No. 25-429

In the Supreme Court of the United States

PAMELA BONDI, ATTORNEY GENERAL, PETITIONER

v.

MUK CHOI LAU

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

BRIEF IN OPPOSITION

Shay Dvoretzky
Counsel of Record
Parker Rider-Longmaid
Hanaa Khan
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave. NW
Washington, DC 20005
202-371-7000
shay.dvoretzky@skadden.com

Mike Pan Gao
LAW OFFICES OF MIKE P. GAO, P.C.,
3644 Main Street
3rd Floor
Flushing, NY 11354

Raza Rasheed
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
2000 Avenue of the Stars,
Ste. 200N
Los Angeles, CA 90067

Counsel for Respondent

QUESTION PRESENTED

The Immigration and Nationality Act lists criteria that render non-citizens "inadmissible." 8 U.S.C. § 1182(a). Those inadmissibility criteria apply to non-citizens who have not already been "admitted to the United States," and are thus seeking admission to the country. *Id.* In contrast, an "alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States," and is thus not subject to § 1182, unless one of six statutory exceptions applies. 8 U.S.C. § 1101(a)(13)(C)(i)–(vi). The Board of Immigration Appeals has held that the government bears the burden of proving by clear and convincing evidence an exception making a lawful permanent resident inadmissible, *see In re Rivens*, 25 I. & N. Dec. 623, 625 (B.I.A. 2011), and the United States has never challenged that conclusion at any stage of these proceedings.

The question presented is whether, to treat a lawful permanent resident as inadmissible under 8 U.S.C. § 1182(a), the government must prove an exception (by clear and convincing evidence) at the time the lawful permanent resident reenters the country after a trip abroad, or whether the government can allow the lawful permanent resident into the country and decide later that he was inadmissible all along.

PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

The parties in the court of appeals are identified in the case caption. There are no related proceedings in state or federal court, or in this Court.

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INTRODUCTION

This case doesn't warrant review. The court of appeals reached the correct result based on straightforward statutory text. The question presented isn't important because it doesn't implicate meaningful stakes for the government. The purported split is shallower than the government claims—with two decisions decided before *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), including one expressly deferring under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)—and the lower courts will likely resolve it without this Court's intervention. What's more, this case is a bad vehicle for addressing the question presented anyway. The Court should deny review.

The petition arises from the government's attempts to remove Muk Choi Lau—a lawful permanent resident—from the United States. In 2012, Mr. Lau was charged with third-degree trademark counterfeiting in New Jersey. While the charges were pending, he left and reentered the country. Mr. Lau later pled guilty to the charged offense and received a sentence of two years' probation.

Ordinarily, lawful permanent residents are considered "admitted" to the country and cannot be treated as inadmissible under 8 U.S.C. § 1182 when they return after travel abroad. *See* 8 U.S.C. § 1101(a)(13)(C). Instead, if the government wishes to deport a green card holder based on a criminal conviction, it must generally satisfy the criteria for deporting a person who has already been "admitted to the United States" under 8 U.S.C. § 1227. That rule is subject to several exceptions. Among them, a lawful permanent resident can be treated as someone

seeking admission to the country, and thus subject to an inadmissibility determination under § 1182, if he has committed a crime involving moral turpitude. 8 U.S.C. §§ 1101(a)(13)(C)(v); 1182(a)(2)(A).

The government sought to remove Mr. Lau under § 1182, arguing that his guilty plea showed that, at the time he reentered the country, he had committed a crime involving moral turpitude. In the government's telling, Mr. Lau was thus not admitted when he returned home, but was instead paroled into the country for criminal prosecution, because his crime involving moral turpitude made him an applicant seeking admission subject to § 1182's inadmissibility criteria. Mr. Lau objected, explaining (among other things) that to parole him into the country pending an inadmissibility determination, the government needed to prove at the time of reentry that he had committed a crime involving moral turpitude. The government did not and could not meet that burden, Mr. Lau explained, because he hadn't been convicted of a crime when he reentered the country, and thus couldn't be considered an applicant for admission.

The Second Circuit agreed with Mr. Lau, holding that based on the statute's plain language, if the government wants to treat a lawful permanent resident as an applicant for admission and parole him into the country, it must determine that the lawful permanent resident committed a crime involving moral turpitude (or else satisfies some other statutory exception) at the time he reenters the country. Pet. App. 8a-15a. The court then applied uncontested BIA precedent holding that the government must rely on clear and convincing evidence for that determination. *Id.* Because the government had no evidence that Mr. Lau had committed a crime involving moral turpitude when he

reentered the country—much less clear and convincing evidence—the court held that the government cannot seek to remove Mr. Lau as inadmissible under § 1182, but must instead attempt to deport him under § 1227. *Id.*

That decision is correct and does not warrant this Court's review. The question presented is not important, because the government has ample authority to deport lawful permanent residents after it actually proves that they have committed a crime involving moral turpitude. And the claimed circuit split, which involves no conflict with any decision after *Loper Bright*, is likely to disappear without this Court's intervention given its recent guidance in *Loper Bright*.

1. To start, the decision below is correct. Under the Immigration and Nationality Act's (INA) parole provision, 8 U.S.C. § 1182(d)(5)(A), the government cannot parole a non-citizen unless he is "applying for admission to the United States." But an "alien lawfully admitted for permanent residence in the United States"—like Mr. Lau—"shall not be regarded as seeking an admission into the United States," unless one of six statutory exceptions applies. 8 U.S.C. § 1101(a)(13)(C). That means the government's theory that it can parole a returning green card holder into the country, and only later figure out whether he has committed a crime involving moral turpitude, doesn't work. The Department of Homeland Security (DHS) lacks authority to parole a lawful permanent resident unless it determines that he has committed an offense (or some other circumstance) establishing that he should be treated as if he were seeking admission to the country. The Second Circuit thus correctly held that the INA requires the government to establish at the time of reentry that a lawful permanent resident

is subject to § 1182 as a non-citizen seeking admission to the country.

Moreover, under BIA precedent that the government has never challenged in this case, the government must prove a § 1101(a)(13)(C) exception by clear and convincing evidence. *See In re Rivens*, 25 I. & N. Dec. 623, 625 (B.I.A. 2011). No one thinks that a pending criminal charge is clear and convincing evidence that the defendant committed the charged crime. To the contrary, criminal charges are not evidence at all, and a defendant is innocent until proven guilty. *See, e.g.*, *Nelson v. Colorado*, 581 U.S. 128, 135-36 (2017). So the government failed to prove that Mr. Lau should be treated as seeking admission when he reentered the country. Mr. Lau thus isn't subject to removal under § 1182. If the government wants to try to remove him, it must instead proceed under § 1227—the provision governing deportation of persons already "admitted to the United States." 8 U.S.C. § 1227(a). The government's counterarguments ignore the key statutory text, and rely on strawmanning Mr. Lau's arguments and raising unsubstantiated policy concerns that cannot overcome the INA's clear text.

2. The question presented doesn't otherwise merit this Court's review. For one thing, the question isn't important, as the government's complaints about invoking other ample authority make clear. Indeed, § 1227 gives the government substantial authority to remove green card holders who have committed crimes involving moral turpitude, *see* 8 U.S.C. § 1227(a)(2)(A)(i)(I), so the Second Circuit's rule will not hinder the government's efforts to remove criminal non-citizens. There's no reason for the Court to expend its scarce resources to decide whether the government can take two roads to get to the same place.

For another thing, there is no certworthy circuit conflict. The government claims the circuits have split 3–1, with the majority adopting its reading of the INA. In reality, the split is 2–1 against the government, with the Second and Third Circuits holding that the government must determine whether a green card holder can be treated as applying for admission before paroling him, and only the Fifth Circuit holding that the government can parole first, and sort out whether it had the power to do so later. *Compare* Pet. App. 8a-15a (decision below), *and Doe v. Attorney General*, 659 F.3d 266 (3d Cir. 2011), *with Munoz v. Holder*, 755 F.3d 366 (5th Cir. 2014). There is every reason to believe that the Fifth Circuit will abandon its pre–*Loper Bright* outlier rule when confronted with the Second Circuit's powerful textual analysis. The best course is to let the split dissipate on its own.

Nor is there any merit to the government's insinuation that the Court should decide what burden of proof DHS must meet to prove a § 1101(a)(13)(C) exception. There is no circuit conflict on that question. And the government didn't challenge below the BIA precedent requiring clear and convincing evidence. The issue isn't preserved, and even now the petition doesn't argue that the BIA's precedent is wrong.

3. Finally, this case is a bad vehicle to decide the question presented. If the government can't remove Mr. Lau under § 1182, it will invoke § 1227, which also allows removal for crimes involving moral turpitude. Whether Mr. Lau ultimately remains in the country will thus turn on whether his offense is a crime involving moral turpitude, not what the Court might say about the question presented. And since the government apparently thinks the Court should determine

its burden of proof, the Court should wait for a case where the government has preserved that issue.

The Court should deny the petition.

STATEMENT

A. Legal background

1. The INA "governs both the exclusion of aliens from admission to this country and the deportation of aliens previously admitted." *Judulang v. Holder*, 565 U.S. 42, 45 (2011). But the "statutory bases" under the INA "for excluding and deporting aliens have always varied." *Id* at 46. One provision in the INA, 8 U.S.C. § 1182, sets forth the grounds that make a non-citizen "inadmissible." *Judulang*, 565 U.S. at 46. A different provision, 8 U.S.C. § 1227, governs deportation of non-citizens who are already in the country. *Judulang*, 565 U.S. at 46. Although the criteria for inadmissibility and deportation often overlap, there are differences. *Id.* And while a non-citizen generally bears the burden to prove admissibility under § 1182, the government generally bears the burden to prove deportability under § 1227.

2. Determining whether § 1182 or § 1227 applies turns on the concept of "admission." The INA defines "admission" as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A). A non-citizen seeking admission into the country is subject to § 1182, which sets forth the categories of persons who "are ineligible to receive visas and ineligible to be admitted to the United States." *Id.* § 1182(a). By contrast, § 1227 governs removal of non-citizens who have already been "admitted to the United States." *Id.* § 1227(a).

Lawful permanent residents—*i.e.*, green card holders—have already been admitted to the United States. So the INA specifies that when a lawful permanent resident travels abroad and then returns home, he "shall not be regarded as seeking an admission into the United States for purposes of the immigration laws." *Id.* § 1101(a)(13)(C). Lawful permanent residents thus are not generally subject to an inadmissibility determination under § 1182 when they reenter the country. Instead, if there is a reason to remove them, the government generally must proceed under § 1227.

That general rule is subject to six exceptions. *See Vartelas v. Holder*, 566 U.S. 257, 263 (2012). A lawful permanent resident is considered to be seeking admission, and thus "subject to admission procedures, and, potentially, to removal from the United States on grounds of inadmissibility," *id.*, when he: (1) "has abandoned or relinquished" his green card; (2) "has been absent from the United States for a continuous period in excess of 180 days"; (3) "has engaged in illegal activity after having departed the United States"; (4) has left the country while removal proceedings are pending; (5) "has committed" one of several listed offenses, including some crimes "involving moral turpitude"; or (6) "is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer." 8 U.S.C. §§ 1101(a)(13)(C)(i)–(vi), 1182(a)(2)(A). The Board of Immigration Appeals has determined "that [DHS] bears the burden of proving by clear and convincing evidence that a returning lawful permanent resident is to be regarded as seeking an admission." *Rivens*, 25 I. & N. Dec. at 625.

3. When a non-citizen arrives at the border, the INA gives DHS discretion to "parole" the non-citizen "into the United States temporarily under such conditions as" DHS "may prescribe." 8 U.S.C. § 1182(d)(5)(A). But this parole authority extends only to "alien[s] applying for admission to the United States"—parole "shall not be regarded as an admission of the alien." *Id.* Lawful permanent residents are thus not subject to parole unless one of the six exceptions in § 1101(a)(13)(C) applies.

B. Factual and procedural background

1. Mr. Lau is a Chinese citizen who became a lawful permanent resident of the United States in 2007. Pet. App. 4a. On May 7, 2012, he "was charged with third-degree trademark counterfeiting in violation of New Jersey law." *Id.* "While awaiting trial, he temporarily left the United States." *Id.* When he returned, an immigration officer in New York "declined to admit him to the United States and instead paroled him for deferred inspection pursuant to 8 U.S.C. § 1182(d)(5)(A)." *Id.* Mr. Lau subsequently pleaded guilty to the counterfeiting charge and was sentenced to two years' probation. *Id.*

2. DHS then initiated removal proceedings, asserting that Mr. Lau was deportable under 8 U.S.C. § 1182(a)(2)(A)(i)(I) because he had purportedly committed a crime involving moral turpitude. *Id.* During his removal proceedings, Mr. Lau argued, among other things, that (1) he was not subject to inadmissibility under § 1182 because he is lawful permanent resident, had not been convicted of any crime when he reentered the country, and thus was not a non-citizen seeking admission subject to § 1182; and (2) his counterfeiting offense doesn't count as a crime involving

moral turpitude because it didn't require New Jersey authorities to prove that he had wrongful intent. Pet. App. 18a-24a. The immigration judge and Board of Immigration Appeals rejected Mr. Lau's arguments and ordered him removed from the country. *Id.*

3. The Second Circuit granted Mr. Lau's petition for review. The court held that the INA's plain text required DHS to prove, at the time Mr. Lau reentered the country, that Mr. Lau had committed a crime involving moral turpitude, and should thus have been treated as a non-citizen applying for admission. Pet. App. 8a-15a. Applying BIA precedent that the government never disputed, the court held that the government had the burden of proving by clear and convincing evidence that Mr. Lau was subject a § 1101(a)(13)(C) exception. *Id.* Because Mr. Lau had not been convicted of any crime at the time he reentered the country, the Second Circuit held that he was not subject to inadmissibility under § 1182, and DHS needed to proceed under § 1227 if it wanted to try to deport him. *Id.* The Second Circuit didn't reach Mr. Lau's alternate challenges to his deportation order, including that his offense of conviction doesn't count as a crime involving moral turpitude. Pet. App. 8a.

4. The government sought rehearing en banc, which the court of appeals denied with no recorded dissents. Pet. App. 41a.

REASONS FOR DENYING THE PETITION

The Court should deny the petition. The court of appeals' decision correctly applies clear statutory text. But even if it didn't, the question presented doesn't merit the Court's review because it has few practical consequences and the shallow circuit conflict—with only a single, pre–*Loper Bright* decision—will likely

dissolve on its own. And this case is a poor vehicle because the Court's answer to the question presented wouldn't decide whether Mr. Lau can remain in the United States anyway.

I. The Second Circuit's decision is correct. Section 1182's grounds for inadmissibility apply to non-citizens who are seeking admission into the United States, not those who have already been admitted. 8 U.S.C. § 1182(a). A lawful permanent resident returning from abroad "shall not be regarded as seeking an admission into the United States," unless one of six exceptions applies, including that the non-citizen has committed a crime involving moral turpitude. *Id.* §§ 1101(a)(13)(C); 1182(a)(2)(A). The INA makes clear that the DHS must determine whether a non-citizen meets one of those exceptions at the time of reentry. *See id.* § 1182(d)(5)(A). The government's alternative to admitting a lawful permanent resident is paroling them into the country while reserving the right to determine inadmissibility later. *See id.* But DHS can parole a non-citizen only if he is "applying for admission," *id.*—meaning it must determine then and there whether the lawful permanent resident should "be regarded as seeking an admission into the United States," *id.* § 1101(a)(13)(C), before deciding whether to admit or parole him. And for more than a decade, the Department of Justice has conceded—based on longstanding immigration law principles—that it must prove by clear and convincing evidence that a lawful permanent resident should be regarded as seeking admission. *Rivens*, 25 I. & N. Dec. at 625.

The Second Circuit correctly applied those principles to hold that Mr. Lau was not seeking admission when he reentered the United States. At the time Mr. Lau reentered, he had not been convicted of any crime

and did not admit to one at the border. DHS thus did not have clear and convincing evidence that Mr. Lau had committed a crime involving moral turpitude. Because DHS couldn't meet its burden to prove an exception, the default rule applies and Mr. Lau must "not be regarded as seeking an admission into the United States" subject to § 1182's grounds for inadmissibility. 8 U.S.C. § 1101(a)(13)(C). The government's counterarguments fail to grapple with the key statutory text, mischaracterize Mr. Lau's argument as a challenge to an immigration officer's discretionary parole decision, and resort to overblown policy notions at odds with the INA's plain text.

II. The question presented doesn't warrant review for any other reason, either. The question isn't important because the government still has ample authority to deport lawful permanent residents who commit crimes involving moral turpitude under 8 U.S.C. § 1227 even in cases where it cannot use § 1182. And while the government claims there is a 3–1 circuit split favoring its interpretation of the INA, there is at best a 2–1 conflict against the government, with a majority of circuits holding that the government must determine at the time of reentry whether to treat a lawful permanent resident as seeking admission. That split will likely resolve itself with further percolation, since there is every reason to believe the Fifth Circuit will revisit its pre–*Loper Bright* outlier position in light of the Second Circuit's compelling analysis of the INA's plain statutory text.

Moreover, while the government tries to smuggle a second issue into its question presented—what burden the government must meet to establish that a lawful permanent resident is seeking admission—that question isn't certworthy either. There is no circuit

split on that question. And the government didn't challenge BIA precedent holding that the government must prove an exception by clear and convincing evidence in the proceedings below. The government thus hasn't even preserved the issue for the Court's review.

III. Many of these same considerations make this case a bad vehicle for resolving the question presented. For starters, the question presented isn't outcome-determinative. Whether the government can remove Mr. Lau doesn't turn on the answer to the question presented. Instead, it will depend on how the lower courts resolve Mr. Lau's arguments that his offense doesn't count as a crime involving moral turpitude. That's because no matter how the government proceeds—whether because it says Mr. Lau is inadmissible under § 1182 or because it says he is deportable under § 1227—Mr. Lau needs to have actually committed a crime involving moral turpitude. That's the question that matters, and the government hasn't asked the Court to resolve it. Moreover, the government seems to think that the Court should review what burden it must meet to treat a lawful permanent resident as seeking admission to the United States. But since the government never challenged the clear and convincing evidence standard below, the Court should await a case where the government has actually preserved that issue.

I. The Second Circuit correctly held that Mr. Lau was not removable under 8 U.S.C. § 1182 because he was not an "alien applying for admission" when he returned to the United States.

The court of appeals correctly held that the government has the burden to prove, at the time of

reentry and by clear and convincing evidence, that a lawful permanent resident should be treated as seeking admission to the United States. The government does not dispute that when Mr. Lau reentered the United States, the government lacked clear and convincing evidence that he had committed a crime involving moral turpitude. The Second Circuit thus correctly determined that Mr. Lau isn't removable under § 1182, meaning the government must attempt to remove him § 1227. Pet. App. 8a-15a.

A. Under the INA, lawful permanent residents like Mr. Lau aren't considered to be seeking admission into the United States unless the government can prove a statutory exception at the time of reentry by clear and convincing evidence.

The INA's plain text makes clear that lawful permanent residents aren't subject to removal under § 1182 unless the government proves a statutory exception at the time of reentry. And following blackletter immigration law principles, the Department of Justice has long conceded that the government must prove a statutory exception by clear and convincing evidence.

1. The INA uses separate standards for "the exclusion of aliens from admission to this country and the deportation of aliens previously admitted." *Jadulang*, 565 U.S. at 45; *see supra* pp. 6-8. The INA defines "admission" and "admitted" as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A). Section 1182 governs inadmissibility of non-citizens seeking admission to the United

States. *Judulang*, 565 U.S. at 46; 8 U.S.C. § 1182. And Section 1227 governs deportation of non-citizens who have already been admitted. *Judulang*, 565 U.S. at 46; 8 U.S.C. § 1227.

The government sought to exclude Mr. Lau as inadmissible under § 1182, so the relevant question is whether Mr. Lau was seeking admission when he returned to the United States. The INA addresses that exact question. The statute provides that an "alien lawfully admitted for permanent residence in the United States"—like Mr. Lau—"shall not be regarded as seeking an admission into the United States," unless one of six exceptions applies. 8 U.S.C. § 1101(a)(13)(C). The exception at issue here provides that a lawful permanent resident is considered to be seeking admission if he "has committed" one of several listed offenses, including a "crime involving moral turpitude." *Id.* §§ 1101(a)(13)(C)(v), 1182(a)(2)(A).

2. The INA makes clear that the government must prove that a lawful permanent resident is subject to a § 1101(a)(13)(C) exception at the time he tries to reenter the United States.

a. When DHS suspects that a non-citizen is inadmissible, the INA gives it discretion to "parole" the non-citizen "into the United States temporarily under such conditions as" DHS "may prescribe." *Id.* § 1182(d)(5)(A). But that parole authority extends only to "alien[s] applying for admission to the United States." *Id.* A lawful permanent resident, in contrast, "shall not be regarded as seeking an admission into the United States," unless one of the statutory exceptions applies. *Id.* § 1101(a)(13)(C).

The INA thus contemplates that DHS must determine whether a § 1101(a)(13)(C) exception applies—

and the lawful permanent resident is thus "applying for admission into the United States"—before DHS paroles him into the country. If DHS can't make that determination, it cannot find the lawful permanent resident inadmissible under § 1182 because he isn't a non-citizen seeking admission. The government must then rely on § 1227 if it wishes to remove the non-citizen after admission.

b. Another textual clue reinforces the point. The Court has "frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach," and noted that "that the present tense generally does not include the past." *Carr v. United States*, 560 U.S. 438, 448 (2010). One of § 1101(a)(13)(C)'s exceptions allows DHS to treat a returning green card holder as an applicant for admission if he "*is attempting* to enter at a time or place other than as designated by immigration officers." *Id.* § 1101(a)(13)(C)(vi) (emphasis added). On its face, that language contemplates that DHS will determine in the present whether the lawful permanent resident "is attempting to enter" at an inappropriate place at the time of entry. That is yet more evidence that the INA expects DHS to determine whether a § 1101(a)(13)(C) exception applies at the time the green card holder seeks reentry.

3. Although the INA doesn't specify what standard the government must meet to prove a § 1101(a)(13)(C) exception at the time a lawful permanent resident seeks reentry, the answer to that question is equally clear. This Court has long held that as a background principle of immigration law, non-citizens should not be removed from the country unless the government provides "clear, unequivocal, and convincing evidence that the facts alleged as grounds for [removability] are true." *Woodby v. INS*,

385 U.S. 276, 286 (1966). That principle has historically applied "when the alien is a permanent resident." *Landon v. Plasencia*, 459 U.S. 21, 35 (1982). Because the INA doesn't expressly depart from that historical practice, the Board of Immigration appeals—an agency under the Department of Justice—has repeatedly held "that the DHS bears the burden of proving by clear and convincing evidence that a returning lawful permanent resident is to be regarded as seeking an admission." *Rivens*, 25 I. & N. Dec. at 625; *In re Valenzuela-Felix*, 26 I. & N. Dec. 53, 54 (B.I.A. 2012) (same); *see also In re Huang*, 19 I. & N. Dec. 749, 754 (B.I.A. 1988). Although those decisions are subject to administrative review within the Department of Justice, 8 C.F.R. § 1003.1(d)(1)(i), 1003.1(h), they have never been challenged or overruled. The BIA applied the clear and convincing evidence standard in this case, and the government did not challenge that burden either during Mr. Lau's removal proceedings, or before the Second Circuit.

In sum, lawful permanent residents cannot be removed under § 1182 unless a statutory exception applies. The government must determine whether an exception applies at the time the lawful permanent resident attempts to reenter the country. And the government must prove that exception by clear and convincing evidence.

B. The government didn't have clear and convincing evidence of a § 1101(a)(13)(C) exception at the time Mr. Lau returned to the United States.

The government didn't prove by clear and convincing evidence at the time Mr. Lau reentered the country that a § 1101(a)(13)(C) exception applied. The

exception the government relied on below allows DHS to treat a lawful permanent resident as seeking admission to the United States if the non-citizen "has committed an offense identified in section 1182(a)(2)," which makes "inadmissible" "any alien convicted of, or who admits having committed," most "crime[s] involving moral turpitude." 8 U.S.C. §§ 1101(a)(13)(C)(v), 1182(a)(2)(A). The "straightforward reading" of the exception is that it applies "to a lawful permanent resident who has been convicted of" a crime involving moral turpitude "(or admits to one)." *Vartelas*, 566 U.S. at 275 n.11.

When Mr. Lau reentered the United States, he hadn't been convicted of any offense, much less a crime involving moral turpitude. And he did not admit to committing such a crime before entry. Indeed, at the time Mr. Lau reentered the country, DHS knew only that Mr. Lau had been charged with trademark counterfeiting in New Jersey, an offense for which he was presumed innocent. A pending criminal charge is not evidence, much less clear and convincing evidence, that the defendant has committed the charged offense. *See, e.g.*, *Nelson*, 581 U.S. at 135-36. Unsurprisingly, the government doesn't even try to argue otherwise.

Because the government did not (and could not) prove at the time Mr. Lau reentered the country that he committed a crime involving moral turpitude, DHS could neither treat him as applying for admission under § 1182 nor parole him into the country. If the government wants to remove Mr. Lau, it must try invoking the grounds for removal of admitted persons specified in § 1227.

C. The government's counterarguments lack merit.

The government offers several justifications for its position that DHS can parole a lawful permanent resident charged with a crime into the country, and then figure out later whether he was seeking admission and was thus subject to § 1182. None is persuasive.

1. The government first makes an argument from verb tense, noting that the INA treats a lawful permanent resident who "has committed" a crime involving moral turpitude as seeking admission. 8 U.S.C. §§ 1101(a)(13)(C)(v), 1182(a)(2)(A). Because "has committed" "is in the present-perfect tense, 'which by definition focuses on the *present*,'" the government argues that Congress must have intended for the exception to be assessed based the factual record that exists when an "immigration judge" is "resolving the charges of removal." Pet. 11. But that argument assumes its own conclusion—that DHS can parole the lawful permanent resident into the country and then sort out whether he was seeking admission later in immigration court proceedings. To the contrary, the INA specifies that "DHS must determine whether an LPR is an applicant for admission as a threshold matter *before* it is authorized to parole (rather than admit) that individual." Pet. App. 14a; *supra* pp. 14-15. So the statute's use of present tense verbs cuts directly against the government. It just means that DHS has to assess the exception based on the facts existing at the time the lawful permanent resident seeks reentry. It doesn't allow the government to put off figuring out whether DHS was allowed to parole the lawful permanent resident until after it has already paroled him.

2. a. The government contends (Pet. 12-13) that the Second Circuit's decision amounted to an improper attempt to review DHS's discretionary decision to parole Mr. Lau into the country. That makes no sense. Mr. Lau didn't challenge a discretionary parole decision. Rather, he challenged the government's decision to classify him as an applicant for admission to the United States subject to removal under § 1182's criteria for inadmissibility. The INA gave the Second Circuit jurisdiction to review that "question[] of law." 8 U.S.C. § 1252(a)(1), (a)(2)(D). And because an error of law is an abuse of discretion, *see, e.g.*, *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 232 (2020), DHS's parole decision cannot stand.

b. Relatedly, the government contends that "as a matter of historical fact," the immigration officer paroled Mr. Lau into the United States, and so the Court must now treat him as an applicant for admission even if the immigration officer lacked authority to parole him. Pet. 11. That contention likewise lacks merit. The relevant "historical fact" is that Mr. Lau did, in fact, reenter the United States. Whether that reentry was admission or parole is a legal question that turns on whether the immigration officer had authority to parole Mr. Lau into the country. The officer had no such authority because immigration officers can parole only non-citizens seeking admission, and lawful permanent residents like Mr. Lau "shall not be regarded as seeking an admission into the United States." 8 U.S.C. § 1101(a)(13)(C). An immigration officer can't exercise parole authority Congress never gave her.

3. The government argues that "[n]othing in the parole statute or any other provision of the INA limits the government, in meeting its burden of proof in the

removal proceedings, to evidence that it possessed on the date of the LPR's reentry." Pet. 14. But as explained, the INA specifies *when* 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. *Supra* pp. 14-15. The government doesn't respond to this argument—the core of the Second Circuit's reasoning—presumably because it has no response.

4. Unable to find support for its position in the INA's text, the government appeals to its view of good policy. The government claims (Pet. 15-17) that it can't be required to have clear and convincing evidence that a lawful permanent resident meets a § 1101(a)(13)(C) exception at the time of reentry because immigration officers lack the means to determine whether a non-citizen charged with a crime actually committed the offense. But as this Court has repeated too many times to count, policy arguments can't overcome clear statutory text. *See, e.g.*, *United States ex rel. Schutte v. SuperValu Inc.*, 598 U.S. 739, 757-758 (2023).

In any event, the government's concerns are overblown. "Ordinarily, to determine whether there is clear and convincing evidence that an alien has committed a qualifying crime, the immigration officer at the border would check the alien's records for a conviction." *Vartelas*, 566 U.S. at 275. If a lawful permanent resident has a conviction that satisfies a § 1101(a)(13)(C) exception, or admits to such a crime at the border, that will be clear and convincing evidence that he should be treated as seeking admission. If he doesn't, that just means the government can't deny him admission or parole him under § 1182. The government can still try to establish any of the many

grounds for removal applicable to non-citizens who have been admitted to the United States in § 1227. *Supra* pp. 6-8.

II. The question presented doesn't warrant the Court's review for any other reason, either.

The question presented doesn't merit review. The question isn't important, because the government has ample authority to remove non-citizens on the grounds it invokes here—commission of crimes involving moral turpitude—no matter what the Court might decide. The claimed split in fact goes against the government, with just one outlier, pre–*Loper Bright* decision supporting its position. And the government failed to preserve the burden question it seems to want, but is tellingly not asking, the Court to review.

A. The question presented is not important.

1. The INA gives the government ample authority to deport lawful permanent residents who have committed crimes involving moral turpitude.

The question presented doesn't meaningfully affect the government's ability to remove non-citizens who have committed crimes involving moral turpitude, and thus doesn't warrant spending this Court's scarce time and resources. The upshot of the petition is that the government wants to remove Mr. Lau under § 1182 because it thinks his conviction for trademark counterfeiting is a crime involving moral turpitude. As the Second Circuit correctly noted, however, § 1227 "'provides that any alien who 'is convicted of a crime involving moral turpitude committed within five years … after the date of admission' is deportable." Pet. App. 14a (quoting 8 U.S.C. § 1227(a)(2)(A)(i)(I)). So the government has

considerable authority to remove lawful permanent residents who commit crimes involving moral turpitude no matter how the Court might decide the question presented. If the government loses, it just has to use § 1227 rather than § 1182.

If anything, § 1227 gives the government *more* removal authority than § 1182. Under § 1182, the government only remove a non-citizen convicted of a crime involving moral turpitude only if "the maximum penalty possible for the crime" exceeds "imprisonment for one year" and the non-citizen was sentenced "to a term of imprisonment in excess of 6 months." 8 U.S.C. § 1182(a)(2)(A)(ii). By contrast, § 1227 makes non-citizens deportable for any crime involving moral turpitude "for which a sentence of one year or longer may be imposed," without requiring that the non-citizen have been sentenced to more than six months in prison. *Id.* § 1227(a)(2)(A)(i)(II). The bottom line is that the government removal authority won't suffer if the Court declines to intervene (while the circuit split, in all likelihood, resolves itself, *infra* pp. 25-30).

2. The government's importance arguments lack merit.

The government's claims that this case and the question presented are important and high-stakes lack merit. The bottom line is that the government has ample authority to deport non-citizens who commit crimes involving moral turpitude, and the Second Circuit's correct reading of the statute's clear text raises no administrability problems.

a. The government claims that "[i]n a significant number of cases," the Second Circuit's "rule will almost certainly affect whether DHS may parole an LPR for purposes of prosecution." Pet. 19. But the

government admits that "DHS does not track the number of LPRs with pending charges who are paroled into the United States," *id.*, and so the government's insistence that the question presented impacts "a significant number of cases" is pure speculation.

The government insists that the "number of cases affected by the question is undoubtedly large" because "every day last fiscal year, roughly 75,000 to 175,000 LPRs arrived at our Nation's ports of entry, seeking to reenter the United States." *Id.* But the government doesn't say how many returning LPRs have pending, unresolved criminal charges, a number that is likely quite small since state and federal courts typically would not give a green card holder facing serious charges an opportunity to leave the country. And in any event, the government's numbers are dubious on their face. If true, the government's reentry estimates would imply that lawful permanent residents attempt to reenter the United States somewhere between 27 million and 64 million times each year. But by DHS's own estimates, there are only about 12.8 million lawful permanent residents living in the United States. *See* Sarah Miller, Office of Homeland Security Statistics, *Estimates of the Lawful Permanent Resident Population in the United States and the Subpopulation Eligible to Naturalize: 2024 and Revised 2023*, at 1 (Sept. 2024), https://tinyurl.com/vk3y3k4b. So the government's claim is that each lawful permanent resident is leaving and reentering the country between two and five times per year. That's unlikely. The more plausible explanation is that most of the lawful permanent residents reentering the country each day are people who commute across the border for work and return home at night. *See* U.S. Citizenship and

Immigration Services, *Policy Manual* Ch. 4, https://tinyurl.com/n7wwb4ps (last visited Dec. 8, 2025). If the government wants to claim that huge numbers of lawful permanent residents are crossing the border each day, it should come to the Court with hard, DHS-backed data rather than rank speculation.

b. Even if the government must admit rather than parole a large number of returning lawful permanent residents, that still doesn't make the question presented important. The government has ample overlapping authority under § 1227 to remove lawful permanent residents who are convicted of serious crimes. *Supra* pp. 21-22.

Presumably anticipating this major hole in its argument, the government claims that forcing it to rely on § 1227 rather than § 1182 to remove returning lawful permanent residents who are subsequently convicted of serious crimes "will have material effects on immigration enforcement." Pet. 20. But it doesn't explain why. The government notes that in removal proceedings, the non-citizen generally has the burden of proving that she was validly admitted, while the government must prove that the non-citizen should be deported. *Id.* But that general burden allocation doesn't matter to the question presented. The government doesn't dispute that it must prove that a lawful permanent resident is seeking admission and is thus subject to § 1182. So the government will bear the burden of proof no matter how the Court might rule on the question presented.

c. The government also repeats (Pet. 20-21) its argument that the question presented is important because it will be difficult for immigration officers to assess whether returning lawful permanent residents

with criminal charges should be treated as seeking admission to the United States. But again, there are no such hard decisions to make. To "determine whether there is clear and convincing evidence that an alien has committed a qualifying crime, the immigration officer at the border would check the alien's records for a conviction." *Vartelas*, 566 U.S. at 275. If the lawful permanent resident has a conviction for a qualifying crime or admits to one in an inspection interview, then the immigration officer can treat him as seeking admission. Otherwise, the immigration officer will admit the lawful permanent resident and the government can institute removal proceedings under § 1227 later if the non-citizen is actually convicted. The only difference between that system and the government's parole for prosecution approach is what statute will apply in later removal proceedings. It makes no difference to what line immigration officers actually have to consider at the border.

B. The claimed split is shallow and cuts against the government, and the question presented would benefit from further percolation in light of the Second Circuit's decision.

The government claims (Pet. 17) that there is a 3–1 circuit split, with the Third, Fifth, and Ninth Circuits embracing its interpretation of the INA and the Second Circuit as the lone outlier. In reality, there is at most a 2–1 split against the government, with the Second and Third Circuits holding that DHS must be able to prove that a lawful permanent resident is seeking admission at the time he reenters the country, and the Fifth Circuit alone agreeing with the BIA that the government can wait to meet its burden of proof based on the evidence it has at the time of the non-citizen's

removal proceedings. There is every reason to think that the Fifth Circuit will reconsider its outlier position when confronted with the Second Circuit's well-reasoned decision based on statutory text the Fifth Circuit failed to consider. And contrary to the government's insinuations, there is no split at all about the burden of proof it must meet to treat a lawful permanent resident as an applicant for admission. This Court has recently denied government petitions where a shallow split is likely to dissipate in light of intervening decisions, *see, e.g.*, *Commissioner v. Culp*, 144 S.Ct. 2685, No. 23-1037 (cert. denied June 24, 2024); *United States v. Cano*, 141 S.Ct. 2877, No. 20-1043 (cert. denied June 28, 2021), and it should do the same here.

1. There is at most a 2–1 split about when the government must prove that a returning lawful permanent resident should be treated as an applicant for admission, with the majority favoring Mr. Lau's position.

Start with the split, which is not the 3–1 conflict the government asserts. The Third Circuit agrees with the Second Circuit that the government must prove at the time of reentry that a lawful permanent resident is subject to an exception making him an applicant for admission. The Fifth Circuit agrees with the BIA that DHS does not have to meet its burden of proof at the time of reentry. And the Ninth Circuit's position is unknown, because its only published opinion on this topic afforded *Chevron* deference to the BIA's interpretation of the INA, and it has not conducted its own review of the relevant statutory provisions after *Loper Bright*. So the split is at most 2–1, with a majority of circuits concluding that DHS

must determine at the time a lawful permanent resident reenters the United States whether he is subject to a statutory exception.

a. Third Circuit. In *Doe*, a lawful permanent resident, Rodov, "returned to the [United] States from a trip abroad, only to discover that he was subject to an arrest warrant arising out of his association with a wire fraud scheme." 659 F.3d at 268. An immigration officer purported to parole Rodov into the United States, and the government subsequently charged with him with removability under § 1182. *Id.* Rodov argued that he wasn't subject to § 1182 because, as a lawful permanent resident, he "had already been admitted to the country" and wasn't seeking admission. *Id.* at 269. Rodov further argued that DHS could not have properly determined that he was subject to a § 1101(a)(13)(C) exception—committing a crime involving moral turpitude—because there was no "record of a conviction" at the time he reentered the United States. *Id.* at 270.

The Third Circuit agreed with Rodov that DHS was required to determine "at the time the government sought to parole him" whether he should be treated as seeking admission. *Id.* The court held that the government's position that it could "parole Rodov into the country for prosecution irrespective of whether he [was] an alien seeking admission or a lawful permanent resident" was "quite obviously contrary to the plain language of the statutes," most notably the provision in § 1182 governing parole. *Id.* at 273. The court also held that it would have violated due process for DHS to strip "a lawful permanent resident of his protected status at that time and only determin[e] that its action was legally permitted at some later date." *Id.* at 270. Like the Second Circuit here,

the court thus held that "DHS's representatives were therefore required to determine whether or not there was adequate evidence that Rodov had 'committed' his crime when he arrived at his point of entry, well before he had been convicted, or even formally charged." *Id.*

At the time the Third Circuit issued its decision, however, the BIA had not yet issued its decision in *Rivens* concluding that the government bears the burden to prove one of § 1182's exceptions by clear and convincing evidence. Sensing "a hole in the Immigration and Nationality Act" on the "burden of proof," the court declared as a matter of federal common law that DHS must only have probable cause to believe that a § 1101(a)(13)(C) exception applies to invoke its parole authority. *Id.* at 271-72. No published Third Circuit decision addresses, much less disagrees with, *Rivens*'s determination of the government's burden.

b. Fifth Circuit. In *Munoz*, a lawful permanent resident, Munoz, reentered the United States after being charged with aggravated assault with a deadly weapon. 755 F.3d at 369. An immigration officer purported to parole Munoz, and she later pled guilty to the offense. *Id.* at 368-69. After the government charged her with removability under § 1182, Munoz argued that she couldn't be treated as a non-citizen applying for admission because DHS did not have "clear and convincing evidence *at the time* of her reentry" that she had committed a disqualifying offense. *Id.* at 370.

The Fifth Circuit held that the government can meet its burden to prove that a lawful permanent resident is seeking admission based on evidence developed after the non-citizen reenters the country. The court reasoned that "nothing" in § 1101 or § 1182

"limits the timing of the [statutory exception] determination." *Id.* The court found the BIA's decision in *Valenzuela-Felix* persuasive. *Id.* at 371-72. And the court also accepted the court's policy argument that DHS should not be required to determine whether a lawful permanent resident is seeking admission at the time of reentry because making that determination would be difficult for immigration agents. *Id.* at 371-72. But the Fifth Circuit did not address the parole statute's language requiring DHS to determine whether lawful permanent residents are seeking admission before paroling them—the primary basis for the Second and Third Circuits' decision.

c. Ninth Circuit. Finally, in *Vazquez Romero v. Garland*, 999 F.3d 656, 664 (9th Cir. 2021), the Ninth Circuit also held that the INA "allow[s] the government to exercise its discretion to parole a returning LPR into the United States for prosecution before satisfying its burden of proof." But unlike the other courts of appeals, the Ninth Circuit did not purport to ground its analysis in statutory text. Instead, the court deferred to the BIA's resolution of this issue in *Valenzuela-Felix* under *Chevron*. After the Ninth Circuit's decision, however, this Court overruled *Chevron* in *Loper Bright*, holding that courts must conduct their own interpretations of statutes rather than deferring to an agency's analysis. 603 U.S. at 412-13. The Ninth Circuit has not revisited this issue since *Loper Bright*, meaning it currently has no position on whether the government must prove that a lawful permanent resident should be treated as seeking admission at the time he reenters the country.

All told, the split is at most 2–1. The Second and Third Circuits have held that the government must prove a § 1101(a)(13)(C) exception before paroling a

lawful permanent resident into the country, while the Fifth Circuit has held that the government can parole first and determine if it had authority to do so later. But the Fifth Circuit has not even considered the key statutory language the Second and Third Circuits relied on. And the Ninth Circuit has not weighed in on the question since *Loper Bright* overruled *Chevron*.

2. Percolation will likely resolve the split.

The best course is for the Court to deny review to allow further percolation, which likely will bring the Fifth Circuit in line. When the Fifth Circuit issued its outlier decision holding that the government does not need to meet its burden of proof at the time a lawful permanent resident reenters the United States, it lacked the benefit of the Second Circuit's well-reasoned analysis of the INA's text and structure. Instead, the Fifth Circuit was reacting to the Third Circuit's decision, which grounded its opinion largely on thinly explored due process concepts. Indeed, the Fifth Circuit's opinion did not address the express requirement in § 1182(d)(5)(A) that DHS determine that a non-citizen is seeking admission into the United States before it has authority to parole that person for prosecution. The Fifth Circuit's analysis is inconsistent with *Loper Bright*'s admonition to "use every tool at [its] disposal to determine the best reading of the statute." *Loper Bright*, 603 U.S. at 400. There is every reason to believe that the Fifth Circuit will reconsider its outlier view in light of the Second Circuit's powerful statutory analysis and *Loper Bright*. There is no need for the Court's intervention.

3. There is no split on the burden of proof the government must meet to treat a returning lawful permanent resident as an applicant for admission, and the government hasn't preserved that issue anyway.

Although it never comes right out and says so, the government insinuates at several points in its brief (Pet. 2, 9, 17, 20) that there is a split on the burden it must meet to establish a § 1101(a)(13)(C) exception, and invites the Court to resolve the question. *See* Pet. at I (question presented). The Court should decline. There is no split on the government's burden, and the government hasn't preserved that issue for review.

a. There is no circuit conflict about what burden the government must meet to establish a § 1101(a)(13)(C) exception. To date, only the Third Circuit has weighed in on that question, holding (over a dissent) that the proper standard is probable cause. *See Doe*, 659 F.3d at 272; *contra id.* at 279 (Rendell, J., concurring in part and dissenting in part). After the Third Circuit's decision, however, the BIA determined that the correct standard is clear and convincing evidence. *Rivens*, 25 I. & N. Dec. at 625. The government has not challenged that conclusion in administrative proceedings within the Department of Justice. Subsequently, the Second and Fifth Circuits assumed the clear and convincing evidence standard applies given BIA precedent, and neither court independently analyzed the issue. *See* Pet. App. 12a; *Munoz*, 755 F.3d at 369; *see also Vartelas*, 566 U.S. at 275. There is no circuit conflict about the government's burden of proof.

Even if there were, the best course for this issue would also be percolation. When the Third Circuit

issued its decision, there was no precedent on what burden the government must meet to prove a § 1101(a)(13)(C) exception, so the court felt obligated to supply a standard under federal common law. *Doe*, 659 F.3d at 271-72. The Third Circuit will likely reconsider that decision in light of the BIA's analysis that the default standard for stripping LPRs of their legal protections is clear and convincing evidence.

b. The government also failed to preserve the burden issue. The government never challenged the clear and convincing evidence standard before the BIA or the Second Circuit. Instead, it assumed that the clear and convincing evidence standard should apply based on BIA precedent—precedent subject to Attorney General review—and argued that it should be permitted to meet its burden based on evidence that develops after a lawful permanent resident is paroled into the country. The government's petition adheres to this framing, arguing that the government met its burden by clear and convincing evidence. Pet. 12. The government has thus forfeited any challenge to the proper burden of proof.

III. This case is a poor vehicle to resolve the question presented.

The question presented isn't certworthy, but this case is a bad vehicle to address it regardless.

First, answering the question presented won't determine whether Mr. Lau is removable. If the Court grants the petition and reverses, the Second Circuit on remand will still need to address whether Mr. Lau's offense of conviction is a crime involving moral turpitude. And the government hints (Pet. 19-20) that if the petition is denied, it will attempt to remove him under § 1227. In that proceeding, Mr. Lau will again

argue that his offense of conviction doesn't count as a crime involving moral turpitude. So either way, whether Mr. Lau keeps his lawful permanent resident status and can remain in the country will turn on future decisions about whether his conviction for third degree trademark counterfeiting is a crime involving moral turpitude, rather than anything the Court might say about the question presented. The Court shouldn't consider the question where its resolution won't make a difference.

Second, the government seems to think the burden of proof is an important part of the question presented. But the government didn't preserve any challenge to the burden of proof here. The Court should await a case where the government has first tried and failed to convince the BIA (or the Attorney General) and court of appeals that its burden should be different than the clear and convincing evidence standard it has adopted as a matter of BIA precedent. That issue isn't ready for this Court, which isn't a court of first instance.

CONCLUSION

The Court should deny the petition.

Respectfully submitted.

Shay Dvoretzky
Counsel of Record
Parker Rider-Longmaid
Hanaa Khan
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Ave. NW
Washington, DC 20005
202-371-7000
shay.dvoretzky@skadden.com

Mike Pan Gao
LAW OFFICES OF
MIKE P. GAO, P.C.,
3644 Main Street
3rd Floor
Flushing, NY 11354

Raza Rasheed
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
2000 Avenue of the Stars,
Ste. 200N
Los Angeles, CA 90067

Counsel for Respondent

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