No. 25-429

# In the Supreme Court of the United States

PAMELA BONDI, ATTORNEY GENERAL, PETITIONER

*v.*

MUK CHOI LAU

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

## BRIEF FOR THE PETITIONER

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## QUESTION PRESENTED

Under 8 U.S.C. 1182(a), various categories of aliens, including those who have committed or been convicted of certain crimes, are "ineligible to be admitted to the United States" and thus removable. 8 U.S.C. 1182(a)(2); see 8 U.S.C. 1229a(e)(2). A lawful permanent resident returning to the United States after a short trip abroad generally is not "regarded as seeking an admission into the United States" and therefore is not typically subject to the inadmissibility grounds in Section 1182(a). 8 U.S.C. 1101(a)(13)(C). But that general rule does not apply to a lawful permanent resident who "has committed an offense identified in section 1182(a)(2)." 8 U.S.C. 1101(a)(13)(C)(v). The question presented is:

Whether, to remove as inadmissible a lawful permanent resident who committed an offense listed in Section 1182(a)(2) and was subsequently paroled into the United States, the government must prove that it possessed clear and convincing evidence that the alien committed the offense at the time of his last reentry into the United States.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 130 F.4th 42. The decisions of the Board of Immigration Appeals (Pet. App. 16a-27a) and the immigration judge (Pet. App. 28a-40a) are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on March 4, 2025. A petition for rehearing was denied on July 17, 2025 (Pet. App. 41a). The petition for a writ of certiorari was filed on October 8, 2025, and granted on January 9, 2026. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

### STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reproduced in the appendix. App., *infra*, 1a-9a.

## INTRODUCTION

The Immigration and Nationality Act (INA), ch. 477, 66 Stat. 163, as amended (8 U.S.C. 1101 *et seq.*), makes various categories of aliens inadmissible to, and therefore removable from, the United States. 8 U.S.C. 1182(a). When returning from a trip abroad, a lawful permanent resident (LPR) undergoing inspection at a port of entry ordinarily will not be subject to those inadmissibility grounds. But when a returning LPR "has committed an offense identified in section 1182(a)(2)," the LPR may "be regarded as seeking an admission into the United States." 8 U.S.C. 1101(a)(13)(C)(v). Admitting to or being convicted of such an offense also renders the LPR inadmissible. 8 U.S.C. 1182(a)(2).

That describes respondent. In March 2012, he committed an offense identified in Section 1182(a)(2)—namely, counterfeiting under New Jersey law, which is a "crime involving moral turpitude," 8 U.S.C. 1182(a)(2)(A)(i)(I). Respondent then traveled to China, returning to the United States in June 2012. When he was inspected at the airport, therefore, he already "ha[d] committed" a disqualifying offense and thus was "seeking an admission." 8 U.S.C. 1101(a)(13)(C)(v). Later, respondent pleaded guilty to and was convicted of that offense, rendering him inadmissible. And the government proved all of those facts by clear and convincing evidence in respondent's removal proceedings. Under the INA's plain text, respondent was thus properly ordered removed.

The court of appeals nevertheless vacated respondent's removal order on the fundamentally flawed view that the government had not adequately established that respondent was seeking an admission in the first place. The court seized on the fact that when respond-

ent arrived in the United States in June 2012, immigration officers at the airport chose to parole him into the country to face prosecution for his counterfeiting offense rather than immediately detain him for removal proceedings. When an LPR with pending criminal charges seeks to reenter the United States, immigration officers routinely exercise their law-enforcement discretion to defer the LPR's inspection and instead parole the LPR into the United States for the purpose of prosecution. See 8 U.S.C. 1182(d)(5)(A) (authorizing discretionary parole of "any alien applying for admission"); 8 C.F.R. 235.2 (parole for deferred inspection). The decades-long practice of granting parole in such circumstances provides a significant public benefit, as it helps both the LPR and the government. The LPR gets to organize his criminal defense from inside the United States. And the government can enable his presence for the criminal trial (and the potential serving of any criminal sentence) without forfeiting a potential ground for removal.

The court of appeals upended that established practice by imposing a novel burden of proof on immigration officers at the border and ports of entry when they consider whether to grant parole for deferred inspection. Under the decision below, it is not sufficient for the government to establish in removal proceedings before an immigration judge, by clear and convincing evidence, that an LPR "committed" a disqualifying offense and was therefore "seeking an admission" when he arrived in the United States. 8 U.S.C. 1101(a)(13)(C)(v). Instead, the government must show that *immigration officers at the border* possessed such evidence at the time they paroled the LPR. Here, the court concluded that immigration officers at the airport lacked sufficient ev-

idence that respondent had committed his counterfeiting offense—even though all agree that respondent had in fact committed that offense. Accordingly, the court held that respondent should have been admitted rather than paroled, and therefore should be treated *as if* he had been admitted for purposes of the removal proceedings.

That defies common sense and reality. Respondent was in fact paroled, and the INA twice makes clear that a grant of parole "shall not" be regarded as an admission, 8 U.S.C. 1101(a)(13)(B), 1182(d)(5)(A). Indeed, the court of appeals lacked jurisdiction to review the discretionary parole decision in the first place. 8 U.S.C. 1252(a)(2)(B)(ii). Respondent's parole for deferred inspection necessarily meant that as of his removal proceedings, he remained an arriving alien awaiting inspection. 8 C.F.R. 1.2 ("An arriving alien remains an arriving alien even if paroled."); see 8 C.F.R. 1001.1(q) (same). Accordingly, the government needed only to show (and did show) that respondent was seeking an admission at the time of the removal proceedings.

Even if the government had to show that respondent was seeking an admission on the earlier date of his reentry, the government met that burden. Respondent's judgment of conviction proved that he committed his offense *before* he sought to reenter the United States. The court of appeals identified no text in the INA that would preclude the government from relying on that evidence in the removal proceedings or would otherwise limit the government to evidence that immigration officers had in hand on the date of respondent's reentry. To the contrary, the INA specifically directs that decisions in removal proceedings be "based only on

the evidence produced at the hearing" before the immigration judge. 8 U.S.C. 1229a(c)(1)(A).

If affirmed, the decision below would create significant practical consequences for the Department of Homeland Security (DHS). The court of appeals' rule would require line immigration officers defending our Nation's borders to take on the role of immigration judges—weighing burdens of proof before exercising their discretionary parole authority. And it would upend decades of settled practice of paroling aliens for deferred inspection, including to face prosecution, for significant public benefit (including to the aliens). Those consequences underscore the implausibility of the court of appeals' rule, for which it identified no textual support in the INA. This Court should reverse the judgment below.

## STATEMENT

### A. Statutory Background

1. The INA governs "how persons are admitted to, and removed from, the United States." *Pereida* v. *Wilkinson*, 592 U.S. 224, 227 (2021). Every day at our Nation's borders and ports of entry, "immigration officers must determine whether to admit or remove" each of the "many aliens" seeking admission to the United States. *Jennings* v. *Rodriguez*, 583 U.S. 281, 285 (2018); see 8 U.S.C. 1225(a). Those decisions are generally "quickly made." *Jennings*, 583 U.S. at 286. But when additional consideration is required, Congress has authorized the detention or parole of aliens in certain circumstances. *Ibid.*; see 8 C.F.R. 235.2 (parole for deferred inspection).

As relevant here, the Secretary of Homeland Security may "in [her] discretion parole into the United States temporarily under such conditions as [s]he may

prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States." 8 U.S.C. 1182(d)(5)(A). Parole does not grant the alien "admission" to the United States. *Ibid.*; see 8 U.S.C. 1101(a)(13)(B). Nor does parole "affect an alien's status." *Leng May Ma* v. *Barber*, 357 U.S. 185, 190 (1958). Thus, "[a]n arriving alien remains an arriving alien even if paroled." 8 C.F.R. 1.2; see 8 C.F.R. 1001.1(q) (same). Accordingly, once the purposes of parole have been served, the alien's "case shall continue to be dealt with in the same manner as that of any other applicant for admission." 8 U.S.C. 1182(d)(5)(A); see 8 C.F.R. 212.5(e)(2)(i) ("he or she shall be restored to the status that he or she had at the time of parole").

Parole is often used to defer the inspection of aliens arriving in the United States, including where evidence related to admissibility is not available. Cf. 8 C.F.R. 235.2(b)(3). Even before the INA was enacted, the government had used parole to permit "persons who stand excluded from the United States" to be released into the United States to do such things as "defend criminal prosecution[s]" or "testify in criminal cases for the Government." U.S. Dep't of Justice, *Annual Report of the Immigration and Naturalization Service for the Fiscal Year Ended June 30, 1951*, at 48 (1951); see *In re R-*, 3 I. & N. Dec. 45, 46 (B.I.A. 1947) ("Parole is an administrative device of long standing" that "has been employed for more than 25 years in many types of cases.").

2. Separately, the INA authorizes the removal of an alien who "is either 'inadmissible' under § 1182 or 'deportable' under [8 U.S.C. 1227]." *Campos-Chaves* v. *Garland*, 602 U.S. 447, 451 (2024) (quoting 8 U.S.C. 1229a(e)(2)). In ordinary removal proceedings, the

basic procedure is the same whether an alien is charged with being inadmissible or deportable. See 8 U.S.C. 1229a. But the two tracks differ in important respects. Sections 1182 and 1227 identify "sometimes overlapping and sometimes divergent" substantive grounds for removal, including various criminal offenses. *Judulang* v. *Holder*, 565 U.S. 42, 46 (2011); cf. 8 U.S.C. 1182(a) (grounds for inadmissibility); 8 U.S.C. 1227(a) (grounds for deportability).

For instance, and as relevant here, an alien may be inadmissible if he is ever convicted of a "crime involving moral turpitude (other than a purely political offense)," with certain exceptions, 8 U.S.C. 1182(a)(2)(A)(i)(I); see 8 U.S.C. 1182(a)(2)(A)(ii) (listing exceptions), whereas an alien may be deportable if he is convicted of a "crime involving moral turpitude committed within five years" of admission, with no enumerated exceptions, 8 U.S.C. 1227(a)(2)(A)(i)(I). The two tracks also carry different burdens of proof. "[I]n the case of an alien who has been admitted," the government generally "has the burden of establishing by clear and convincing evidence that * * * the alien is deportable." 8 U.S.C. 1229a(c)(3)(A). But "if the alien is an applicant for admission," "the alien has the burden of establishing * * * that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible," 8 U.S.C. 1229a(c)(2)(A); see 8 C.F.R. 1240.8(b).

As a general matter, an LPR returning from a trip abroad "shall not be regarded as seeking an admission into the United States," and thus can be charged only with deportability, not inadmissibility. 8 U.S.C. 1101(a)(13)(C). But the INA provides six exceptions to that default rule, which—when applicable—subject an LPR to potential "removal from the United States on

grounds of inadmissibility." *Vartelas* v. *Holder*, 566 U.S. 257, 263 (2012). One such exception is for an alien who "has committed an offense identified in section 1182(a)(2)," 8 U.S.C. 1101(a)(13)(C)(v), such as "a crime involving moral turpitude," 8 U.S.C. 1182(a)(2)(A)(i)(I). Counterfeiting offenses have long been considered crimes involving moral turpitude. See *United States ex rel. Volpe* v. *Smith*, 289 U.S. 422, 423 (1933).

**B. Proceedings Below**

1. Respondent is a native and citizen of the People's Republic of China. Pet. App. 17a. In September 2007, he was admitted to the United States as an LPR. *Id.* at 4a. In May 2012, respondent was arrested and charged with trademark counterfeiting in violation of N.J. Stat. Ann. § 2C:21-32(d)(2) (West 2012). Pet. App. 28a. The charging document alleged that respondent, with intent to defraud, sold $282,240 worth of apparel bearing a counterfeit mark in March 2012. J.A. 24.

While awaiting trial, respondent left the United States. Pet. App. 4a. In June 2012, he returned to John F. Kennedy International Airport (JFK) in New York. *Ibid.* An FBI records check revealed respondent's pending criminal charge. J.A. 5. An immigration officer therefore paroled respondent into the United States for a deferred inspection. Pet. App. 4a; J.A. 26. In June 2013, following a guilty plea in the Superior Court of New Jersey for Essex County, respondent was convicted of trademark counterfeiting and sentenced to two years of probation. Pet. App. 29a.

In March 2014, DHS initiated removal proceedings against respondent, charging him with inadmissibility on the ground that he had been "convicted of a crime involving moral turpitude." Pet. App. 4a-5a (quoting 8 U.S.C. 1182(a)(2)(A)(i)(I)) (ellipsis omitted); see J.A.

25-31 (notice to appear). Respondent contended that he could not be charged with inadmissibility because, as an LPR, he was not seeking an admission when he arrived at JFK in June 2012. Pet. App. 33a. Respondent also contended that trademark counterfeiting in New Jersey is a petty offense that does not trigger inadmissibility as a crime involving moral turpitude. *Id.* at 31a-33a; see 8 U.S.C. 1182(a)(2)(A)(ii) (so-called "petty offense" exception). In the alternative, he requested a discretionary waiver of inadmissibility. Pet. App. 34a. The immigration judge rejected each of respondent's arguments, determining that he was inadmissible as charged and ineligible for a discretionary waiver. *Id.* at 28a-40a. The judge ordered him removed to China. *Id.* at 40a.

The Board of Immigration Appeals (Board or BIA) affirmed. Pet. App. 16a-27a. The Board held that respondent's counterfeiting conviction provided clear and convincing evidence that he had "committed an offense identified in [8 U.S.C 1182(a)(2)]" and was thus properly subject to removal on a ground of inadmissibility. Pet. App. 23a (citation omitted). The Board rejected, as foreclosed by Board precedent, respondent's contention that DHS had to show that he had "been *convicted* of trademark counterfeiting when he arrived at the port of entry." *Ibid.* (citing *In re Valenzuela-Felix*, 26 I. & N. Dec. 53 (B.I.A. 2012)). Instead, the Board concluded that DHS could use respondent's conviction "as proof in subsequent removal proceedings" that he had committed the offense. *Ibid.* The Board also concluded that New Jersey trademark counterfeiting is a crime involving moral turpitude, that the petty-offense exception did not apply, that respondent was ineligible for a waiver of inadmissibility, and that he received due process. *Id.* at 18a-22a, 24a-27a.

2. The court of appeals granted respondent's petition for review and vacated the removal order. Pet. App. 1a-15a. The court framed the question as whether "DHS improperly classified [respondent] as an applicant for admission under 8 U.S.C. § 1182(d)(5)(A) by paroling him into the United States." *Id.* at 3a. The court concluded that respondent's parole was improper. *Ibid.*

The court of appeals noted that Section 1182(d)(5)(A) authorizes parole for an "alien applying for admission to the United States," but that an LPR "shall not be regarded as seeking an admission into the United States" unless an exception applies. Pet. App. 9a (first quoting 8 U.S.C. 1182(d)(5)(A); then quoting 8 U.S.C. 1101(a)(13)(C)) (emphasis omitted). The court recognized that an exception exists for an LPR who has "'committed' certain offenses" and that an LPR "commit[s]" an offense when he "'engages in criminal conduct,'" not when he is convicted. *Id.* at 9a-10a (citations omitted). But the court concluded that DHS bears the burden of demonstrating that it had clear and convincing evidence "at the time of an LPR's reentry" that the LPR had committed a disqualifying offense. *Id.* at 12a. DHS could not, in the court's view, "use a subsequent conviction" to establish that fact in removal proceedings. *Id.* at 14a. And criminal charging documents alone, the court decided, cannot satisfy that burden. *Id.* at 12a.

Having held that respondent could not be removed on grounds of inadmissibility, the court of appeals granted the petition for review without addressing respondent's arguments that his New Jersey offense was not a crime involving moral turpitude (or at a minimum fell within the petty-offense exception), and that he was

improperly denied a discretionary waiver of inadmissibility. See Pet. App. 8a.

## SUMMARY OF ARGUMENT

A. Whether respondent is removable on inadmissibility grounds depends on whether, at the time of his removal proceedings, he was seeking an admission or, instead, was already admitted. Respondent was once admitted as an LPR, but his overseas trip required him to undergo inspection upon arriving in the United States on his return trip in June 2012. And although an LPR ordinarily is not considered to be seeking an admission in such circumstances, the INA contains an exception if an LPR has committed any crimes of certain kinds, including a crime involving moral turpitude. 8 U.S.C. 1101(a)(13)(C)(v), 1182(a)(2)(A)(i)(I).

Here, respondent unquestionably committed a counterfeiting offense in March 2012, before he sought to reenter in June 2012. In addition, respondent was paroled for a deferred inspection when he arrived, and so for purposes of immigration law remained an arriving alien awaiting inspection at the time of his removal proceedings. Either way, as the evidence in his removal proceedings conclusively showed, he was not admitted to the United States, but instead was seeking an admission. That evidence also conclusively showed that respondent was inadmissible by virtue of his conviction. Respondent was thus correctly ordered removed from the country.

B. The court of appeals nevertheless vacated respondent's order of removal on the theory that because immigration officers in June 2012 did not have clear and convincing evidence that respondent had committed a crime involving moral turpitude, he should not have been paroled (and thus should be treated as having in-

stead been admitted). That was wrong for two independent reasons.

1. First, the court of appeals lacked jurisdiction to review the parole decision. The INA makes clear that "no court shall have jurisdiction to review" a discretionary parole decision. 8 U.S.C. 1252(a)(2)(B). If DHS were to erroneously *admit* an LPR in analogous circumstances, the government could not later charge that LPR with inadmissibility on the theory that the admission was erroneous. Likewise, the court could not treat respondent as having been admitted simply because the court thought that DHS should not have granted parole.

The record indisputably shows that respondent was, as a factual matter, paroled. No evidence shows that he was instead admitted. And the INA twice makes clear that parole "shall not" be regarded as an admission. 8 U.S.C. 1182(d)(5)(A); see 8 U.S.C. 1101(a)(13)(B). Accordingly, as a factual matter, respondent had not been admitted at the time of his removal proceedings. And in those proceedings, the government conclusively proved that respondent had committed and been convicted of a crime involving moral turpitude, thereby establishing that he was seeking an admission and was inadmissible.

2. Second, even if the court of appeals could review DHS's parole decision and thereby require the government to establish that respondent was seeking an admission in June 2012, the court erred in limiting the government to proving that historical fact using only the evidence that immigration officers at JFK had at the time. The court identified nothing in the INA to support that limitation. To the contrary, the INA directs that the immigration judge's determination in removal proceedings "shall be based only on the evidence pro-

duced *at the hearing*." 8 U.S.C. 1229a(c)(1)(A) (emphasis added). And here, respondent's judgment of conviction conclusively proved that in June 2012, he had already committed a crime involving moral turpitude.

A footnote in *Vartelas* v. *Holder*, 566 U.S. 257 (2012), could be read to suggest that respondent was not seeking an admission in June 2012 because he had not yet been *convicted* of a crime involving moral turpitude. See *id.* at 275 n.11. That footnote does not bind this Court because it is dicta; it is contrary to the plain meaning of "has committed an offense"; and it is inconsistent with the Court's interpretation of "committed an offense" elsewhere in the INA.

C. The court of appeals' rule not only lacks support in the INA's text, but also is contrary to historical practice and good sense. Immigration officers at the border and ports of entry must handle a large inflow of aliens each day, making quick decisions about each one. Requiring them to conduct mini-trials with clear and convincing evidence is inconsistent with that role. And they will often lack access to relevant evidence—not just about the commission of offenses under state law, but about criminal activity abroad or an LPR's abandonment of his status, to name just a few examples. The net result would be to effectively nullify the ability to parole LPRs, including to face prosecution. That would be contrary to longstanding practice predating the INA and of which Congress was and has been well aware. And it would foreclose the significant public benefits of parole, including to the LPRs themselves. That underscores the ill-considered consequences of the court's novel rule.

## ARGUMENT

To remove an LPR who commits an offense identified in 8 U.S.C. 1182(a)(2), then travels outside the country, and is subsequently paroled when he attempts to reenter the United States, the government need not prove that immigration officers at the border or port of entry possessed clear and convincing evidence of the offense at the time of the LPR's reentry. At most, the INA requires the government to establish the LPR's commission of that offense by clear and convincing evidence in removal proceedings before an immigration judge. The government unquestionably presented such evidence here. The court of appeals' contrary rule lacks any textual basis in the INA and would be unworkable. The judgment below should be reversed.

### A. The Government Proved By Clear And Convincing Evidence That Respondent Was Seeking An Admission And Was Inadmissible

The government satisfied all of the requirements under the INA's plain text to establish that respondent is removable. In removal proceedings, the immigration judge must determine whether the alien "is removable from the United States." 8 U.S.C. 1229a(c)(1)(A). An "alien admitted to the United States" is removable if he "is deportable," whereas an "alien not admitted to the United States" is removable if he "is inadmissible." 8 U.S.C. 1229a(e)(2). That present-tense phrasing directs the judge to make those determinations as of the time of the removal proceedings.

The government established by clear and convincing evidence in respondent's removal proceedings that he was "not admitted," and he was therefore properly charged with inadmissibility instead of deportability. Even though respondent was previously admitted as an

LPR, he had to undergo inspection when he arrived in the United States in June 2012 after an overseas trip. See 8 U.S.C. 1225(a)(1). By that time, he had already committed a crime involving moral turpitude and thus was deemed to be seeking an admission under 8 U.S.C. 1101(a)(13)(C)(v). Regardless, respondent was paroled for a deferred inspection, and so he remained an arriving alien awaiting inspection as of his removal proceedings. 8 C.F.R. 1.2 ("An arriving alien remains an arriving alien even if paroled."); see 8 C.F.R. 1001.1(q) (same); see also 8 U.S.C. 1182(d)(5)(A); 8 C.F.R. 212.5(e)(2)(i). In respondent's removal proceedings, the government conclusively proved through respondent's state-court judgment of conviction that he had both committed a crime involving moral turpitude (and thus was seeking an admission) and been convicted of that crime (and thus was inadmissible). The INA required nothing more.

1. Removal proceedings are, with exceptions not relevant here, "the sole and exclusive procedure for determining whether an alien may be * * * removed from the United States." 8 U.S.C. 1229a(a)(3). In those proceedings, an immigration judge must decide "whether an alien is removable from the United States." 8 U.S.C. 1229a(c)(1)(A). Under the INA, an alien is "removable" if, "in the case of an alien not admitted to the United States, * * * the alien is inadmissible," or, "in the case of an alien admitted to the United States, * * * the alien is deportable." 8 U.S.C. 1229a(e)(2). Because inadmissibility and deportability are different concepts, the immigration judge must therefore first determine whether the alien is "admitted" or "not admitted." *Ibid.*

Much can turn on that threshold determination. The substantive grounds for inadmissibility and deportabil-

ity are "sometimes overlapping and sometimes divergent." *Judulang* v. *Holder*, 565 U.S. 42, 46 (2011); see 8 U.S.C. 1182(a) (grounds for inadmissibility); 8 U.S.C. 1227(a) (grounds for deportability); p. 7, *supra*. And the burdens of proof differ too: the government generally "has the burden of establishing by clear and convincing evidence that * * * the alien is deportable," 8 U.S.C. 1229a(c)(3)(A), but "the alien has the burden of establishing * * * that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible," 8 U.S.C. 1229a(c)(2)(A); see 8 C.F.R. 1240.8(b).

The INA does not, however, specify who bears the burden to establish that the alien is (or is not) admitted in the first place, or the requisite standard of proof. The Board has held that in removal proceedings, the government bears the burden to establish by clear and convincing evidence that an LPR is seeking an admission into the United States. See, *e.g.*, *In re Rivens*, 25 I. & N. Dec. 623, 626 (B.I.A. 2011). We assume that holding is correct for purposes of this case, and this Court may do so as well.

Critically, the provisions above are phrased in the present tense: "is removable," "is admissible," "is deportable," et cetera. That present-tense phrasing directs the immigration judge to look to the state of the world at the time of the removal proceedings. See *Stanley* v. *City of Sanford*, 606 U.S. 46, 49-51 (2025). Accordingly, immigration judges have long evaluated aliens' removability in removal proceedings "by focusing on the circumstances existing at the time of the ultimate hearing before the Immigration Judge." *In re Valenzuela-Felix*, 26 I. & N. Dec. 53, 56 (B.I.A. 2012); see *In re Kazemi*, 19 I. & N. Dec. 49, 51 (B.I.A. 1984); *Klapholz* v. *Esperdy*, 201 F. Supp. 294, 298-300 (S.D.N.Y. 1961),

aff'd, 302 F.2d 928 (2d Cir.), cert. denied, 371 U.S. 891 (1962).

2. This case turns on whether respondent was seeking an admission (and thus could be removed on inadmissibility grounds) or, instead, was already admitted (and thus could be removed only on deportability grounds). When an LPR like respondent arrives in the country after a trip and undergoes inspection, he is regarded as seeking an admission if he has committed a disqualifying criminal offense. Immigration officers at the port of entry will often parole such an LPR so that he can face prosecution for that offense. But that parole merely pauses the inspection; it neither constitutes an admission nor changes the LPR's status from that of an arriving alien.

a. The INA provides that the "terms 'admission' and 'admitted' mean, with respect to an alien, 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); see *Vartelas* v. *Holder*, 566 U.S. 257, 261 (2012). That inspection generally takes place at a port of entry when the alien arrives in the United States. All persons, including United States citizens, must undergo an examination or inspection when arriving in the United States. See 8 C.F.R. 235.1. For example, a "person claiming U.S. citizenship must establish that fact to the examining officer's satisfaction" or "shall thereafter be inspected as an alien." 8 C.F.R. 235.1(b). Likewise, a "person claiming to have been lawfully admitted for permanent residence must establish that fact to the satisfaction of the inspecting officer." 8 C.F.R. 235.1(f)(1)(i).

The inspection of an alien generally seeks to determine whether the alien is admissible—even if the alien

previously has been admitted. The INA provides that "[a]n alien present in the United States who has not been admitted *or who arrives in* the United States * * * shall be deemed for purposes of this chapter an applicant for admission." 8 U.S.C. 1225(a)(1) (emphasis added). Because an alien who travels abroad and returns to the United States "arrives in" the country when he enters a port of entry on his return trip, he is deemed to be an applicant for admission irrespective of any previous admissions to the country. See, *e.g.*, *Vartelas*, 566 U.S. at 261.

b. The INA does contain a limited carveout for certain LPRs who leave the country and return. In the definitional section of the statute, the INA provides that "[a]n alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission * * * unless" one of six enumerated exceptions is satisfied. 8 U.S.C. 1101(a)(13)(C); see 8 U.S.C. 1101(a)(13)(C)(i)-(vi). That provision, enacted in 1996, was intended to partially abrogate and partially codify the so-called *Fleuti* doctrine, under which an LPR "could travel abroad for brief periods without jeopardizing his resident alien status." *Vartelas*, 566 U.S. at 260; see *Rosenberg* v. *Fleuti*, 374 U.S. 449, 462 (1963) (holding that "an innocent, casual, and brief excursion by a resident alien outside this country's borders may not * * * subject him to the consequences of an 'entry' into the country on his return"); see also Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 301(a), 110 Stat. 3009-575. For example, one of the exceptions effectively defined the outer limits of a "brief excursion," providing that an LPR may be regarded as seeking an admission if he "has been absent from the United

States for a continuous period in excess of 180 days." 8 U.S.C. 1101(a)(13)(C)(ii). But Congress further deviated from *Fleuti* by adding additional exceptions.

As relevant here, the exception in clause (v) applies where an LPR "has committed an offense identified in section 1182(a)(2)," with exceptions not relevant here. 8 U.S.C. 1101(a)(13)(C)(v). To "commit" means "[t]o perpetrate, as a crime," or "to perform as an act." *Black's Law Dictionary* 273 (6th ed. 1990) (*Black's*). As the court of appeals correctly recognized, Pet. App. 10a-11a, an LPR need not have been convicted of a qualifying offense in order to have "committed" it for purposes of triggering clause (v). See *Barton* v. *Barr*, 590 U.S. 222, 232 (2020).

Section 1182(a)(2) lists several criminal offenses that render an alien inadmissible, including a "crime involving moral turpitude (other than a purely political offense)." 8 U.S.C. 1182(a)(2)(A)(i)(I); see 8 U.S.C. 1182(a)(2)(A)(ii) (listing certain exceptions). Accordingly, an LPR who has committed a disqualifying offense (whether or not he has been convicted of that offense) and then leaves the country may properly be regarded as seeking an admission when he arrives in the United States at a port of entry on his return journey.

c. At ports of entry, however, decisions about "whether to admit or remove" each of the "many aliens" being inspected must be "quickly made." *Jennings* v. *Rodriguez*, 583 U.S. 281, 285-286 (2018). And the INA generally provides that "if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a [removal] proceeding under section 1229a." 8 U.S.C. 1225(b)(2)(A); see 8 U.S.C. 1226(a) and (c) (detention of other aliens during removal

proceedings). Yet evidence relevant to the admissibility inquiry might not be immediately available in that setting.

Accordingly, rather than detain every alien for removal proceedings, immigration officers may defer the inspection of an alien to a later time and place, and parole the alien into the country in the interim. 8 C.F.R. 235.2 (parole for deferred inspection); see 8 U.S.C. 1182(d)(5)(A) (providing that the Secretary "may * * * in [her] discretion parole * * * for urgent humanitarian reasons or significant public benefit any alien applying for admission"). As this case illustrates, that includes deferring the inspection of an LPR who may be seeking an admission under one of the six exceptions in Section 1101(a)(13)(C). Cf. 8 C.F.R. 235.3(b)(5)(ii). Such parole for deferred inspection provides significant public benefit, as it allows development of a fuller record without the government's having to forfeit a potential ground of inadmissibility. Parole also can benefit the alien, as he might avoid detention and use the opportunity to gather more evidence relating to his admissibility. See 8 C.F.R. 235.2(b)(3).

The government has long paroled aliens pending a deferred decision on admissibility after their arrival in the United States. See, *e.g.*, *In re R-*, 3 I. & N. Dec. 45, 46 (B.I.A. 1947) ("Parole is an administrative device of long standing" that "has been employed for more than 25 years in many types of cases."); see also, *e.g.*, *Kaplan* v. *Tod*, 267 U.S. 228, 229 (1925); *Klapholz*, 201 F. Supp. at 297-298. And in particular, the government has long paroled aliens "to defend criminal prosecutions" or "to testify in criminal cases for the Government." *In re R-*, 3 I. & N. Dec. at 46. That practice makes especial sense when the result of those criminal proceedings could af-

fect the alien's admissibility. Such parole provides a significant public benefit by ensuring that aliens who have committed crimes and might pose a threat to public safety may be found inadmissible and removed.

Congress has made clear, however, that "such parole of such alien shall not be regarded as an admission of the alien." 8 U.S.C. 1182(d)(5)(A); see 8 U.S.C. 1101(a)(13)(B) ("An alien who is paroled * * * shall not be considered to have been admitted."). Indeed, parole does not "affect an alien's status." *Leng May Ma* v. *Barber*, 357 U.S. 185, 190 (1958); see *id.* at 188-190. A paroled LPR in respondent's situation thus remains an arriving alien awaiting inspection. 8 C.F.R. 1.2 ("An arriving alien remains an arriving alien even if paroled."); see 8 C.F.R. 1001.1(q) (same). Accordingly, notwithstanding an alien's prior parole, "his case shall continue to be dealt with in the same manner as that of any other applicant for admission." 8 U.S.C. 1182(d)(5)(A); see 8 C.F.R. 212.5(e)(2)(i) (the alien "shall be restored to the status that he or she had at the time of parole"). A paroled alien is, in short, "still in theory of law at the boundary line." *Kaplan*, 267 U.S. at 230.

3. Respondent's case followed the trajectory above. Although he had been admitted as an LPR in 2007, respondent (like all persons arriving at a port of entry, including U.S. citizens) was subject to inspection when he arrived in the United States in June 2012 on his return journey from China. During that inspection, immigration officers at JFK discovered that in May 2012, respondent had been arrested for and charged with counterfeiting under New Jersey law. J.A. 5. But respondent had not yet been convicted of that offense. Immigration officers thus deferred respondent's inspection and paroled him into the United States. J.A. 26. While

on parole, respondent pleaded guilty to, and was convicted of, the counterfeiting offense. J.A. 7-10. Respondent was still on parole when DHS initiated removal proceedings.

In those proceedings, the government proved by clear and convincing evidence that respondent was seeking an admission and thus was properly charged with inadmissibility. The evidence showed that respondent had been paroled for deferred inspection ever since his arrival and reentry into the country in June 2012. See J.A. 2, 6, 25-26. From the perspective of the immigration judge adjudicating respondent's case, therefore, respondent was in effect still an arriving alien awaiting inspection. And respondent's state-court judgment conclusively showed that he committed a counterfeiting offense in March 2012 (before his reentry) and was convicted of that offense in June 2013. See J.A. 7. In light of that judgment, the immigration judge correctly concluded that respondent had "committed" a crime involving moral turpitude and was, in light of 8 U.S.C. 1101(a)(13)(C)(v), seeking an admission into the United States.

Respondent argued below that his counterfeiting offense is not a crime involving moral turpitude, or at a minimum falls within the "petty offense" exception in 8 U.S.C. 1182(a)(2)(A)(ii)(II). But the court of appeals did not resolve those issues, which are therefore not before this Court. For purposes of this case, therefore, the Court should assume that the counterfeiting offense is a crime involving moral turpitude that renders an alien inadmissible.

Accordingly, the government established by clear and convincing (indeed, conclusive) evidence that, as of the removal proceedings, respondent was paroled and

therefore was "not admitted," 8 U.S.C. 1229a(e)(2)(A); see 8 U.S.C. 1182(d)(5)(A); that he was "seeking an admission" because he had "committed" a crime involving moral turpitude, 8 U.S.C. 1101(a)(13)(C)(v); see 8 U.S.C. 1182(a)(2)(A)(i); and that he was thus properly charged with inadmissibility, not deportability. And because respondent also had been convicted of that crime, he was inadmissible under 8 U.S.C. 1182(a)(2)(A)(i) and thus removable. The immigration judge therefore correctly ordered respondent's removal from the United States, and the Board correctly affirmed that order. Nothing in the INA required the government, the judge, or the Board to proceed any differently.

### B. The INA Did Not Require The Government To Further Prove That It Possessed Clear And Convincing Evidence At The Time Of Respondent's Reentry That He Was Properly Paroled

Nevertheless, the court of appeals vacated respondent's order of removal on the theory that because immigration officers at JFK in June 2012 did not have clear and convincing evidence that respondent had committed a disqualifying offense, the government should not have paroled him for deferred inspection, but instead should have admitted him. Pet. App. 10a-11a. Had that happened, the court reasoned, respondent would not have been seeking an admission and thus would be removable only on grounds of deportability, not inadmissibility. That reasoning was wrong for two independent reasons.

First, the court of appeals had no jurisdiction to review the parole decision. The court was thus obligated to recognize the *fact* of respondent's parole, which meant that as of his removal proceedings, respondent was not admitted. Accordingly, the relevant question

was whether respondent was seeking an admission as of the removal proceedings—not as of his reentry in June 2012. And the government conclusively showed that as of his removal proceedings, respondent had committed the counterfeiting offense and thus was seeking an admission.

Second, even if the government had to show that respondent was seeking an admission as of June 2012, the government needed only to (and did) produce clear and convincing evidence of that historical fact in the removal proceedings. The government did not need to further prove that immigration officers at JFK possessed that evidence in June 2012.

***1. The court of appeals lacked authority to review the propriety of respondent's parole, which maintained his status as an arriving alien***

The court of appeals erred at the outset by concluding that because (in its view) respondent was improperly paroled, he should be treated as if he had instead been admitted. The court lacked authority to review the parole decision. So whether or not that parole decision was correct, the salient point is that respondent was in fact paroled, and thus was not admitted as of his removal proceedings.

a. The court of appeals concluded that if respondent were not seeking an admission in June 2012 when he arrived in the United States, DHS would have lacked authority to parole him (because the INA authorizes parole for "any alien applying for admission," 8 U.S.C. 1182(d)(5)(A)). And if DHS should not have paroled respondent, the court reasoned, respondent should be deemed to have actually been admitted for purposes of determining removability. The court thus framed the relevant inquiry as whether DHS had properly "pa-

rol[ed] [respondent] into the United States upon his return from abroad." Pet. App. 3a.

That was the wrong question. The court of appeals lacked authority to review DHS's parole decision. Parole decisions are discretionary, 8 U.S.C. 1182(d)(5)(A), and the INA expressly states that "[n]otwithstanding any other provision of law (statutory or nonstatutory), * * * no court shall have jurisdiction to review" any "decision or action" that is "in the discretion of the" Secretary, except with respect to "constitutional claims or questions of law," 8 U.S.C. 1252(a)(2)(B)(ii) and (D). Here, the only relevant issue is the *fact* of respondent's parole for deferred inspection, which had the effect of pausing his inspection at JFK. The immigration officers' decision to defer respondent's inspection is precisely the sort of discretionary decision of which the INA precludes review.

At a minimum, the court here had jurisdiction only over respondent's final order of removal, not the parole decision. 8 U.S.C. 1252(a)(1). Nor could the parole decision be reviewed as an issue subsidiary to the ultimate removability determination. The INA precludes review of "any" discretionary decision, "regardless of whether" the decision "is made in removal proceedings." 8 U.S.C. 1252(a)(2)(B)(ii). It follows that an alien may not use a challenge to a removal order to collaterally attack an earlier discretionary parole decision made by a different agency in a different setting. The Board itself lacks authority to review DHS parole decisions. See *In re Arambula-Bravo*, 28 I. & N. Dec. 388, 394 (B.I.A. 2021); *Valenzuela-Felix*, 26 I. & N. Dec. at 62-63. It would be passing strange if a court of appeals reviewing the Board's decision could do so.

b. In any event, whether or not the parole decision was correct, respondent had, as a factual matter, been paroled into the United States for a deferred inspection and therefore had not been admitted. 8 U.S.C. 1101(a)(13)(B), 1182(d)(5)(A); cf. 8 C.F.R. 1240.8(b). If DHS were mistaken in admitting an LPR in similar circumstances, the government could not later charge him with being inadmissible on the theory that DHS *should have* paroled or detained him instead. In that circumstance, the LPR would have been admitted into the United States as a factual matter, and thus could be charged in removal proceedings only with deportability, not inadmissibility. See 8 U.S.C. 1229a(e)(2).

By the same token, where (as here) DHS has in fact paroled an LPR seeking to reenter the United States, the LPR cannot ask the immigration judge in subsequent removal proceedings to ignore the fact of his parole and treat him as if he had been admitted rather than paroled. Here, respondent was on parole for deferred inspection since he arrived in the United States in June 2012, and thus remained an arriving alien awaiting inspection. 8 C.F.R. 1.2 ("An arriving alien remains an arriving alien even if paroled."); see 8 C.F.R. 1001.1(q) (same); see also 8 U.S.C. 1182(d)(5)(A); 8 C.F.R. 212.5(e)(2)(i). Accordingly, the relevant question is whether respondent was seeking an admission as of his removal proceedings. He unquestionably was, as the government conclusively proved with the judgment of conviction. See J.A. 7-10.

c. In his brief opposing certiorari, respondent argued that because he was permitted to reenter the country in June 2012, "[w]hether that reentry was admission or parole is a legal question that turns on whether the immigration officer had authority to parole [respond-

ent] into the country." Br. in Opp. 19. That is incorrect. Whether respondent was paroled for deferred inspection in June 2012 is a *factual* question, not a legal one; and the evidence in the record conclusively proves that he was paroled. *E.g.*, J.A. 2 (Form I-213 showing respondent's "Status at Entry" as "Parolee").

In contrast, no documentary evidence shows that respondent's June 2012 entry was an admission. The INA defines "'admission'" to mean a "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). Respondent was paroled for a *deferred* inspection, and so by definition did not enter "*after* inspection." *Ibid.* (emphasis added); see J.A. 26 (notice to appear) ("you were paroled into the United States for a deferred inspection"). Indeed, respondent has repeatedly acknowledged in his own filings that he was paroled for a deferred inspection. *E.g.*, Administrative Record (A.R.) 11 (motion to terminate) ("USCBP paroled [respondent] for the deferred inspection."); A.R. 236 (Form I-601 application for a waiver of inadmissibility) ("I was paroled into the United States on June [1]5, 2012 on deferred inspection.").

Nor could a court deem respondent's June 2012 entry to have been an admission. Congress has stated that DHS "may" parole an alien, 8 U.S.C. 1182(d)(5)(A), but that parole "shall not" be regarded as an admission, *ibid.*; see 8 U.S.C. 1101(a)(13)(B) (paroled alien "shall not" be considered to have been admitted). "When a statute distinguishes between 'may' and 'shall,' it is generally clear that 'shall' imposes a mandatory duty." *Kingdomware Technologies, Inc.* v. *United States*, 579 U.S. 162, 172 (2016). Respondent's contention that a

court may deem an erroneously paroled alien to have been admitted is thus foreclosed by the INA's text.

Respondent's atextual contention is akin to saying that a criminal defendant was not actually convicted if the prosecution presented insufficient evidence at trial. That is nonsensical. The defendant might have been *wrongly* convicted, but he was convicted all the same. Cf. *Lewis* v. *United States*, 445 U.S. 55, 60 (1980) (defendant "has been convicted" of predicate felony under felon-in-possession statute even if he argues that the prior conviction was improper). Perhaps one might say that he was not convicted *if* the conviction were later vacated on sufficiency grounds through an appropriate avenue for review (such as direct appeal or postconviction proceedings). Cf. *Hewitt* v. *United States*, 606 U.S. 419, 429-430 (2025). But respondent identifies no appropriate avenue to retroactively vacate his parole decision. To the contrary, respondent expressly disclaims seeking review of the parole decision here. See Br. in Opp. 19.

At all events, Section 1101(a)(13) makes clear that an "alien who is paroled * * * shall not be considered to have been admitted." 8 U.S.C. 1101(a)(13)(B). The provision says "who is paroled"—not "who is correctly paroled." So whether or not DHS erred in its parole decision, the immigration judge in the removal proceedings was obligated to find that respondent was paroled nonetheless. Respondent thus was not admitted as of his removal proceedings, and instead remained an arriving alien awaiting inspection. 8 C.F.R. 1.2 ("An arriving alien remains an arriving alien even if paroled."); see 8 C.F.R. 1001.1(q) (same); see also 8 U.S.C. 1182(d)(5)(A); 8 C.F.R. 212.5(e)(2)(i). And in those removal proceedings, the government presented clear and convincing

(indeed, conclusive) evidence that respondent had already committed and been convicted of his counterfeiting offense, thereby proving that he was both seeking an admission under Section 1101(a)(13)(C)(v) and inadmissible under Section 1182(a)(2)(A)(i).

***2. In any event, the parole decision was correct because respondent was in fact seeking an admission at the time of his reentry, as the government proved in the removal proceedings***

Even if the court of appeals were correct to review DHS's decision to parole respondent into the United States, and thus to require the government to prove by clear and convincing evidence that respondent was seeking an admission as of June 2012, the government satisfied that requirement. Respondent's judgment of conviction conclusively shows that he committed the counterfeiting offense in March 2012 and was thus seeking an admission when he arrived in the United States in June 2012. See J.A. 7 (judgment of conviction listing "Date(s) of Offense" as "03/01/2012"); Pet. App. 28a-29a. The court erred in requiring the government to further prove that, in June 2012, immigration officers at JFK actually possessed that (or other) clear and convincing evidence of respondent's commission of that offense.

a. Nothing in the INA limits the government, in meeting its burden of proof in removal proceedings, to the evidence that it possessed on the date of the LPR's reentry. Exactly the opposite: Congress expressly directed that the immigration judge's determination of removability—which necessarily includes the subsidiary determination whether the alien is seeking an admission—"shall be based only on the evidence produced at the hearing." 8 U.S.C. 1229a(c)(1)(A). The court of appeals' view that the determination whether

respondent was seeking an admission must be based only on the evidence available to immigration officers at JFK in June 2012 is inconsistent with that directive.

The only way to square the court of appeals' rule with the statutory text is by reading the statute's reference to "evidence produced at the hearing" as being further limited to the consideration only of evidence that was also available to officers of a different agency at an earlier time in a different setting. But that is not a reasonable reading of Section 1229a's directive. Congress knows how to write such directives. For example, federal courts must evaluate a state prisoner's habeas claim "in light of the evidence presented in the State court proceeding." 28 U.S.C. 2254(d)(2). And judicial review of agency action under 5 U.S.C. 706, as well as under other administrative-review statutes, must be based on "the administrative record already in existence, not some new record made initially in the reviewing court." *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973) (per curiam); see, *e.g.*, 7 U.S.C. 2023(a)(15); 16 U.S.C. 470aaa-6(b)(1); 28 U.S.C. 586(d)(2); 30 U.S.C. 1276(b); 42 U.S.C. 405(g). Congress did not use that sort of language here. To the contrary, it expressly authorized (indeed, required) the immigration judge to determine removability "based only on the evidence produced *at the hearing*." 8 U.S.C. 1229a(c)(1)(A) (emphasis added).

That directive reflects the normal way adversarial proceedings unfold. Every day, litigants prove facts about the state of the world as of a certain date using evidence that was created after that date. For example, a party asserting (or contesting) diversity jurisdiction might provide an affidavit to establish the party's citizenship as it existed on the date of the complaint's filing. Cf. *Grupo Dataflux* v. *Atlas Global Group, L.P.*, 541

U.S. 567, 574-575 (2004). Or a criminal defendant might assert that he was insane at the time of the offense by offering a later-in-time expert psychiatric report. Cf. *Kahler* v. *Kansas*, 589 U.S. 271, 283-284 (2020).

Removal proceedings under the INA are no different. For example, an alien is deportable if he was inadmissible "at the time of entry or adjustment of status." 8 U.S.C. 1227(a)(1)(A). To prove deportability on that ground, the government must produce clear and convincing evidence *in the removal proceedings* to establish that, in retrospect, the alien was in fact inadmissible at that previous point in time. See 8 U.S.C. 1229a(c)(3)(A). The government need not further prove that the relevant immigration officers possessed that evidence at the time of entry or adjustment of status. Nothing in the INA suggests such a requirement, which would be absurd: If the government possessed such evidence at that time, presumably it would not have admitted the alien or adjusted his status in the first place. Cf. *Barton*, 590 U.S. at 236 (emphasizing the distinction between the commission of an act that renders an LPR inadmissible and the subsequent adjudication at which that fact is proved).

The same is true here. The government could properly use respondent's subsequent conviction to prove that, at the time respondent arrived at JFK in June 2012, he was already someone who "ha[d] committed an offense" that triggered the exception in Section 1101(a)(13)(C)(v). Neither respondent nor the court of appeals called into question the dispositive fact that respondent committed his counterfeiting offense *before* he reentered the United States. Thus, at the time of his reentry, respondent in fact "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). Nor does respondent dispute that the government established that dispositive fact in his removal proceedings by clear and convincing (indeed, conclusive) evidence.

Instead, respondent (Br. in Opp. 16-17) and the court of appeals (Pet. App. 10a-11a) would transfer the government's burden to prove that fact by clear and convincing evidence from the removal proceedings (where it applies) to the inspection process at the border or a port of entry (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, see Br. in Opp. 15-16, neither respondent nor the court of appeals has identified any statutory text suggesting that DHS inspection and parole decisions at ports of entry—which are conducted and made by (non-lawyer) immigration officers—are subject to that same standard. Likewise, neither respondent nor the court of appeals identifies anything in the INA that limits the government's evidence in removal proceedings to evidence that immigration officers previously possessed in a different setting.

Observing that the INA authorizes the Secretary to parole "any alien applying for admission," 8 U.S.C. 1182(d)(5)(A), respondent has argued that "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); see Pet. App. 14a (similar). True enough, but that obligation in no way implies that, in subsequent removal proceedings, the government must prove that it made the correct determination by offering only the evidence that it had in hand at that prior time.

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 as of his June 2012 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.

b. The court of appeals did not identify any text in the INA that limits the government in removal proceedings to the evidence that DHS immigration officers possessed at the time of reentry. As noted, the INA's text affirmatively belies such a limitation. See 8 U.S.C. 1229a(c)(1)(A). The court instead cited the Board's decision in *Rivens*, which required the government to offer "clear and convincing evidence" that an LPR was seeking an admission. Pet. App. 12a (quoting *Rivens*, 25 I. & N. Dec. at 625); see *id.* at 13a. But as the Board has explained, *Rivens* articulates the government's burden of proof "in the context of removal proceedings"; it does not suggest that DHS immigration officers must satisfy that burden during inspection at the border or ports of entry. *Valenzuela-Felix*, 26 I. & N. Dec. at 57.

Even if DHS had to definitively determine at the port of entry whether respondent was seeking an admission in order to make a discretionary parole decision, there is no justification for the court of appeals' additional requirement that the government support that decision only with evidence that it possessed at the time. Whether an LPR "has committed" a disqualifying offense is an objective inquiry about the state of the world, not a subjective inquiry into an immigration officer's state of mind. Respondent had in fact committed

such an offense as of his June 2012 reentry, and the government proved that fact with conclusive evidence when it needed to: in respondent's removal proceedings.

c. Finally, respondent has suggested (Br. in Opp. 17) that even the evidence produced in the removal proceedings was insufficient to prove that respondent was seeking an admission in June 2012 because Section 1101(a)(13)(C)(v) requires an LPR to have been *convicted* of a disqualifying offense, and he was not convicted until June 2013. For that proposition, respondent relies on a footnote in *Vartelas*, in which this Court stated that Section 1101(a)(13)(C)(v), "on straightforward reading, appears to advert to a lawful permanent resident who has been convicted of an offense under § 1182(a)(2) (or admits to one)." 566 U.S. at 275 n.11. That footnote admittedly does seem to indicate that, setting aside an admission of guilt, the LPR must be convicted of a disqualifying offense before he may be treated as seeking an admission under clause (v). If that reading of the statute were correct, respondent here would not have been seeking an admission in June 2012 when he arrived in the United States because he was not convicted of the counterfeiting offense until the following year.

But that reading is incorrect. Section 1101(a)(13)(C)(v) says "has committed," not "has been convicted of." A person can "commit"—that is, "perpetrate," *Black's* 273—a crime without even being arrested, much less convicted. Interpreting "has committed" in Section 1101(a)(13)(C)(v) to require a conviction thus contradicts the plain meaning of that phrase. And that interpretation would be especially inapt in this context. Many of the cross-referenced offenses in Section 1182(a)(2) do not even require a conviction to establish

inadmissibility. *E.g.*, 8 U.S.C. 1182(a)(2)(C) (controlled-substance trafficking), 1182(a)(2)(D) (prostitution). And imposing such an interpretation would improperly blur the distinction between commission and conviction that runs throughout immigration law. See, *e.g.*, *Barton*, 590 U.S. at 232; *Moncrieffe* v. *Holder*, 569 U.S. 184, 191 & n.4 (2013). Indeed, this Court has explained—including in an immigration case argued on the same day as *Vartelas*—that the phrase "when the alien has committed an offense referred to in section 1182(a)(2)," 8 U.S.C. 1229b(d)(1), refers to "the date of *commission* of the offense," not "the *conviction*." *Barton*, 590 U.S. at 232; see *Holder* v. *Martinez Gutierrez*, 566 U.S. 583, 588 n.2 (2012) (relevant temporal reference is "the date of [the] offense").

Thus, to the extent the footnote in *Vartelas* reads "has committed" in Section 1101(a)(13)(C)(v) to require a conviction, it is mistaken. And this Court should not feel bound by that mistaken reading. The footnote plainly is dicta unnecessary to the resolution of *Vartelas*, which held that Section 1101(a)(13)(C)(v) was not applicable to the alien there. 566 U.S. at 275. The footnote does not even definitively adopt the mistaken reading, stating only that the text "appears to advert" to it. *Id.* at 275 n.11; cf. *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U.S. 519, 548 (2013) (Court not bound by previous language that was "hedged" with "the word 'presumably'"). The court of appeals here did not rely on the footnote, holding that Section 1101(a)(13)(C)(v) is triggered "upon the commission, rather than the conviction, of a crime." Pet. App. 10a-11a. And at all events, this Court need not resolve the issue if it accepts the government's principal argument (see Parts A, B.1, *supra*) that the relevant question is whether respondent, by

virtue of his parole, was seeking an admission at the time of the removal proceedings (at which point he had already been convicted), not in June 2012.

### C. The Consequences Of Respondent's Position Confirm That Congress Did Not Prescribe That Position

The court of appeals' time-of-entry evidentiary rule is also contrary to "good practical sense," "history," and "practice." *Munoz* v. *Holder*, 755 F.3d 366, 371-372 (5th Cir. 2014). Those consequences dispel any possible doubt about what the text already makes clear: Whether immigration officers have correctly determined that an LPR is seeking an admission is proved later to an immigration judge in removal proceedings, not to some hypothetical adjudicator by clear and convincing evidence at the border.

Controlling "the movement of people and goods across the border * * * is a daunting task." *Hernandez* v. *Mesa*, 589 U.S. 93, 107 (2020). At ports of entry, immigration officers are "rightly" focused on "law enforcement responsibilities," not the "burden of proof in removal proceedings." *Munoz*, 755 F.3d at 371 (quoting *Valenzuela-Felix*, 26 I. & N. Dec. at 64); accord *Vazquez Romero* v. *Garland*, 999 F.3d 656, 664 (9th Cir. 2021). Yet the court of appeals' rule would require line immigration officers (who generally are not lawyers) to make on-the-spot determinations about whether the government possesses clear and convincing evidence when deciding whether to parole an LPR into the United States.

It is unclear how, exactly, immigration officers could be expected to make such determinations at the border or ports of entry. Given the volume of aliens seeking entry, admission decisions must be "quickly made." *Jennings*, 583 U.S. at 286. A requirement that immigration officers hold mini-trials at ports of entry to as-

sess the strength of the government's evidence would be unworkable in practice. Cf. *Vartelas*, 566 U.S. at 275 (observing that immigration officers at the border do not "call into session a piepowder court").

Indeed, immigration officers will often lack access to the strongest evidence that an LPR is seeking an admission. Here, for example, New Jersey prosecutors might well have possessed clear and convincing evidence of respondent's offense before he arrived at JFK in June 2012. The May 2012 criminal complaint against respondent indicates that state authorities had found $282,240 worth of counterfeit apparel and obtained a recording implicating respondent. J.A. 24. But federal immigration officers at JFK would not likely have had ready access to state prosecutors' files.

That difficulty is not limited to the criminal-offense exception in Section 1101(a)(13)(C)(v). For example, an LPR who arrives in the country is seeking an admission if he "has abandoned or relinquished [LPR] status." 8 U.S.C. 1101(a)(13)(C)(i). Absent an express relinquishment, it would likely be difficult for immigration officers at ports of entry to amass clear and convincing evidence of such abandonment. Likewise, immigration officers are unlikely to have clear and convincing evidence that the LPR "has engaged in illegal activity after having departed the United States." 8 U.S.C. 1101(a)(13)(C)(iii). The court of appeals' rule would improperly render much of Congress's careful handiwork in Section 1101(a)(13)(C) unenforceable at the border. Cf. *Ysleta Del Sur Pueblo* v. *Texas*, 596 U.S. 685, 699 (2022).

Given those administrative difficulties, the practical effect of the court of appeals' ruling could be to nullify the use of parole for LPRs, including those facing prosecution. That result would contradict both Congress's

expectations and longstanding agency practice. When the INA codified the government's parole authority in 1952, an established and expected basis for granting parole was for the "purposes of prosecution." See p. 20, *supra*. Congress codified that authority in the INA in part at the Department of Justice's urging. See, *e.g.*, *Revision of Immigration, Naturalization, and Nationality Laws: Joint Hearings on S. 716, H.R. 2379, and H.R. 2816 Before the Subcomms. on the Judiciary*, 82d Cong., 1st Sess. 713 (1951) (testimony of Deputy Attorney General) (agreeing that Congress should "giv[e] statutory force and effect to [the government's administrative parole] practice"). And the reports of the House and Senate Judiciary Committees about the INA stated that the Attorney General needed "broader discretionary authority" to grant parole "in cases where it is strictly in the public interest to have an inadmissible alien present in the United States, such as, for instance, a witness or for purposes of prosecution." H.R. Rep. No. 1365, 82d Cong., 2d Sess. 52 (1952); accord S. Rep. No. 1137, 82d Cong., 2d Sess. 13 (1952).

The government has long used that parole authority for returning LPRs who face prosecution, which provides a significant public benefit. See, *e.g.*, *In re K-*, 9 I. & N. Dec. 143, 154, 157 (Att'y Gen. 1961). In the ensuing decades, Congress has never questioned the practice, even as it has made multiple amendments to the parole statute. *E.g.*, IIRIRA § 602(a), 110 Stat. 3009-689; Refugee Act of 1980, Pub. L. No. 96-212, § 203(f), 94 Stat. 107-108. If affirmed, the decision below would upend that status quo, potentially forcing the government to grant admission to LPRs who Congress has determined should be inadmissible by virtue of their criminal conduct.

Even if DHS could find a way to conduct hearings at the border, that result would not necessarily benefit LPRs. Parole itself does not affect an LPR's immigration status. *Valenzuela-Felix*, 26 I. & N. Dec. at 61 n.9; see *Leng May Ma*, 357 U.S. at 190 ("The parole of aliens seeking admission * * * was never intended to affect an alien's status."). But deferring potential removal proceedings pending the result of the criminal case allows the LPR to organize his criminal defense from inside the United States. And if the LPR prevails in his criminal case, or negotiates a plea deal for an offense not covered by the INA, the LPR might avoid removal altogether. Without parole, by contrast, the government would have an incentive in some cases to initiate removal proceedings immediately, during which the LPR may be detained. 8 U.S.C. 1226(a) and (c); see 8 U.S.C. 1225(b)(2)(A). That result would hardly benefit LPRs in respondent's situation and underscores the ill-considered consequences of the court of appeals' novel rule.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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## APPENDIX

1. 8 U.S.C. 1101(a)(13) provides:

**Definitions**

(a) As used in this chapter—

* * * * *

(13)(A) The terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.

(B) An alien who is paroled under section 1182(d)(5) of this title or permitted to land temporarily as an alien crewman shall not be considered to have been admitted.

(C) An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien—

(i) has abandoned or relinquished that status,

(ii) has been absent from the United States for a continuous period in excess of 180 days,

(iii) has engaged in illegal activity after having departed the United States,

(iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this chapter and extradition proceedings,

(v) has committed an offense identified in section 1182(a)(2) of this title, unless since such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title, or

(vi) 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.

2. 8 U.S.C. 1182 provides in pertinent part:

**Inadmissible aliens**

**(a) Classes of aliens ineligible for visas or admission**

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * * * *

**(2) Criminal and related grounds**

**(A) Conviction of certain crimes**

**(i) In general**.

Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21),

is inadmissible.

* * * * *

**(d) Temporary admission of nonimmigrants**

* * * * *

(5)(A) The Secretary of Homeland Security may, except as provided in subparagraph (B) or in section 1184(f) of this title, in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Secretary of Homeland Security, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

* * * * *

3. 8 U.S.C. 1225 provides in pertinent part:

**Inspection by immigration officers; expedited removal of inadmissible arriving aliens; referral for hearing**

**(a) Inspection**

**(1) Aliens treated as applicants for admission**

An alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is

brought to the United States after having been interdicted in international or United States waters) shall be deemed for purposes of this chapter an applicant for admission.

* * * * *

**(3) Inspection**

All aliens (including alien crewmen) who are applicants for admission or otherwise seeking admission or readmission to or transit through the United States shall be inspected by immigration officers.

* * * * *

4. 8 U.S.C. 1229a provides in pertinent part:

**Removal proceedings**

**(a) Proceeding**

**(1) In general**

An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.

**(2) Charges**

An alien placed in proceedings under this section may be charged with any applicable ground of inadmissibility under section 1182(a) of this title or any applicable ground of deportability under section 1227(a) of this title.

**(3) Exclusive procedures**

Unless otherwise specified in this chapter, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States. Nothing in this section shall affect proceedings conducted pursuant to section 1228 of this title.

* * * * *

**(c) Decision and burden of proof**

**(1) Decision**

**(A) In general**

At the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States. The determination of the immigration judge shall be based only on the evidence produced at the hearing.

* * * * *

**(2) Burden on alien**

In the proceeding the alien has the burden of establishing—

(A) if the alien is an applicant for admission, that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible under section 1182 of this title; or

(B) by clear and convincing evidence, that the alien is lawfully present in the United States pursuant to a prior admission.

In meeting the burden of proof under subparagraph (B), the alien shall have access to the alien's visa or other entry document, if any, and any other records and documents, not considered by the Attorney General to be confidential, pertaining to the alien's admission or presence in the United States.

**(3) Burden on service in cases of deportable aliens**

**(A) In general**

In the proceeding the Service has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

* * * * *

**(e) Definitions**

In this section and section 1229b of this title:

* * * * *

**(2) Removable**

The term "removable" means—

(A) in the case of an alien not admitted to the United States, that the alien is inadmissible under section 1182 of this title, or

(B) in the case of an alien admitted to the United States, that the alien is deportable under section 1227 of this title.

5. 8 C.F.R. 1.2 provides in pertinent part:

**Definitions.**

* * * * *

*Arriving alien* means an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport. An arriving alien remains an arriving alien even if paroled pursuant to section 212(d)(5) of the Act, and even after any such parole is terminated or revoked. However, an arriving alien who was paroled into the United States before April 1, 1997, or who was paroled into the United States on or after April 1, 1997, pursuant to a grant of advance parole which the alien applied for and obtained in the United States prior to the alien's departure from and return to the United States, will not be treated, solely by reason of that grant of parole, as an arriving alien under section 235(b)(1)(A)(i) of the Act.

* * * * *

6. 8 C.F.R. 235.2 provides:

**Parole for deferred inspection.**

(a) A district director may, in his or her discretion, defer the inspection of any vessel or aircraft, or of any alien, to another Service office or port-of-entry. Any alien coming to a United States port from a foreign port, from an outlying possession of the United States, from Guam, Puerto Rico, or the Virgin Islands of the United States, or from another port of the United States at which examination under this part was deferred, shall be regarded as an applicant for admission at that onward port.

(b) An examining immigration officer may defer further examination and refer the alien's case to the district director having jurisdiction over the place where the alien is seeking admission, or over the place of the alien's residence or destination in the United States, if the examining immigration officer has reason to believe that the alien can overcome a finding of inadmissibility by:

(1) Posting a bond under section 213 of the Act;

(2) Seeking and obtaining a waiver under section 211 or 212(d)(3) or (4) of the Act; or

(3) Presenting additional evidence of admissibility not available at the time and place of the initial examination.

(c) Such deferral shall be accomplished pursuant to the provisions of section 212(d)(5) of the Act for the period of time necessary to complete the deferred inspection.

(d) Refusal of a district director to authorize admission under section 213 of the Act, or to grant an application for the benefits of section 211 or section 212(d) (3) or (4) of the Act, shall be without prejudice to the renewal of such application or the authorizing of such admission by the immigration judge without additional fee.

(e) Whenever an alien on arrival is found or believed to be suffering from a disability that renders it impractical to proceed with the examination under the Act, the examination of such alien, members of his or her family concerning whose admissibility it is necessary to have such alien testify, and any accompanying aliens whose protection or guardianship will be required should such alien be found inadmissible shall be deferred for such time and under such conditions as the district director in whose district the port is located imposes.