No. 25-429

In the Supreme Court of the United States

PAMELA BONDI, PETITIONER

v.

MUK CHOI LAU

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent does not dispute that, for over 60 years, the government has paroled lawful permanent residents (LPRs) with pending criminal charges into the United States for purposes of prosecution. Respondent does not dispute that the decision below upends that practice by holding that the government cannot parole an LPR for purposes of prosecution unless it can prove at the border by clear and convincing evidence that he committed the offense. And while he quibbles over how to count the cases, respondent also does not dispute that the decision below entrenches a circuit conflict on the question presented and—given the difficulty of predicting venue in immigration proceedings—risks effectively applying nationwide. That disagreement carries significant consequences for the enforcement of our Nation's immigration laws and warrants this Court's review.

On the merits, respondent largely repeats the court of appeals' errors. He focuses on the discretionary deci-

sion made by the Department of Homeland Security (DHS) to parole him at the border rather than the removal order actually before the Court. He then seeks to import the clear-and-convincing evidentiary burden that undisputedly applies in removal proceedings to that parole decision and contends that, even though he was in fact eligible for parole, DHS could not prove his eligibility at the border by clear and convincing evidence. But the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, regards a returning LPR who "has committed" a disqualifying offense as "seeking an admission" and does not impose any burden of proof on DHS parole decisions at the border. 8 U.S.C. 1101(a)(13)(C)(v). Because respondent had committed his disqualifying offense both before his removal proceedings and before reentry, the immigration judge in the removal proceedings correctly found him inadmissible as charged.

Respondent's limited arguments against certiorari are unpersuasive. Although he concedes the existence of a circuit conflict, he minimizes the disagreement by suggesting that deference-based decisions predating *Loper Bright Enterprises* v. *Raimondo*, 603 U.S. 369 (2024), are nullities. But *Loper Bright* refutes that premise and, in any event, the Fifth Circuit's decision upholding an order of removal in analogous circumstances does not rely on agency deference and concededly conflicts with the decision below. Respondent also emphasizes that the government could use the deportability statute to try to remove him and other LPRs who commit crimes. But that statute is not coextensive with the inadmissibility statute and places a significantly higher burden of proof on the government. The decision below therefore materially disrupts the government's efforts to remove convicted criminals like respondent from the United States. The petition for a writ of certiorari should be granted.

A. The Decision Below Is Incorrect

With limited exceptions not relevant here, an alien's removability is determined in removal proceedings before an immigration judge. 8 U.S.C. 1229a(a)(1). Because of his previous parole at the border, respondent was not "considered to have been admitted" to the United States at the time of his removal proceedings. 8 U.S.C. 1101(a)(13)(B). And because he "ha[d] committed an offense identified in [8 U.S.C.] 1182(a)(2)," he was, at the time of those proceedings, "regarded as seeking an admission into the United States." 8 U.S.C. 1101(a)(13)(C)(v). The immigration judge therefore correctly applied the inadmissibility grounds to order respondent's removal from the United States. Pet. 10-12. Respondent's contrary argument depends on two fundamental errors.

First, although he disclaims doing so (Br. in Opp. 19), respondent incorrectly focuses on DHS's decision to parole him into the United States, rather than the removal order before the Court. See *id.* at 3, 14 (starting his analysis with the parole statute, 8 U.S.C. 1182(d)(5)(A)); *id.* at 19 ("DHS's parole decision cannot stand.").

Respondent is correct (Br. in Opp. 14-15, 18) that DHS must determine that an alien is "applying for admission" before granting him parole under 8 U.S.C. 1182(d)(5)(A). But it does not follow that respondent may collaterally attack that DHS decision in his removal proceedings before the immigration judge and the Board of Immigration Appeals (Board or BIA), as he seeks to do here. The parole decision and the removal decision are separate decisions made by separate agencies via separate processes. Indeed, the Board has held that it lacks authority to review DHS parole decisions. See *In re Arambula-Bravo*, 28 I. & N. Dec. 388,

394 (2021). In the context of this petition for review of respondent's removal order, the relevant time to analyze whether respondent "has committed" a disqualifying offense is in his removal proceedings, not when he was at the border. 8 U.S.C. 1101(a)(13)(C)(v); see Pet. 12-13; see also Br. in Opp. 18 (agreeing that Section 1101(a)(13)(C)(v) "focuses on the *present*" but disputing what counts as the present) (citation omitted).

Second, even if DHS's parole decision were subject to judicial review here, nothing in the INA requires the government to show that it possessed clear and convincing evidence of the offense *at the time of reentry*. Instead, the government can use any available evidence—including an intervening conviction—to carry that burden *in the removal proceedings*. Pet. 13-15.

Respondent never disputes the dispositive fact that he committed his offense *before* he reentered the United States and thus, at the time of reentry, "ha[d] committed an offense identified in section 1182(a)(2)" and was to "be regarded as seeking an admission into the United States." 8 U.S.C. 1101(a)(13)(C)(v). Respondent instead tries (Br. in Opp. 16-17) to transfer the government's burden to prove that fact by clear and convincing evidence from the removal proceedings (where it applies) to the border (where it does not). Again, nothing in the INA supports that maneuver. While the clear and convincing standard is a settled feature of *removal* proceedings, *id.* at 15-16, respondent offers no authority suggesting that DHS *parole* decisions at the border—which are made by non-lawyer immigration officers—are subject to that same standard.

The only time in the ordinary removal process when the government is obligated to "prove" anything, Br. in Opp. 17, is in the removal proceedings where an immigration judge can take and weigh evidence. Here, the

government proved that respondent "ha[d] committed" a disqualifying offense before reentry by offering his record of conviction—just as any litigant may use later-arising evidence to prove a fact about the state of the world as of an earlier date. Pet. 14-15. Even if "the government must *determine* whether a lawful permanent resident is treated as an applicant for admission[] before the non-citizen is paroled into the country," Br. in Opp. 20 (emphasis added), that does not mean that the government must *prove* that it made the correct decision by offering only the evidence that it already had.

Respondent also briefly cites (Br. in Opp. 17) this Court's dictum in *Vartelas* v. *Holder*, 566 U.S. 257, 275 n.11 (2012), that Section 1101(a)(13)(C)(v) might apply only to an alien who has been convicted of or has admitted to a disqualifying offense, not to an alien who has merely committed the offense. As we previously explained, see Pet. 14 n.*, that dictum was ill considered and contradicts the statutory text, which asks whether the alien "has committed" a covered offense. 8 U.S.C. 1101(a)(13)(C)(v). Respondent does not address that point and repeatedly uses (Br. in Opp. 2-4, 10-14, 17-18, 20-21, 28) the correct term "committed," suggesting that he is not relying on the *Vartelas* dictum. But even were a conviction required, respondent *was* convicted before his removal proceedings and would still be subject to removal on the correlative ground of inadmissibility. Pet. 10-12.

B. Respondent Acknowledges A Circuit Conflict

Respondent concedes (Br. in Opp. 9) a "circuit conflict" on the question presented, although he counts the cases as 2-1 in his favor rather than 3-1 in the government's.

Even if that math were correct, a 2-1 conflict would warrant review here given the significant operational disruption inflicted by the Second Circuit's rule. Pet. 16-17, 19-21. Respondent acknowledges (Br. in Opp. 28-29) that *Munoz* v. *Holder*, 755 F.3d 366 (5th Cir. 2014), is irreconcilable with the decision below, but claims (Br. in Opp. 30) that the Fifth Circuit is "likely" to reconsider given "the Second Circuit's powerful statutory analysis." Respondent's speculation is unsound. As explained (Pet. 10-17), the Second Circuit's reasoning is atextual and unpersuasive, imposing an artificial temporal limit on the evidence the government may use to prove that an LPR is seeking admission. There is no reason to think that the en banc Fifth Circuit will overrule circuit precedent finding the relevant provisions "unambiguous" and instead adopt the Second Circuit's erroneous view. *Munoz*, 755 F.3d at 370 n.5.

Respondent also undercounts the circuits rejecting his position. Pet. 17-19. Respondent acknowledges the Ninth Circuit's contrary decision in *Vazquez Romero* v. *Garland*, 999 F.3d 656 (2021). But he claims (Br. in Opp. 29) that, because that case deferred to the BIA under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984), the Ninth Circuit has "no position" on the question after *Loper Bright*, *supra*. But *Loper Bright* makes clear that it "do[es] not call into question prior cases that relied on the *Chevron* framework." 603 U.S. at 412. The Ninth Circuit thus recognizes that "the holdings of [its] prior cases in which *Chevron* deference was applied remain precedential." *Murillo-Chavez* v. *Bondi*, 128 F.4th 1076, 1087 (2025). Regardless, Judge Ikuta's opinion for the court in *Vazquez Romero* was not a rote application of *Chevron* deference. The Ninth Circuit carefully considered statutory text, structure, and historical practice before

"join[ing] the Fifth Circuit" in accepting the BIA's interpretation. *Vazquez Romero*, 999 F.3d at 668; see *id.* at 660, 664-666. That holding remains binding law in the Ninth Circuit and conflicts with the decision below.

The decision below also conflicts with the rule in the Third Circuit. As respondent recognizes (Br. in Opp. 27-28), that court takes an idiosyncratic approach whereby the government must establish at the border that an LPR is seeking admission but need do so only by probable cause, which can be shown by a pending criminal charge. *Doe* v. *Attorney Gen.*, 659 F.3d 266, 270 (2011). That position—which respondent does not embrace (see Br. in Opp. 30)—represents something of a middle ground between the decision below and the Fifth and Ninth Circuit's approach. But on these facts, the Third Circuit is best understood as aligned with the latter camp. Because respondent had a pending charge at the time of reentry, he would have been subject to removal on the ground of inadmissibility in the Third Circuit.

Respondent has no evident basis for predicting (Br. in Opp. 32) that the Third Circuit "will likely reconsider" its position in light of the BIA's 2011 holding that the clear-and-convincing-evidence standard applies in removal proceedings to the question whether an LPR is seeking an admission. In 2018, the government identified the Board's new precedent and urged the Third Circuit to change course. *Mensah* v. *Attorney Gen.*, 747 Fed. Appx. 904, 909 (2018). The Third Circuit rejected that request, holding that its earlier precedent remained "binding." *Ibid.* The circuit conflict is thus firmly entrenched and unlikely to resolve itself absent this Court's intervention.

C. The Circuit Conflict Warrants Review Now

As a practical matter, the Second Circuit's novel rule is unworkable for line immigration officers at the border, and it impairs a critical tool in the government's efforts to remove convicted criminals like respondent from the United States. Pet. 15-17, 19-21. Respondent does not dispute that, due to the difficulty of predicting venue in immigration proceedings, the Second Circuit's outlier rule threatens to affect decisions by immigration officers nationwide. Pet. 20-21.

Respondent minimizes (Br. in Opp. 20, 25) those practical effects on the ground that immigration officers can readily check for the existence of a conviction. But that effectively concedes that the decision below disables the government from paroling LPRs *pre*-conviction for purposes of prosecution—a practice that dates back over 60 years and benefits LPRs and the government alike, but which respondent never acknowledges. Pet. 16-17, 21. The court of appeals' decision to upend over half a century of immigration law—without the benefit of oral argument—warrants this Court's intervention.

Respondent dismisses (Br. in Opp. 24) as "rank speculation" DHS's view that the decision below poses a significant challenge for its operations because DHS does not specifically track the number of unique LPRs who are paroled for purposes of prosecution each year. See Pet. 19. But until the decision below, that was not a category of aliens DHS needed to tally. Respondent speculates (Br. in Opp. 23) that the number of cases will be small because courts rarely permit aliens with pending charges to leave the country. But as the reported cases illustrate, LPRs often leave the country before arrest and are encountered only upon their return. *E.g.*, *Vazquez Romero*, 999 F.3d at 661; *Munoz*, 755 F.3d at

368; *Doe*, 659 F.3d at 268; see also *Mensah*, 747 Fed. Appx. at 905 (LPR on bail was ordered not to leave the United States but did so regardless). Even if the number of LPRs with pending charges traveling abroad is low as a relative matter, the large number of LPRs reentering the country daily makes the question presented undoubtedly consequential in absolute terms.

Respondent emphasizes (Br. in Opp. 24, 32) that the government has other authorities to seek removal, namely the grounds of deportability in 8 U.S.C. 1227. But as respondent recognizes (Br. in Opp. 6), the grounds for inadmissibility and deportability are distinct, so access to the inadmissibility statute is crucial in many cases. See Pet. 19-20. Respondent notes (Br. in Opp. 5) that his offense—a crime involving moral turpitude within five years of admission—happens to fall within both statutes. 8 U.S.C. 1182(a)(2)(A)(i); 8 U.S.C. 1227(a)(2)(A)(i). But for LPRs whose crime of moral turpitude occurs *outside* of five years, only the inadmissibility statute would apply. See *ibid.*

Moreover, the question presented affects every criminal offense listed in Section 1182(a)(2), not just crimes involving moral turpitude. And there are numerous differences between the crimes that render an alien inadmissible under Section 1182(a)(2) and those that render an alien deportable under Section 1227(a)(2). See *Judulang* v. *Holder*, 565 U.S. 42, 46 (2011) (noting that the lists are "sometimes overlapping and sometimes divergent"). For example, only the inadmissibility statute expressly covers prostitution and money laundering. 8 U.S.C. 1182(a)(2)(D) and (I); see 8 U.S.C. 1227(a)(2). And for drug-trafficking offenses, the deportability statute requires a conviction while the inadmissibility statute demands only "reason to believe" that the alien is a drug trafficker. 8 U.S.C. 1182(a)(2)(C); 8 U.S.C.

1227(a)(2)(B)(i). Respondent's suggestion (Br. in Opp. 22) that the deportability statute is categorically broader is simply incorrect.

The two statutes also carry different burdens of proof, with aliens generally required to prove admissibility "clearly and beyond doubt" and the government required to prove deportability by "clear and convincing evidence." 8 U.S.C. 1229a(c)(2)(A) and (3)(A). Respondent notes (Br. in Opp. 24) that the threshold question of which statute applies also carries a clear and convincing standard. But once the choice is made, the different burdens apply, making the initial choice critical. That is presumably why respondent has fought so hard to avoid being placed on the inadmissibility track, even though he now concedes (*id.* at 33) that he might also be deportable.

Respondent contends (Br. in Opp. 9, 12) that the question presented is not "outcome-determinative" since the Second Circuit did not reach his argument that New Jersey trademark counterfeiting is not a crime involving moral turpitude because it supposedly does not require "wrongful intent." The Board and the immigration judge readily rejected that argument given the plain language of the New Jersey statute, which requires "intent to deceive or defraud." Pet. App. 18a (quoting N.J. Stat. Ann. § 2C:21-32(c) (West 2012)) (emphasis omitted); see *id.* at 31a. Regardless, this is "a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Consistent with its usual practice, this Court could grant certiorari, reverse the Second Circuit's erroneous ruling that respondent is not subject to removal on the ground of inadmissibility, and remand for the Second Circuit to address any other preserved challenges to respondent's removal order.

Finally, respondent confusingly suggests (Br. in Opp. 31-33) that the government is tacitly challenging BIA precedent requiring it to prove by clear and convincing evidence in removal proceedings that an LPR is seeking admission, although he acknowledges (*id.* at 31) that the petition does not "say[] so." To confirm: The government is not challenging the clear and convincing standard. This case is about *when* the government must carry that burden. Because the Second Circuit created a circuit conflict and disrupted immigration enforcement by incorrectly requiring the government to carry that burden at the border rather than in removal proceedings, this Court's review is warranted.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General

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