No. 20-60936

United States Court of Appeals for the Fifth Circuit

ANTONY KAHUMBU,

Petitioner,

v.

MERRICK GARLAND, U.S. ATTORNEY GENERAL,

Respondent.

On Petition for Review of an Order of the
Board of Immigration Appeals
Agency Number [redacted]

REPLY BRIEF FOR PETITIONER ANTONY KAHUMBU

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I. Introduction: Contrary to OIL's assertion, because DHS has never properly served a Notice to Appear, Mr. Kahumbu has now accrued ten years of continuous physical presence, rendering him statutorily eligible to request cancellation of removal.

8 U.S.C. § 1229b(b) requires a cancellation of removal applicant to demonstrate, among other criteria, that they have "been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application." 8 U.S.C. § 1229b(b)(1)(A). Petitioner Antony KAHUMBU ["Antony"] is the husband of [redacted] He seeks to reopen these proceedings because, as OIL concedes, (OIL Br. at 15, 16 n.9) the Notice to Appear [NTA] in this case was insufficient to stop the calculation of his ten year period in light of *Niz-Chavez v. Garland,* 141 S.Ct. 1474 (2021).

This is a petition for review of a motion to reopen under 8 U.S.C. § 1229a(7). *See* ROA.7. The Board of Immigration Appeals [BIA or

Board] denied Antony's statutory motion solely under 8 C.F.R. § 1003.2(c)(2), finding that, because he had not accrued ten years of continuous physical presence [CPP], he had not established *prima facie* eligibility for cancellation. (ROA.7–8.)[1] Whether, on this record, Antony has acquired ten years of CPP, is the sole legal issue in this petition. *See Mireles-Valdez v. Ashcroft,* 349 F.3d 213, 217 (5th Cir. 2003) (holding whether CPP exists is a non-discretionary, "straightforward statutory interpretation and application of law to fact.")

Antony originally entered the US [redacted] (*See* ROA.737.) The BIA's denial of his direct appeal was August 27, 2014—before ten years had accrued. (ROA.8.) *Pereira v. Sessions,* 138 S. Ct. 2105 (2018), the case through which Antony originally sought reopening, was issued June 21, 2018, and Antony reached ten years on

[1] As the BIA noted, Antony also made an alternative, *sua sponte* Motion to Reopen, which the Board ruled on in the alternative. OIL claims that Antony has "waived" any argument that he failed to meet the legal criteria for *sua sponte* reopening. (OIL Br. at 13, n.8.) However, this Court continues to consistently hold that it lacks jurisdiction to review BIA decisions on *sua sponte* motions to reopen. *See, e.g., Guerrero-Lasprilla v. Barr,* 822 F. App'x 254, 256 (5th Cir. 2020) (citations omitted); *Khan v. Holder,* 334 F. App'x 655 (BIA 2009). OIL does not contest jurisdiction over the BIA's denial of the remaining, alternative statutory motion to reopen.

August 26 of that same year. (ROA.737.) He then sought reopening. The crux of OIL's argument is that, in passing § 1229b(d), Congress "was aware of certain background principles," (OIL Br. at 25), including an alleged principle that continuous physical presence cannot "continue to accrue" after the applicant is "issued a final order of removal" (OIL Br. at 19).

To reach this conclusion, OIL seeks to resurrect old case law containing the approach to "stop-time" that Congress specifically rejected when it passed IIRIRA.[2] As Petitioner demonstrates below, the stop-time rule now contained at 8 U.S.C. § 1229b(d)(1) was formulated specifically to ensure that the date of the final order could no longer be used to cut off CPP. The power to prolong required residence (by prolonging proceedings) was specifically taken away from the noncitizen, removing incentive to delay immigration proceedings. Instead, DHS/ICE was empowered to stop time, specifically by serving a Notice to Appear. Congress did not, and could not envision, that DHS/ICE would subsequently issue legally deficient NTAs on a massive and continuous scale, or that *Niz-Chavez v. Garland,* 141 S.Ct. 1474 (2021) would be the result.

Precedent cited by OIL as purported authority regarding an unexecuted, final administrative order has not only been rejected by Congress, but also by the BIA, which (at least in cases outside of this one) has held that decisions regarding distinct and separate forms of relief should not be cross-pollinated. Instead, any interpretation of the stop-time rule must be a permissible construction of the statute itself.

That statute is found at 8 U.S.C. § 1229b(d), which provides, in full:

> (d) Special rules relating to continuous residence or physical presence
>
> (1) Termination of continuous period
> For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end (A) except in the case of an alien who applies for cancellation of removal under subsection (b)(2), when the alien is served a notice to appear under section 1229(a) of this title, or (B) when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.
>
> (2) Treatment of certain breaks in presence

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[2] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-587 to 3009-59715 [IIRIRA].

> An alien shall be considered to have failed to maintain continuous physical presence in the United States under subsections (b)(1) and (b)(2) if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.
>
> (3) Continuity not required because of honorable service in Armed Forces and presence upon entry into service
> The requirements of continuous residence or continuous physical presence in the United States under subsections (a) and (b) shall not apply to an alien who--
> (A) has served for a minimum period of 24 months in an active-duty status in the Armed Forces of the United States and, if separated from such service, was separated under honorable conditions, and
> (B) at the time of the alien's enlistment or induction was in the United States.

OIL presents an avid defense, but the BIA's attempt to use *Matter of Romalez-Alcaide,* 23 I&N Dec. 423 (BIA 2002) and *Matter of Garcia,* 24 I&N Dec. 171 (BIA 2007) to deny this Motion is, in essence, an attempt to add language to the statute. Congress did *not* include unexecuted orders in § 1229b(d)—not as a "break" under Section (d)(2), and emphatically not as a stop-time event. Again, Congress specifically, explicitly rejected the final-order approach as the measure that stopped time, when it enacted § 1229b(d). And finally, as seen below, the purportedly damning language from *Romalez-Alcaide,* that "An order of removal is

intended to end an alien's presence in the United States," 23 I&N Dec. at 426 (ROA.8), says only what an order intends to do in the future—not what it effects *per se*. *Romalez-Alcaide* held that a break in presence was effected by actual, physical departure—which, by any standard, is required for a "break" in presence under § 1229b(d)(2). In short, OIL's proffered interpretation of CPP cannot be squared with 8 U.S.C. § 1229b(d) as a whole.

II. To break continuous physical presence under 8 U.S.C. § 1229b(d)(2), a cancellation applicant must actually depart the country.

A. The plain language of the statute is unambiguous: it does not allow for constructive breaks in presence.

If an event is to permanently "break" presence under the second "stop-time" paragraph, 8 U.S.C. § 1229b(d)(2), there must be an actual, physical departure. In *Matter of Mendoza-Sandino,* 22 I&N Dec. 1236 (BIA 2000), the BIA discussed the history and context of the stop-time rule now contained at §1229b(d). The BIA indicated, "The language of

Section 240A(d) [8 U.S.C. § 1229b(d)] makes it clear that Congress appreciated the difference between a "break" in continuous physical presence and the "end" of continuous physical presence." 22 I&N Dec. at 1240. Continued the Board: "Congress has distinguished between certain actions that "end" continuous physical presence, *i.e.,* service of a charging document or commission of a specified crime, and certain **departures from the country** that only temporarily "break" that presence. *Id.* (emphasis added).

The assumption made by the BIA is that to fall within the ambit of section 1229b(d)(2), an event must include a departure from the country. That assumption is mandated by the terms of the statute itself. The title of the section is "Treatment of certain breaks in **presence.**" 8 U.S.C. § 1229b(d)(2) (emphasis added). The presence being broken is "continuous **physical** presence." *Id.*. The section specifically references "**departure** from the United States." *Id.*. There is simply no room, in this particular sub-paragraph, to interpret a removal order—which is a piece of paper, not a departure, nor an absence—as a break in presence. The language does not allow for it. The statute, on its face, is unambiguous. *See Rodriguez-Avalos v.*

Holder, 799 F.3d 444, 450 (5th Cir. 2015) (stating "We start with the text" and "If the intent of Congress is clear, that is the end of the matter") (citations omitted).

OIL points to no authority that holds a removal order alone, without an actual departure, constitutes a break in presence under § 1229b(d)(2). Instead, cases which hold that removal is a break in presence analyze whether the departure or an absence permanently effected such a break. For example, in *Mireles-Valdez v. Ashcroft,* 349 F.3d 213 (5th Cir. 2003), the issue was whether a "voluntary departure under the threat of the commencement of immigration proceedings" constituted a break in presence under 8 U.S.C. § 1229b(d)(2). *Id.* at 214, 217. This Court assessed instances that fell outside the temporal purview of § 1229b(d)(2), but the presumption was still that a departure had to have occurred. *Id.* at 217 (assessing whether "absences shorter than those listed" can break presence under § 1229b(d)(2)); *see also Ascencio-Rodriguez v. Holder,* 595 F.3d 105, 115 (2d Cir. 2010) (holding "return to Mexico" constituted a break in presence under § 1229b(d)(2)).

B. The "traditional background principle" cited by OIL applies only to physical departures, and not unexecuted orders.

As indicated above, OIL's argument relies on the assertion that, in passing § 1229b(d), Congress "was aware of certain background principles" (OIL Br. at 25). Below, Petitioner addresses now-defunct jurisprudence that once applied in the suspension context, regarding when an unexecuted removal, deportation or exclusion order was said to constitute a break in required presence.

The jurisprudence cited by OIL, (*see, e.g.,* OIL Br. 17, 20) does tend to establish that, had Antony actually been physically deported, it would have easily constituted a permanent break in presence under § 1229b(d)(2). But, at the outset, it is important to note a distinction that OIL fails to acknowledge—there is a difference between intending something, and actually doing it.

OIL relies heavily on a quote from *Mrvica v. Esperdy,* 376 U.S. 560, 568 (1964) (OIL Br. at 17) in which the Supreme Court states that the "obvious purpose of deportation is to terminate residence." (OIL Br. at 17, *citing* 376 U.S. at 568.) What OIL fails to acknowledge is that said purpose is only effected when such deportation actually occurs.

The next sentence in *Mrvica* states the purpose "has been achieved in this instance." *Id.*. The reason it was achieved, is that Mrvica had been deported. *Id.*. As the Court stated, "We think it is beyond dispute that one who has been deported does not continue to have his residence here..." *Id.*. But, again, the Court noted, "the order of deportation is but a method of enforcing the return...." *Id.* (citation omitted). In other words, the purpose of ordering deportation is to end residence, but the order *per se* does not effect said ends. The actual deportation (or removal under threat of it) has to occur.

Indeed, OIL offers no authority that there can be a "break" in CPP, under 8 U.S.C. § 1229b(d)(2), without a literal departure from the country. *See also Ascencio-Rodriguez v. Holder,* 595 F.3d 105, 115 (2d Cir. 2010) (holding "return to Mexico" constituted a break in presence under § 1229b(d)(2)); *Landin-Zavala v. Gonzales,* 488 F.3d 1150, 1152 (9th Cir. 2007) (holding an executed order of exclusion was a break in presence under § 1229b(d)(2).)

Perhaps OIL's heaviest gun is a quote from *Romalez-Alcaide,* 23 I&N Dec. at 426, which is also the phrase the BIA relied upon when it

issued its entirely novel decision that a final administrative order stops time under § 1229b(d). (ROA.8.) (OIL Br. at 24.) In that case, the BIA stated "[a]n order of removal is intended to end an alien's presence in the United States..." *Id.*.

Importantly, what the BIA said was, "**intended** to end" (emphasis added). It didn't say "*does* end." It could not have, for unless there is a departure, there is no break; and Congress made a specific list of non-departure events that stop-time, at § 1229b(d)(1). A final order was not among them. A final order was specifically excluded, and the BIA made no attempt to hold otherwise in *Romalez-Alcaide*. This one quote, interpreted incorrectly, and taken out of context, cannot serve to alter the substantive reach of 8 U.S.C. § 1229b(d)(1). It cannot add words to the statute. Nowhere in the INA does it say that CPP ceases to accrue after a final order is issued.

III. The final removal order, an event Congress explicitly meant to exclude from 8 U.S.C. § 1229b(d)(1), cannot now be added to that section's list of stop-time events.

A. Whether or not the list of events at § 1229b(d)(1) is considered exhaustive, a final administrative order cannot be added to that list.

In *Mireles-Valdez v. Ashcroft,* this Court held that a voluntary departure under threat of removal constituted a "break" under 8 U.S.C. § 1229b(d)(2), indirectly upholding *Romalez-Alcaide.* 349 F.3d at 217. In doing so, the Court indicated "subpart (d)(1) cannot be exhaustive because...subpart (d)(2) provides that certain absences...terminate continuous presence." *Id.* at 218. The Court also indicated, "the statute at issue does not state that its provisions are exhaustive." *Id.*. Based on this reasoning, it found *Romalez-Alcaide* to be a permissible interpretation of § 1229b(d). *Id.*.

Petitioner contends that Section 1229b(d)(1) is, in fact, meant to be a definitional and exhaustive list of what events—outside of departures (or "breaks")—can permanently stop time on CPP. However, even if this Court finds that (d)(1) is non-exhaustive, OIL's posited additional event (a final order of removal) must be rejected as too far afoul of the intent of Congress, as expressed not only in the legislative

history, but also in the plain text and context of the statute. *See Rodriguez-Avalos v. Holder,* 444 F.3d at 450 (Indicating Court's method of interpretation for INA.)

1. Congress intentionally excluded final removal orders from the list of stop-time events at 8 U.S.C. § 1229b(d)(1).

In "continuing" relief applications, such as the old suspension, or what's now known as "special rule" cancellation, a required statutory period has traditionally been interpreted, through case law, to run up until a final agency decision. *Matter of Mendoza-Sandino,* 22 I&N Dec. at 1238–1240; *see also Vargas-Gonzalez v. INS,* 647 F.2d 457, 458-59 (5th Cir. 1981) (7 years for suspension of deportation could run even past the Petition for Review, if said appeal was not frivolous). But, Congress specifically rejected that method of counting the physical presence for "ten year cancellation" under 8 U.S.C. § 1229b(b). *Matter of Mendoza-Sandino*, 22 I&N Dec. 1236, 1243 (BIA 2000); *see also Rodriguez-Avalos v. Holder*, 788 F.3d 444, 453 (5th Cir. 2015), *citing Matter of Ortega-Cabrera,* 23 I&N Dec. 793, 794–95 (BIA 2005) (stating: "Subsequent to the passage of the stop-time rule... the BIA and federal courts have "universally established" that the ten-year period of continuous physical

presence stops for purposes of eligibility for cancellation of removal upon service of the NTA").

The legislative history of IIRIRA specifically demonstrates that Congress meant to replace the suspension approach to CPP, due to past abuses of calculating presence:

> Suspension of deportation is often abused by aliens seeking to delay proceedings until 7 years have accrued. This includes aliens who failed to appear for their deportation proceedings and were ordered deported in absentia, and then seek to re-open proceedings once the requisite time has passed. Such tactics are possible because some Federal courts permit aliens to continue to accrue time toward the seven year threshold even after they have been placed in deportation proceedings. Similar delay strategies are adopted by aliens in section 212(c) cases, where persons who have been in the United States for a number of years, but have only been lawful permanent residents for a short period of time, seek and obtain this form of relief.

H.R. Rep. No. 104-469(I) (1996) 1996 WL 168955, *122; *see also* H.R. Rep. No. 104-828 (1996), 1996 WL 563320, *214 (summarizing terms of § 1229b(d)); *id.* at 213–14 (indicating cancellation is meant to wholly replace suspension).

OIL's assertion that Congress was aware of a "background principle" that CPP ends with an administratively final order (OIL Br. at 25) is thus technically accurate—but Congress meant to *replace* it,

not affirm it. This was the whole purpose of enacting the stop-time rule. OIL cannot now, resurrect this purported "principle," when Congress has specifically rejected it.

Finally, the BIA specifically rejects the application of pre-IIRIRA jurisprudence when it comes to the stop-time rule. In *Mendoza-Sandino,* the Board rejected three historic cases "on the issue of whether a new period of continuous physical presence can begin following the termination of an alien's presence." 22 I&N Dec. at 1240, n.4. Continued the Board, "These cases were decided before the changes brought about by IIRIRA and the NACARA, so there was at that time no legislation outlining what events broke or terminated continuous physical presence." *Id.*.

2. Under the INA, when a removal order is meant to have *per se* consequences, those consequences are explicitly designated.

In at least two places, the INA does, explicitly, provide consequences for an unexecuted removal order. Section 1182(a)(9)(A)(i) provides that any arriving alien "who has been ordered removed" is inadmissible for at least 5 years. *Id.*. Likewise, in the very well known "permanent bar," section 1182(a)(9)(C) provides than an alien "who has

been ordered removed" and subsequently enters without admission, is inadmissible. *Id.*. These two references make it clear that Congress could have easily included the phrase "who has been ordered removed" into Section 1229b(d)(1)—if that was the desired result. It was not. Instead, Congress envisioned that DHS/ICE would issue NTAs, and that this would effectively stop time. Again—nowhere in the Immigration and Nationality Act, is it stated, that CPP cannot accrue after a final order of removal has been issued. There *are* consequences for having an unexecuted order of removal; but, stop-time is not one of them.

B. In the alternative, subsection 1229b(d)(1) is, in fact, exhaustive, and *Mireles-Valdez v. Ashcroft* can be clarified to reflect this.

1. When enacting § 1229b(d), Congress was clear that suspension was being wholly and substantively replaced, including the stop-time rule.

When Congress passed IIRIRA, it unequivocally meant for suspension to wholly be replaced by cancellation. The name was changed everywhere; the suspension standard was eliminated. H.R. Rep. No. 104-828 (1996), 1996 WL 563320, *76, *213–14, 223. Congress explained:

> Section 240A(b)(1) replaces the relief now available under INA section 244(a) ("suspension of deportation"), but limits the categories of illegal aliens eligible for such relief and the circumstances under which it may be granted. The managers have deliberately changed the required showing of hardship from "extreme hardship" to "exceptional and extremely unusual hardship" to emphasize that the alien must provide evidence of harm to his spouse, parent, or child substantially beyond that which ordinarily would be expected to result from the alien's deportation. ...

Id. at *213.

This meant that the case-law interpreting CPP for *suspension* purposes, was also now defunct. That is why the BIA specifically rejected it in *Mendoza-Sandino*. 22 I&N Dec. at 1240, n.4.

2. § 1229b(d)(1) comprises an exhaustive definition that cannot be supplemented with extra categories of events.

Since Congress meant to replace the entire suspension regime, especially its abuses in the CPP context, it stands to reason that section 1229b(d)(1) was meant to comprise the entire solution, regarding the stop-time issue. That intent is reflected in the plain language of the statute. True—as this Court says—the statute does not explicitly exclude other "stop-time" events. *Mirelez-Valdez v. Ashcroft,* 349 F.3d at 218. But, when it comes to stop-time, section 1229b(d)(1) is

substantively designed in a manner that excludes all other possibilities. The phrase "whichever is earliest" is the strongest indication that no other stop-time events are envisioned.

In addition, the text of section 1229b(d)(1) does not make way for other categories of stop-time events. This is because, by its nature, it is meant a definitional approach to stop-time. It would thus be a prime example of judicial overreach to attempt by fiat to add completely different categories of events that stop-time.

Imagine, for example, if the BIA purported to add new categories of aggravated felonies to Section 1101(a)(43). Separation of powers would not stand for it. It is clear that, even though Section 1101(a)(43) does not say so, no additional aggravated felonies can be added by executive fiat. It is clear from the nature of the category; and the same is so with stop-time events. They are meant to be distinct, substantive categories, and new ones cannot simply be added.

IV. In the alternative, this case should be remanded for the BIA to consider the effect of *Niz-Chavez* on its decision.

Finally, Antony notes that the BIA has not yet had a chance to apply *Niz-Chavez* to this case; and yet, from the start of this motion to reopen, he has objected to the procedural sufficiency of the NTA.

(ROA.17.) *Niz-Chavez* makes clear that the NTA in the case was fatally flawed; not in compliance with the INA, and lacking in essential character of what an NTA should be. The case should therefore be remanded to the BIA for initial consideration of *Niz-Chavez* in application to his case. "A court of appeals 'is not generally empowered to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.' " *INS v. Ventura*, 537 U.S. 12, 16 (2002), (*quoting Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)). "Rather, 'the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.' " *Ventura, supra, at* 16,

Conclusion

For the reasons indicated above, OIL's arguments fail to defeat this Petition. Petitioner thus again respectfully asserts this Petition should be sustained, and the case remanded to the BIA for further proceedings consistent with the Court's opinion.

Date: September 2, 2021

Respectfully submitted,
s/ Birgit Almgren

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Certificate of Service

I hereby certify that on September 2, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served electronically.

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Certificate of Compliance

This petition contains **4,586** words (even including) the portions described in Rule 32(f)). Accordingly, the brief complies with the word limit set forth in Rule 32(a)(7)(B)

This brief also complies with Rules 32(a)(5) and 32(a)(6) because this brief uses Century Schoolbook, a proportionally spaced 14-point font.

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