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 RESPONDENT

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QUESTION PRESENTED

The Immigration and Nationality Act lists criteria that render noncitizens "inadmissible." 8 U.S.C. § 1182(a). A noncitizen "lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States," and thus is not subject to a finding of inadmissibility under § 1182, unless one of six statutory exceptions applies. *Id.* § 1101(a)(13)(C)(i)–(vi). The government expressly accepts here that, under longstanding precedent, it must prove by clear and convincing evidence a statutory exception making a lawful permanent resident (LPR) inadmissible.

The question here concerns *when* the government must decide whether a statutory exception applies. That question turns on whether the government may invoke its parole authority to defer deciding. That authority lets the government, in its "discretion," "parole into the United States temporarily … any [noncitizen] applying for admission to the United States, but such parole of such alien shall not be regarded as an admission." 8 U.S.C. § 1182(d)(5)(A). And when a noncitizen arrives at a port of entry, she must be "admitted or paroled" to enter the country. *Id.* § 1182(a)(6)(A)(i).

The question presented is whether, to treat an LPR as inadmissible under 8 U.S.C. § 1182(a), the government must prove an exception (by clear and convincing evidence) at the time the LPR reenters the country after a trip abroad, or whether the government can parole the LPR into the country and decide only later, based on subsequently developed evidence, that he could be treated as seeking admission.

PARTIES TO THE PROCEEDINGS AND RELATED PROCEEDINGS

The parties to the proceeding are Pamela Bondi and Muk Choi Lau. The only related proceedings are the decisions below. The Second Circuit's decision is captioned *Lau v. Bondi*, 130 F.4th 42 (2d Cir. 2025), and its denial of rehearing is available at Order, *Lau v. Bondi*, No. 21-6623 (2d Cir. filed July 17, 2025). The Board of Immigration Appeals' decision is available at *In re Lau*, A059-413-277 (B.I.A. Nov. 23, 2021), and the Immigration Court's decision is available at *In re Lau*, A059-413-277 (Immg. Ct. Mar. 20, 2018).

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INTRODUCTION

This case is about whether the Department of Homeland Security (DHS) can ignore clear textual limitations in the Immigration and Nationality Act regarding how it treats lawful permanent residents (LPRs) returning from brief trips abroad. The government wants to ignore statutory text not because—contrary to its policy claims—the Second Circuit's carefully reasoned ruling deprives it of authority it needs. It wants to do so because it would rather be able to pursue inadmissibility proceedings against LPRs than have to pursue the deportation proceedings that the INA makes clear it must follow.

In the government's view, DHS needs not decide at the border whether an LPR is subject to an inadmissibility determination because it can instead "parole" him into the country and decide that question later. But the INA's text makes clear that DHS must admit returning LPRs unless it can determine when he presents at the border that a statutory exception applies. If that evidence develops only later, the government must attempt to remove the LPR, if at all, through deportation proceedings.

This isn't a hard case, as the Second Circuit recognized. The INA gives the government ample authority to seek removal of LPRs who commit crimes. But DHS "must turn square corners," and the INA clearly signposts the roads. *Niz-Chavez v. Garland*, 593 U.S. 155, 172 (2021). The government's contrary arguments ignore statutory text and this Court's precedent. Indeed, the government's lead argument, that courts lack jurisdiction to consider DHS's parole authority, flouts the statutory command that questions of law are reviewable, as this Court has held.

1. The INA "governs both the exclusion of [noncitizens] from admission to this country and the deportation of [noncitizens] previously admitted." *Judulang v. Holder*, 565 U.S. 42, 45 (2011). One provision in the INA, 8 U.S.C. § 1182, sets out the grounds that make a noncitizen who wishes to enter the country "inadmissible." *Judulang*, 565 U.S. at 46. A different provision, 8 U.S.C. § 1227, governs deportation of noncitizens previously admitted. *Judulang*, 565 U.S. at 46.

A key INA provision here specifies that noncitizens who have been "lawfully admitted for permanent residence" "shall not be regarded as seeking an admission into the United States for purposes of the immigration laws." 8 U.S.C. § 1101(a)(13)(C). That provision makes green-card holders presumptively exempt from admissibility procedures under § 1182 when they come into the country. Thus, if the government wants to remove a green-card holder, it must generally invoke its deportation authority in § 1227.

Section 1101(a)(13)(C)'s exemption from "seeking an admission" status is subject to several exceptions. As relevant here, an LPR can be treated as seeking admission, and thus subject to an inadmissibility determination under § 1182, if he has committed a crime involving moral turpitude. *Id.* §§ 1101(a)(13)(C)(v), 1182(a)(2)(A).

When (and only when) a noncitizen is "applying for admission," DHS can temporarily parole him into the country while preserving its ability to remove him as inadmissible under § 1182. *Id.* § 1182(d)(5)(A). That is the only alternative to admission for allowing a noncitizen arriving at the border to enter—she must be "admitted or paroled." *Id.* § 1182(a)(6)(A)(i).

Because LPRs presumptively "shall not be regarded as seeking an admission into the United States for purposes of the immigration laws," *id.* § 1101(a)(13)(C), DHS cannot parole green-card holders unless one of the six exceptions applies.

2. This case involves the government's attempt to remove Muk Choi Lau, an LPR, under § 1182's inadmissibility framework rather than § 1227's deportation framework. In 2012, New Jersey charged Mr. Lau with trademark counterfeiting. While the charges were pending, he left and reentered the country. He later pled guilty and was sentenced to probation.

The government seeks to remove Mr. Lau as inadmissible under § 1182, arguing that his guilty plea shows that, at the time he reentered the country, he had committed a crime involving moral turpitude. The government says Mr. Lau wasn't admitted into the United States when he arrived at the airport and was allowed to enter the country. Instead, the government claims, it paroled Mr. Lau into the country to face prosecution. According to the government, that parole decision allows it to treat Mr. Lau as someone seeking an admission into the country and thus subject to § 1182.

3. The government's position is wrong. It contravenes plain statutory text and the fundamental principle that agencies have only the authority Congress grants them. And it's unnecessary, as over 130 years of executive branch practice and the government's substantial deportation authority under § 1227 show. The INA allows DHS to treat a returning green-card holder as inadmissible under § 1182 only when it can establish one of § 1101(a)(13)(C)'s

exceptions at the time the LPR reenters the country. DHS didn't and couldn't do that here, so it cannot invoke § 1182. It must attempt to remove Mr. Lau, if at all, under § 1227.

a. The INA's plain text requires DHS to determine whether an LPR can be treated as "seeking an admission" at the time he reenters the country. A returning LPR can be "seeking an admission"—*i.e.*, "lawful entry … into the United States after inspection and authorization by an immigration officer," *id.* § 1101(a)(13)(A)—only when he is standing at the border, unless, as noted below, he has been validly paroled into the country. Section 1101(a)(13)(C) provides that persons who have been "lawfully admitted for permanent residence … shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless" one of six exceptions applies. *Id.* § 1101(a)(13)(C). DHS thus must decide whether to "regard[]" a green-card holder as seeking an admission (or not) at the border. That is the point at which DHS must evaluate whether its evidence establishes one of § 1101(a)(13)(C)'s six exceptions.

The provision governing DHS's parole authority confirms that reading. That provision gives DHS "discretion" to "parole" noncitizens "applying for admission to the United States." *Id.* § 1182(d)(5)(A). That language authorizes DHS to parole an LPR into the country only if a § 1101(a)(13)(C) exception lets it treat the LPR as "seeking an admission." *Id.* § 1101(a)(13)(C). That's strong evidence that Congress intended for DHS to assess § 1101(a)(13)(C)'s exceptions at the border—the place where DHS's authority to "parole" returning LPRs "into the United States," *id.* § 1182(d)(5)(A), is relevant.

b. Longstanding executive branch practice confirms that Congress expects DHS to determine at the border whether an LPR has committed a disqualifying crime. Since 1891, Congress has banned from the country noncitizens guilty of crimes involving moral turpitude. *See* Pub. L. No. 51-551, § 1, 26 Stat. 1084, 1084 (Mar. 3, 1891). In the more than 130 years since, executive branch officials have consistently screened for crimes involving moral turpitude at the border. To this day, DHS screens out applicants for admission who have been convicted of a crime involving moral turpitude, or who admit to one during inspection. *See* 8 U.S.C. § 1182(a)(2)(A)(i)(I). Nothing in the INA suggests that the procedure should work differently when DHS assesses whether a returning LPR has committed a crime involving moral turpitude for purposes of § 1101(a)(13)(C)(v).

c. DHS couldn't treat Mr. Lau as applying for admission when he returned to the United States. Longstanding agency precedent, which the government accepts for purposes of this case, Br. 16, holds that DHS must have clear and convincing evidence to invoke a § 1101(a)(13)(C) exception. *See In re Rivens*, 25 I. & N. Dec. 623, 625 (B.I.A. 2011). The government doesn't claim it could satisfy that standard when Mr. Lau returned to the country. Mr. Lau had not been convicted of any crime and was presumed innocent, *see, e.g.*, *Nelson v. Colorado*, 581 U.S. 128, 135-36 (2017), and the government had no evidence—only unproven allegations—that he had committed a crime involving moral turpitude. The government thus lacked authority to parole Mr. Lau into the country, and instead "admitted" him when it allowed him to enter after inspection. 8 U.S.C. § 1101(a)(13)(A). Since Mr. Lau was admitted into the country, the

government cannot use § 1182's inadmissibility framework to remove him. It must try § 1227 instead.

4. The government's contrary position is circular. The government claims it could parole Mr. Lau to figure out if it had the authority to parole him. The argument refutes itself. The government cannot parole a noncitizen unless he is "applying for admission to the United States." *Id.* § 1182(d)(5)(A). Someone "lawfully admitted for permanent residence," like Mr. Lau, "shall not be regarded as seeking an admission into the United States," unless an exception in 8 U.S.C. § 1101(a)(13)(C) applies. So DHS must rest a parole decision on a determination that a § 1101(a)(13)(C) exception applies. It cannot parole into the country an LPR to give it time to determine whether the circumstances in fact trigger the very parole authority it already exercised. The statute makes clear that DHS must make that determination *before* and as a *condition* of invoking its parole authority.

The government resorts to arguing that courts cannot review whether it had authority to parole Mr. Lau because parole decisions are discretionary. But the INA permits judicial review of "questions of law," even in the context of a decision "in the [government's] discretion." *Id.* § 1252(a)(2)(B), (D). Thus, courts can review "whether a noncitizen is statutorily eligible" for a discretionary decision like parole. *See Wilkinson v. Garland*, 601 U.S. 209, 221 (2024).

5. Finally, the government argues that interpreting the INA as written would be bad policy because it's too hard for immigration officers to determine whether a returning green-card holder has committed a crime involving moral turpitude, and the public is harmed when potential criminals enter the

country. That complaint rings hollow. For starters, the policy concern makes no sense. The government's premise is that it needs greater authority *to let the very same noncitizens in* via parole—so they are coming in either way. And if the government readmits rather than paroles an LPR who has committed a crime involving moral turpitude, it still has substantial authority to remove him just as expeditiously through deportation proceedings, *see* 8 U.S.C. § 1227(a)(2)(A)(i), meaning parole authority and § 1182 are unnecessary. In any event, immigration officers have been assessing noncitizens' criminal history at the border for over 130 years. There's no reason it would be unusually difficult for the government to do so for purposes of § 1101(a)(13)(C)(v).

The INA doesn't give DHS the power to functionally strip a green-card holder of his right to enter the country without evidence justifying that drastic step. The Court should affirm the Second Circuit's holding that because DHS lacked the power to parole Mr. Lau, he was admitted to the country and cannot be removed under § 1182's inadmissibility framework.

STATEMENT

A. Legal background

1. LPRs are not subject to a finding of inadmissibility when they reenter the country unless a § 1101(a)(13)(C) exception applies.

The INA provides separate procedures for "the exclusion of aliens from admission to this country and the deportation of aliens previously admitted." *Jadulang*, 565 U.S. at 45-46. LPRs have already been admitted through the immigration system and have a qualified right to travel abroad and reenter the

country. They are not typically considered to be "seeking admission" under the INA when they return home from international trips.

a. Section 1182 sets forth the grounds that make a noncitizen "inadmissible," and § 1227 governs deportation of persons already admitted. *Id.* at 46. The criteria for inadmissibility and deportation often overlap, but there are some differences. *Id.* And a noncitizen must prove he is admissible into the country under § 1182, while the government bears the burden to prove that a noncitizen is deportable under § 1227. *See* 8 U.S.C. § 1229a(c)(2)-(3).

A noncitizen has been "admitted" into the country under § 1182 if he "lawful[ly] ent[ered]" "after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A). Typically, admission takes place when immigration officials permit the noncitizen "to pass through the port of entry." 3B George L. Blum et al., *American Jurisprudence 2d Aliens and Citizens* § 1250 (Feb. 2026 update).

b. LPRs have already been admitted to the United States through the immigration system and given the right to reside here. So, when an LPR returns home after travelling abroad, he "shall not be regarded as seeking an admission into the United States." 8 U.S.C. § 1101(a)(13)(C). If the government believes he is removable from the country, it must pursue deportation under § 1227.

In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress created six exceptions to this general rule. *See Vartelas v. Holder*, 566 U.S. 257, 263 (2012). Under each exception, the LPR is "subject to admission procedures, and, potentially, to removal from the United States." *Id.*

An LPR is regarded as "seeking admission" into the country when he:

> (i) "has abandoned or relinquished" his green-card;
>
> (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 left the country while removal proceedings are pending;
>
> (v) "has committed" one of several listed offenses, including some crimes "involving moral turpitude"; 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."

8 U.S.C. §§ 1101(a)(13)(C)(i)-(vi), 1182(a)(2)(A).

This case centers on the exception for an LPR who "has committed" a crime "involving moral turpitude." Under the government's own uncontested agency precedent, it needs "clear and convincing evidence" that the exception applies. *Rivens*, 25 I. & N. Dec. at 625.

2. The government may parole an LPR into the country only if a § 1101(a)(13)(C) exception applies.

The INA also authorizes DHS to "parole" a noncitizen "into the United States temporarily" and "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A). The parole authority extends only to "alien[s] applying for admission to the United States." *Id.* But LPRs

"shall not be regarded as seeking an admission" unless one of six exceptions applies. *Id.* § 1101(a)(13)(C). DHS thus cannot parole rather than admit an LPR unless a § 1101(a)(13)(C) exception applies.

3. For more than a century, the executive branch has been screening out at the border noncitizens guilty of crimes involving moral turpitude.

For more than a century, Congress has instructed executive branch officials to exclude noncitizens who have committed crimes involving moral turpitude at the border.

a. Congress began regulating the admission of noncitizens in the late 1800s. *See* 1 Stanley Mailman et al., *Immigration Law and Procedure* § 2.02[2] (2025). For example, in 1875, Congress barred all noncitizens who were "undergoing a sentence for conviction in their own country of felonious crimes." Pub. L. No. 43-141, § 5, 18 Stat. 477 (Mar. 3, 1875).

The current restriction on immigration by individuals who have committed crimes involving moral turpitude originated in 1891. That act made excludable "persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude." Act of March 3, 1891, § 1.

These early acts contemplated that immigration officials would "inspect" noncitizens "upon the[ir] arrival." *Id.* § 8; *see* Act of March 3, 1875, § 5. Consider the procedure at Ellis Island. Beginning in the late nineteenth century, officials at Ellis Island required arriving noncitizens to fill out questionnaires about their personal history and intentions. Marian L. Smith, *The Creation and Destruction of Ellis Island Immigration Manifests: Part 1*, 28 Prologue, Fall

1996, at 240. By 1903, the questionnaires asked noncitizens whether they were "[e]ver institutionalized for crime or insanity." *Id.*

b. Since the INA's 1952 enactment, immigration officials have classified noncitizens at the border by reviewing their criminal history and asking whether they have committed a disqualifying offense. The 1952 INA made a noncitizen inadmissible if he had "been convicted of a crime involving moral turpitude … admit[ted] having committed such a crime, or … admit[ted] committing acts which constitute the essential elements of such a crime." *See* Pub. L. No. 82-414, § 212(a)(9), 66 Stat. 163, 182 (June 27, 1952).

So too today: A noncitizen is inadmissible if he has been "convicted of," "admits having committed," or "admits committing acts which constitute the essential elements of … a crime involving moral turpitude." 8 U.S.C. § 1182(a)(2)(A). Immigration officers have "access to the criminal history record information contained in the National Crime Information Center's Interstate Identification Index" "for the purpose of determining whether or not [an] applicant for admission has a criminal history record." *Id.* § 1105(b)(1).

B. Factual and procedural background

1. Mr. Lau is a sixty-nine-year-old Hong Kong native. Pet. App. 4a, 17a; A.R. 11. He has resided in New York with his family since becoming an LPR in 2007. Pet. App. 4a; A.R. 11.

On May 7, 2012, New Jersey charged Mr. Lau with trademark counterfeiting for allegedly selling shorts bearing a counterfeit mark. Pet. App. 4a; A.R. 339. While the charges were pending, "he temporarily left the United States" for a "short and casual visit" to China. Pet. App. 4a; A.R. 11, 250. When Mr.

Lau returned home on June 15, 2012, an immigration officer "declined to admit him to the United States and instead" purported to "parole[] him" under 8 U.S.C. § 1182(d)(5)(A). Pet. App. 4a, 29a.

On June 24, 2013, Mr. Lau pled guilty to trademark counterfeiting in New Jersey Superior Court. Pet. App. 4a. He was sentenced to two years' probation. *Id.*

2. On March 13, 2014, the government initiated removal proceedings against Mr. Lau. Pet. App. 4a. It asserted that he was inadmissible under § 1182(a)(2)(A)(i)(I) because he had been convicted of a crime involving moral turpitude. *Id.*

During removal proceedings, Mr. Lau argued that he was admitted into the country, meaning the government would need to invoke its deportation authority, not its authority to remove inadmissible noncitizens, to seek to remove him. He explained that he was not "seeking admission" upon his return to the United States in 2012 so he was not subject to parole, and thus that he was admitted instead. Mr. Lau also argued that his conviction did not count as a crime involving moral turpitude. Pet. App. 18a-24a.

The immigration judge and Board of Immigration Appeals (BIA) rejected Mr. Lau's arguments and ordered his removal. *Id.* The BIA concluded that Mr. Lau was seeking admission upon his return to the country even though his criminal charges were still pending. Pet. App. 7a.

3. The Second Circuit granted Mr. Lau's petition for review. Pet. App. 1a-15a. Judge Sullivan's unanimous opinion held that the INA required the government to prove at the time Mr. Lau reentered the country that he had committed a crime involving

moral turpitude to treat him as seeking admission. Pet. App. 8a-15a. Because the government couldn't make that showing—it had nothing beyond unproven allegations that Mr. Lau had committed a crime—the government didn't have authority to parole him and thus readmitted him when it allowed him to enter the country. Pet. App. 14a-15a.

The court vacated the removal order and remanded to the BIA with instructions to terminate the removal proceedings without prejudice to renewal under § 1227. Pet. App. 15a. The court didn't reach Mr. Lau's other arguments, including that his counterfeiting offense wasn't a crime involving moral turpitude. Pet. App. 8a.

4. The government sought rehearing en banc, which the Second Circuit denied with no recorded dissents. Pet. App. 41a. The government then petitioned for a writ of certiorari, which this Court granted on January 9, 2026.

SUMMARY OF ARGUMENT

I. Mr. Lau isn't removable under § 1182 because the government could not show that he should be regarded as seeking admission under § 1101(a)(13)(C) when he returned to the United States.

A. DHS, like other administrative agencies, can exercise only powers granted to it by Congress. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988). And courts may review any "questions of law" concerning DHS's exercise of its powers, 8 U.S.C. § 1252(a)(2)(B), (D), including whether it had authority to take an otherwise discretionary action. *See Wilkinson*, 601 U.S. at 221.

B. Read against these background principles, the INA's text makes clear that LPRs like Mr. Lau aren't seeking admission into the United States when they return from abroad unless the government can establish that an exception applies at the time of entry. Longstanding historical practice confirms the point. And if a noncitizen isn't seeking admission, the government lacks authority to parole him, rather than simply admit him.

1. The INA's plain text requires the government to assess whether an LPR is seeking admission at the time of reentry. Section 1101(a)(13)(C) provides that an LPR "shall not be regarded as seeking an admission" unless one of six exceptions applies. A noncitizen "seeks" admission—*i.e.*, entry into the country—at the border, so the statute suggests that an LPR can be "regarded" as "seeking an admission"—or not—only at the border. And the government may parole a noncitizen into the country only if he is "applying for admission." 8 U.S.C. § 1182(d)(5)(A). DHS thus can parole an LPR into the country only if it determines at the border that the LPR is "seeking an admission" under § 1101(a)(13)(C).

2. Historical practice also suggests that DHS must determine at the border whether a § 1101(a)(13)(C) exception applies. For more than a century, the executive branch has been assessing at the border whether noncitizens have committed crimes involving moral turpitude. Indeed, Congress has restricted immigration by noncitizens who have committed crimes involving moral turpitude since 1891. *See* Act of March 3, 1891, § 1. And to implement those restrictions, immigration officers asked noncitizens about their criminal history. Smith, *supra*. The INA similarly contemplates that DHS officials will

screen for criminal history before noncitizens are admitted into the country. *See* 8 U.S.C. § 1182(a)(2)(A)(i)(I). Nothing in § 1101(a)(13)(C) or the parole statute, § 1182(d)(5)(A), suggests that Congress expected DHS to depart from this longstanding practice and assess criminal history after the LPR has already reentered the country.

C. The government lacked sufficient evidence to invoke a § 1101(a)(13)(C) exception when Mr. Lau reentered the country in 2012. Longstanding agency precedent that the government expressly accepts for purposes of this case requires DHS to have clear and convincing evidence to invoke a § 1101(a)(13)(C) exception. *Rivens*, 25 I. & N. Dec. at 625. When Mr. Lau returned home, he had been charged with, but not convicted of, a crime. A pending criminal charge isn't evidence of anything—it's simply an accusation, and the accused is presumed innocent. *See, e.g.*, *Nelson*, 581 U.S. at 135-36. So DHS couldn't parole, rather than admit, Mr. Lau. And since Mr. Lau was admitted, he cannot be removed under § 1182.

II. The government's counterarguments contradict the INA and otherwise lack merit.

A. The government first claims (Br. 24-25) that courts lack jurisdiction to review its parole decisions. That argument conflates discretion with the antecedent question about the authority to exercise discretion, and it ignores the INA's plain language.

1. The INA authorizes judicial review of determinations about whether a noncitizen was eligible for a discretionary decision. The INA expressly preserves judicial review over "questions of law," even where they arise in the context of a "decision … in the [government's] discretion." 8 U.S.C. § 1252(a)(2)(B), (D).

Courts thus may review "whether a noncitizen is statutorily eligible" for discretionary relief. *Wilkinson*, 601 U.S. at 221. That means that this Court can review whether DHS had authority under the "statutory standard," *id.* at 223, to parole, rather than admit, Mr. Lau when he reentered the country.

2. The government's suggestion (Br. 26) that Mr. Lau is stuck with DHS's decision to parole him, even if it lacked authority to do so, is meritless. If DHS lacked authority to parole Mr. Lau, then he was not, in fact, paroled, because agencies can exercise only the powers Congress gives them. *See National Federation of Independent Businesses v. OSHA*, 595 U.S. 109, 117 (2022) (*NFIB*). The effect of the government's lack of parole authority is at most a question about "the application of a 'statutory standard.'" *Wilkinson*, 601 U.S. at 223. It thus "presents a mixed question of law and fact" that "fall[s] within the statutory definition of 'questions of law' in § 1252(a)(2)(D) and [is] therefore reviewable." *Id.* at 223, 225. The government's contrary argument would nullify § 1182(d)(5)(A), which limits the parole power to persons "applying for admission," by permitting the government to exercise unlimited, unreviewable parole authority. *See Freytag v. Commissioner*, 501 U.S. 868, 877 (1991).

B. The government next claims (Br. 19-22, 27) that it had authority to parole Mr. Lau to determine whether it had authority to parole him. That bootstrapping, according to the government, is perfectly fine as long as DHS developed evidence that Mr. Lau had committed a crime involving moral turpitude by the time of his removal hearing. That argument makes no sense.

1. The government cannot parole an LPR to determine whether it has authority to parole him. That argument mistakes the government's intended purpose in exercising discretion with for the authority to exercise discretion in the first place. The INA and DHS's regulations require officers to determine that a permanent resident is applying for admission *before* paroling him—if they can't make that determination, they lack parole authority. 8 U.S.C. §§ 1101(a)(13)(C), 1182(d)(5)(A); 8 C.F.R. § 235.2(b)(3). DHS can't parole a green-card holder—for "deferred inspection" or anything else—unless it can first establish one of the conditions Congress set for executing that power.

2. The government's suggestion (Br. 29-34) that it can retroactively justify its parole decision based on evidence it didn't have at the time is equally off-base. The INA's plain text requires DHS to determine whether one of § 1101(a)(13)(C)'s exceptions applies *before* invoking its parole authority. DHS can't parole first and ask whether it was allowed to do so later.

C. Finally, the government resorts to policy reasons why it supposedly needs to circumvent the INA's restrictions on its parole authority. Those arguments also lack merit.

1. The government claims that DHS can't be required to assess criminal history at the border because it's too hard for immigration officials. But to administer § 1101(a)(13)(C), immigration officers could ask whether the permanent resident has committed a crime involving moral turpitude (or its essential elements) and check his criminal history. That's exactly what immigration officers already do under 8 U.S.C. § 1182(a)(2)(A)(i)(I), and what they have been doing since the 1800s.

2. The government also suggests that, to protect the public, it needs authority to parole green-card holders without first assessing whether it has the power to do so. But even if the government can't remove a criminal green-card holder under § 1182's inadmissibility framework, it still had substantial authority to deport persons guilty of crimes involving moral turpitude (among other crimes) under § 1227. *See* 8 U.S.C. § 1227(a)(2)(A)(i). And besides, parole allows a noncitizen into the country. So the question is not whether the government will keep green-card holders accused of crime away from the public, but which statute—§ 1182 or § 1227—will apply in removal proceedings.

ARGUMENT

I. Mr. Lau is not removable under 8 U.S.C. § 1182 because the government could not show when he returned to the United States that he should be regarded as seeking admission under the INA.

Section 1182 governs inadmissibility of noncitizens seeking admission into the country. *Judulang*, 565 U.S. at 46; 8 U.S.C. § 1182. The government agrees that it cannot use § 1182 to remove a person "lawfully admitted for permanent residence in the United States"—like Mr. Lau—"unless" one of six exceptions applied when he reentered the country, including that the LPR "has committed" a crime involving moral turpitude. 8 U.S.C. § 1101(a)(13)(C)(v); Pet. Br. 7, 18. The government expressly accepts that it must prove the exceptions by clear and convincing evidence. Cert. Reply 11; *see* Pet. Br. 16. And the government doesn't claim that it had clear and convincing evidence when Mr. Lau reentered the country that he

had committed a crime involving moral turpitude. The only question is when the government must meet its burden: when the LPR reentered the country, or later in removal proceedings?

The INA's plain text makes clear that LPRs aren't "seeking an admission," 8 U.S.C. § 1101(a)(13)(C), and thus aren't subject to removal under § 1182, unless the government proves a § 1101(a)(13)(C) exception at the time of reentry. Reinforcing that text is more than a century of government practice assessing whether noncitizens have committed disqualifying crimes at the border. The government thus couldn't treat Mr. Lau as inadmissible under § 1182 unless it had clear and convincing evidence that he had committed a crime involving moral turpitude when he reentered the country. Because it lacked such evidence, the INA directed the government "not" to "regard[]" Mr. Lau "as seeking an admission," and he cannot be removed under § 1182. *Id.* § 1101(a)(13)(C). If the government wishes to try removing Mr. Lau, it must invoke its deportation authority under § 1227.

A. DHS can exercise only power conferred by Congress and both the INA and the Court's precedents confirm that courts have jurisdiction to review whether DHS has a particular power.

Two bedrock legal principles, which the government seems determined to ignore, are important for resolving this case.

First, "an administrative agency's power … is limited to authority delegated by Congress." *Bowen*, 488 U.S. at 208. That's because agencies may only "implement and apply the laws [Congress] has enacted," not exercise "[l]egislative power." *FCC v. Consumers'*

Research, 606 U.S. 656, 672 (2025). To determine the scope of an agency's authority, courts "apply[] the traditional tools of statutory interpretation." *Pugin v. Garland*, 599 U.S. 600, 610 (2023). The principal task is to ascertain the plain meaning of the statutory text. *See Jennings v. Rodriguez*, 583 U.S. 281, 299 (2018).

Second, the INA preserves "judicial review" over "questions of law." 8 U.S.C. § 1252(a)(2)(D). The Court has clarified that a "question[] of law" under § 1252(a)(2)(D) includes a "mixed question of law and fact." *Wilkinson*, 601 U.S. at 212. A question is "mixed" even if it "requires a court to immerse itself in facts" or is "primarily factual." *Id.* at 222, 225. And "whether a noncitizen is statutorily eligible" for DHS to take a discretionary action is the kind of mixed question the INA permits courts to review. *Id.* at 221.

B. The INA's text and longstanding historical practice make clear that LPRs like Mr. Lau aren't regarded as seeking admission when they return from abroad unless the government can establish a statutory exception at the time of reentry.

The INA contemplates two ways for a noncitizen to legally enter the country: admission or parole. Green-card holders are presumptively entitled to readmission and ineligible for parole unless one of the six exceptions listed in 8 U.S.C. § 1101(a)(13)(C) applies, including an exception for LPRs who have committed a crime involving moral turpitude. The INA's text and structure make clear that the government must assess whether one of the exceptions applies at the border, because that is the only time that an LPR can be "regarded as seeking an admission

into the United States," *id.*—or not—and is also the time at which the government would need to assess whether a green-card holder can be paroled.

1. The INA's text requires the government to assess at the time of reentry whether an LPR is "seeking an admission."

a. The INA contemplates two primary ways that a noncitizen may lawfully enter the United States: "admission or parole." *See* 8 U.S.C. § 1182(a)(6)(A)(i), (a)(9)(B)(ii), (a)(9)(B)(ii), (a)(9)(B)(iv).

i. "[A]dmission" refers to "the lawful entry of the [noncitizen] into the United States after inspection and authorization by an immigration officer." *Id.* § 1101(a)(13)(A). When a noncitizen arrives at the border, immigration officials inspect his travel documents and assess whether he is subject to any of § 1182's grounds for inadmissibility. *See* 5 *Immigration Law and Procedure* § 61.04. Border officials will "admit the applicant for admission if" his papers are valid and the inspector "is satisfied that the applicant is not excludable." 1 *Immigration Law and Procedure* § 8.06.

ii. If the noncitizen isn't admissible, he may still lawfully enter the country if the border official elects to parole him. Parole refers to "[t]he temporary release of an inadmissible alien into the United States." *Parole*, *Black's Law Dictionary* (12th ed. 2024). The INA gives DHS discretion to "parole" a noncitizen "applying for admission to the United States" "temporarily … for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A).

b. The decision tree for immigration officials is simpler when LPRs seek to reenter the United States.

Green-card holders have already passed through the immigration system and been "lawfully accord[ed] the privilege of residing permanently in the United States as an immigrant." *Id.* § 1101(a)(20). So, Congress has directed that when a green-card holder arrives at the border, he cannot "be regarded as seeking an admission into the United States for purposes of the immigration laws unless" one of six exceptions applies. *Id.* § 1101(a)(13)(C). That means that a green-card holder typically cannot be screened for inadmissibility under § 1182. And it also means that a green-card holder normally cannot be paroled, since DHS's parole authority extends only to persons "applying for admission to the United States." *Id.* § 1182(d)(5)(A).

As a result, unless one of § 1101(a)(13)(C)'s exceptions applies, an LPR who has been allowed to enter at the border has been "admitted," *id.* § 1101(a)(13)(A), and is not subject to removal under § 1182 or parole.

c. The INA's key provisions make clear that the government must assess whether an exception applies at the border, when a returning green-card holder is reentering the country. Begin with 8 U.S.C. § 1101(a)(13)(C).

i. Section 1101(a)(13)(C) provides that a noncitizen "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" one of six statutory exceptions applies. *Id.* Recall that "[t]he terms 'admission' and 'admitted' mean, with respect to [a noncitizen], the lawful entry of the [noncitizen] into the United States after inspection and authorization by an immigration officer." *Id.* § 1101(a)(13)(A). In this context,

"seeking" means to "to try to acquire or gain." *Seeking*, Merriam-Webster Online, https://www.merriam-webster.com/dictionary/seeking. And although the term "entry" is no longer expressly defined by the INA, it has historically referred to the "'coming of [a noncitizen] into the United States.'" *Rosenberg v. Fleuti*, 374 U.S. 449, 452 (1963) (quoting earlier version of INA).

Putting the definitions together, a person who has already been given the right to come into and permanently reside in the United States can't be regarded as seeking permission to enter when he returns to the country unless a statutory exception applies. That makes sense, since an LPR has already been "accord[ed] the privilege of residing permanently in the United States as an immigrant," 8 U.S.C. § 1101(a)(20), and is thus presumptively entitled to admission.

ii. Read with these definitions in mind, § 1101(a)(13)(C) makes clear that the government must assess whether an LPR falls into a statutory exception at the time he reenters the country. A noncitizen is only "seeking an admission," *id.* § 1101(a)(13)(C)—*i.e.*, attempting to gain "entry … into the United States," *id.* 1101(a)(13)(A)—when he arrives at a port of entry. Once he has presented himself for "inspection and authorization by an immigration officer" and been allowed to come into the country, he has been "admitted." *Id.* After that, he is not "seeking" to enter the country because he is already in the country.

Indeed, 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). "Seeking" is phrased in the present tense, meaning that a person cannot be "seeking an admission" once they have already entered the country. So a noncitizen can be "regarded as seeking an admission," 8 U.S.C. § 1101(a)(13)(C)—or not—only when he's at the border. That is the point in time where the government must decide whether to "regard[]" the LPR "as seeking an admission into the United States for purposes of the immigration laws." *Id.*

iii. One of § 1101(a)(13)(C)'s exceptions reinforces the point. The sixth exception allows DHS to treat a returning green-card holder as applying 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). "Is attempting" is another present tense phrase that impliedly excludes the past. *See Carr*, 560 U.S. at 448. On its face, the exception's language contemplates that DHS will determine in the present whether the LPR "is attempting to enter" at an inappropriate place at the time of entry. A person cannot be "attempting" to enter the country if he has already entered.

d. The parole statute's text points to the same conclusion. The INA gives DHS discretion to "parole" the noncitizen "into the United States temporarily under such conditions as" DHS "may prescribe." 8 U.S.C. § 1182(d)(5)(A). But like the rest of § 1182, that parole authority extends only to noncitizens "applying for admission to the United States." *Id.* And an LPR "shall not be regarded as seeking an admission into the United States" unless one of the statutory exceptions applies. *Id.* § 1101(a)(13)(C).

Accordingly, under the parole statute's plain text, the government cannot parole an LPR into the country unless one of the statutory exceptions applies. As Judge Sullivan summarized for the Second Circuit below, "the INA is definitive on the question of *sequence*: 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. That structure is strong evidence that Congress intended for DHS to determine whether the exceptions apply at the border rather than in later immigration proceedings. After all, a noncitizen cannot be released "into the United States," 8 U.S.C. § 1182(d)(5)(A), once he is already in the United States. The concept of parole is relevant for a returning LPR only when he seeks reentry at the border.

The INA's text and structure answer the question presented: The government must determine whether an LPR is subject to a statutory exception, and thus is "seeking an admission," when he presents at the border. If it can't make that determination with the evidence it has, it "shall not … regard[]" the permanent resident "as seeking an admission into the United States for purposes of the immigration laws," *id.* § 1101(a)(13)(C), which means the government must admit, and not parole, him. And that means that if the government wishes to remove the permanent resident from the country after it allows him in, it must seek deportation under § 1227 rather than proceeding under § 1182's inadmissibility framework.

2. For more than a century, the executive branch has been assessing at the border whether noncitizens have committed crimes involving moral turpitude, and the INA says nothing to displace that practice.

Historical practice also supports reading § 1101(a)(13)(C) as requiring the government to determine at the border whether an LPR may be treated as an applicant for admission. "[I]n determining the meaning of a statute or the existence of a power," courts give "weight" to the executive branch's historical practices in the relevant field because "lawmakers … naturally adjust" their expectations about how the law will be executed based on those practices. *See, e.g.*, *United States v. Midwest Oil Co.*, 236 U.S. 459, 472-73 (1915) (collecting cases). Put differently, "the longstanding practice of the government … can inform a court's determination of what the law is." *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 386 (2024) (alterations adopted).

Congress has excluded noncitizens guilty of crimes involving moral turpitude since 1891. In the 135 years since, immigration officials have consistently assessed at the border whether arriving noncitizens have committed crimes involving moral turpitude. Given that longstanding practice, Congress would have expected DHS to determine at the border whether a returning LPR "has committed" a crime involving moral turpitude, 8 U.S.C. § 1101(a)(13)(C)(v).

a. In 1875, Congress first barred all noncitizens who were "undergoing a sentence for conviction in their own country of felonious crimes other than" purely "political" offenses. *See* Act of March 3, 1875,

§ 5. At that time, immigrants arrived in the United States almost exclusively by ship. The 1875 statute required "the collector of the port at which" the ship "arrive[d]" to "inspect[]" the ship's passengers and "certify" to the vessel owner any "persons … ascertained by him to be" inadmissible convicts. *Id.* It was "unlawful" for any noncitizen to leave the boat "until the inspection shall have been had and the result certified." *Id.* That border inspection was the government's only opportunity to assess whether a noncitizen's crimes rendered them inadmissible because Congress didn't pass legislation authorizing the Treasury Secretary to deport noncitizens who had been improperly admitted until 1888. *See* 1 *Immigration Law and Procedure* § 2.02.

b. In 1891, Congress broadened the criminal ban to include all "persons who ha[d] been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude." Act of March 3, 1891, § 1. It then broadened the ban again in 1917 to include anyone who "admit[ted]" to "having committed a felony or other crime or misdemeanor involving moral turpitude." Pub. L. No. 64-301, § 3, 39 Stat. 874, 875 (Feb. 5, 1917).

As with the 1875 law, Congress envisioned that officials administering these laws would determine at the border whether an arriving noncitizen had committed a crime involving moral turpitude. The 1891 statute created a "superintendent of immigration" whose agents would "inspect" newcomers "on board [the] vessels" on which they arrived. Act of March 3, 1891, §§ 7-8. If immigration officials couldn't complete the inspection on the boat, they could "detain them" on shore "until a thorough inspection [was] made." *Id.* § 8. In 1893, Congress made detention mandatory for

noncitizens who were not "clearly and beyond doubt entitled to admission," and authorized four-person boards of "special inquiry" to determine a noncitizen's admissibility at the border. *See* Pub. L. No. 52-206, § 5, 27 Stat. 569, 570 (Mar. 3, 1893).

The Ellis Island immigration station in New York harbor, which operated from 1892 through 1954, illustrates these procedures in practice. When immigrants arrived, they were required to submit "manifest logs" answering numerous questions aimed at determining admissibility. Smith, *supra*. Those questions included whether the noncitizen had "ever" been "in prison." Act of February 5, 1917, § 12. The manifest would later be used by immigration officers during the inspection. *Id.* Immigrants were also required to answer many oral questions. Henry P. Guzda, *Ellis Island a welcome site? Only after years of reform*, Monthly Labor Review 30 (1986). After inspection, noncitizens were detained pending an immigration inquiry. *Id.* The detained immigrant would eventually appear for a hearing in front of a special inquiry board, which would determine his admissibility. *Id.* Unless they passed inspection, immigrants were not typically allowed to enter the country.

c. The 1952 INA broadened the criminal ban to all noncitizens who "have been convicted of a crime involving moral turpitude (other than a purely political offense), or … who admit having committed such a crime, or … who admit committing acts which constitute the essential elements of such a crime." Immigration and Nationality Act of 1952, § 212(a)(9). That language persists today. 8 U.S.C. § 1182(a)(2)(A)(i)(I).

As with prior immigration laws, Congress understood that officials would assess at the border whether noncitizens had committed a crime involving moral turpitude. As the INA's legislative history explains, "immigration officers charged with administering the law will be able to determine from the information supplied by the alien whether he falls within the 'criminal' category of excludables, notwithstanding the fact that there may be no record of conviction or admission of the commission of a specific offense." H.R. Rep. No. 82-1365, at 48 (1952).

The practice of screening for crimes at the border didn't end with subsequent amendments to the INA or the passage of IIRIRA. Customs and Border Patrol (CBP) uses a variety of law enforcement databases, including the FBI's criminal history database and the Integrated Automated Fingerprint Identification System, to screen arrivals at ports of entry. Congressional Research Service, R43356, *Border Security: Immigration Inspections at Ports of Entry* 8-9 (2015); *see, e.g.*, *United States v. FNU LNU*, 261 F.R.D. 1, 9-22 (E.D.N.Y. 2008), *aff'd on other grounds*, 653 F.3d 144 (2d Cir. 2011). Reminiscent of the ship-manifest system, air carriers must submit passenger manifests to CBP through the Advance Passenger Information System so that officers can screen and identify high-risk and inadmissible passengers and crew members. *Border Security* 8.

Travelers who trigger alarms for criminal history or who arouse suspicion during primary inspections are referred to secondary inspection, where they are subject to an extensive interview, physical searches, and additional vetting. *Id.* at 12. Mr. Lau's case demonstrates how CBP will interview arrivals who are flagged as having potential criminal history in

order to make an admissibility determination. J.A. 13-J.A. 18. CBP officers have the investigative tools to make such determinations at ports of entry and are delegated the statutory responsibility to make them. *See, e.g.*, 8 C.F.R. §§ 235.1, 287.5. If they are able to determine that a returning LPR committed a disqualifying offense, they have discretion to parole the LPR into the country pending completion of his criminal proceedings and any subsequent removal proceedings. But if they can't determine whether an LPR committed a crime involving moral turpitude at the border, the government can later institute deportation proceeding under § 1227 based on the evidence it collects after admission.

* * *

For well over a century—and before they had today's sophisticated information-sharing networks—executive branch officials have been determining at the border whether arriving noncitizens are inadmissible based on disqualifying criminal offenses. That history is more evidence that the INA's plain text makes sense and means what it says: Government officials must determine at the border, rather than in later immigration proceedings, whether returning LPRs should be treated as applying for admission.

C. When Mr. Lau reentered the country, the government lacked clear and convincing evidence that he had committed a crime involving moral turpitude.

The government couldn't have determined by clear and convincing evidence when Mr. Lau reentered the country that a § 1101(a)(13)(C) exception applied. The government relied on the exception for a noncitizen who "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 anything, much less a crime involving moral turpitude. Nor did he admit to committing such a crime. Indeed, when Mr. Lau reentered the country, DHS knew only that New Jersey had charged him with trademark counterfeiting—an offense for which he was presumed innocent. A pending criminal charge is an unproven allegation, and not clear and convincing evidence that the defendant has committed an offense. *See, e.g.*, *Nelson*, 581 U.S. at 135-36.

The government doesn't argue otherwise. Because the government lacked clear and convincing evidence when Mr. Lau returned to the country and presented his green-card that he had committed a crime involving moral turpitude, DHS could not treat him as seeking admission under § 1101(a)(13)(C) and so could not parole him under § 1182. That means Mr. Lau was admitted into the United States when he was allowed to enter. *Supra* pp. 20-30. If the government wants to remove Mr. Lau, it must try to do so under § 1227.

II. The government's counterarguments contradict the INA and otherwise lack merit.

The government's position in this case rests on circular reasoning. Paroled individuals aren't treated as admitted to the country, meaning they can be subject

to removal under § 1182. 8 U.S.C. § 1182(a)(2)(A)(i)(I). The government claims it didn't need evidence at the border that Mr. Lau had committed a crime involving moral turpitude because it had the power to parole him into the country; see how his criminal proceedings played out; and then prove in removal proceedings, based on later-developed evidence, that at the time he entered the country he had committed an offense that allowed him to be paroled in the first place.

That makes no sense, and the government provides no example of government action whose authority depends on its exercise. The government cannot parole a noncitizen unless he is "applying for admission." *Id.* § 1182(d)(5)(A). And the INA specifies that a person "lawfully admitted for permanent residence"—like Mr. Lau—"shall not be regarded as seeking an admission" unless one of the six statutory exceptions applies. *Id.* § 1101(a)(13)(C). So the government's theory that it could parole Mr. Lau to figure out whether he had committed an offense that would give it power to parole him doesn't work.

The most remarkable thing about the government's brief is that the government never confronts this central bootstrapping defect with its argument. And it fails to do so even though the Second Circuit rejected the very same argument. Perhaps avoiding the issue makes sense. After all, if physics worked like the government's "logic," all we'd have to do to fly is reach down and tug on our shoes to find we had Hermes's winged sandals.

Rather than confront its lack of authority, the government tries to dodge the issue. *First*, the government argues (Br. 24-29) that courts lack jurisdiction to review whether it had authority to parole

Mr. Lau into the country, and must accept the fact that he was paroled no matter whether it had authority to parole him. The government must be suffering from amnesia from the wall it hit in *Wilkinson*, where this Court made clear that courts have jurisdiction under 8 U.S.C. § 1252(a)(2) to review the government's authority to take discretionary action. 601 U.S. at 221. That means courts have jurisdiction to review whether a permanent resident can be paroled. And courts aren't required to accept government action as historical fact if the agency had no authority to take it. *See Bowen*, 488 U.S. at 208.

Second, the government claims (Br. 19-21, 27-36) that, even if courts can review its parole decision, it could parole Mr. Lau because he was convicted of trademark counterfeiting long after DHS's parole decision. That's wrong. The INA specifies that LPRs like Mr. Lau are presumptively ineligible for parole. 8 U.S.C. §§ 1101(a)(13)(C), 1182(d)(5)(A). DHS can parole an LPR only if it is able to determine that an exception applies at the time of reentry. *Supra* pp. 20-30. It would turn the INA on its head to allow DHS to parole an LPR on the mere hope that the necessary evidence will eventually turn up.

Finally, the government contends (Br. 36-39) that the Court should reverse the Second Circuit's textualist decision because it's too hard for border officials to assess at the border whether a returning permanent resident has committed a crime involving moral turpitude. But every day, border officials assess whether noncitizens are inadmissible by looking up whether they have been convicted of a crime involving moral turpitude and interviewing them to see if they will admit to committing such a crime or its elements. *See* 8 U.S.C. § 1182(a)(2)(A)(i)(I). Executive branch officials

have been making this same determination at the border since the nineteenth century, long before they gained access to today's sophisticated databases. *Supra* pp. 26-30. Requiring DHS to assess at the border whether a returning LPR has committed a crime involving moral turpitude doesn't unfairly burden the government. And the complaint makes little sense on its own terms anyway. The government can't explain why its § 1227 deportation authority is inadequate and it needs to instead let people into the country before proceeding on the inadmissibility track.

A. The Second Circuit had jurisdiction to determine whether the government had authority to parole, rather than admit, Mr. Lau when he returned to the country.

The government's lead argument is that "whether or not [its] parole decision was correct" doesn't matter. Br. 24; *see* Br. 25-29. That's because, in its view, the Second Circuit "lacked authority to review the parole decision," and was instead required to accept that Mr. Lau "was in fact paroled." Br. 24.

Not close—not enough even for government work. Federal courts have jurisdiction to review whether an LPR could be paroled into the country. The INA expressly reserves judicial review of "questions of law" involved in "any decision or action … in the discretion of" the government, 8 U.S.C. § 1252(a)(2)(B), (D), as this Court very recently reconfirmed, *Wilkinson*, 601 U.S. at 221. Courts thus aren't required to accept unauthorized government actions. That makes sense, since agencies "possess only the authority that Congress has provided." *NFIB*, 595 U.S. at 117.

1. The INA gives courts jurisdiction to review determinations about whether a noncitizen was eligible for a discretionary decision.

The government first argues (Br. 24-25) that the Second Circuit lacked jurisdiction to review the government's parole decision because parole decisions are discretionary, and the INA precludes judicial review of discretionary decisions. That argument contravenes both the INA and this Court's precedents.

a. While the INA blocks judicial review of "any … decision or action" "in the discretion of the … Secretary of Homeland Security," it preserves review of "questions of law." 8 U.S.C. § 1252(a)(2)(B), (D). The carveout for questions of law includes mixed questions of law and fact, *see Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 232 (2020), including mixed questions relevant to a discretionary decision that are "primarily factual," *Wilkinson*, 601 U.S. at 225.

For example, the INA gives immigration judges discretion to cancel removal of certain noncitizens who show "that removal would result in exceptional and extremely unusual hardship" to a close family member who is a U.S. citizen or LPR. 8 U.S.C. § 1229b(b)(1)(D). In *Wilkinson*, the Court held that the INA preserves courts' jurisdiction to review whether a noncitizen's evidence establishes unusual hardship, even if courts can't review an immigration judge's ultimate determination about whether to exercise his or her discretion to cancel removal. 601 U.S. at 217. Determining "whether a noncitizen is statutorily eligible for cancellation of removal requires a court to assess whether an IJ correctly applied the statutory

standard to a given set of facts"—a reviewable "mixed question of law and fact." *Id.* at 221.

Just so here. The parole statute confers discretion to parole a noncitizen who is "applying for admission to the United States." 8 U.S.C. § 1182(d)(5)(A). But a person "lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission" unless a statutory exception applies. *Id.* § 1101(a)(13)(C). Like the cancellation of removal provision, the parole provision gives DHS discretion, but only upon a finding that certain statutory eligibility criteria are met. And, as in *Wilkinson*, the Court can review whether the evidence on hand satisfied those criteria, *see* 601 U.S. at 212-13—here, whether the evidence when Mr. Lau returned to the country made him eligible for parole.

b. The government claims that no court can scrutinize its parole decision because that decision was purely "factual." Br. 26-27. But determining whether Mr. Lau had committed a crime involving moral turpitude when he returned to the United States required applying a "statutory standard to a given set of facts." *Wilkinson*, 601 U.S. at 221. As this Court held in *Wilkinson* and *Guerrero-Lasprilla*, that is exactly the kind of mixed question that the INA makes reviewable. *Wilkinson*, 601 U.S. at 217; *Guerrero-Lasprilla*, 589 U.S. at 227.

c. The government also claims (Br. 27-28) that the Second Circuit's jurisdiction was limited to examining Mr. Lau's final order of removal, and not anything related to the parole decision. But the immigration judge ordered Mr. Lau removed as inadmissible under § 1182. Pet. App. 17a-24a. The government could use § 1182 to remove Mr. Lau only

if it had authority to treat him as an applicant for admission—treatment that depends on whether the government had authority to parole rather than admit him at the border. 8 U.S.C. §§ 1101(a)(13)(C), 1182(d)(5)(A). The INA gave the Second Circuit—and gives this Court—jurisdiction to resolve the question of law of whether DHS had authority to parole Mr. Lau as part of determining whether he could be validly removed under § 1182. *Id.* § 1252(a)(2)(B), (D).

2. Courts and litigants are not bound by parole decisions DHS lacked authority to make.

The government next argues that whether or not it had authority to parole Mr. Lau, it did in fact parole him, and he and the Court are now bound by that "historical fact." Br. 24. That argument contravenes basic principles of agency law and statutory interpretation.

a. Start with agency law. "Administrative agencies" like DHS "are creatures of statute." *NFIB*, 595 U.S. at 117. "They accordingly possess only the authority that Congress has provided." *Id.* Here, Congress gave DHS authority to parole only noncitizens "applying for admission," 8 U.S.C. § 1182(d)(5)(A), and specified that a person "lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission" unless one of the six statutory exceptions applies, *id.* § 1101(a)(13)(C). Because DHS couldn't determine that a statutory exception applied when Mr. Lau reentered the country, it couldn't parole him. *See id.* § 1182(d)(5)(A). Thus, no matter what DHS purported to do in the administrative record (Pet. Br. 26-29), Mr. Lau was not paroled. The government couldn't saddle

Mr. Lau with a legal status—parole—that it lacked authority to dispense.

b. The government's position also contravenes bedrock principles of statutory interpretation. The Court has "consistently … expressed 'a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.'" *Freytag*, 501 U.S. at 877. Interpreting the INA as making the government's parole decisions conclusive—even when the government lacked authority to parole the noncitizen—would make superfluous Congress's decision to limit the parole power to persons "applying for admission to the United States," 8 U.S.C. § 1182(d)(5)(A), as well as its decision to preserve judicial review of questions of law, *id.* § 1252(a)(2)(B), (D).

Recall also that the parole provision allows the Secretary of Homeland Security to parole noncitizens "into the United States temporarily under such conditions as he may prescribe." *Id.* § 1182(d)(5)(A). Under the government's view, the Secretary could adopt a policy of paroling all returning permanent residents under the condition that they surrender their green cards, pay the Secretary $50,000, and leave the United States the next day, and there is nothing anyone could do about it. That isn't the statutory scheme Congress wrote. DHS's parole "authority is not unbounded." *Biden v. Texas*, 597 U.S. 785, 806 (2022).

c. In light of these fundamental defects, it's no surprise that the government's justifications for its argument lack merit.

First, the government points to provisions in the INA and related regulations specifying that parolees "shall not be regarded" as having been admitted, *see* 8

U.S.C. § 1182(d)(5)(A), and argues (Br. 26-29) that, since Mr. Lau was paroled, he is treated in removal proceedings as if he was standing at the border. But DHS lacked authority to parole Mr. Lau when he reentered the country because it lacked any evidence of a statutory exception and had only unproven allegations. *Supra* pp. 30-31. So he wasn't paroled, and his entry into the country after presenting himself for inspection was an admission. *Id.* That means he can't be treated as applying for admission under § 1182 in removal proceedings. *Id.*

Second, the government analogizes Mr. Lau's situation to that of a person convicted of a crime with insufficient evidence, arguing (Br. 28) that just as a wrongfully convicted man was still convicted, a wrongfully paroled man was still paroled. The problem with the government's analogy is that courts have constitutional and statutory power to enter convictions even when they rest on a legal error. That a later court may recognize the error and reverse the conviction doesn't mean that the court lacked jurisdiction to enter the conviction in the first place. *See Lewis v. United States*, 445 U.S. 55, 60-61 (1980). By contrast, DHS is not a court. It has only the powers Congress gave it, *Bowen*, 488 U.S. at 208, and the INA doesn't allow DHS to parole LPRs unless the government establishes one of six eligibility criteria, 8 U.S.C. §§ 1101(a)(13)(C), 1182(d)(5)(A). So DHS did not parole Mr. Lau because Congress did not give it authority to assign him that status.

Besides, the analogy fails on its own terms. Just as this Court can reverse a wrongful conviction, § 1252(a)(2) preserves this Court's power to reverse a parole decision that exceeded DHS's authority.

B. The INA doesn't allow the government to parole an LPR first and answer authority questions later.

The government next argues that it should win even if the Court rejects its jurisdictional arguments. The government claims (Br. 27, 32-34) that it can parole any LPR for "deferred inspection" even if it doesn't have evidence establishing a statutory exception, and that its decision is valid if it can substantiate its parole authority with the evidence developed by the time of removal proceedings.

The INA rejects that approach. The government may parole an LPR only if a statutory exception applies. 8 U.S.C. §§ 1101(a)(13)(C), 1182(d)(5)(A). The government can't parole an LPR based on the mere hope that later evidence might emerge justifying its decision.

1. The government cannot parole an LPR to determine whether it has authority to parole him.

The government first argues that it had discretion to parole Mr. Lau into the country to see if it had authority to parole him. In its view, immigration officers were authorized to parole Mr. Lau "pending a deferred decision on admissibility" under 8 C.F.R. § 235.2. Br. 20; *see* Br. 19-22, 27. It argues that its regulations allow it to parole a permanent resident "for deferred inspection" so long as the immigration officer determines that he "may be seeking an admission." Br. 20. That argument is wrong under the INA and DHS's regulations alike. The argument focuses on why the government might *want* to parole someone, but says nothing about any *authority* to do so.

Start with the INA. The statute provides that DHS "may … parole" a noncitizen who is "applying for admission." 8 U.S.C. § 1182(d)(5)(A). And permanent residents "shall not be regarded as seeking an admission … unless" an exception applies. *Id.* § 1101(a)(13)(C). So the government cannot parole an LPR—for deferred inspection or otherwise—unless an exception applies. Paroling an LPR to hunt for evidence to authorize his parole gets the statute backwards.

DHS's regulations can't override the INA's limitations on DHS's parole power, but they don't support the government's argument anyway. The regulation governing parole for deferred inspection provides, in relevant part, that "[a]n examining immigration officer may defer further examination … if the examining immigration officer has reason to believe that the alien can overcome *a finding of inadmissibility* by: … (3) [p]resenting additional evidence of admissibility not available at the time and place of the initial examination." 8 C.F.R. § 235.2(b)(3) (emphasis added). On its face, the regulation envisions that DHS will invoke its parole authority only after making an initial "finding of inadmissibility" that the noncitizen might overcome. *Id.* It doesn't allow the government to put off determining the noncitizen's admissibility so that *the government* can hunt for more evidence.

2. The government can't retroactively justify its parole decision based on evidence it lacked at the border.

The government next claims that it is not "limit[ed] … to the evidence that it possessed" at the border when justifying its parole decision in removal proceedings. Br. 29; *see* Br. 30-34. According to the

government, it can parole whomever it wants as long as it has enough evidence by the time it initiates removal proceedings to invoke a § 1101(a)(13)(C) exception. The government's arguments fail.

a. The government first invokes 8 U.S.C. § 1229a(c)(1)(A), which provides that an immigration judge's decision in removal proceedings "shall be based only on the evidence produced at the hearing." The government argues that § 1229a(c)(1)(A) allows it to meet its burden to invoke one of § 1101(a)(13)(C)'s exceptions based "on the evidence produced at the hearing," even if that evidence wasn't available when DHS first purported to parole an LPR for deferred inspection. Br. 29-30.

But § 1229a just specifies that an immigration judge can't consider extra-record evidence in removal proceedings. It doesn't say what evidence the government can rely on in determining whether it may parole an LPR. The INA's plain text, in contrast, requires DHS to assess whether a statutory exception applies when a permanent resident reenters the country. *Supra* pp. 21-25.

For the same reason, the government's claims that "Congress knows how to write" statutes "limit[ing]" the record on judicial review, miss the point. Br. 30. The INA doesn't allow DHS to parole an LPR unless it can establish that an exception applies. *Supra* pp. 20-30. Congress didn't need to limit the scope of the record in immigration proceedings to require DHS to follow the statute.

b. The government next argues that "[w]hether 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." Br. 33. The government thus contends that what matters is whether the LPR had committed a crime involving moral turpitude at the time of reentry, not whether the government had evidence of the offense. *Id.* But again, "the INA is definitive on the question of *sequence*: 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. So DHS must determine whether a returning LPR "has committed" a crime involving moral turpitude based on what it knows when it tries to parole him, and not what it may later learn.

c. The government argues that it should be able to retroactively justify its parole decisions because "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," Br. 30, and a criminal defendant might use an "expert psychiatric report" obtained after the offense took place to prove his insanity defense, Br. 31. Neither analogy works. The Federal Rules of Civil Procedure allow civil litigants to invoke federal diversity jurisdiction as long as they have a reasonable basis for their jurisdictional allegations, even if they need discovery to prove them. Fed. R. Civ. P. 11(b)(3). And a criminal defendant pleading insanity doesn't need to prove anything to anyone at the time he's committing a crime. By contrast, Congress instructed DHS not to parole LPRs unless it established a statutory exception, meaning DHS cannot invoke its parole authority without evidence of an exception. *See supra* pp. 20-30. That rule comports with the general administrative law principle that an agency cannot justify its decision after the fact. *See Department of*

Homeland Security v. Regents of the University of California, 591 U.S. 1, 21 (2020).

d. Unable to show that it can justify its parole decisions after the fact in litigation, the government complains about the burden of proof. It contends that nothing in the INA's text "suggest[s] that DHS inspection and parole decisions at ports of entry … are subject to" the "clear and convincing evidence" standard. Br. 32. But the government already disavowed any challenge to the burden of proof. In its own words: "The government is not challenging the clear and convincing standard," Cert. Reply 11, but rather is "assuming" the standard "is correct for purposes of this case, and this Court may do so as well," Pet. Br. 16. So much for square corners.

In any event, the government's complaints are misplaced. This Court has long held that noncitizens 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 with special force "when the alien is a permanent resident." *Landon v. Plasencia*, 459 U.S. 21, 35 (1982). Because the INA doesn't depart from that historical practice, the BIA has repeatedly held "that the DHS bears the burden of proving by clear and convincing evidence that a returning [LPR] 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). Although those decisions are subject to administrative review, 8 C.F.R. § 1003.1(d)(1)(i), (h), they have never been challenged or overruled. And the decisions make sense. Removal from the country is a "particularly severe penalty" that many would risk

prison time to avoid. *See Lee v. United States*, 582 U.S. 357, 370 (2017). The clear and convincing evidence standard accounts for the gravity of a removal decision.

e. Lastly, the government disagrees (Br. 34-36) with this Court's description in *Vartelas* that a "straightforward reading" of § 1101(a)(13)(C) shows that an LPR "who has been convicted of an offense under § 1182(a)(2) (or admits to one)" is "seeking admission." 566 U.S. at 275 n.11. In its view, § 1101(a)(13)(C) doesn't require a conviction—just that the permanent resident "has committed" a crime involving moral turpitude. Br. 34-35 (citing *Barton v. Barr*, 590 U.S. 222, 232 (2020)). But the Court does not need to decide whether *Vartelas*'s reading is correct. The government concedes for this case that it needed clear and convincing evidence. Br. 32. No matter whether § 1101(a)(13)(C) requires a conviction, the government had no clear and convincing evidence that Mr. Lau "had committed" a crime involving moral turpitude in June 2012. In a case where the question matters and is properly presented, the Court could consider the government's argument. It would then also need to confront the powerful argument that, as amici explain, *Vartelas*'s reading is correct because § 1101(a)(13)(C)(v)'s text shows that Congress intended for LPRs to be treated as applicants for admission if they would be inadmissible under § 1182(a)(2), which requires a conviction or admission of the offense. *See* Immigration Law Professors' Amicus Br. § I.A.

Barton doesn't change that result. The Court held there that a noncitizen "committed an offense referred to in § 1182(a)(2)" during his initial-residence period, making him ineligible for cancellation of removal,

even if he was convicted "after the [period] elapsed." *Barton*, 590 U.S. at 232. That makes sense, because the decision of whether a noncitizen is eligible for cancellation of removal takes place after he is found removable. *See* 8 U.S.C. § 1229b(a). The INA thus requires courts to look back at the noncitizen's initial-residence period with the benefit of hindsight. Sections 1101(a)(13)(C) and 1182(d)(5)(A), however, require the government to determine at the border whether a permanent resident is "seeking admission," *before* it may decide to parole him.

C. The government's policy arguments lack merit.

Unable to show that the INA supports its position, the government resorts to policy arguments. But "policy arguments" "cannot supersede the clear statutory text." *United States ex rel. Schutte v. SuperValu Inc.*, 598 U.S. 739, 757-58 (2023). Regardless, the government's arguments lack merit on their own terms.

First, the government claims (Br. 36-38) that it is impossible for immigration officers to determine at the border whether LPRs have committed crimes involving moral turpitude. But that claim doesn't withstand scrutiny. DHS regularly assesses whether noncitizens are inadmissible because they committed crimes involving moral turpitude by checking for records of conviction and interviewing noncitizens at the border to see if they admit the offense, and has been doing so for more than 100 years. *See* 8 U.S.C. § 1182(a)(2)(A)(i)(I); *supra* pp. 26-30. There is no reason why DHS can't do the same for returning LPRs.

Second, the government claims (Br. 38-39) that paroled permanent residents and the public benefit from its approach. Not true. The permanent resident

benefits from being admitted into the country rather than paroled. And the public is at most minimally affected because the government has substantial authority to remove noncitizens convicted of crimes involving moral turpitude under § 1227.

1. Requiring immigration officers to assess whether an LPR has committed a crime involving moral turpitude before paroling him is both easily administrable and consistent with historical practice.

The government takes issue with requiring immigration officers "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." Br. 36. In its view, such a rule would be "unworkable" and interfere with "the movement of people and goods across the border." Br. 36-37. The government claims that Mr. Lau's position would have "the practical effect" of "nullify[ing] the use of parole for LPRs" contrary to "Congress's expectations and longstanding agency practice." Br. 37. The government's arguments lack merit.

First, the government's administrability "concerns are exaggerated." *Moncrieffe v. Holder*, 569 U.S. 184, 203 (2013). Implementing § 1101(a)(13)(C) wouldn't require immigration officers to "call into session a piepowder court to entertain a plea or conduct a trial." *Vartelas*, 566 U.S. at 275. Indeed, the INA already creates a blueprint for conducting the § 1101(a)(13)(C) inquiry. Section 1182(a)(2)(A) makes a noncitizen "inadmissible" if he has been "convicted of," "admits having committed," or "admits committing acts which constitute the essential elements of"

"a crime involving moral turpitude." 8 U.S.C. § 1182(a)(2)(A)(i)(I). Immigration officers thus can take the same steps under § 1101(a)(13)(C) that they already do under § 1182(a)(2)(A)(i)(I): Ask the noncitizen whether he has committed a crime involving moral turpitude or its essential elements and "check [his] records for a conviction," *Vartelas*, 566 U.S. at 275.

For that same reason, the government's complaint that immigration officers would "lack access to the strongest evidence," such as "prosecutors' files," is irrelevant. Br. 37. Immigration officers don't need access to the prosecutors' files because they won't be conducting "mini-trials at ports of entry," Br. 36-37. *See Vartelas*, 566 U.S. at 275. If the consequence of conducting this inquiry is that permanent residents are paroled less often, that will be the result of the statute Congress wrote. *See* 8 U.S.C. § 1101(a)(13)(C).

Second, for over a century, immigration officers have assessed at the border whether noncitizens have committed disqualifying crimes. Since 1875, Congress has restricted immigration by noncitizens who have committed crimes in various forms. *See* Act of March 3, 1875, § 5. And crimes involving moral turpitude have been disqualifying since 1891. The executive branch has historically enforced these statutes by screening out at the border ineligible noncitizens with criminal records. *See supra* pp. 26-30. If federal officials could assess criminal history at the border in the era of wooden ships and oil lamps, it's hard to believe that DHS officials can't do so today.

2. Paroling an LPR facing unproven criminal charges doesn't benefit him or the public.

The government also claims (Br. 20-21, 38-39) that paroling LPRs who are facing criminal charges benefits the permanent residents and the public alike. Not so.

a. Start with the supposed benefits to the LPR. The government says parole benefits green-card holders by letting them "organize [their] criminal defense from inside the United States." Br. 39; *see* Br. 20. But if the government lacks sufficient evidence of a statutory exception, it must admit the LPR into the country. *Vartelas*, 566 U.S. at 263. So an LPR facing an unproven criminal charge will be able to organize his defense from within the country either way.

The government next says that, under Mr. Lau's reading, it will be "incentiv[ized] … to initiate removal proceedings immediately, during which the LPR may be detained." Br. 39; *see* Br. 21. But it would make little sense to initiate removal proceedings against a permanent resident for committing a disqualifying crime while the criminal prosecution is still pending. As the government itself explains, "if the LPR prevails in his criminal case, or negotiates a plea for an offense not covered by the INA, the LPR might avoid removal altogether." Br. 39. So the government's "incentive" is to let the criminal proceedings play out, and then decide whether to seek removal.

b. The government also claims that paroling permanent residents facing criminal charges provides "significant public benefit by ensuring that [those] who have committed crimes" can be removed from the country. Br. 21, 38. That makes no sense. The INA

gives the government substantial power to deport LPRs convicted of crimes involving moral turpitude. 8 U.S.C. § 1227(a)(2)(A)(i). "Escaping" removal under § 1182 "does not mean escaping deportation." *Moncrieffe*, 569 U.S. at 204. "To the extent that" Mr. Lau's position "may have any practical effect on policing our Nation's borders, it is a limited one." *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 581 (2010).

CONCLUSION

The Court should affirm.

Respectfully submitted.

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