No. 25-429

In the Supreme Court of the United States

TODD BLANCHE, ACTING ATTORNEY GENERAL,
PETITIONER

v.

MUK CHOI LAU

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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulations:

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The Immigration and Nationality Act (INA), ch. 477, 66 Stat. 163, as amended (8 U.S.C. 1101 *et seq.*), provides that although a lawful permanent resident (LPR) arriving in the United States at a port of entry and undergoing inspection generally need not establish his admissibility, an LPR may be regarded as seeking an admission if, among other possibilities, he "has committed an offense identified in section 1182(a)(2)." 8 U.S.C. 1101(a)(13)(C)(v). Respondent agrees that when he arrived in the United States in June 2012, he *in fact* had already committed a New Jersey counterfeiting offense that, as the case comes to this Court, is taken to be an offense identified in Section 1182(a)(2). Respondent was thus properly charged with a ground of inadmissibility in his removal proceedings.

Respondent nevertheless maintains that his removal order should be vacated because immigration officers in the Department of Homeland Security (DHS) whom he encountered at the airport in June 2012 did not themselves possess clear and convincing evidence that he had committed that counterfeiting offense. Yet respondent identifies nothing in the INA's text, historical practice, or this Court's cases imposing such an evidentiary requirement on officers at the border.

Respondent instead attempts to cobble together an at-the-border evidentiary requirement by shifting his focus to the separate question whether he was properly *paroled* into the United States for a deferred inspection and prosecution. The thrust of respondent's argument is as follows: (1) because DHS may parole only an "alien applying for admission to the United States," 8 U.S.C. 1182(d)(5)(A), immigration officers at the border must determine whether an LPR is "seeking an admission" under 8 U.S.C. 1101(a)(13)(C) before granting parole; (2) those officers must possess clear and convincing evidence to treat the LPR as seeking an admission; and (3) if the officers lack such evidence and nevertheless grant parole, then the parole is deemed to have been an unintentional decision to grant *admission* into the United States, thereby precluding a subsequent removal on any ground of inadmissibility.

Respondent devotes most of his brief to the first step, but that is not in dispute here. Before paroling respondent, immigration officers *did* determine that he was seeking an admission—just not with the level of proof that respondent urges in step two. The requisite level of proof is the crux of the dispute in this case. Yet respondent barely makes any attempt to establish that the INA imposes a clear-and-convincing evidentiary re-

quirement at the border. Rather than provide a reasoned basis for that supposed requirement, respondent simply asserts—repeatedly and without elaboration—that the Board of Immigration Appeals has adopted such a requirement, and that the government has accepted that holding for purposes of this case. See Resp. Br. 5, 9, 15, 18, 44, 45. That is wrong twice over.

The Board has expressly rejected any at-the-border evidentiary requirement, holding instead that DHS must "establish by clear and convincing evidence *at the time of the removal hearing* that a returning [LPR]" is seeking an admission. *In re Valenzuela-Felix*, 26 I. & N. Dec. 53, 64 (2012). And for purposes of this case, the government accepts only the proposition "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." Gov't Br. 16 (emphasis added). Respondent's unreasoned attempt to shift that evidentiary requirement, as through sleight-of-hand, from the removal proceedings to the border is akin to shifting the beyond-a-reasonable-doubt requirement from a criminal trial to the arrest or indictment.

Imposing an evidentiary requirement on immigration officers at the border makes no practical sense. Evidentiary burdens are appropriate in adversarial proceedings before a decisionmaker like an immigration judge, not at the border where non-lawyer immigration officers process hundreds or thousands of arriving aliens each day. Respondent's position also contradicts the INA's directive that the immigration judge's decision be based "only on the evidence produced at the [removal] hearing," 8 U.S.C. 1229a(c)(1)(A), without any further limitation to evidence that immigration officers

at the border possessed. And the INA makes clear that an arriving LPR is seeking an admission if he *in fact* "has committed an offense identified in section 1182(a)(2)," 8 U.S.C. 1101(a)(13)(C)(v)—not just when "immigration officers have clear and convincing evidence that the LPR has committed" such an offense, as respondent would effectively rewrite the statute to say.

Respondent's inability to establish his at-the-border evidentiary rule dooms his case. Assuming the government had to show that respondent was seeking an admission in June 2012, it indisputably proved that historical fact in respondent's removal proceedings by providing clear and convincing evidence that respondent committed his counterfeiting offense in March 2012. See J.A. 7. Because respondent was in fact seeking an admission in June 2012, he was properly paroled and thus properly charged with inadmissibility rather than deportability. That is enough to decide this case.

That said, respondent's argument suffers from additional flaws that provide independent bases to reverse the decision below. Respondent's argument hinges on his contention that DHS lacked authority to parole him, but DHS's parole decision is judicially unreviewable. Respondent observes that questions of law are reviewable, but the relevant point here is the *fact* that respondent was paroled—regardless of whether DHS was correct to grant that parole. Nor may respondent's entry be deemed to have been an unwitting admission into the United States. Congress has twice emphasized that parole is *not* to be regarded as an admission, see 8 U.S.C. 1101(a)(13)(C), 1182(d)(5)(A), and respondent provides no basis for a federal court to defy that repeated congressional command. See Gov't Br. 26-29.

A. The Government Proved By Clear And Convincing Evidence In Respondent's Removal Proceedings That He Was Seeking An Admission And Was Inadmissible

The court of appeals erred in setting aside respondent's final order of removal for two independent reasons. First, because respondent was in fact paroled at the port of entry for a deferred inspection and for criminal prosecution, he was deemed to be still at the airport awaiting an inspection when his removal proceedings commenced. Accordingly, the relevant question for the immigration judge was whether respondent was seeking an admission as of those proceedings. Gov't Br. 23-29. Second, even if the relevant question were, as respondent contends, whether he was correctly paroled in the first place, the government proved by clear and convincing (indeed, conclusive) evidence that respondent had, in fact, already committed his disqualifying offense when he arrived in the United States in June 2012, and thus was both seeking an admission and properly paroled. *Id.* at 29-36. Either is a sufficient ground to reverse.

1. The government needed to prove—and did prove—by clear and convincing evidence that, as of his removal proceedings, respondent was seeking an admission

The time for assessing whether respondent was seeking an admission was as of his removal proceedings. The INA frames the relevant inquiries in the present tense, which therefore directs the immigration judge to make determinations based on the facts available in the removal proceedings. Gov't Br. 16. Respondent elsewhere relies on verb tenses (Br. 23-24), but he has no answer to the use of the present tense in Section 1229a, which governs removal proceedings. And here, because respondent was paroled as of his removal proceedings,

he was to be treated in those proceedings as if he were still at the airport awaiting inspection. Accordingly, the government needed to establish—and did establish—that respondent had committed his counterfeiting offense as of the removal proceedings. Gov't Br. 23-29. Respondent's contrary argument is that DHS lacked authority to parole him, and so his parole should be treated as if it were an admission. But the parole decision is judicially unreviewable, and in any event a court may not treat even an incorrect parole as an admission.

a. The INA provides 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," "regardless of whether" the decision "is made in removal proceedings." 8 U.S.C. 1252(a)(2)(B)(ii) and (D). Granting (or terminating) an alien's parole is a decision or action in the Secretary's discretion. 8 U.S.C. 1182(d)(5)(A). It follows that an alien may not use a challenge to a removal order to mount a collateral attack on an antecedent parole decision. Gov't Br. 24-25.

Respondent accuses (Br. 33-37) the government of overlooking this Court's decision in *Wilkinson* v. *Garland*, 601 U.S. 209 (2024). But *Wilkinson* simply reiterates the rule above: Questions of law (which, in this context, include mixed questions of law and fact) are judicially reviewable in a petition for review, but discretionary decisions are not. See *id.* at 225 & n.4. Respondent contends (Br. 35-36) that he is challenging an underlying question of law, namely, whether he was eligible for parole in the first place. But from the immigration judge's perspective, the salient point was the *fact* that

respondent had been paroled (and thus had not been admitted). See Gov't Br. 26-29. As we have pointed out, the Board lacks authority to question DHS's antecedent parole decision (including the legal basis for it). *Id.* at 25. Respondent does not contend otherwise; yet he does not explain how a court of appeals could reverse the Board's decision on a ground that the Board itself lacks authority to address.

b. Even if parole decisions were reviewable in removal proceedings, and even if respondent's parole were unauthorized, that would not mean that his parole should be treated as a decision to admit him into the United States. Gov't Br. 26-28. Congress twice emphasized that "parole * * * shall not be regarded as an admission," 8 U.S.C. 1182(d)(5)(A), and that an "alien who is paroled * * * shall not be considered to have been admitted," 8 U.S.C. 1101(a)(13)(B). Those prohibitions apply to *any* "alien who is paroled," not just those who are *correctly* paroled.

Respondent in effect urges this Court to adopt a kind of legal fiction: If DHS lacked authority to parole respondent at the border, his entry must be deemed to have been an unintended decision to admit him. See Resp. Br. 31, 39. But one could just as readily adopt the opposite legal fiction: If the parole was unauthorized, then respondent's entry reflected his own unintended evasion of inspection at the border. Respondent supplies no principled basis to favor his preferred fiction over that one, which more closely reflects the traditional legal fiction that a paroled alien is still at the border. See, *e.g.*, *Kaplan* v. *Tod*, 267 U.S. 228, 230 (1925). If anything, Congress's repeated admonition that a parole is *not* an admission counsels strongly against respondent's approach, which is also inconsistent with

Congress's definition of "admission" as "the lawful entry of the alien into the United States *after* inspection and authorization by an immigration officer." 8 U.S.C. 1101(a)(13)(A) (emphasis added). Even respondent does not suggest that immigration officers at the airport *actually* completed their inspection of him in June 2012 or authorized his admission at any point.

Nor is it an answer to repeat (Resp. Br. 19-20, 37-39) the truism that agencies like DHS have only the authorities that Congress has granted them. Even assuming that DHS lacked the authority to parole respondent, respondent nevertheless was in fact paroled—just as a wrongly convicted defendant has in fact been convicted. See Gov't Br. 26-28. Respondent objects (Br. 39) to that analogy on the ground that courts have the authority to enter judgments that rest on legal error, whereas agencies do not. The premise is questionable, cf., *e.g.*, *Blackledge* v. *Perry*, 417 U.S. 21, 30 (1974) (a double-jeopardy claim goes "to the very power of the State to bring the defendant into court"), but in any event respondent misses the point. Agency action likewise can establish real-world consequences even if legally erroneous. If an agency, say, incorrectly grants a regulated party a license, the party has *in fact* been licensed, even if unlawfully. And if an agency incorrectly denies the issuance of a license, the party cannot act as if the license has been issued simply because he believes that it *should have* been issued. Cf. *Poulos* v. *New Hampshire*, 345 U.S. 395, 409-414 (1953) (upholding conviction for conducting services in a public park without a license even where the license was unconstitutionally withheld).

Here, respondent was in fact paroled (correctly or not), and the effect of that parole was to pause his in-

spection and maintain his status as if he were still standing at the border. *Kaplan*, 267 U.S. at 230; see *Leng May Ma* v. *Barber*, 357 U.S. 185, 190 (1958) (parole does not "affect an alien's status"). Even if respondent believes that immigration officers at the airport should have admitted him, he is not entitled to be treated as if he had in fact been admitted (which is what he seeks). Perhaps respondent might have had a point if the record were unclear whether his entry was pursuant to a parole or an admission; in that case, perhaps a court could consider the legality of each possibility in presuming that—as a factual matter—the agency chose the lawful alternative. But no such ambiguity exists here. The record is unequivocal that respondent was in fact paroled, not admitted. See Gov't Br. 26-27. As respondent has acknowledged in his filings, "I was paroled into the United States on June [1]5, 2012 on deferred inspection." Administrative Record (A.R.) 236 (application for waiver of inadmissibility); see, *e.g.*, A.R. 11 (motion to terminate); A.R. 28 (brief before the Board).

2. Even if the government had to prove that respondent was seeking an admission at the time of his entry, it did so with clear and convincing evidence

In any event, even assuming for argument's sake that the Secretary's discretionary decision to parole respondent is judicially reviewable and that an incorrectly paroled LPR should be deemed to have been admitted, the removal order still must be sustained. When respondent arrived at the airport in June 2012, he had already committed his New Jersey counterfeiting offense, and therefore was seeking an admission under Section 1101(a)(13)(C)(v) and was properly paroled under Section 1182(d)(5)(A). Respondent *does not dispute* that he had already committed the offense at that point.

And the government proved in his removal proceedings by clear and convincing evidence that he had committed the offense. See J.A. 7-10, 24; A.R. 283-292. Yet respondent still insists that he was improperly paroled. That contention lacks merit.

a. Respondent contends that his parole was unauthorized because DHS immigration officers who inspected him at the airport in June 2012 did not themselves, in that moment, possess clear and convincing evidence that respondent had committed the counterfeiting offense in March 2012.* But respondent identifies nothing in the INA's text establishing a burden of proof that immigration officers at the border must satisfy when assessing whether an arriving LPR is seeking an admission—much less any statutory text imposing a clear-and-convincing standard.

That statutory silence contrasts with the INA provisions addressing burdens of proof in removal proceedings. 8 U.S.C. 1229a(c)(1)-(7); see Gov't Br. 29-33. Such proceedings are the adversarial setting in which the question whether an LPR is (or was) seeking an admis-

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* Consistent with the opinions of the Second Circuit, the Board, and the immigration judge, Pet. App. 4a, 17a, 28a, our opening brief stated that respondent arrived at John F. Kennedy International Airport (JFK) in June 2012. We now believe that was mistaken. Although several record documents, including respondent's own application for a waiver of inadmissibility, state that respondent arrived at JFK, *e.g.*, A.R. 234; J.A. 4, 26, other record documents indicate that respondent arrived at Newark Liberty International Airport, *e.g.*, J.A. 6 (I-94 showing entry at port "4601," which is Newark); J.A. 13, 18 (sworn statement taken at "Newark Liberty International Airport"). After a review of the entire record, we have concluded that respondent in fact arrived at Newark. We regret any confusion. Even so, the location of the port of entry is immaterial to the legal issues in this case.

sion is litigated and resolved by a factfinder—the immigration judge in the first instance, the Board on appeal, and a court of appeals on a petition for review. Indeed, the INA's explicit directive that the immigration judge's decision be based "only on the evidence produced at the [removal] hearing" is inconsistent with respondent's suggestion that the directive be further limited to whatever evidence immigration officers possessed when they encountered the LPR at the border. 8 U.S.C. 1229a(c)(1)(A). Respondent characterizes (Br. 42) that provision as merely prohibiting "extra-record evidence." But that misses the point. Given that Congress was limiting the evidence that the immigration judge could consider, it notably did *not* include respondent's further limitation—even though it has imposed such limitations in other statutes. See Gov't Br. 30 (listing examples).

The relevant regulations, for their part, do not directly address the issue. To the extent they explain what DHS officers must find at the border, they repeatedly state that arriving individuals must establish "to the satisfaction" of the inspecting officer whatever facts are relevant to determining the person's status. See, *e.g.*, 8 C.F.R. 235.1(b) ("A person claiming U.S. citizenship must establish that fact to the examining officer's satisfaction."); 8 C.F.R. 235.1(f)(1) ("Each alien seeking admission at a United States port-of-entry * * * must establish to the satisfaction of the inspecting officer that the alien is not subject to removal."); 8 C.F.R. 235.1(f)(1)(i) ("A person claiming to have been lawfully admitted for permanent residence must establish that fact to the satisfaction of the inspecting officer."). Requiring the arriving individual to establish facts "to the satisfaction of the inspecting officer" is a far cry from

requiring the officer to establish facts by clear and convincing evidence to a nonexistent decisionmaker.

b. Respondent repeatedly emphasizes that the INA imposes a "sequencing" requirement, Resp. Br. 25, 43 (quoting Pet. App. 14a), under which DHS immigration officers at the airport must "assess" whether an LPR is seeking an admission before granting parole, *id.* at 4-5, 7, 14-15, 17-23, 26-27, 29, 33-35, 42, 46-48. Nobody has contended otherwise. The problem with respondent's argument is that nothing in the INA imposes an *evidentiary burden* on immigration officers making that assessment. Respondent provides no explanation for his *ipse dixit* that the assessment must be made with clear and convincing evidence—as opposed to being made to the immigration officer's "satisfaction," as the regulations provide with respect to other assessments, or even with "probable cause," as the Third Circuit holds, *Doe* v. *Attorney General*, 659 F.3d 266, 272 (2011).

Instead, respondent attempts to bridge that logical gap by repeatedly suggesting (Br. 5, 9, 15, 18, 44, 45) that the Board has adopted a clear-and-convincing evidentiary standard that should apply at the border, and that the government accepts that standard for purposes of this case. That is doubly wrong. The government accepts only the proposition "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." Gov't Br. 16 (emphasis added); see Cert. Reply 11 ("The government is not challenging" Board precedent "requiring [proof] by clear and convincing evidence *in removal proceedings* that an LPR is seeking admission.") (emphasis added).

That is consistent with what the Board has decided. In *In re Rivens*, 25 I. & N. Dec. 623 (2011), the Board

held that "DHS bears the burden of proving by clear and convincing evidence that a returning lawful permanent resident is to be regarded as seeking an admission." *Id.* at 625. Because *Rivens* was decided in the context of removal proceedings, the Board did not explicitly say (perhaps because it was obvious) that the burden it described applied in removal proceedings. And if there were any lingering doubt, the Board removed it in *Valenzuela-Felix*, which made clear that the burden applies "*at the time of the removal hearing*." 26 I. & N. Dec. at 64. The Board expressly rejected the requirement, pressed here by respondent, that "DHS possess evidence meeting the ultimate 'clear and convincing evidence' standard of proof at the time of the lawful permanent resident's arrival at the port of entry." *Ibid.* (citation omitted). Respondent thus errs in claiming that "[l]ongstanding agency precedent that the government expressly accepts" supports his position. Resp. Br. 15; see *id.* at 44.

Respondent's reliance on the government's acceptance of *Rivens* and *Valenzuela-Felix* is tantamount to leveraging a government concession that the beyond-a-reasonable-doubt standard applies to criminal proceedings into a requirement that prosecutors prove that they possessed such evidence at the time they sought the indictment. Whatever standard applies in removal proceedings says nothing about what immigration officers must know or possess at the border. Respondent's entire argument hinges on the mistaken proposition that, because DHS officers needed to decide at the border whether he was seeking an admission, that decision must have been made by clear and convincing evidence. That conflates what DHS lawyers must prove to an immigration judge in removal proceedings with what non-

lawyer immigration officers must determine when inspecting an arriving LPR.

c. Imposing a clear-and-convincing evidentiary burden on immigration officers at the border does not make practical sense. Evidentiary burdens are associated with adversarial proceedings before a neutral decisionmaker. Immigration officers are not lawyers, neither are the aliens, and there is no factfinder at the border who can evaluate whether the parties have satisfied their respective burdens of proof. Immigration officers do not, in short, "call into session a piepowder court." *Vartelas* v. *Holder*, 566 U.S. 257, 275 (2012). Holding such minitrials would be inconsistent with Congress's general designation of removal proceedings as "the sole and exclusive procedure for determining" an alien's admissibility or deportability. 8 U.S.C. 1229a(a)(3). Respondent contends (Br. 47-48) that officers will not actually conduct such minitrials under his rule because they will just stop attempting to determine whether every arriving LPR is seeking an admission under Section 1101(a)(13)(C) and simply admit more LPRs instead. A theory that would as a practical matter cause officers to stop enforcing the INA has little to recommend it.

Limiting the government in removal proceedings to the evidence that immigration officers possessed at the border would also be inconsistent with the way normal adversarial proceedings unfold, in which litigants prove facts about the state of the world at a certain time using later-developed evidence—such as when a criminal defendant proves insanity with a later-in-time expert report. See Gov't Br. 30-31. Respondent resists (Br. 43) that analogy on the question-begging ground that "a criminal defendant pleading insanity doesn't need to

prove anything to anyone at the time he's committing a crime." Precisely. The INA likewise does not require immigration officers to prove anything to anyone at the border; instead, DHS must prove historical facts (such as the past commission of a crime) in removal proceedings, and nothing in the INA limits DHS to the evidence that immigration officers had in hand at the moment they encountered the alien at the border. Just as the Department of Justice may prove, in a criminal trial, a defendant's past commission of an offense by using evidence developed after the arrest or indictment, so too may DHS prove, in removal proceedings, an LPR's past commission of an offense using evidence developed after the encounter.

d. Respondent briefly invokes (Br. 43) the principle that "an agency cannot justify its decision after the fact." That principle of administrative law reflects the rule "that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947). But a temporary grant of parole is not a reviewable final agency action, and removal proceedings are *administrative* proceedings. Respondent provides no basis to create a supercharged *Chenery* doctrine that would limit an agency's ability to present evidence in an administrative proceeding itself. That the Court in *Chenery* upheld an agency action after the agency provided new reasons on a remand belies respondent's suggestion. *Ibid.*

e. Respondent spends many pages (Br. 14-15, 26-30, 46-48) recounting that immigration officers at the border have long reviewed arriving aliens' criminal records

in making exclusion decisions. Nobody disputes that. But in reciting that history, respondent elides the critical point: Congress directed that an LPR is to be regarded as seeking an admission if he "has committed" a disqualifying offense, not just if he has been convicted of (or admits to committing) the offense. 8 U.S.C. 1101(a)(13)(C)(v); see Gov't Br. 34-36. Short of a conviction, immigration officers at the border will rarely if ever have access to clear and convincing evidence that could prove an LPR's commission of an offense. Respondent apparently agrees, because his only response is that officers can "check[] for records of conviction and interview[] noncitizens at the border to see if they admit the offense." Resp. Br. 46; see *id.* at 47-48. That blinkered approach would effectively nullify Congress's decision in Section 1101(a)(13)(C)(v) to focus the inquiry on whether the LPR has committed—rather than been convicted of—a disqualifying offense.

Respondent halfheartedly argues (Br. 45) that "has committed" actually means "has been convicted of," notwithstanding the obvious textual difference between those formulations. That argument lacks merit. Gov't Br. 34-36. It is also essentially foreclosed by *Barton* v. *Barr*, 590 U.S. 222 (2020), which held 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 to "the *conviction*." *Barton*, 590 U.S. at 232. Respondent attempts (Br. 45-46) to distinguish *Barton* on what amount to policy reasons, but he has no response to the Court's *textual* holding that the "commission" of an offense is different from a "conviction." Respondent's amici speculate that Congress might have used "committed" because "not all the cross-referenced offenses listed in

section 1182(a)(2) require convictions to trigger inadmissibility"; but because a crime involving moral turpitude *does* require a conviction to trigger inadmissibility, "committed" should be read to mean "convicted of" with respect to such crimes. Immigration Law Profs. Amicus Br. 13. If amici were right, however, Congress would have simply said "inadmissible under section 1182(a)(2)," not "has committed an offense identified in section 1182(a)(2)." Cf., *e.g.*, 8 U.S.C. 1327 (prohibiting aiding or assisting the entry of "any alien inadmissible under section 1182(a)(2)").

The flaws with respondent's at-the-border evidentiary rule do not end there. Under respondent's view, *any* determination under Section 1101(a)(13)(C)(v) presumably would require immigration officers to amass clear and convincing evidence, such as whether the LPR's crime involving moral turpitude is a "petty offense," or whether the LPR committed a foreign offense relating to a controlled substance, or whether the LPR "is coming to the United States to engage in [prostitution or] any other unlawful commercialized vice," to name just a few such subsidiary determinations. 8 U.S.C. 1182(a)(2)(A), (D), and (H). And that is to say nothing about determinations in the other five clauses of Section 1101(a)(13)(C). See Gov't Br. 37. It blinks reality to claim that Congress would have expected immigration officers at the border to possess clear and convincing evidence of such activity, or that the applicability of those provisions would depend on the availability of such evidence. Respondent's view would thus render unenforceable most of Congress's careful handiwork in Section 1101(a)(13)(C). Respondent's brief contains no explanation why Congress should be understood to have enacted such a toothless statute.

f. Finally, respondent contends (Br. 31-32, 40-41) that it would be circular or bootstrapping to parole him in order to determine whether he was seeking an admission and was therefore eligible to be paroled in the first place. Of course immigration officers must determine that an arriving LPR is "seeking an admission" in order to parole him under 8 U.S.C. 1182(d)(5)(A), which authorizes parole of "any alien applying for admission." The government has not contended otherwise. A parole for deferred inspection does not mean deferring a determination about whether parole is available in the first place; "deferred inspection" describes the *effect* of such a parole—namely, to pause the inspection and treat the parolee as if he were still standing at the border.

If any argument is circular, therefore, it is respondent's, which assumes the conclusion that before granting parole, immigration officers must determine *by clear and convincing evidence* that an LPR is seeking an admission. But as explained above, the INA does not specify the standard under which officers must make that determination, much less impose a clear-and-convincing standard. Before paroling respondent here, immigration officers at the airport *did* determine that he was seeking an admission—just not with the level of proof that respondent prefers. That DHS later proved by clear and convincing evidence, in his removal proceedings, that respondent was in fact seeking an admission at the time of the parole does not make the grant of parole circular or bootstrapping. It simply reflects the different standards of proof applicable at the border and in removal proceedings.

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

The unworkability of respondent's at-the-border evidentiary requirement confirms that Congress did not impose any such requirement. Gov't Br. 36-39. Respondent attacks a strawman in asserting that "'policy arguments' 'cannot supersede the clear statutory text.'" Resp. Br. 46 (citation omitted). Of course they cannot. But "outcome-pertinent consequences—what might be called textual consequences—are relevant to a sound textual decision." Antonin Scalia and Bryan A. Garner, *Reading Law* 352 (2012). Here, the textual consequences of reading the INA to silently impose an at-the-border evidentiary rule would be to render much of Section 1101(a)(13)(C) ineffective at the border and to needlessly contradict the INA's express provisions dictating the burden of proof in removal proceedings.

Respondent's rule would also nullify the longstanding and unbroken practice of paroling LPRs for deferred immigration inspection or criminal prosecution. Such parole has a long pedigree, even predating the INA. 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*, 267 U.S. at 229-230; *In re K-*, 9 I. & N. Dec. 143, 157 (Att'y Gen. 1961), complaint dismissed sub nom. *Klapholz* v. *Esperdy*, 201 F. Supp. 294 (S.D.N.Y. 1961), aff'd, 302 F.2d 928 (2d Cir.) (per curiam), cert. denied, 371 U.S. 891 (1962); 5 Charles Gordon et al., *Immigration Law and Procedure* § 61.04(b) (Lexis 2026). And Congress codified that historical practice in 1952. See Gov't Br. 38. Elsewhere respondent heavily relies (Br. 10-11, 26-30) on historical practice under the immigration laws, but

he ignores the longstanding historical practice of parole for deferred inspection or prosecution.

As this case illustrates, such parole provides a significant public benefit by allowing LPRs to organize their defenses from within the country. See Gov't Br. 3-5, 20-21, 38-39. Respondent objects (Br. 49) that such parole does not provide a significant public benefit because, under his rule, an arriving LPR in his situation would have to be admitted (rather than paroled) and could therefore organize his defense from within the United States anyway. That is wrong and misses the point. It is wrong because other alternatives include detention, see Gov't Br. 39; cf. *United States* v. *Sing Tuck*, 194 U.S. 161, 168-169 (1904), or perhaps even being stranded at the airport during an extended inspection while immigration officers attempt to procure the additional evidence that respondent's rule would require. Instead of those impractical courses of action, immigration officers have long exercised their discretionary authority to parole arriving aliens, postponing the need for any admission decision.

Respondent's objection also misses the point because Congress has directed that LPRs are deemed to be seeking an admission in certain circumstances, and consequently subject to applicable grounds of inadmissibility. 8 U.S.C. 1101(a)(13)(C)(i)-(vi). Requiring nearly every such LPR to be admitted would bypass those grounds and undermine that congressional directive. Respondent's observation (Br. 49-50) that LPRs in his position might ultimately be removable on grounds of *deportability* is thus beside the point; Congress plainly wanted at least some LPRs to be removable on grounds of inadmissibility. Besides, the grounds for inadmissibility and deportability are not coextensive, *Judulang*

v. *Holder*, 565 U.S. 42, 46 (2011), and they trigger different burdens of proof in removal proceedings, 8 U.S.C. 1229a(c)(2) and (3). So even if respondent might be removable as either inadmissible or deportable, that would not be true of all LPRs.

Respondent contends (Br. 38) that a reversal here would permit the government to parole *every* arriving LPR and require all of them to "surrender their green cards, pay the Secretary $50,000, and leave the United States the next day." That alarmist contention lacks merit for several reasons. Parole does not "affect an alien's status," *Leng May Ma*, 357 U.S. at 190, so an LPR retains lawful-permanent-resident status even when paroled for deferred inspection or prosecution. And requiring an alien to *leave* the country is not a condition of *parole*; parole and departure are mutually exclusive concepts, which is why the Secretary *terminates* parole when he wants a paroled alien to depart. Cf., *e.g.*, *Noem* v. *Doe*, 145 S. Ct. 1524 (2025) (involving a termination of mass-parole programs). Finally, the practice of granting parole to LPRs in these circumstances is longstanding. *E.g.*, *K-*, 9 I. & N. Dec. at 157. Yet over all those decades, respondent cannot identify any executive-branch practice of summarily paroling every returning LPR or charging them a fee for the privilege—not even at the border or at ports of entry within the Fifth Circuit, which expressly adopted the government's position more than a decade ago. See *Munoz* v. *Holder*, 755 F.3d 366, 370 (2014).

Finally, respondent's at-the-border evidentiary rule would be unworkable. Gov't Br. 36-37. Controlling "the movement of people and goods across the border * * * is a daunting task," *Hernández* v. *Mesa*, 589 U.S. 93, 107 (2020), and non-lawyer immigration officers are ill-

equipped to make on-the-spot determinations about whether their evidence satisfies a clear-and-convincing threshold. Respondent once again invokes (Br. 47-48) immigration officers' ability to review records of conviction, but that is nonresponsive to Congress's directive to inquire whether the LPR has merely *committed* the offense—to say nothing of the other parts of Section 1101(a)(13)(C). Respondent ultimately concludes (Br. 48) that if immigration officers at the border as a practical matter cannot enforce Section 1101(a)(13)(C), "that will be the result of the statute Congress wrote." But Congress did not write a self-defeating statute, and this Court should not create one by blue-penciling an at-the-border evidentiary requirement that does not appear in the INA's text.

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The judgment of the court of appeals should be reversed.

Respectfully submitted.

D. JOHN SAUER
Solicitor General

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