secondary argument here, but insofar as intent is  
24 essential for imputation, which is what the Government  
25 says -- the Government says the reason that the switch

1 from "domicile" to "residence" matters is because  
2 "domicile" looks to intent, and "residence" doesn't.  
3 But, in fact, continuous residence does, necessarily  
4 does, look to intent because it's the intent to remain  
5 continuously or permanently.

6 JUSTICE KENNEDY: Is -- is there some  
7 advantage to giving parents an incentive to apply for  
8 early lawful permanent residence? Because under your  
9 view, parents wouldn't have to bother to apply for it at  
10 all. I'm -- I'm wondering about the --

11 MR. ROTHFELD: Well, I --

12 JUSTICE KENNEDY: -- the consequences of  
13 deciding in your favor. And the other one, quite  
14 distinct, is it seems to me that there probably would  
15 not be some floodgate of -- of imputed residence cases.

16 MR. ROTHFELD: I -- I -- the only thing  
17 we're talking about here, of course, is -- is a  
18 particular relief from removal provision. And so,  
19 certainly, the -- the expectation that the child someday  
20 down the road may seek relief from removal --

21 JUSTICE KENNEDY: Right.

22 MR. ROTHFELD: -- if they do -- if they  
23 become an LPR and do something wrong is not going to  
24 induce parents to delay.

25 JUSTICE SCALIA: Mr. Rothfeld, I'm -- I'm

1     curious, how often -- this dispute here is simply about  
2     whether the Attorney General is permitted to cancel  
3     removal, right?

4                   MR. ROTHFELD: That is correct.

5                   JUSTICE SCALIA: How often does -- are  
6     applications for cancellation of removal granted? I  
7     mean, is it a common phenomenon, or are we really  
8     talking here about just spinning it out longer so that  
9     the -- so that the person who will ultimately be  
10    deported can stay here that much longer?

11                  MR. ROTHFELD: I -- I can't give you current  
12    statistics. I think this Court said, I believe in the  
13    St. Cyr case, that a fairly -- substantial -- 40 percent  
14    or so of the cases are granted. The Gutierrez case, in  
15    fact, the IJ would have granted removal and --

16                  JUSTICE SCALIA: You think it's as high as  
17    40 percent?

18                  MR. ROTHFELD: I believe that that's -- I  
19    wouldn't swear to that, Your Honor, but -- but it is  
20    a -- a significant percentage. And, again, Gutierrez is  
21    an example of that. The IJ would have granted it but  
22    for the -- the rejection of the imputation rule further  
23    on in the -- in the process.

24                  And I think this is actually kind of a  
25    significant point, which goes to what Congress would

1 have had in mind. We are only talking about not  
2 entitlement to relief; we're talking about entitlement  
3 to ask the Attorney General, in the exercise of his  
4 unreviewable discretion, to grant relief to deserving  
5 immigrants who would otherwise be forced out of the  
6 country by application of an inflexible rule.

7 CHIEF JUSTICE ROBERTS: I suppose one of the  
8 things he could take into account in exercising his  
9 discretion is whether we're actually dealing with a  
10 minor, or, as I understand in this case, it's someone  
11 who is quite a bit older.

12 MR. ROTHFELD: He -- it is unreviewable  
13 discretion, yes. He could take anything into account.  
14 And, certainly, the nature of the family ties, the --  
15 the background of the immigrant, all of those things are  
16 taken into account. But the question -- whether or not  
17 Congress when it passed this statute, knowing how  
18 section 212(c) had been interpreted, the prospect that  
19 Congress meant to --

20 JUSTICE SOTOMAYOR: Counsel, that's a very  
21 big assumption. I mean, yes, it's the two biggest  
22 circuits who have defined domicile and imputation, but  
23 it wasn't us, number one. And, number two, going back  
24 to Justice Alito's question, they didn't adopt the same  
25 word, "domicile"; they changed it. So --

1 MR. ROTHFELD: Well, I can give you --

2 JUSTICE SOTOMAYOR: And that's what the BIA  
3 was saying.

4 MR. ROTHFELD: I can give you two responses  
5 to that, if I may, Justice Sotomayor. First, yes, I  
6 mean, it is a presumption that Congress is aware of  
7 judicial decisions, but I think that presumption --

8 JUSTICE SOTOMAYOR: It can't be aware of all  
9 judicial decisions.

10 MR. ROTHFELD: No, but in this particular  
11 context, there's particular reason to think they were  
12 because Congress, it is agreed, enacted this legislation  
13 to cure a conflict in the circuits involving the  
14 application of this cancellation provision. And so,  
15 there would have been particular reason for Congress to  
16 be aware of what the courts had done.

17 CHIEF JUSTICE ROBERTS: You -- you said you  
18 had two points. Do you want to get your second out, in  
19 half a sentence?

20 MR. ROTHFELD: I -- I can rest at this  
21 point, Your Honor.

22 Thank you so much.

23 CHIEF JUSTICE ROBERTS: Thank you.

24 Ms. Kruger, you have 4 minutes remaining.

25 REBUTTAL ARGUMENT OF LEONDRA R. KRUGER

1 ON BEHALF OF THE PETITIONER

2 MS. KRUGER: Thank you.

3 I'd like to make three quick points --

4 JUSTICE KENNEDY: The -- the Respondent said  
5 that the BIA gave no policy reason, no policy  
6 justifications, for its -- for its interpretation.

7 Is that correct in your view?

8 MS. KRUGER: I don't think that that is  
9 correct. The BIA noted -- to be clear, the BIA was, I  
10 think, heavily influenced by what it saw as the clear  
11 language of the statute, but it also noted that the  
12 imputation rule was inconsistent with a history of  
13 non-imputation of LPR status, an approach that treats  
14 LPR status as accorded to individual aliens.

15 JUSTICE SCALIA: What do you respond to the  
16 point that lawfulness has been attributed, not just  
17 intent, but under the prior law, lawfulness was also  
18 attributed?

19 MS. KRUGER: I think this goes back to the  
20 answer I was giving to Justice Breyer earlier. Where  
21 former section 212(c) had an explicit lawful status  
22 requirement, which is the status of being a lawful  
23 permanent resident, no court of appeals allowed  
24 imputation from parent to child.

25 Their argument is a little bit more

1 convoluted than that. It is that because domicile,  
2 lawful unrelinquished domicile, was interpreted to mean  
3 the ability to form a lawful intent to remain  
4 permanently in the United States, and the Ninth Circuit  
5 said you could only form such an intent if you are a  
6 lawful permanent resident, that in Lepe-Guitron, the  
7 Ninth Circuit was therefore necessarily imputing LPR  
8 status from parent to child.

9 I think the more straightforward way to read  
10 the Ninth Circuit's decision is that it was imputing the  
11 intent to remain permanently in the United States from  
12 parent to child, based in part on the parents'  
13 establishment of a domicile, and based on the common law  
14 rule that the child's domicile follows that of his  
15 parents.

16 CHIEF JUSTICE ROBERTS: Counsel, in response  
17 to Justice Kennedy's question about whether they gave a  
18 policy reason, your answer was that they, you know,  
19 followed the history. I'm not sure that's the same as a  
20 policy.

21 MS. KRUGER: Well, in -- in addition to  
22 discussing the individual nature of LPR status, they  
23 also noted the consequence of the Ninth Circuit's  
24 imputation rule would be to permit a kind of end run  
25 around the substantive eligibility requirements for LPR



1 status. So, theoretically, you could have an individual  
2 minor alien who's not eligible, who's inadmissible for  
3 adjustment of status, who would nevertheless be accorded  
4 a substantial benefit of that status without regard to  
5 whether or not he could have received that status in  
6 fact.

7 I want to --

8 JUSTICE SCALIA: Was that the case under the  
9 prior law?

10 MS. KRUGER: Under the -- under former  
11 section 212(c).

12 JUSTICE SCALIA: Yes, when -- yes.

13 MS. KRUGER: Again, no court --

14 JUSTICE SCALIA: So, it's not unthinkable.

15 MS. KRUGER: No court had imputed LPR  
16 status, the threshold requirement for relief under --  
17 under the predecessor statute, from parent to child.  
18 So, it wasn't the case that somebody who was actually  
19 ineligible for -- for LPR status would nevertheless be  
20 eligible for waiver of removal under -- under that  
21 provision.

22 JUSTICE SOTOMAYOR: I just don't understand  
23 that argument because they've conceded that you need  
24 the -- the child needs their own LPR status before it  
25 triggers --

1                   MS. KRUGER: Right, and I think that  
2 concession --

3                   JUSTICE SOTOMAYOR: -- residency.

4                   MS. KRUGER: I think that concession is  
5 important for the following reason: When Congress  
6 enacted the present cancellation of removal statute, it  
7 preserved that threshold requirement that you had to be  
8 an LPR in order to seek relief, but it added a  
9 durational requirement. You had to have attained that  
10 status at least 5 years before you sought relief.

11                   There's no reason to think, if there's no  
12 precedent for imputing LPR status in the first place,  
13 that there would be precedent for imputing LPR status  
14 going back 5 years. One necessarily follows from the  
15 other.

16                   If I could, I'd like to address the other  
17 proposition that Respondent Sawyers makes, that courts  
18 were necessarily imputing residence as an element of  
19 domicile. That argument relies heavily on the 1967  
20 regional commissioner decision dealing with firm  
21 resettlement.

22                   If you look at that decision, you will see  
23 that the regional commissioner focused very intensely on  
24 the minor alien's particular actions -- identity,  
25 documents that he received personally from the foreign

1 country, his own schooling, and residence. And the  
2 degree to which the regional commissioner rested on  
3 principles of imputation is entirely unclear.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 The case is submitted.

6 (Whereupon, at 11:20 a.m., the case in the  
7 above-entitled matter was submitted.)

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